

Attaining Environmental Justice For Posterity



Kariuki Muigua
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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.

I extend my sincere gratitude to those who have encouraged me to keep moving on and to contribute to knowledge.

I am grateful to Ngararu Maina, James Njuguna, Anne Wairimu, Mwati Muriithi, Jack Liaduma and the staff of Kariuki Muigua and Company Advocates and Glenwood Publishers for their technical input and moral support.

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;

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
FPIC	Free, Prior and Informed Consent
GDP	Gross Domestic Product
IEL	International Environmental Law
NEMA	National Environmental Management Authority
NET	National Environment Tribunal
RBA	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

Devolution and Natural Resource Management in Kenya

Abstract

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

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

1. Introduction

This paper discusses devolution as a form of decentralisation, within the context of the Constitution of Kenya 2010 and its implication on natural resource management (NRM) in Kenya. The Constitution creates a decentralized system of government with 47 political and administrative units.¹ The primary objective of decentralisation is to devolve power, functions, resources management and representation down to the local level.² Ideally, decentralisation, a process through which powers, responsibilities and resources are devolved by the central state to lower territorial entities and regionally/locally elected bodies, is supposed to increase efficiency, participation, equity, and environmental sustainability.³

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

In natural resources management, decentralisation is justified on several grounds. It enables local people to identify and prioritise their environmental problems accurately; ensure efficient resource allocation; promote greater respect for decisions made with local inputs such as rules for resource use; allow for easier monitoring of resource use and give marginalised groups greater influence on

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

² Ibid, Art. 174.

³ Oyono, P.R., “One step forward, two steps back? Paradoxes of natural resources management decentralisation in Cameroon,” *The Journal of Modern African Studies*, 2004, 42, pp. 91-111, at p. 91.
decentralization and local governance, October, 1999, p. 2.

⁵ Ibid.

local policy.⁶ This is especially so, where decentralisation adopts democratic forms rather than administrative ones. Democratic decentralisation requires representative and downwardly accountable local authorities, who hold a secure and autonomous domain of powers to make and implement meaningful decisions.⁷

Decentralisation takes several forms. It could be devolution, delegation, deconcentration and divestment or privatisation. Out of all these, devolution, which is the focus of this paper, is the most common understanding of genuine decentralisation.⁸ Devolution is the transfer or transition from one person to another of a right, liability, title, estate, or office.⁹ It seeks to distribute power, duties and responsibilities from one centralized point. It is a system of decentralization that effectively (through the Constitution) locates political and economic power at sub-national levels and that is controlled democratically by the people and not the national/central government.¹⁰ The objective of devolution is to improve the performance of government by making it more accountable and responsive to the needs and aspirations of the people and secondly, to facilitate the development and consolidation of participatory democracy.¹¹ It entails moving away from the costly state-centred control towards approaches in which the local people and authorities play a much more active role in managing the resources around them. Their involvement increases resource user participation in natural resource management decisions and the accruing benefits.¹²

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

The Fourth Schedule to the Constitution of Kenya outlines the obligations of the central government and those of the county governments.¹⁶ The obligations of the central government towards natural resource management include the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including,

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

⁷ *Ibid*, p. 212.

⁸ *Ibid*, p.6.

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

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

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

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

¹³ *Ibid*, p. 3.

¹⁴ *Ibid*, Art. 176(2).

¹⁵ *Ibid*, Art. 6 (3).

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

in particular, fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.¹⁷

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

2. Historical Overview of Devolution in Kenya

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

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

¹⁷ Ibid.

¹⁸ Ibid, Part 2.

¹⁹ Ibid.

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

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

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

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

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

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

²⁶ Ibid, S. 6(1).

²⁷ Ibid, S. 6(2).

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

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

3. Natural Resources Management in Kenya

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

In October 1982, former President Daniel Arap Moi announced that Kenya would henceforth allocate its resources for rural development on a decentralised basis, so as to be more responsive

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

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

³⁰ *Ibid.*

³¹ *Ibid.*

³² National Water Policy, 2012, Government Printer, Nairobi; National Land Policy, 2009; See generally, Yatich T, et al, ‘Policy and institutional context for NRM in Kenya: Challenges and opportunities for Landcare.’ ICRAF Working paper-no.43, (World Agroforestry Centre, 2007, Nairobi).

Available at <http://www.worldagroforestry.org/downloads/publications/PDFs/wp15330.pdf> [Accessed on 10/09/2018].

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

to the 'needs and aspirations of wananchi.'³⁴ Over the years, there has been a paradigm shift in conservation and natural resource management from the central government to Community-Based Natural Resource Management (CBNRM) approaches. CBNRM as a form of decentralisation, is expected to be more effective and efficient in attaining sustainable utilization of natural resources and promoting environmental justice when compared to state-centric approaches.³⁵

The main difference between the CBNRM and devolution is that, while in CBNRM the communities are involved in conservation activities with the advantage of sharing accruing benefits, devolution entails not just administrative but also political decentralization that involves the sharing of power with the central government as defined by legal or constitutional provisions.³⁶ Under devolution, communities have more control and right of participation in decision-making as well as governance matters.

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

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

Under the constitutional provisions on conflicts of laws between the two levels of government, national legislation is to prevail on matters of environment protection in cases where the county governments have unreasonably or prejudicially acted in relation to environmental protection.⁴⁰ The role of the Senate concerning natural resource management is a legislative function where the

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

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

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

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

³⁸ *Ibid*.

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

⁴⁰ Art. 191.

Senate represents the county government interests and functions.⁴¹ It is not enough that the legal framework on devolution contains provisions addressing these factors, but the same must be seen to inform the procedure for its implementation.

The effect of devolution on natural resources management is, therefore, not mutually exclusive but largely depends on other laws and practice on tenure security, ownership, effective enforcement of rules and regulations, monitoring, sanctioning, strong leadership with capable local organization, expectation of benefits, common interests among community members, and local authority.⁴² The various sectoral laws have demonstrated the state's attempts to adopt CBNRM although with little success due to lack of goodwill and as discussed above, limitation due to other factors. Their implementation demonstrates state-centric tendencies with much of the control powers remaining with the government authorities.

4. State-centric approach to Natural Resource Management

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

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

Moreover, it concentrates on political factors and institutional weaknesses,⁴⁵ and as such in order to provide populations with basic services and maintain the rule of law, resource-rich States have to develop well-designed institutions that promote efficiency, equality among citizens, economic growth and stability. When the capacity of these institutions or the will of political leaders is diminished, political opportunities are created for local groups to challenge the government's

⁴¹ Ibid, Art. 96.

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

⁴³ Nyamwamu, C.O., 'From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics,' Paper Presented At the FES Conference on State of Implementation of the Constitution since 2010, p.2, available at <http://www.feskenya.org/media/publications/From%20A%20Centralized%20System%20To%20A%20Devolved%20System%20Of%20Governments%20-%20Cyprian%20Orina-Nyamwamu.pdf>, [Accessed on 10/09/2018].

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

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

legitimacy and authority.⁴⁶ Because natural resources are important for livelihood and generation of income, there is need for even greater opportunities for increasing equity, alleviating poverty and providing development opportunities through the redistribution of control, decentralisation of services and infrastructure.⁴⁷ However, this also means that natural resource decentralisation is at greater risk of local elite capture and they are more likely to be resisted by those in a position to lose control over resources in the re-distribution of powers engendered by decentralisation.⁴⁸ In Mali for instance, since the colonial times the central government had sought control, access and use of forestlands and declared them public land, resulting in a very harsh reaction between the foresters and the local people.⁴⁹ This presents the challenge that the central government faces when it tries to manage the resources without the involvement of the local people.

Devolved governments will heavily rely on the environmental resources in order to promote development in the counties. Also important is the constitutional provision that one of the principles of devolved government is that County governments must have reliable sources of revenue to enable them to govern and deliver services effectively.⁵⁰ This is to be achieved through exploitation of the natural resources within their boundaries. However, as it was noted in the *1999 Sessional Paper on Environment and Development*,⁵¹ environmental protection, management, and development should consider broad issues that bind together people, resources, development, and environment.⁵² Indeed, one of the recommendations of the Policy paper was that the Government should encourage the participation of local communities in biodiversity conservation and management; and create incentives for effective conservation of biodiversity by local communities. This was however not effectively implemented through the existing legal framework. If anything, the same was undermined by the often complex and bureaucratic requirements on licences and permits. The framework concentrated on giving communities user rights and not control over the resources thus denying them any voice on how the same should be managed.

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

⁴⁶ Ibid, p. 12.

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

⁴⁸ Ibid.

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

⁵⁰ Art. 175.

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

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

⁵³ Ibid, Art. 6(2).

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

Participation by local communities in the governance affairs of a country has been hailed as an indication of good and democratic governance as well as the respect and promotion of the rights of citizens.⁵⁴ One of the most outstanding features of the current Constitution of Kenya, 2010 is the principle of public participation in the governance affairs of the country.⁵⁵ The Constitution calls for respect of the environment, being the people's heritage.⁵⁶ It also lays out the obligations of the State in respect of the environment. Amongst these is the obligation to encourage public participation in the management, protection and conservation of the environment.⁵⁷ Further, it places a duty on every person to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁵⁸ This brings about a paradigm shift, in that participation in natural resources, is not only a right but also a duty of every citizen. The implication is that all the existing laws on natural resource management must reflect this position.

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

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

In addition, *In the Matter of Mui Coal Basin Local Community (2015) eKLR*, the High Court emphasized the importance of public participation as a constitutional governance principle. The

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

⁵⁵ Art. 10.

⁵⁶ Preamble to the Constitution.

⁵⁷ Art. 69 (1).

⁵⁸ Art. 69 (2).

question as to what degree of engagement satisfies the threshold of public participation was also discussed the *Mui Coal Basin Local Community* case where the court stated that:

“(d)..... public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.”

6. The Implication of Devolution on Natural Resource Management

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

At the heart of the objectives of devolution, is the promotion of environmental justice in exploitation of natural resources.⁶⁰ Devolution gives powers of self-governance to the people and enhances public participation in the exercise of the powers of the State and in making decisions

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

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

affecting them; recognises the right of communities to manage their own affairs and to further their development; protects and promotes the interests and rights of minorities and marginalised communities; promotes social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensures equitable sharing of national and local resources throughout Kenya; and facilitates the decentralisation of State organs, their functions and services, from the capital of Kenya.⁶¹ Devolution was thus expected to address the main challenges facing the struggle for environmental justice in Kenya especially in relation to natural resources management. There has however been debate on the success of devolution in achieving this.⁶²

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

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

The county governments are expected to establish the policy, legal and social framework and conditions needed for local management to succeed, facilitate and regulate private activity, helping the local organizations enforce locally designed and monitored regulations and sanctions, addressing local inequality and ensuring representation of marginalised groups so that downward accountability of organization receiving devolved authority is assured and helping communities

⁶¹ Art. 174.

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

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

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

⁶⁵ Gruber, J.S., 'Key principles of community-based natural resource management; a synthesis and interpretation of identified effective approaches for managing the commons,' 2008. Available at http://iasc2008.glos.ac.uk/conference%20papers/papers/G/Gruber_132301.pdf [Accessed on 10/09/2018].

⁶⁶ Constitution of Kenya, Art. 174.

⁶⁷ Ibid, Art.174(c).

⁶⁸ Ibid.

defend their rights including protection against powerful external groups such as mining and timber companies and cartels.⁶⁹

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

The *Transition to Devolved Government Act*⁷² sought to, *inter alia*, provide a legal and institutional framework for a coordinated transition to the devolved system of government while ensuring continued delivery of services to citizens; and provide for the mechanism for capacity building requirements of the national government and the county governments and make proposals for the gaps to be addressed.⁷³ The Constitution also requires that the Government at either level should liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.⁷⁴

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

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

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

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

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

⁷³ Ibid, S. 3.

⁷⁴ Art. 189 (1) (c).

⁷⁵ Akamani, K. & Wilson, P. I., "Toward the adaptive governance of transboundary water resources," Conservation Letters, Vol.4, No.6, 2011, pp. 409-416. Available at http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?Art.=1001&context=for_articles [Accessed on 10/09/2018].

participation in decision-making and policy implementation processes, and access to justice through the courts.⁷⁶

Although community participation, in a people-centred environmental project or programme, can mean many different things, the use of local knowledge is a valuable indicator of the type and level of participation and ‘ownership’ of a development process by the local residents, producers or users.⁷⁷ Notably, the range of local knowledge transcends empirical facts, since it includes information, attitudes, values, skills and practices concerning a high diversity of biological resources.⁷⁸ This is precisely what the devolved system of governance seeks to actualize as one of its main objectives under the Constitution and the *County Governments Act 2012*.⁷⁹

The *County Governments Act, 2012*, contains elaborate provisions on public participation, public communication and access to information and civic education all of which have an implication on natural resources management at the county level. The Act provides the principles upon which citizen participation in counties should be based.⁸⁰ These include timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. This is in appreciation of the fact that, meaningful public participation of the citizens, requires access to the relevant information that is also useful in decision making by the citizenry in relation to the management of natural resources in their counties.⁸¹

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

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

⁷⁶ Ibid.

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

⁷⁸ Ibid.

⁷⁹ Act No. 17 of 2012.

⁸⁰ Ibid, S. 87.

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

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

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

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

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

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

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

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

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

⁸⁵ *Ibid*.

⁸⁶ 'Policy, Legal and Institutional Framework Governing Environmental Management in Kenya,' p. 305, available at http://www.tanariverdelta.org/tana/975DSY/version/default/part/AttachmentData/data/MUMIAS_Tana_EI_A_part5.pdf [Accessed on 10/09/2018].

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

⁸⁸ S. 36, County Governments Act, 2012.

be satisfactorily achieved through the meaningful involvement of the people in the counties in the natural resources exploitation. The devolved system of government holds a promise to deal with rampant poverty in many parts of the country.⁸⁹

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

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

Indeed, with regard to climate change mitigation, the *Climate Change Act, 2016*⁹⁴ recognises that the county governments are to play a central role alongside the national government in the efforts towards mitigating the effects of climate change. The climate change law establishes the Climate Change Council.⁹⁵ The Council is to provide an overarching national climate change coordination mechanism and should— ensure the mainstreaming of the climate change function by the national and county governments; approve and oversee implementation of the National Climate Change Action Plan; advise the national and county governments on legislative, policy and other measures necessary for climate change response and attaining low carbon climate change resilient development; approve a national gender and intergenerational responsive public education awareness strategy and implementation programme; provide policy direction on research and training on climate change including on the collation and dissemination of information relating to climate change to the national and county governments, the public and other stakeholders; provide guidance on review, amendment and harmonization of sectoral laws and policies in order to achieve the objectives of this Act; administer the Climate Change Fund established under this Act; and set the targets for the regulation of greenhouse gas emissions.^{96,97}

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

⁹⁰ S. 22, Constitution of Kenya, 2010.

⁹¹ Ibid, S. 3 of Part II.

⁹² Ibid, S. 10.

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

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

⁹⁵ Ibid, S. 5.

⁹⁶ S. 6, Climate Change Act, 2016.

⁹⁷ Ibid, S. 5.

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

6.1 Land Management and Devolution

The *National Land Policy*,¹⁰² perhaps in contemplation of devolution, provides that the institutional framework on land will be reformed to ensure devolution of power and authority, participation and representation, justice, equity and sustainability. It advocates for three institutions to be set up namely the National Land Commission, the District Land Boards and Community Land Boards. Indeed, some of these were captured in the Constitution of Kenya 2010 and the resulting sectoral laws on land. The National Land Commission was established by the Constitution of Kenya.¹⁰³ The *Community Land Act*, 2016 as envisaged under the Constitution also seeks to give effect to Article 63(5) of the Constitution; to provide for the recognition, protection, management and administration of community land; to establish and define the functions and powers of Community Land Boards and management committees; to provide for the powers of county governments in relation to unregistered community land; and for connected purposes. This Act provides for holding of unregistered community land in trust by county governments.¹⁰⁴

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

Where community land is to be converted to public land by transfer, the community land law states that such transfer is subject to the approval of the members of the community in a general meeting, and it is to be done in accordance with the Land Act.¹⁰⁶ Further, where community land is to be converted to private land by either transferor allocation by the Committee or a county government, such conversion of land requires approval of the County Assembly in the case of land held by the

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

⁹⁹ Art. 69(1) (b).

¹⁰⁰ County Governments Act, S. 103.

¹⁰¹ Ibid, S. 106.

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

¹⁰³ Art. 67, Constitution of Kenya.

¹⁰⁴ s. 6.

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

¹⁰⁶ s.22.

County Government; and members of a community in a general meeting in the case of land managed and administered by a Committee.¹⁰⁷ It is also important to note that where land is set aside by a community for public purposes, through consultation between the concerned communities with the Commission the involved county government, is to ensure that prompt and adequate compensation is made to the affected community.¹⁰⁸

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

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

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

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

The *National Land Commission Act*¹¹⁵ was enacted to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to

¹⁰⁷ s. 23.

¹⁰⁸ S. 26.

¹⁰⁹ Act No. 6 of 2012, Laws of Kenya.

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

¹¹¹ Land Act, S. 9(3).

¹¹² Ibid, S. 14(1).

¹¹³ Ibid, S. 14(4) (5).

¹¹⁴ S. 14(8).

¹¹⁵ Act No. 5 of 2012.

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

6.2 Forests Management and Devolution

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

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

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

The Policy also observes that the forest sector has had to contend with low productivity of tree crops, low conversion efficiency and weak value addition schemes. These arise from climate change, small genetic base of crops, emerging pests and diseases, low investments in technology development, and poor investment in forest based industry. The Policy thus recommends that there

¹¹⁶ Preamble, National Land Commission Act.

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

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

¹¹⁹ [Government Printer, Nairobi].

¹²⁰ Forest Policy, 2014, p. ii.

¹²¹ Ibid.

is need for research and development to refocus on basic forestry disciplines such as productivity, health, crop diversification, processing, value addition, intellectual property rights and indigenous knowledge. Further, the sector also faces challenges in building capacity for sustainable utilization and management.¹²² With regard to the County governments, the Policy recommends that there is great need to build the capacity of county governments to undertake forestry development on community and private lands. Mechanisms for engaging county governments in forestry research and development should also be developed.¹²³ Further, livelihood enhancement will be one of the guiding principles with a focus on fighting poverty as a major consideration for all strategies and programmes in forest sector development.¹²⁴

In order to promote public participation in forests management, the Policy recommends enhancement of participatory approaches as one of the guiding principles in forest conservation and management so as to ensure that the relevant government agencies, county governments, private sector, civil society and communities are involved in planning, implementation and decision making processes.¹²⁵ The Policy also advocates for commercialization of forestry activities where forestry operations are to be undertaken in a business manner focusing on result-based management. In this regard, the government will invite private sector to invest in tree growing, wood processing and value addition.¹²⁶

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

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

Implementation of the law is to be guided by such principles as: good governance and access to public information, and a participatory approach to forest conservation and management;

¹²² National Forest Policy, 2014, para. 2.2.2.

¹²³ Ibid, para. 2.2.3.

¹²⁴ Ibid.

¹²⁵ Ibid, para.3.3 (e).

¹²⁶ Ibid.

¹²⁷ Ibid.

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

¹²⁹ Preamble, Forest Conservation and Management Act, 2016.

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

¹³¹ Ibid, S. 48.

devolution of forest resources management and conservation wherever possible and appropriate to those owners and managers of forest resources; adoption of an ‘ecosystem approach’ in the conservation and management of forests wherever possible; recognition of the rights and responsibilities of communities and private land owners to manage and utilize forest and forest resources; equitable sharing and enjoyment of the benefits accruing from forest conservation and management by the people of Kenya; and protection of indigenous knowledge and intellectual property rights embodied in forest biodiversity and genetic resources.¹³²

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

6.3 Water Resources Management and Devolution

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

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

Communities are allowed to participate in water resources management through the formation of the Water Resource Users Associations may be established as associations of water resource users at the sub-basin level in accordance with Regulations prescribed by the Authority. A Water Resource Users Association should be a community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.¹³⁹

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

The courts have affirmed that the provision and management of water services is a shared constitutional function, distributed between the two levels of government.¹⁴¹ This will be useful in addressing some of the challenges that have been experienced in relation to devolution of water

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

¹³³ No. 43 of 2016, Laws of Kenya.

¹³⁴ *Ibid*, S. 5, 7 & 9.

¹³⁵ *Ibid*, SS. 4(1), 5.

¹³⁶ S. 11 & 12, Water Act, 2016.

¹³⁷ *Ibid*, S. 6.

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

¹³⁹ *Ibid*, S. 29(2).

¹⁴⁰ *Ibid*, S. 64(2)..

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

services. An example is the conflict between Kwale County and Mombasa County; and Murang'a and Nairobi Counties. Kwale and Murang'a counties were under the impression that they can charge for the export of water from their counties to other counties.¹⁴²

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

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

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

The Water Act 2016 empowers county governments to establish water services providers, which may be a public limited liability company established under the Companies Act, 2015 or other body providing water services as may be approved by the Regulatory Board. In establishing a water services provider, a county government must comply with the standards of commercial viability set out by the Regulatory Board.¹⁴⁶ A water services provider shall be responsible for- the provision of water services within the area specified in the licence; and the development of county assets for

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

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

¹⁴⁴ Ibid, p. 11.

¹⁴⁵ Ibid, p. 5.

¹⁴⁶ Water Act 2016, S. 77.

water service provision.¹⁴⁷ The Act also provides that a county water services provider may with the approval of the relevant licensing authority extend water services to rural or developing areas.¹⁴⁸ The Act further provides that nothing in its provisions should deprive any person or community of water services on the grounds only that provision of such services is not commercially viable.¹⁴⁹

The Act also requires every county government to put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.¹⁵⁰ The measures referred to in subsection (2) shall include the development of point sources, small scale piped systems and standpipes which meet the standards set by the Regulatory Board and which may be managed by the Water community associations, public benefits organizations or a private person under a contract with the county government.¹⁵¹ Further, in order to implement its obligations under this section, a county government should formulate and submit annually to the Regulatory Board and to the Cabinet Secretary, a five year development plan incorporating an investment and financing plan for the provision of water services in the rural areas referred to subsection (1) within its area of jurisdiction.¹⁵² The Cabinet Secretary is also to provide technical, financial and other assistance to a county government to enable the county government to discharge its responsibility under this section.¹⁵³

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

7. Lessons from other Jurisdictions

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

In Zambia, the decentralization process has been institutionalized in response to structural adjustment policies. While devolution has limited communication between the central government and the county government, at the local level institutions created there locally have been more

¹⁴⁷ Ibid, S. 78(1).

¹⁴⁸ Ibid, S. 81.

¹⁴⁹ Ibid, S. 94(1).

¹⁵⁰ Ibid, S. 33(2).

¹⁵¹ Ibid, S. 33(3).

¹⁵² Ibid, S. 33(4).

¹⁵³ Ibid, S. 33(5).

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

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

successful.¹⁵⁶ In Tanzania, there is the Joint Forest Management (JFM), where village communities are entrusted with the protection and management of nearby forests. The areas concerned are usually degraded or even deforested areas. The communities are required to organize forest protection committees, village forest committees, village forest conservation and development societies, etc. Each of these bodies has an executive committee that manages its day-to-day affairs.¹⁵⁷

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

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

8. Way Forward

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

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

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

¹⁵⁸ CAMPFIRE means Communal Areas Management Programme for Indigenous Resources.

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

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

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

It is noteworthy that the *Environmental Management Co-ordination (Amendment) Act, 2015*¹⁶² was enacted to make provisions to align the Environmental Management and Coordination Act, with the Constitution of Kenya, 2010. The Amendment Act takes into account the devolved system of government, rationalizing of state resources, sound environmental practices, structures for dispute resolution and principles such as transparency, accountability and participatory environment management. Further, the Act disbanded Provincial and District Environmental Committees and constituting County Environmental Committees in accordance with Chapter 11 of the Constitution. The Act empowers the Governor of every county to appoint the members of such committees.¹⁶³ The functions of the County Environmental Committees will be to ensure the proper management of the environment for the respective counties. The Amendment Act also requires every County Environment Committee to prepare a county environment action plan for each county.¹⁶⁴ The amendment law, although important in aligning EMCA 1999, with the Constitution of Kenya 2010 and especially the devolved system of governance, is not comprehensive on how the proposed public participation will be undertaken. The implication is that, just like the current Act, the amendment law risks promoting public participation through less meaningful ways. Much more needs to be done in order to promote meaningful and quality public participation within the devolution framework.

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

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

To ensure the success of the devolution of NRM, there is a need for management frameworks that encourage the engagement of multiple actors across the two levels of government and affected communities. The central Government still remains relevant in the natural resource management setup, as it is more effective in keeping the county governments in check in a system of counter-checks and balances amongst the 47 county governments and the national government. The active involvement of independent organizations and Non-Governmental Organisations (NGO's) will

¹⁶² No. 5 of 2015, Laws of Kenya.

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

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

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

also go a long way in ensuring that the appropriate standards in natural resource management are maintained, educating the locals on the benefits that accrue and from sustainable utilization of the resources around them.¹⁶⁶

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

9. Conclusion

Devolution must entail transfer of real powers and real resources from national to local administration, otherwise, their ability to operate will be hampered severely.¹⁶⁹ With Kenya and the devolution experiences in the new dispensation, a proper legal and institutional framework will be of great help in ensuring efficient natural resource management programmes are implemented. The central government can still maintain a role in: protecting wider 'public goods' (watersheds, biodiversity, carbon sinks and other ecological services); establishing the policy, legal and social frameworks and conditions needed for local management to succeed; facilitating and regulating private activity; mediating conflict; helping local organisations enforce locally designed and monitored regulations and sanctions; providing legal recourse; providing technical assistance; addressing local inequality and ensuring representation of marginal groups so that downward accountability of organisations receiving devolved authority is assured; helping communities to defend their rights, including protection against powerful external groups such as mining and timber companies and organised traders; and supporting local capacity building.¹⁷⁰

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

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

¹⁶⁷[1995-1998] 1 EA, 258.

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

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

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

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environmental degradation are some of the challenges that can be addressed through the devolved system of governance and management of natural resources.

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

Strengthening the Environmental Liability Regime in Kenya for Sustainable Development

Abstract

This paper discusses the concept of environmental liability and offers some recommendations on how the same can be enhanced in the context of the Kenyan environmental liability regime with the aim of achieving the country's goals on sustainable development. The paper argues that there is a need to adopt a more preventive or precautionary approach that is participatory rather than concentrating on a reactive one that seeks restoration of damaged environmental resources.

1. Introduction

This paper critically discusses the environmental liability regime in Kenya and offers some thoughts on how the same can be made more effective as a way of fast tracking the realisation of the sustainable development agenda in the country. Environmental liability may be defined as an obligation which may result in future payments for the enterprise, due to past events or to compensate a third party harmed by environmental damage by the company.¹ Liabilities incurred can be derived from either legal obligations, such as rehabilitation of land, a fine or compensation as a result of court decision, or from contractual obligations arising out of company's internal commitment to environmental safeguards.²

The Report of the World Commission on Environment and Development, *Our Common Future*, asserted that economic growth always brings risk of environmental damage, as it puts increased pressure on environmental resources.³ This risk is ever increasing especially in the era of the growing desire by various states especially in the developing world to achieve economic development. The sustainable development agenda has however brought to the fore the need for consideration and incorporation of environmental protection and conservation measures in all development plans. As a result of this, environmental liability stems from the states' desire and responsibility to not only ensure the protection of the right to clean and healthy environment but also the fact that the environment is considered to be the main reservoir for most of the resources necessary for realisation of economic and social rights.⁴ Environmental protection is considered to be the existential right of man and is a necessary condition for the survival of mankind.⁵

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.⁶

¹ Nuta, F. M., & Nuta, A. C., "Environmental Liabilities Accounting: A Review Of Some Standards And Guidelines," *Journal of Public Administration, Finance and Law* 2, no. 2 (2012): 47-51, at p.47.

² *Ibid*, at p.47.

³ Report of the World Commission on Environment and Development, *Our Common Future*, op cit., para. 50.

⁴ See generally, 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.

⁵ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage." *Economics of Agriculture* 64, no. 3 (2017): 1161-1176, at p. 1162.

⁶ Health and Environment Linkages Initiative – HELI, Health and Environment Linkages Initiative, available at <http://www.who.int/heli/en/> [Accessed on 13/4/2019].

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.⁷ Human health is believed to be connected to environmental health and that the two are mutually dependent.⁸

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.⁹ Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹⁰ The WHO has asserted 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.¹¹ The 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.¹²

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.¹³ A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.¹⁴

Despite the progressive Kenyan Constitution making great strides in promoting environmental conservation and protection¹⁵, there is still no evidence of strict environmental culpability in cases of environmental damage, with many of the environmental restoration and protection initiatives

⁷ Higenbottam, N., 'Nurse's Role as an Environmental Activist,' p.2. Available at <http://www.theluminaryproject.org/downloads/Essay%20Contest%20Higenbottam.pdf> [Accessed on 13/4/2019].

⁸ 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 13/4/2019].

⁹ World Health Organization, Environmental Health, available at

http://www.who.int/topics/environmental_health/en/ [Accessed on 13/4/2019].

¹⁰ World Health Organization, '1948 WHO definition of health,' Constitution of World Health Organization. Available at https://www.who.int/governance/eb/who_constitution_en.pdf

¹¹ 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 13/4/2019].

¹² Ibid.

¹³ 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.

¹⁴ '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/Art/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ [Accessed on 12/4/2019].

¹⁵ See Chapter Five of the Constitution, Part 2 (Articles 69-72).

being left to the state.¹⁶ Some of the existing tools on environmental liability have been used as a mere formality to satisfy statutory requirements, unless the courts and tribunals intervene. It is against this background that this paper examines the status of the environmental liability regime in Kenya and makes some recommendations on how enforcement and compliance with environmental standards can be enhanced as a step towards realising sustainable development in the country.

2. Environmental Liability under the International and Regional Environmental Legal Framework

Internationally and regionally, there are a number of instruments that strive to facilitate enforcement and compliance with environmental laws and regulations. Some of these instruments have also made attempts to apportion blame in environmental degradation.

Article 2 (1) of the *Vienna Convention for the Protection of the Ozone Layer*¹⁷ 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. This Convention mainly advocates for preventive and control measures by States implemented through cooperation.

The *1972 Stockholm Declaration of the United Nations Conference on the Human Environment* under Principle 13 deals with the issue of compensation for damage to victims of environmental damage in a manner that: "Member States should adopt national laws relating to liability and compensation to victims of pollution and other environmental damage. Member States should also cooperate without delay and decisively in the adoption of future international regulations relating to liability and compensation, when activities within their legal competence or control cause environmental effects in areas outside their jurisdiction."

The Rio Conference on Environment and Development from 1992 established the basic principles of civil protection of basic ecological values, but also the precautionary principle, all based on the recommendations of the Brundland Commission.¹⁸ The *Montreal Protocol*,¹⁹ 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 sets limits on the production of chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.²⁰

¹⁶ Article 69 of the Constitution of Kenya 2010 outlines the obligations of the State in respect to the environment with individual persons only having a corresponding duty to cooperate with the State. This is based on the presumption that the State will take up its obligations.

¹⁷ United Nations, *Vienna Convention for the Protection of the Ozone Layer*, Vienna, 22 March 1985, United Nations, Treaty Series, vol. 1513, p. 293. Kenya is a signatory to the Convention.

¹⁸ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," op. cit., at p. 1167.

¹⁹ *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.

²⁰ Arts. 2A-I.

*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*²¹ 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.²² 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.

The Convention requires Parties to co-operate with a view to adopting, as soon as practicable, a protocol which sets 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.²³

Also relevant is the *Minamata Convention on Mercury*²⁴ is a global treaty to protect human health and the environment from the adverse effects of mercury. Major highlights of the Minamata Convention include a ban on new mercury mines, the phase-out of existing ones, the phase out and phase down of mercury use in a number of products and processes, control measures on emissions to air and on releases to land and water, and the regulation of the informal sector of artisanal and small-scale gold mining. The Convention also addresses interim storage of mercury and its disposal once it becomes waste, sites contaminated by mercury as well as health issues.²⁵ Kenya signed up on 10 Oct 2013 but is yet to ratify the Convention.²⁶

Also notable is the *European Charter on Environment and Health*²⁷ 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 International Court of Justice, in the 1997 case concerning the *Gabcikovo-Nagymaros Project* (Hungary and Slovakia)²⁸, 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.²⁹

²¹ Basel, 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.

²² Preamble.

²³ Art. 12.

²⁴ 16 August 2017, No. 54669. Adopted in 2013 in Japan, entered into force in 2017.

²⁵ <http://www.mercuryconvention.org/Convention/Text> [Accessed on 24/4/2019].

²⁶ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-17&chapter=27&clang=_en

²⁷ WHO, *European Charter on Environment and Health*, 1989, European Series No. 35, adopted at the First European Conference on Environment and Health Frankfurt, 7–8 December 1989.

²⁸ *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I. C. J. Reports 1997, p. 7.

²⁹ *Ibid.*

3. Environmental Liability under Kenya’s Legal Framework: the (In) adequacy

Under the Fourth Schedule to the Constitution, 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.³⁰ It is also to come up with health policy; agricultural policy; and the energy policy including electricity and gas reticulation and energy regulation.³¹

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.³² 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.³³ The other function of county governments is control of air pollution, noise pollution, other public nuisances and outdoor advertising.³⁴ The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment.³⁵ The two government levels should work together to facilitate a coordinated, multisectoral approach for effectiveness discharge of their environmental responsibilities.

3.1 Environmental Management Tools in Kenya

While some approaches seek to rely on a human rights approach to environmental conservation and protection, 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.³⁶ This section discusses some of these approaches in reference to Kenya’s environmental laws. It is however worth pointing out that while most of these tools are provided for and enforced through the *Environmental Management and Coordination Act (EMCA)*³⁷, there are corresponding provisions

³⁰ Fourth Schedule to the Constitution, Part I clause 22.

³¹ Clauses 28, 29, 31.

³² Fourth Schedule to the Constitution, Part II, Clause 1.

³³ *Ibid*, clause 2.

³⁴ *Ibid*, clause 3.

³⁵ Article 42, Constitution of Kenya 2010 (Government printer, Nairobi, 2010).

³⁶ 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 12/4/2019].

³⁷ Environmental Management and Coordination Act (EMCA), Act No. 8 of 1999, Laws of Kenya; See also Environmental Management and Coordination (Amendment) Act, 2015).

and requirements under the various sectoral laws on water³⁸, land³⁹, forests⁴⁰, mining⁴¹, public health⁴², agricultural production⁴³ and energy⁴⁴ sectors, among others. Their wordings may be different but they are mainly concerned with health and environmental protection while carrying out various activities or laying out relevant infrastructure. They also define penalties and other remedies in case of violation of set rules and regulations.

³⁸ Water Act, No. 43 of 2016, Laws of Kenya:

Sec. 144. (l) Power to order a person to remedy the contravention of the Act and in particular-

- (a) to clean up any pollution or make good any other harm identified to any water resource; or
 - (b) to remove or destroy any works, plant or machinery employed for the purposes of the contravention.
- (2) Power to recover the expenses incurred in remedying the contravention through an application to the Tribunal.

Sec. 146. Power to institute and maintain criminal proceedings in any court against any person accused of an offence under this Act or under any Regulations or Regulations made under this Act.

³⁹ Land Act, No. 6 of 2012, Laws of Kenya:

- 11. Conservation of ecologically sensitive public land.
- 12. Allocation of public land.
- 148. Compensation in respect of public right of way.

⁴⁰ Forests Management and Conservation Act, No. 34 of 2016, Laws of Kenya:

- 44. Compulsory restoration and re-vegetation where forests are depleted.
- 46. Requirements for a strategic environmental, cultural, economic and social impact assessment licence.

⁴¹ Mining Act, No. 12 of 2016, Laws of Kenya:

- 101. (2) Environmental and social impact assessment report and environmental management plan for the term of the mining licence to the National Environment Management Authority;
- 181. (1) Environmental protection bond sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations of the licence holder.

⁴² Public Health Act, Cap 242, Laws of Kenya:

An Act of Parliament to make provision for securing and maintaining health

Health Act, No. 21 of 2017, Laws of Kenya:

15. (1) The national government ministry responsible for health shall- (v) provide policy guidelines and regulations for hospital waste management and conduct of environmental health impact assessment;

⁴³ Agriculture and Food Authority Act, No. 13 of 2013, Laws of Kenya.: An Act of Parliament to provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes.

Fisheries Management and Development Act, No. 35 of 2016, Laws of Kenya:

49. (1) prohibition of introduction into the Kenya fishery waters any toxic, hazardous or other harmful substances.

Crops Act, No. 16 of 2013, Laws of Kenya:

4. (b) 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;

⁴⁴ Energy Act, No. 1 of 2019, Laws of Kenya:

100. (2) All licences or permits issued by the Authority shall include-

- (a) a requirement that the licensee shall comply with all applicable environmental, health and safety laws;
- (b) a stipulation that the licensee is subject to liability under tort and the contract laws;

a. Civil Liability Against State and Private persons

Civil law protection of the environment is not regulated directly by specific regulations, but it is foreseen by legislative instruments in the area of compensation of damages.⁴⁵ Civil law protection is enforced through sanctions as a mechanism of coercion against a person or entity that causes damage, with the aim of achieving and bringing the property or other personal non-material goods to the state in which they were before threat or disturbance.⁴⁶ Notably, civil law sanctions relating to protection of the environment are grouped on the basis of their function: *preventive sanctions, natural restitution and compensatory and reparatory sanctions* (emphasis added).⁴⁷ The objective of preventive sanctions, which can be assumed, is to eliminate potential hazards, i.e. to prevent activities that are causing harassment or the danger or harm that might occur.⁴⁸

The *Draft Principles on Human Rights and the Environment of 1994*,⁴⁹ declare 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.⁵⁰

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.⁵¹ The current Constitution of Kenya has some express provisions that seek to apportion environmental liability as far as realisation of the right to clean and healthy environment is concerned. For instance, 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.

Article 69 outlines the State and individual obligations in respect of the environment. Clause (1) provides that the State shall—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.

⁴⁵ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

⁴⁶ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *op cit.*, 1163.

⁴⁷ *Ibid.*, at p. 1163.

⁴⁸ *Ibid.*, at p. 1163.

⁴⁹ *Draft Principles On Human Rights And The Environment*, E/CN.4/Sub.2/1994/9, Annex I (1994).

⁵⁰ *Ibid.*, Principle 5.

⁵¹ Edo, Z.O., '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.

Article 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.

To facilitate the implementation of the foregoing provisions, 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.⁵² 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.⁵³ 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.⁵⁴

The *Environment and Land Court Act 2011*⁵⁵ establishes the Environment and Land Court⁵⁶ and grants it 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 applicable in Kenya relating to environment and land.⁵⁷ 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.⁵⁸ Notably, nothing in the Act precludes the Court from hearing and determining 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.⁵⁹ In exercise of its jurisdiction under this Act, the Court shall have power to 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.⁶⁰ Also notable is section 18 thereof which provides that in exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—the principles of sustainable development, including— the principle of public participation in the development of policies, plans and processes for the management of the environment and land; 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; the principle of international co-operation in the management of environmental resources shared by two or more

⁵² Art. 70(2).

⁵³ Art. 70(3); See also s. 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

⁵⁴ Joseph Owino Muchesia & another v Joseph Owino Muchesia & another [2014] eKLR, para. 34.

⁵⁵ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

⁵⁶ *Ibid*, sec. 4.

⁵⁷ *Ibid*, sec. 13(1).

⁵⁸ *Ibid*, sec. 13(2) (a).

⁵⁹ *Ibid*, sec. 13(3).

⁶⁰ *Ibid*, sec. 13(7).

states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.

The implication of the foregoing is that even where a party is unable to prove the denial, violation, infringement or threat to environmental rights for one reason or the other, then the court 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. The set out remedies can go a long way in strengthening the environmental liability regime in Kenya. This is in line with the national values and principles of governance that requires or persons and state organs to promote sustainable development.

These provisions were invoked in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*⁶¹ where 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...*"⁶² (emphasis added)

In addition to the foregoing post constitutional provisions and practice, courts in Kenya have been making positive strides for longer as far as environmental liability is concerned. 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."⁶³

Courts in most Common Law jurisdictions including Kenya rely on common law principles as in the case of *Rylands vs Fletcher* when determining the issue of strict liability in environmental

⁶¹ [2013] eKLR, Environment and Land No. 273 of 2013.

⁶² Paras 25 & 28.

⁶³ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

matters.⁶⁴ The English Case of *Rylands vs Fletcher*⁶⁵ resulted in what is commonly referred to as the rule in *Rylands vs Fletcher* which imposes strict liability on the owner of land for damage caused by the escape of substances to his or her neighbour's land. From this case the prerequisites of a strict liability claim are that the defendant made a “non-natural”⁶⁶ or “special” use of his land; that the defendant brought onto his land something that was likely to do mischief if it escaped; the substance in question escaped; and the Plaintiff's property was damaged because of the escape.⁶⁷

The Supreme Court of India has in addition introduced the concept of absolute liability in addition to strict liability where the defendant is engaged in industrial activities resulting in pollution. In the case of *M C Mehta vs Union Of India* [1987] 1 SCC 395, cited with approval in *Indian Council*

⁶⁴ See also *Donoghue v Stevenson* [1932] UKHL 100, SC (HL) 31, AC 562, All ER Rep 1. It laid the foundation of the modern law of negligence, establishing general principles of the duty of care.

⁶⁵ *Rylands vs Fletcher* [1861-73] ALL ER REP 1. In that case, the Defendant had employed contractors to build a reservoir on his land. While building it, the contractors discovered a series of old coal shafts and passages under the land filled loosely with soil and debris, which joined up with Plaintiff's adjoining mine. Rather than blocking these shafts, the contractors left them and as a result the Defendant's reservoir burst and flooded the Plaintiff's mine causing damage. The Court stated as follows:

“We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences.” “If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage.”

⁶⁶ The Supreme Court of Colombia in the case of *John Campbell Law Incorporation Vs Owners Strata Plan, 1350* [2001]BSCS 1342, the principle of non-natural use of land under *Rylands Vs Fletcher* is not a fixed concept but rather an evolving rule which reflects the constant changes that occur in modern life. This approach has also been adopted by different courts in various jurisdictions, including the English courts.

⁶⁷ *David M. Ndeti v Orbit Chemical Industries Limited* [2014] eKLR, para. 23.

For Enviro-Legal Action & Others vs Union of India & Others [1996] 2 LRC, the court stated that the test upon which such liability is to be imposed is based on the nature of the activity.⁶⁸ Consequently, where an activity is inherently dangerous or hazardous, then absolute liability for the resulting damage attaches on the person engaged in the activity.⁶⁹

As part of civil liability, EMCA also provides for environmental restoration orders, conservation orders, and easements.⁷⁰

b. Criminal Liability in Environmental Matters

Criminal law enforces the protection of society from crime, so that the most favorable protection of the environment is achieved in this way.⁷¹

The *Environmental Management and Coordination Act (EMCA), 1999*, provides for criminal liability in environmental matters under various sections. The Act provides that ‘subject to the Constitution and the directions and control of the Attorney-General, an environmental inspector may, in any case in which he considers it desirable so to do:- institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court-martial) in respect of any offence alleged to have been committed by that person under EMCA; and discontinue at any stage with the approval of the Attorney-General, before judgement is delivered any such proceedings instituted or undertaken by himself.’⁷²

Part XIII of EMCA on environmental offences carries more elaborate provisions on criminal liability in environmental matters. The offences range from failure to maintain proper records as

⁶⁸ It stated-

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of the substance of any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item for its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried out carefully or not.....We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity, resulting for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands Vs. Fletcher* [1868] LR 3 HL 330, [1861-73].”

⁶⁹ David M. Ndeti v Orbit Chemical Industries Limited [2014] eKLR, para. 29.

⁷⁰ EMCA, Part IX (Sec. 108-116).

⁷¹ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

⁷² S. 118, EMCA.

required under EMCA, to violation of environmental standards under the Act and for each there are prescribed penalties.⁷³

c. Environmental Impact Assessment

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.⁷⁴

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’.⁷⁵ 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.⁷⁶ The Environment (Management and Conservation) Act (EMCA) 1999⁷⁷ provides for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts. EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development.⁷⁸

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.⁷⁹ 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.

EIA can be a powerful tool for keeping the corporates including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered

⁷³ Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146.

⁷⁴ Environmental Management and Co-Ordination Act, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

⁷⁵ Ingelson, A., et al, ‘Philippine Environmental Impact Assessment, Mining and Genuine Development,’ Law, Environment and Development Journal, Vol. 5, No. 1, 2009, p. 7.

⁷⁶ 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/Art./109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf>

⁷⁷ Act No. 8 of 1999, Laws of Kenya.

⁷⁸ Al Ouran, N.M., ‘Analysis of Environmental Health linkages in the EIA process in Jordan,’ International Journal of Current Microbiology and Applied Sciences, Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

⁷⁹ Regulation 16, Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003.

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's lives such as unregulated mining activities.⁸⁰ A good example is the alleged lead poisoning in Owino Uhuru, a slum area in Mombasa city adjacent to a lead battery recycling factory, which has led to protracted court battles.⁸¹ These are some of the incidences that can be avoided through effective enforcement of the environmental laws at the early stages of setting up such factories.

d. Strategic Environmental and Social Assessment (SESA) and Strategic Environmental Assessment (SEA)

Strategic Environmental and Social Assessment (SESA) is an effective environmental management tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.⁸² 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).⁸³ 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.⁸⁴

⁸⁰ Jenje, B., '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 Chege, M. W., 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.

⁸¹ Okeyo B. & Wangila A., "Lead Poisoning in Owino Uhuru Slums in Mombasa- Kenya," (Eco-Ethics International –Kenya Chapter, 2012). Available at <https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf> [Accessed on 24/4/2019]; Zoë Schlanger, "A Kenyan mother, two disappearing Indian businessmen, and the battery factory that poisoned a village," Quartz Africa, March 18, 2018. Available at <https://qz.com/africa/1231792/a-battery-recycling-plant-owned-by-indian-businessmen-caused-a-lead-poisoning-crisis-in-kenya/> [Accessed on 24/4/2019].

⁸² Notably, the Energy Act, No. 1 of 2019, Laws of Kenya, requires under section 107 (1) (2)(d) 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.

⁸³ 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.

⁸⁴ Ibid; See also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulations 42 & 43.

e. Environmental Audits and Monitoring

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.⁸⁵

EMCA 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.⁸⁶ An initial environmental audit and a control audit are conducted by a qualified and authorized environmental auditor or environmental inspector who is an expert or a firm of experts registered by NEMA. In the case of an ongoing project NEMA requires the proponent to undertake an initial environmental audit study to provide baseline information upon which subsequent environmental audits shall be based. The proponent shall be issued with an acknowledgement letter and an improvement order where necessary.⁸⁷

One of the functions of the National Environment Management Authority (NEMA) under EMCA is to identify projects and programmes or types of projects and programme, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act.⁸⁸

NEMA or its designated agents is responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment. An environmental inspector appointed under the 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).⁸⁹ The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made should 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).⁹⁰

The owner of premises or the operator of a project should take all reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact assessment study report submitted under section 58(2) and should prepare and submit an environmental audit report on those measures to the Authority annually or as the Authority may, in writing, require.⁹¹ The Authority is empowered to, in consultation with the relevant lead agencies, monitor:- all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts; or the operation of any industry, project or activity with a view of determining its immediate and long-term effects on the environment.⁹²

⁸⁵ Constitution of Kenya, 2010, Art. 69(1) (f).

⁸⁶ S. 2, EMCA.

⁸⁷ The Environmental (Impact Assessment and Audit) Regulations, 2003. Available at https://www.nema.go.ke/index.php?option=com_content&view=article&id=27&Itemid=167 [Accessed on 21/4/2019].

⁸⁸ S. 9(2) (j), EMCA.

⁸⁹ S. 68(1), EMCA.

⁹⁰ S. 68(2), EMCA.

⁹¹ S. 68(3), EMCA.

⁹² S. 69(1), EMCA.

In addition, an environmental inspector appointed under this Act may enter upon any land or premises for the purposes of monitoring the effects upon the environment of any activities carried on that land or premises.⁹³

The *Environment (Assessment and Audit) Regulations, 2003*⁹⁴ provide the necessary guidelines on the procedure.

Arguably, NEMA is still facing challenges in discharging its mandate as it is currently and there is a need to work closely with the county governments in order to be in touch with what is happening across the country. These challenges were brought to the public limelight on 10th May, 2018, when Kenyans woke up to the shocking news of the collapse of Milmet Dam – also known as Solai Dam – in Nakuru County. Farms and villages had been washed away in the on-rush of the water's break. Hundreds of people were caught up in the consequent muddy sludge, claiming 47 lives in the downstream flood chaos. The subsequent cases brought against NEMA officials by the Director of Public Prosecutions to hold them liable for the disaster highlighted the challenges that NEMA is facing in discharging its mandate across the country.⁹⁵ This therefore calls for concerted efforts from all lead agencies under the direction of NEMA to ensure that environmental standards are upheld and enforced across the various sectors.

f. Implementation Principles of Sustainable Development

One of the national values and principles of governance as provided under Art. 10 of the Constitution is sustainable development. The principles of sustainable development as also captured in EMCA⁹⁶ include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the principle of international co-operation in the management of environmental resources shared by two or more states; the polluter-pays principle; and the pre-cautionary 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.⁹⁷ This was also captured in the *1972 OECD Guiding Principles on the International Economic Aspects of Environmental Policies*, which stated: "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

⁹³ S. 69(2), EMCA.

⁹⁴ Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Laws of Kenya (Government Printer, Nairobi, 2003).

⁹⁵ See Johnson Kamau Njuguna & another v Director of Public Prosecutions [2018] eKLR, Judicial Review No 9 of 2018.

⁹⁶ EMCA, S. 3(5).

⁹⁷ OECD, Environmental Principles and Concepts, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., Para. 37.

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."⁹⁸ In the *Trail Smelter Arbitration (United States v. Canada)*,⁹⁹ 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 1997¹⁰⁰ where the International Court of Justice concluded that both Parties committed internationally wrongful acts, and that those acts gave rise 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.¹⁰¹

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.¹⁰² 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,

⁹⁸ 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).

⁹⁹ 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 13/4/2019].

¹⁰⁰ 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 13/4/2019].

¹⁰¹ 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 13/4/2019].

¹⁰² 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.

consequently, to arrive at sustainable, environment-friendly development.¹⁰³ 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.¹⁰⁴

The constitutional provision on the enforcement of the right to clean and healthy environment in Kenya is largely based on the principle of the polluter pays principle¹⁰⁵, where the provisions give extensive powers to the court to compel the government or any public agency to take restorative measures and to provide compensation for any victim of pollution and to compensate the cost borne by victims for the lost use of natural resources as a result of an act of pollution.¹⁰⁶ EMCA however provides that 'no civil or criminal liability in respect of a project or consequences resulting from a project shall be incurred by the Government, the Authority or any public officer by reason of the approval of an environmental impact assessment study, evaluation or review report or grant of an environmental impact assessment licence or by reason of any condition attached to such licence.'¹⁰⁷ The same defence is however not available to the licensee as the Act provides that 'the issuance of an environmental impact assessment licence in respect of a project shall afford no defence to any civil action or to a prosecution that may be brought or preferred against a proponent in respect of the manner in which the project is executed, managed or operated.'¹⁰⁸

In addition to the polluter-pays principle, there is also the precautionary principle which also directly impacts on environmental liability. Principle 15 of the *Rio Declaration on Environment and Development*¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

¹⁰³ 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 13/4/2019].

¹⁰⁴ Ibid, p. 67.

¹⁰⁵ Articles 42; 70, Constitution of Kenya 2010.

¹⁰⁶ Luppi, B., Parisi, F., & Rajagopalan, S., "The rise and fall of the polluter-pays principle in developing countries," *International Review of Law and Economics* 32 (2012): 135-144, at p.138.

¹⁰⁷ EMCA, s. 66(1).

¹⁰⁸ EMCA, s. 66(2).

¹⁰⁹ 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.

¹¹⁰ 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 13/4/2019].

¹¹¹ Ibid, p.1.

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.¹¹² It originated in environmental risk management to provide regulatory authority to stop specific environmental contaminations without waiting for conclusive evidence of harm to the environment (i.e., while there was still “uncertainty” about the evidence).¹¹³

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).¹¹⁴ There is a 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.

4. Enhanced Environmental Enforcement and Compliance for Sustainable Development in Kenya

Environmental protection is inherent in the concept of sustainable development, as is a focus on the sources of environmental problems rather than the symptoms.¹¹⁵ While the existing laws seem to put great emphasis on enforcement of environmental responsibilities, there is little evidence of actual promotion of deterrence under the current environmental liability regime in Kenya. Kenya Vision 2030 is the long-term development blueprint for the country, with various pillars that include environmental, 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.¹¹⁶ The Blueprint seeks to ensure that Kenya becomes a nation that has a clean, secure and sustainable environment by 2030, to be achieved through: promoting environmental conservation to better support the economic pillar’s aspirations; improving pollution and waste management through the application of the right economic incentives; commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; enhancing disaster preparedness in all disaster-prone areas and improving the capacity for adaptation to global climatic change.¹¹⁷

Proper apportionment of environmental liability in the country will go a long way in ensuring that all stakeholders, both public and private play their role in achieving sustainable development agenda. 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

¹¹² 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 13/4/2019]

¹¹³ 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.

¹¹⁴ 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 13/4/2019].

¹¹⁵ *Ibid*, para. 50.

¹¹⁶ Sessional paper No. 10 of 2012, *On Kenya Vision 2030*, Government Printer, 2012.

¹¹⁷ *Ibid*.

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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ 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 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. 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.

4.1 Encouraging Proactive Corporate Environmental Compliance

It has rightly been pointed out that virtually all companies face the possibility of environmental liability costs and as such, it is imperative for the management to make at a least a general estimate of their company's potential future environmental liability be it from legally mandated cleanup of hazardous waste sites or from lawsuits involving consumers, employees, or communities.¹²¹ The gathered information, it is argued could be useful in the following ways: encourage defensive and prudent operations and waste reduction; improve manufacturing, waste disposal and shipping practices; negotiate and settle disputes with insurance carriers; influence regulators and public policy makers; determine suitable levels of financial resources; reassess corporate strategy and management practices (think green); articulate a comprehensive risk management program; improve public relations and public citizenship; and assess hidden risks in takeovers and acquisitions.¹²²

¹¹⁸ 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.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Schoemaker, P. J., & Schoemaker, J. A., "Estimating environmental liability: Quantifying the unknown," *California Management Review*, Vol.37, no. 3 (1995): 29-61, at p.29.

¹²² Ibid, at pp. 29-30.

It is advisable for companies and organisations to engage in proactive environmental risk management as part of their strategic plans in order to avoid costly environmental liability mistakes.¹²³

4.2 Due Diligence/Cultivating Environmental Ethics

Kenyans have a role to play in achieving the ideal of a clean and healthy environment.¹²⁴ There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same.¹²⁵ 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.¹²⁶ 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.¹²⁷

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 environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.¹²⁸

¹²³ This is in line with the ISO 14000 which is a series of environmental management standards developed and published by the International Organization for Standardization (ISO) for organizations. The ISO 14000 standards provide a guideline or framework for organizations that need to systematize and improve their environmental management efforts. The ISO 14000 standards are not designed to aid the enforcement of environmental laws and do not regulate the environmental activities of organizations. Adherence to these standards is voluntary.

The ISO 14001 standard specifies the requirements of an environmental management system (EMS) for small to large organizations. An EMS is a systemic approach to handling environmental issues within an organization. The ISO 14001 standard is based on the Plan-Check-Do-Review-Improve cycle.

(ISO 14000 and 1400, <https://whatis.techtarget.com/definition/ISO-14000-and-14001>).

The ISO 14000 family of standards provides practical tools for companies and organizations of all kinds looking to manage their environmental responsibilities. ISO 14001:2015 and its supporting standards such as ISO 14006:2011 focus on environmental systems to achieve this. The other standards in the family focus on specific approaches such as audits, communications, labelling and life cycle analysis, as well as environmental challenges such as climate change.

(International Organization for Standardization, "ISO 14000 family - Environmental management," <https://www.iso.org/iso-14001-environmental-management.html>).

¹²⁴ Article 69(2), Constitution of Kenya.

¹²⁵ Preamble, Constitution of Kenya.

¹²⁶ Article 69(2), Constitution of Kenya.

¹²⁷ See generally, Muigua, K., *Realising Environmental Democracy in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf> [Accessed on 15/4/2019].

¹²⁸ 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

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. The current generation has a responsibility and an environmental liability to ensure that future (unborn) generations have their future guaranteed. This responsibility was affirmed in the case of *Oposa et al. v. Fulgencio S. Factoran, Jr. et al* (G.R. No. 101083) (199) where the Supreme Court of the Philippines stated that even though the right to a balanced and healthful ecology is under the Declaration of Principles and State Policies of the Constitution and not under the Bill of Rights, it does not follow that it is less important than any of the rights enumerated in the latter: “[it] concerns nothing less than self-preservation and self-perpetuation, the advancement of which may even be said to predate all governments and constitutions”. The right is linked to the constitutional right to health, is “fundamental”, “constitutionalised”, “self-executing” and “judicially enforceable”. It imposes the correlative duty to refrain from impairing the environment.¹²⁹ The court stated that the petitioners were able to file a class suit both for others of their generation and for succeeding generations as “the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.”¹³⁰

It is thus important to ensure that all persons are conscious of their responsibility and duty to future generations to eliminate environmental threats affecting life, health and the wellbeing of the generations to come in the spirit of intragenerational and intergenerational equity.

4.3 Environmental Insurance

Environmental insurance is one of the tools that is used in environmental management. However, EMCA does not have provisions touching on the same. In addition, Kenyan insurance firms are yet to popularise environmental insurance services. It is suggested that this is a service that they should take up especially in light of the sustainable development agenda. However, all is not lost as a few of the insurance providers have packages on environmental impairment liability, such as the AIG insurance whose package covers: third-party bodily injury; third-party property and environmental damage; and clean-up costs for pollution conditions, both on site or while migrating from site.¹³¹ Environmental law practitioners may also advise their clients on the possibility of taking up environmental liability insurance. The closest that EMCA has in terms of state sponsored environmental insurance is the National Environment Restoration Fund, which is a state kitty meant to supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require the Authority to intervene towards the control or mitigation of environmental degradation.¹³² There is a need to popularize environmental insurance in the country for both medium and huge companies to shield them against environmental liability which could turn out to be too costly.

<http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf> [Accessed on 15/4/2019].

¹²⁹ *Oposa et al. v. Fulgencio S. Factoran, Jr. et al* (G.R. No. 101083), <https://www.escribnet.org/caselaw/2006/oposa-et-al-v-fulgencio-s-factoran-jr-et-al-gr-no-101083>

¹³⁰ *Ibid.*

¹³¹ <https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability>

¹³² S. 25(3), EMCA.

The basic considerations when buying environmental damage liability insurance have been summarized as follows: the nature and extent of the risk to be insured; the purposes the insurance is to serve; the available types of policies, scopes of coverage, deductibles, and prices; the extent to which the issues just noted are governed by mandatory governmental insurance requirements (i.e., where being used to satisfy federal or state financial responsibility requirements); the importance of disclosures in answers to the warranty questions in the application form; the extent to which the actual scope of coverage in various competing policies serves the insured's purposes, given the nature and extent of the risks involved; the extent to which the rights of the insurance company under the policy may affect the client's freedom to pursue the appropriate regulatory or public relations strategy after an environmentally damaging release; the advantages and disadvantages of self-insurance; and the need for close coordination between legal counsel, environmental managers, and those in charge of insurance for the client on all of these matters.¹³³

5. Conclusion

The environment should be accorded some right, independent of the human beings. Indeed, the Constitution of Kenya 2010 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. Strengthening the environmental liability regime in Kenya is necessary in order to enable the country to have a clean and healthy environment and to achieve sustainable development.

¹³³ Smith Jr, T.T., "Environmental Damage Liability Insurance—A Primer," *The Business Lawyer* (1983): 333-354, at p.336.

Revisiting the Role of Law in Environmental Governance in Kenya

Abstract

This paper discusses the general environmental governance practices and makes recommendations on how the environmental law frameworks in Kenya can be reviewed to make them more inclusive. The main argument is that the law should be a means to an end and it should be no different for the environmental laws in Kenya as far as meeting the socio-economic needs of the people is concerned. The paper advocates for laws that strike a balance between anthropocentric and ecocentric approaches in environmental governance.

1. Introduction

This paper makes a case for how the law on environmental governance in Kenya can be used in enhancing the participation of all stakeholders in environmental governance matters in the country. This is based on the belief that there are certain socio-cultural constructions of nature and the wider socio-economic, cultural and political contexts which help to shape environmental knowledges, rights and practices of a given group of people. This therefore calls for consideration of such issues when coming up with and implementing laws and policies on environmental governance if the same is to effectively deal with environmental issues. The paper makes a case for greater consideration of social justice requirements of the society when legislating on environmental governance matters in Kenya.

2. Environmental Governance: Meaning and Scope

Environmental governance comprises the rules, practices, policies and institutions that shape how humans interact with the environment.¹ Environmental governance has also been defined as the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes.² Some scholars have used the term governance to refer to the fundamental question of how organisation, decisions, order and rule are achieved in heterogeneous and highly differentiated societies. At its core, governance addresses the problem of economic and political co-ordination in social life. Accounts of governance typically describe the form and geographical scale of socio-political institutions, identify key actors and organisations, and characterise how relations among these components may be changing.³ One scholar has convincingly suggested that environmental governance is best understood as the establishment, reaffirmation or change of institutions to resolve conflicts over environmental resources.⁴ In this broader context, conflict refers to a conflict of interest, not necessarily to an open conflict, between involved parties. In addition, the broader definition is considered applicable to the governance of all environmental resources from conventional renewable and non-renewable natural resources to biodiversity and atmospheric sinks, as well as to environmental safety and the quality of air and

¹ United Nations Environment Programme, "Environmental governance," available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 26/5/2019].

² Lemos, M. C., & Agrawal, A., "Environmental governance," *Annu. Rev. Environ. Resour.*, 31 (2006): 297-325.

³ Bridge, G., & Perreault, T., "Environmental governance," *A Companion to Environmental Geography* (2009): 475-497, at p. 476.

⁴ Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *Ecological economics*, 63, no. 1 (2007): 93-103, at p.94.

water.⁵ Furthermore, the definition does not limit the type or scale of environmental governance problems and solutions that can be examined, and it also recognizes social justice as an integral part of environmental decisions.⁶

It has been suggested that good governance includes: *Participation*- Good governance needs to be participatory. Participation can happen directly or through legitimate intermediate institutions or representatives. It includes the obligation of providing information. The rights of free association and freedom of expression are fundamental to participation; *Rule of law*- Good governance requires fair legal frameworks that are enforced impartially. The judiciary and executive powers need to be impartial and incorruptible; *Transparency*- Transparency means that the decision-making processes, as well as the enforcement of decisions, follow rules and regulations. In addition, information needs to be freely available and directly accessible to those who will be affected by such decisions and their enforcement. Information needs to be provided in an easily understandable form and through appropriate media that reaches the people concerned; *Responsiveness*- Good governance requires that institutions and processes try to respond to all stakeholders within a reasonable timeframe; *Consensus oriented*- Good governance requires that different interests within the society be taken into account and that decisions follow the objective of reaching a broad consensus on what is in the best interest of the whole community; *Equity and inclusiveness*- Good governance does not only serve the interests of the mainstream of society, but includes also its most vulnerable and minority groups; *Effectiveness and efficiency*- Good governance means that processes and institutions produce results that meet the needs of society while making the best use of resources at their disposal. The concept of efficiency in the context of good governance also covers the sustainable use of natural resources and the protection of the environment; and *Accountability*- Accountability is a key requirement of good governance. Governmental institutions, but also the private sector and civil society organizations, must be accountable to those who will be affected by their decisions or actions.⁷ Good environmental governance takes into account the role of all actors that impact the environment, including governments, Non-Governmental Organisations (NGOs), the private sector and civil society, who must all cooperate to achieve effective governance that can help us move towards a more sustainable future.⁸

It has rightly been pointed out that ‘governance’ is an umbrella term for diverse forms of state and non-state political control exercised today at various policy levels against a backdrop of growing complexity in actor structures and the operating environment. In this respect, the term ‘governance’

⁵ Ibid, p.94.

⁶ Ibid., p.94.

⁷ United Nations, Introduction to Environmental Governance, 2017. Available at <https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf> [Accessed on 26/5/2019].

⁸ United Nations Environment Programme, “Environmental governance,” available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 26/5/2019].

therefore takes in a broader range of actors and policy instruments than ‘government’, which is restricted to state action.⁹

It is against these definitions of the term ‘governance’ that this paper seeks to discuss what the law making process and its implementation should entail, especially in respect of environmental governance laws in Kenya.

3. Place of Law in General Governance Matters

Some scholars have conceptualised the link between law and governance in general terms. Some have ably argued that Law and governance are closely linked in the following ways:¹⁰ *Constitutions* provide the framework for the legal and political institutions through which government takes place. They provide- legal ‘power-maps’ for how power will be held and exercised; a legal framework for accountability, often enforceable by apex courts; a legalised text which embodies the underlying political settlement or elite-level pact from which any political community flows; rights and safeguards for individuals from abuses of power by political actors and institutions; *Public institutions of governance* are themselves also creatures of law, operating according to law and sometimes even having secondary law-making functions; Good governance depends on a legal platform of both criminal law and civil law, to create the environment – here law’s key role is to provide background norms that enable horizontal interactions; International law increasingly impacts on, and increasingly even regulates governance at the state level. This regulation is diverse and multifarious, including- International legal regulation of political change processes (including peace settlements, coup d’état, or other forms of regime change), which attempts to ensure only ‘democratic’ regime change; International legal requirements for human rights to be protected at the domestic level; Human rights directly impact on the internal governance arrangements of states; International legal requirements for ‘inclusion’ both in change processes and in the terms of the new political settlement itself; A range of diverse international bodies shape domestic governance in what have been termed ‘transnational global administrative spaces’ which impact on domestic governance.¹¹

A good example of this link is to be found under the current Constitution of Kenya which provides for national values and principles of governance which must 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.¹²

The Constitution also declares the Republic of Kenya to be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.¹³ Article 10 of the Constitution of Kenya outlines the national values and principles of governance as including: (a)

⁹ Jänicke, M., & Jörgens, H., "New approaches to environmental governance," *Environmental Governance in Global Perspective*. New Approaches to Ecological and Political Modernisation. Berlin: Freie Universität Berlin (2006): 167-209 at p. 171.

¹⁰ Bell, C., “Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions,” Briefing Paper 4, (The Political Settlements Programme Consortium, 2015), pp.1-2. Available at http://www.politicalsettlements.org/wp-content/uploads/2017/09/2015_BP_4_Bell_Governance-and-Law.pdf [Accessed on 26/5/2019].

¹¹ Bell, C., “Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions,” op cit.

¹² Constitution of Kenya 2010, Art. 10(1).

¹³ Constitution of Kenya 2010, Article 4(2).

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.¹⁴ These values and principles are meant 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.¹⁵

It is thus evident that the law plays an important role in governance matters by not only setting up the relevant governance institutions but also setting out the *modus operandi* for such institutions. Notably, the Constitution of Kenya recognises both formal and informal systems of law. However, the Constitution acknowledges the supremacy of the Constitution and provides that any law, including customary law, which is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.¹⁶ Despite this qualification, it is clear that the definition of law in the context of Kenya includes customary law and applies in a pluralistic way. The Constitution thus creates room for pluralistic operation of formal and informal laws in Kenya in governance matters, albeit with certain qualifications as stated.

4. Environmental Governance in Kenya: Prospects and Challenges in the Legal and Institutional Frameworks

4.1 Environmental Governance in Kenya: Legal and Institutional Frameworks

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 resources¹⁷, 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, biodiversity¹⁸ and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity¹⁹; establish systems of environmental impact assessment, environmental audit and

¹⁴ Constitution of Kenya 2010, Art. 10(2).

¹⁵ Constitution of Kenya 2010, Art. 10(1).

¹⁶ Constitution of Kenya 2010, Art. 2(4).

¹⁷ 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 (Art. 260).

¹⁸ 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 (Art. 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 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).

¹⁹ 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

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.²⁰

Notably, the Constitution of Kenya also 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.²¹ 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 and governance matters.

The Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*²², stated that in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the EMCA. In this regard, Articles 42, 69 and 70 of the Constitution and the broad environmental principles set out in Section 3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes. Invariably, the environmental governance legal framework and any other relevant legislative instrument [substantive or subsidiary], ought to be construed in a manner that promotes the letter and spirit of the above constitutional underpinnings and general principles in Section 3 of the EMCA.²³ While this paper is not intended to downplay the place of command-and-control approach to environmental governance in some cases, this approach has a tendency to focus more on achieving conservation goals and tackling environmental degradation challenges at the expense of also seeking to ensure that these resources help in achieving social justice for the Kenyan people as far as the use environmental resources is concerned. The public participation, consultations and institutional accountability requirements as provided for under different laws are at times treated as a formality. Social justice goals seem to be relegated to a secondary place.

4.2 Need for revisiting the formal and state-centered governance solutions?

This section seeks to re-evaluate the effectiveness of the enforcement power of the state as against solutions or approaches based on voluntary cooperation within the environmental governance framework in Kenya. Some scholars have observed that institutions resolve environmental

resources. Kenya is a signatory to this Convention and it is therefore bound by its provisions in promoting the realisation of the three objectives.

²⁰ Constitution of Kenya, Art. 69(1).

²¹ *Ibid.*, Art. 69(2).

²² *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, Petition 32 of 2017.

²³ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others*, para. 23.

conflicts by striking a particular balance between conflicting interests by either establishing, reaffirming or redefining entitlements in environmental resources.²⁴ In other words, they seek to strike a balance between anthropocentric and ecocentric approaches to environmental governance. An anthropocentric approach to environmental governance would focus on poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information and conflicts management, amongst others.²⁵ Ecocentric approaches dwell on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.²⁶ Conflicts over natural resources and environmental crimes intensify the problems. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits.²⁷

The Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*²⁸, pointed out that a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests.²⁹ This is an affirmation of the fact that courts, in collaboration with other stakeholders in the environmental governance matters, also have a role to play.

It has rightly been argued that the aim of participatory approaches is to place policy programmes (and in particular the sustainability process) on a broad social base and to mobilise hitherto unused supporters and knowledge repositories. Involving citizens and NGOs thus offers untapped potential for environmental policy.³⁰ In addition, citizens serving as an added resource for environmental policy need a system of incentives and an infrastructure of rights and information. This includes transparency regarding the environmental credentials of products on the market, and rights of information, participation and access to justice for citizens and environmental groups. The will to participate also presupposes a minimum of accurate and problem focused environmental reporting in the media. There is again a wide-ranging need for capacity building.³¹

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

²⁴ Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," op cit., at p.95.

²⁵ See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

²⁶ Ibid.

²⁷ 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>

²⁸ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, Petition 32 of 2017.

²⁹ Ibid, para. 22.

³⁰ Jänicke, M., & Jörgens, H., "New approaches to environmental governance," *Environmental Governance in Global Perspective. New Approaches to Ecological and Political Modernisation*, Berlin: Freie Universität Berlin (2006): 167-209, at p.192.

³¹ Jänicke, M., & Jörgens, H., "New approaches to environmental governance," op cit., at p.192.

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.

Customary approaches to environmental governance can be incorporated into the formal environmental governance frameworks as a tool for facilitating participation of communities. As already pointed out, the law should include both formal and customary approaches to governance.

5. Achieving Sustainable Development in Kenya Through Effective Environmental Governance: Revisiting the Role of Law in Environmental Governance

At the global level, it has been suggested that it is through good governance that sustainable development can be achieved in a fair and effective manner.³² Notably, environmental rule of law is central to sustainable development. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance. It highlights environmental sustainability by connecting it with fundamental rights and obligations. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations.³³

In addition, it is contended that natural resources that are managed sustainably, transparently, and on the basis of the rule of law can be the engine for sustainable development as well as a platform for peace and justice. The rule of law in environmental matters is essential for equity in terms of the advancement of the Sustainable Development Goals (SDGs), the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights.³⁴

Arguably, environmental governance structures should be used as means to an end, to wit, realisation of social justice for the people of Kenya. Legitimate environmental decisions have to reflect both distributive and procedural justice concerns. This is especially so when people have broader concerns than their narrowly construed economic welfare. In the context of pluralism, distributive justice matters in a broad sense of whose interests and values will be realized by the establishment, change or affirmation of environmental governance institutions.³⁵ Procedural justice plays a role in justifying decisions to those whose interests and values are sacrificed to realize some other interests and values. It can also facilitate learning and transformation of values and motivations of involved actors. Therefore, governance solutions do more than specify entitlements: they also provide for participation and avail conflict resolution to involved actors.³⁶

³² United Nations, Introduction to Environmental Governance, 2017. Available at <https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf> [Accessed on 27/5/2019].

³³ 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 27/5/2019].

³⁴ Ibid.

³⁵ Paavola, J., "Institutions and environmental governance: A reconceptualization," *Ecological economics*, vol.63, no. 1 (2007): 93-103 at p.98.

³⁶ Ibid., p. 97.

Increasing environmental pressures from climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, contribute to poverty and to growing social inequalities.³⁷

Some scholars have observed that to cope with stressors like climate change, economic instability, and socio-political or ideological shifts, environmental governance needs to formally embrace a broader set of environmental actors, organizations, and institutions, and become more flexible, responsive, and innovative.³⁸ There is need for greater cooperation between state and private-sector actors in environment-related decision making and enforcement processes.

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 national values and principles of governance require formulation of laws and institutions that are based on, *inter alia*, (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.³⁹ The common thread in most of these values and principles is the active participation of the people and the people-centred approach to governance matters. They are a reflection of what the law should seek to achieve in their formulation, interpretation and implementation. Any end result of such laws that does not reflect these values ought to be revisited or even such law reviewed to have it aligned with the Constitution.

In addition to the people-centred values and principles as listed above, 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 Environment (Management and Coordination) Act, 1999⁴⁰ EMCA⁴¹ 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.

The application of law in environmental governance matters in Kenya should include customary law and cultural practices that relate to the environment. In addition, law making process should

³⁷ United Nations, "Environmental Rule of Law", *op. cit.*

³⁸ DeCaro, D. A., Chaffin, B. C., Schlager, E., Garmestani, A. S., & Ruhl, J. B., "Legal And Institutional Foundations Of Adaptive Environmental Governance," *Ecology And Society: A Journal Of Integrative Science For Resilience And Sustainability*, 22, no. 1 (2017): 1.

³⁹ Constitution of Kenya 2010, Art. 10(2).

⁴⁰ No. 8 of 1999, Laws of Kenya.

⁴¹ EMCA, S. 3(5).

ideally be bottom-up. There is need for wide consultation with various stakeholders including communities in not only implementation of the laws and polices but also during the formulation of the same. Meaningful participation of communities will play an important role in not only ensuring that these laws benefit such communities in their interaction of environmental resources but also ensure that their human rights are safeguarded from any potential violation as a result of such laws.

There is a 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. Their customary law practices and knowledge concerning environmental matters can go a long way in enhancing environmental governance in Kenya and should be incorporated into the formal laws in Kenya.

6. Conclusion

It is imperative for the policy makers and legislators to bear in mind the end game of any intended law or policy as far as environmental governance is concerned. The law and any institutions put in place should not just be geared towards dictating how people should behave or conduct themselves when interacting with the environment. While this may be partly a reason as far as conflict management and conservation measures are concerned, laws should also capture and reflect the aspirations of the people and their implementation should be as a way of achieving such dreams and aspirations. Achieving social justice should be one of the direct results of implementing environmental laws and policies on governance. The law should be a tool for achieving social justice for the people and environmental governance laws should not be any different.

There is indeed a need to revisit the role of law in environmental governance in Kenya. Formal laws and also customary law practices and norms should be utilised in participatory governance for sustainable development.

Enhancing Environmental Governance for Peace Building in Kenya

Abstract

Peace is considered to be a necessary ingredient for sustainable development. However, the same can only be achieved and assured where all the needs of groups are taken care of and any dissatisfaction is addressed adequately. Most if not all of the socio-economic needs of a people largely rely on the status of the environment. It is therefore arguable that there is a link between the state of the environment and peace in any society. This paper critically discusses how peacebuilding efforts can benefit from enhancing and streamlining environmental governance as way of addressing some of the causative factors that may directly or indirectly contributed to instability in a society.

1. Introduction

The *2030 Agenda for Sustainable Development*¹ provides a global blueprint for dignity, peace and prosperity for people and the planet, now and in the future. Goal 16 thereof 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.² The *Agenda* also rightly points out that there can be no sustainable development without peace and no peace without sustainable development. One of the elements of sustainable development is effective environmental governance. The *Agenda* states that it 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.³ The *Agenda* calls 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.⁴ It is against this background that this paper discusses the fundamental principles underlying environmental governance and links the same to peacebuilding. The discussion is based on the hypothesis that there exists a link between the state of environmental governance and the peace building in any country.

The paper begins with a background on environmental governance that includes a definition of environmental governance and its underlying principles. The second part discusses the scope and elements of peacebuilding. The author then traces the link between the concept of environmental governance and peacebuilding. Lastly, the discourse ends with some recommendations on how the relationship between the two concepts can be exploited in order to build a lasting peaceful society as part of achieving the sustainable development agenda in the context of Kenya.

¹ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

² Goal 16,

³ Target 35, Transforming our world: the 2030 Agenda for Sustainable Development.

⁴ Ibid, Target 35.

2. Environmental Governance: Theories and Conceptualisation

2.1 Theories and Conceptualisation of Environmental Governance

There exist different definitions of the term ‘governance’ by various scholars.

Governance has been defined as a system for shaping behaviour to socially useful ends, involving many participants serving various roles. Those involved in this system include government officials, legal authorities, self-governing organisations and non-government actors such as citizens, industry stakeholders, those being governed and those who are affected by governance.⁵

Some scholars have discussed the theory of governance under five broad propositions, which are considered to be complementary rather than contradictory. These five propositions are: Governance refers to a set of institutions and actors that occupy government bodies and “beyond” – that is, they are also from the private and the third sector; Governance identifies the blurring of boundaries and responsibilities for tackling social and economic issues; Governance identifies the power dependence involved in the relationships between institutions involved in collective actions; Governance is about autonomous self-governing networks of actors; and Governance recognizes the capacity to get things done which does not rest within the power of government to command or use its authority.⁶

Environmental Governance has been defined as the means by which society determines and acts on goals and priorities related to the management of natural resources. This includes the rules, both formal and informal, that govern human behavior in decision-making processes as well as the decisions themselves. Appropriate legal frameworks on the global, regional, national and local level are also considered to be a prerequisite for good environmental governance.⁷

‘Governance of natural resources’ has been used to mean the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say in the management of natural resources – including biodiversity conservation...⁸ The concept of ‘good governance’ includes accountability and is built on “fundamental human values and rights, including fairness, equity and meaningful engagement in and contribution to decision making.”⁹ It is thus arguable that environmental governance in any country is only as effective as the general governance framework in place. Environmental governance does not operate in a vacuum but also relies on the effectiveness of the general governance in a given country.

⁵ Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability* IUCN, Gland, Switzerland, 2016, xii + 126 pp at p. 1. Available at https://www.iucn.org/sites/dev/files/framework_for_assessing_and_improving_law_for_sustainability.pdf [Accessed on 16/5/2019].

⁶ Asaduzzaman, Mohammed & Virtanen, Petri, “Governance Theories and Models”, 2016, in A. Farazmand (ed.), *Global Encyclopedia of Public Administration, Public Policy, and Governance*, DOI 10.1007/978-3-319-31816-5_2612-1.

⁷ IUCN, *Environmental Law: Governance and MEAs*, available at <https://www.iucn.org/theme/environmental-law/our-work/governance-and-meas> [Accessed on 16/5/2019].

⁸ IUCN Resolution 3.012 on Governance of natural resources for conservation and sustainable development adopted in Bangkok, Thailand in 2004. Available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2004_RES_12_EN.pdf [Accessed on 16/5/2019].

⁹ Ibid.

2.2 Role of Law in Environmental Governance and Management

The law is considered an essential tool for governance and management of natural resources. It contains anticipatory mechanisms to ensure that natural resources are properly distributed, conserved and protected well into the future. Since law is the key instrument for transforming societal goals and aspirations into practice, its role is vital in interweaving environmental interests into the scheme of economic development. Law sets substantive norms, establishes decision-making institutions and processes, and provides mechanisms for accountability and conflict-resolution.¹⁰

It has rightly been argued that law reflects the combined result of the many viewpoints, values, knowledge systems, information types, and power struggles that come into play in its making and is thus inherently integrative. Law reflects the values of society.¹¹ Law creates rights, duties, powers, establishes institutions and procedures, and the basic principles on how people are to interact with each other and with natural resources. Further, the economic and financial interests that drive most of the decisions concerning natural resources are also reflected in the law.¹²

It is noteworthy that environmentally relevant legal principles, rules and implementation arrangements come from diverse sources which include: state-created rules, including constitutions, statutes, regulations, and administrative rules and plans; judicial rules, which include judgments of courts and tribunals, and legally binding rulings of other authorities or agents of government; state-supported private rules – such as industry co-regulatory arrangements or private codes or standards – that are broadly consensual and based in law related to, *inter alia*, contract, property, civil rights, consumer protection, or financial regulation; international bilateral, or multilateral agreements, rules of international bodies, and other state endorsed international legal and administrative arrangements, encompassing both hard law (formally ratified as legally binding) and soft law (not ratified or not of a binding nature); general legal principles that are widely accepted in national or international jurisprudence, particularly as endorsed and clarified by judgments of international and national courts and tribunals; and rules emerging from specific communities, particularly indigenous or religious communities (sometimes referred to as customary law), which can be recognized by states through specific laws, bills of rights or constitutional provisions, linking customary rules and norms to the authority and responsibility of the state.¹³

The system depends upon norms that may be translated into formal or informal rules, and upon organisations and institutional arrangements to implement these norms. Governance systems vary between communities, and change over time, and they intersect. Nation-state governance intersects

¹⁰ Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability* IUCN, Gland, Switzerland, 2016, at p. 1.

¹¹ Cosens, B.A., Craig, R.K., Hirsch, S.L., Arnold, C.A.T., Benson, M.H., DeCaro, D.A., Garmestani, A.S., Gosnell, H., Ruhl, J.B. and Schlager, E., "The role of law in adaptive governance," *Ecology and society: a journal of integrative science for resilience and sustainability* 22, no. 1 (2017): 1, p.1.

¹² Moore, P., et al, *Natural Resource Governance Trainers' Manual*, (IUCN, RECOFTC, SNV, Bangkok, Thailand, 2011), p. 119.

¹³ Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability* IUCN, Gland, Switzerland, 2016, at p. 3.

with private sector approaches, such as voluntary commitments or supply chain standards, and with traditional and indigenous norms and practices for conserving and using the natural world.¹⁴ In Kenya, there are intricate and detailed frameworks and sectoral laws in place to ensure proper conservation and protection of natural resources.¹⁵

In addition to the statutory provisions on environmental law, constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.¹⁶ 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 resources¹⁷, 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, biodiversity¹⁸ and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity¹⁹; 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.²⁰

¹⁴ *Ibid.*, at p. 1.

¹⁵ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

¹⁶ 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; See also Okidi, C.O., "Concept, Function and Structure of Environmental Law", in C.O Okidi, P. Kamari -Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya; Implementing the Framework Law*, (East African Educational Publishers, 2008), pp. 142–182: 146.

¹⁷ 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 (Art. 260).

¹⁸ 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 (Art. 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 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).

¹⁹ 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.

²⁰ Constitution of Kenya, Art. 69(1).

The key weaknesses that have made the law seem not to be playing its intended role in natural resources management are the complex institutional set ups, differing and overlapping mandates and organizational cultures of state agencies created to manage natural resources. Laws also provide for differing management and enforcement methods over similar resources thus creating conflict between agencies, as well as, between agencies and communities living with the resources.²¹ What is required is a strengthened framework law that gives proper attention to all sectors of natural resources as well as inclusive of all stakeholders for effective management.

3. Peace Building: Meaning and Scope

3.1 Meaning and Scope of Peace Building

The term peace is related to the well-being of any person. It is a generally accepted value. In most cultures it is a type of desideratum linked to harmony, tranquility, cooperation, alliance, well-being, and agreement.²² Notably, 'peace is not just the absence of violence, it is much more.'²³ 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.²⁴

Positive peace is considered as a true, lasting, and sustainable peace built on justice for all peoples. Efforts to achieve positive peace emphasize: establishing peace through world order by supporting international law, compliance with multilateral treaties, use of international courts, and nonviolent resolution of disputes, participation in international organizations, trade, and communication, establishing social equality and justice, economic equity, ecological balance; protecting citizens from attack, and meeting basic human needs, establishing a civil peace that provides the constitutional and legal means necessary to settle differences nonviolently, eliminating indirect violence, that shortens the life span of people, sustains unequal life chances, or reduces quality of life for any citizen, practising conflict resolution as a foundation for building peaceful interpersonal relationships. 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.²⁵

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. Efforts to achieve negative peace emphasize: managing interpersonal and organizational conflict in order to control, contain, and reduce actual and potential violence, reducing the incidence of war by eliminating the extreme dangers of the war system and limiting war through international crisis management, preventing

²¹ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

²² 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.

²³ Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

²⁴ 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 16/5/2019].

²⁵ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

war through strategic deterrence and arms control. The concept of negative peace addresses immediate symptoms, the conditions of war, and the use and effects of force and weapons.²⁶ The scope and context of this paper is limited to discussing the connection between positive peace and environmental management and how effective environmental governance can be used as one of the tools geared towards achieving positive peace. Negative peace is just to be treated as a byproduct of the efforts aimed at positive peace.

Peacebuilding is about dealing with the reasons why people fight in the first place and supporting societies to manage their differences and conflicts without resorting to violence. It involves a broad range of measures, which can take place before, during and after conflict. They aim to prevent the outbreak, escalation, continuation and recurrence of conflict.²⁷ Peacebuilding approaches can also be geared towards either 'positive' or 'negative' peace.²⁸

3.2 Role of Law in Peace Building

Conflict is grounded in social, structural, cultural, political and economic factors as seen from the foregoing pillars, since depreciation in one increases chances of conflict in a particular society.²⁹ Some scholars have also argued that peaceful nations are better equipped through their attitudes, institutions and structures to respond to external shocks. This can be seen with internal peace correlating strongly to measures of inter-group cohesion and civic activism, which are key proxies that indicate the ability of societies to resolve internal political, economic, and cultural conflicts as well as being able to respond to external shocks.³⁰ Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.³¹ Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.³²

Some of the factors that contribute to peace, the absence of which can potentially lead to conflict, are when: everyone lives in safety, without fear or threat of violence, and no form of violence is tolerated in law or in practice; everyone is equal before the law, the systems for justice are trusted, and fair and effective laws protect people's rights; everyone is able to participate in shaping political decisions and the government is accountable to the people; everyone has fair and equal access to the basic needs for their wellbeing – such as food, clean water, shelter, education,

²⁶ Ibid., pp.106-107.

²⁷ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [17/5/2019].

²⁸ Ibid.

²⁹ 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 17/05/2019]; 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 16/5/2019].

³⁰ Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' IEP Report 22, p. 5. Available at <https://www.files.ethz.ch/isn/169569/Pillars%20of%20Peace%20Report%20IEP.pdf>

³¹ Ibid, p. 2.

³² Ibid, p. 6.

healthcare and a decent living environment; and everyone has an equal opportunity to work and make a living, regardless of gender, ethnicity or any other aspect of identity.³³

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.³⁴

It is thus arguable that while the law may have in place structures directly meant to bring about negative peace by stopping violence through various mechanisms, all the legal structures meant to address the socio-economic factors listed above have a bearing on achievement of positive peace. It has rightly been argued that many root causes and drivers of conflict such as discrimination and marginalization, unequal distribution of public goods and services, corruption, impunity and lack of accountability stem from or are exacerbated by the absence of the rule of law.³⁵

Also notable is the assertion that 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.³⁶ The law can be useful in contributing to the change in institutional norms as well as shaping the changes in attitudes and behaviour.

The rule of law is seen as a framework for the peaceful management of conflict because of its defining features: laws 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.³⁷ It is thus worth noting that this makes the law an important ingredient in the process of peace building, whether positive peace or negative peace.

4. Nexus between Environmental Governance and Peace Building

Debates about the relationship between the environment and peace building focus on how environmental problems, like resource scarcity and climate change, are likely to create or exacerbate conflict. Some scholars have opined that the environmental governance of a system based on participation, accountability, and equity ensures the broad political social and economic issues of the marginalized sections of the society are addressed.³⁸

³³ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [17/5/2019].

³⁴ Ibid.

³⁵ IDLO, "Sustaining Peace, Building Justice: Discussion Note," available at <https://www.idlo.int/system/files/event-documents/IDLO%20IN%20-%20Sustaining%20Peace-Building%20Justice%20NO%20CONTACTS.PDF> [Accessed on 17/5/2019].

³⁶ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [17/5/2019].

³⁷ Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" available at <http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844> [Accessed on 17/5/2019].

³⁸ Nafees, A., "The Role of Civil Society Institutions in Environmental Governance in India: Post-colonial Context and Human Rights Challenges in the Environmental Justice," *International Journal of Legal Studies and Research*, Special Issue-June 2018, pp. 16-39, at p. 16.

Environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.³⁹ These conflicts are especially expected to be more devastating in poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.⁴⁰

The role of natural resources in conflict has also been a focus of many authors. The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.⁴¹ Under the scarcity theory, it is argued that rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to exacerbate poverty and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict."⁴² An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya⁴³, and with the distrust between local communities around the region against each other⁴⁴ leading to constant conflicts as well as cross border conflicts.⁴⁵ The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. Ironically, it is the richest region in Kenya where oil deposits were to be taken into account. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.⁴⁶

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the "resource curse"—corruption, economic stagnation, and violent conflict over access to revenues.⁴⁷ For instance, it has been pointed out that for many resource rich developing countries, there have been cases of low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.⁴⁸ For instance, extractive industries, particularly in sub-Saharan Africa, have been marked

³⁹ Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," *International security* 19, No. 1 (1994): 5-40 at p. 6.

⁴⁰ *Ibid.*, p.6.

⁴¹ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*, 2007, p.8.

⁴² *Ibid.*, p.8.

⁴³ Turkana County –United Nations Joint Programme 2015-2018, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at <https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf> [Accessed on 17/5/2019].

⁴⁴ Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. <http://www.jstor.org/stable/25842144>. [Accessed on 17/5/2019].

⁴⁵ Johannes, E.M., et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

⁴⁶ '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_peace_prize_winners_acceptance_sp/ [Accessed on 17/5/2019].

⁴⁷ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*, 2007, p.8.

⁴⁸ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda*, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

with increasing levels of political, social, technical and environmental risk.⁴⁹ This has been the case in countries like Sudan, Democratic Republic of Congo⁵⁰ and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources. Conflict also often produces significant environmental degradation.⁵¹

Apart from the adverse effect of the conflict on the environment, the illegal trade of minerals bars communities from benefiting from its resources.⁵² Communities expect that availability of environmental goods and services in their region will improve their livelihoods by ‘real’ development, which may not always be the case.⁵³ Poor and low economic development⁵⁴ and consequently, failed economies result in conflicts,⁵⁵ as a result of environmental and natural resources’ bad governance or mismanagement.⁵⁶ Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.⁵⁷

As far as the abundance theory is concerned, rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption,⁵⁸ which is a threat to protected human security.⁵⁹

⁴⁹ Ibid, p. 48; see also Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 55. Available at <https://commdev.org/wpcontent/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf>

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 17/5/2019].

⁵¹ 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.

⁵² See ‘Diamonds in Sierra Leone, A Resource Curse?’ available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 17/5/2019]; Kinniburgh, C., ‘Beyond “Conflict Minerals”’: The Congo’s Resource Curse Lives On,’ *Dissent Magazine*, Spring 2014, available at <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 12/08/2018]; Free the Slaves, ‘Congo’s Mining Slaves: Enslavement at South Kivu Mining Sites,’ *Investigative Field Report*, June 2013. Available at <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 17/5/2019].

⁵³ Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctadxi.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 12/08/2018].

⁵⁴ See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012).

⁵⁵ Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

⁵⁶ Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, ‘Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,’ (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf> [Accessed on 17/5/2019].

⁵⁷ Saboe, N.T., ‘Benefit Sharing Among Local Resource Users: The Role of Property Rights,’ *World Development*, Vol. 72, pp. 408–418, 2015, p. 408.

⁵⁸ Tsani, S., *Natural resources, governance and institutional quality: The role of resource funds*, *Resources Policy*, 38(2013), pp.181–195, p. 184.

⁵⁹ Alao, A., *Natural Resource Management and Human Security in Africa*, in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010); Lawson, T. R. & Greestein,

Natural and environmental resources exploitation is capable of degenerating into a war. Effective governance of these resources is thus necessary for security and peace. Competition for scarce resources as well as inequality in access to accruing environmental benefits both have the effect of heightened animosity and potential cause for violence.⁶⁰ It is thus evident that any peacebuilding efforts that do not factor in streamlining environmental and natural resources governance are bound to fail as they would not capture the very basic needs of the communities in question: satisfaction of their socio-economic needs with minimal or no struggle.

5. Building Lasting Peace through Effective Environmental Governance

The 2030 SDGs Agenda maintains that while the causes of conflict vary widely, the effects of climate change only exacerbate them. 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. 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.⁶¹

The Constitution of Kenya, 2010 provides for both the state and personal obligations in respect of the environment.⁶² This provision emphasizes the need for incorporation of good governance practices in the management of natural resources. These good governance practices should demonstrate democracy in terms of accountability and transparency. The Constitution requires the State to encourage public participation in the management, protection and conservation of the environment; and utilisation of the environment and natural resources for the benefit of the people of Kenya.⁶³

It has rightly been pointed out that law is a necessary part of the solution to sustainability challenges. However, while it is not the whole solution – that encompasses a complex system of social, economic and political processes and relationships – but it is an essential component. To achieve sustainability goals, appropriate and well-implemented legal frameworks and tools must be in place. And, importantly, they must be effective. It is not enough that laws are enacted, or even that they are fully implemented – they must work.⁶⁴

This section offers some recommendations that go beyond the law in enhancing environmental governance as one of the prerequisites for successful peace building in the country.

J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact*, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 17/5/2019].

⁶⁰ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶¹ 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 17/5/2019].

⁶² Art. 69.

⁶³ Art. 69(1) (d).

⁶⁴ Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability* IUCN, Gland, Switzerland, 2016, at p.ix.

5.1 Use of Alternative Dispute Resolution Mechanisms to Enhance Public Participation in Environmental Conflict management

The Constitution of Kenya, 2010 provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.⁶⁵ This is further cemented by Article 159(2) of the Constitution which provides that one of the guiding principles of the judiciary in exercise of its judicial authority will be to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, subject to clause(3).The *Environment and Land Court Act*, 2011 provides under section 20(2) thereof, that nothing in the 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.

Subsection (2) thereof further provides that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court should stay proceedings until such condition is fulfilled. ADR mechanisms such as negotiation, mediation and conciliation have the potential to create forums for engaging the various stakeholders in environmental matters and subsequently address any underlying tension or feelings of marginalization. This can go a long way in creating more peaceful societies.

5.2 Inclusive and Participatory Approaches to Environmental Governance

The *UN Conference on Environment and Development, Agenda 21*⁶⁶ 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.

Further, 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.

Kenya's approach to environmental governance has largely been sectoral and informed by the command and control approach. 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.⁶⁷ 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

⁶⁵ Art.67 (2) (f).

⁶⁶ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁶⁷ 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:....

sustainable development and use of natural resources.⁶⁸ Art. 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 also provides for active involvement of communities in sustainable environmental and natural resources matters through seeking court's intervention. Citizens have a right of ensuring that their rights in relation to the environment are not violated, by way of litigation.⁶⁹ The Constitution also recognises the right of every person to a clean and healthy environment.⁷⁰

Active participation of citizens (both gender) 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.⁷¹

Governance structures for all sectors, including environmental sector, should be built around the national values and principles of governance as enunciated in the Constitution of Kenya, and particularly those of inter alia—sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human

⁶⁸ Constitution of Kenya, Art. 69(2).

⁶⁹ 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.

⁷⁰ 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

⁷¹ 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, Art. 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.

rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.⁷²

As already pointed, people who feel meaningfully engaged in governance matters are more likely to appreciate the process and also keep peace even when resources are scarce. Local people should be actively engaged in governance matters especially those that directly affect their livelihoods. It has rightly been observed that given that local institutions, systems and processes represent for most people the daily interface between state and society, local governance is a critical arena for these efforts. Inclusive and accountable local governance can help restore social cohesion in divided communities, facilitate participation in public life, distribute resources and opportunities equitably, safeguard minority rights, and test new forms of decision-making that blend formal and informal processes of representation and participation.⁷³

5.3 Inclusive Education for Sustainable Societies

Education has a great role to play in peace building efforts and effective environmental both of which are important components of sustainable development. This realisation forms the basis of SDG Goal 4 which provides that State Parties should ensure inclusive and equitable quality education and promote lifelong learning opportunities for all. They are to ensure that by 2030, all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development.⁷⁴

Education will thus be useful in creating just and sustainable societies. Environmental education and peacebuilding should also be expressly included in the curricula at every stage of learning.

6. Conclusion

Peace building in any country is desirable and so is effective environmental and natural resources governance. The two concepts are arguably joint at the hip and both are at the core of the 2030 Agenda on sustainable development. This paper has discussed the various ways that the two are related and demonstrated how they cannot be treated as mutually exclusive if any efforts towards achieving either are to bear any fruits. While putting in place, any peace building policies, policy makers and other stakeholders ought to have the bigger picture in mind-effective environmental and natural resources governance must first be achieved as these resources are central in realisation of socio-economic rights of citizens. When these rights are largely achieved for all in any country, then it becomes easier to talk about and also achieve peace.

There is need to move away from the command and control models of environmental governance and embrace participatory approaches that not only put into consideration the needs of the community and societies in general but also take into their account their views in order to effectively address any underlying issues of marginalisation. It is such issues, when left unaddressed, which may result in conflict.

⁷² Ibid, Art. 10(2).

⁷³ United Nations Development Programme, *Local Governance In Fragile And Conflict-Affected Settings: Building A Resilient Foundation For Peace And Development*, A UNDP how-to guide, 2016.

⁷⁴ Goal 4.7, *Transforming our world: the 2030 Agenda for Sustainable Development*.

Enhancing Environmental Governance for Peace Building in Kenya

Enhancing Environmental governance for peacebuilding in Kenya is a necessity that cannot be ignored in the quest for sustainable development.

Regulating Mining: A New Vision for Kenya?

Abstract

This paper critically discusses the regulatory framework governing the mining sector in Kenya. It highlights the prospects of the existing laws in enhancing the sector's returns and contribution to the national development agenda. The paper also discusses some of the loopholes that must be addressed by the policy makers and other stakeholders in order to realise the full benefits of the new laws, if any.

1. Introduction

The mining subsector in Kenya can be considered relatively small considering that its current contribution to the national Gross Domestic Product (GDP) is much smaller than the expected potential.¹ However, there have been improved hopes of higher incomes from this sector especially with the discovery of various mineral deposits in various parts of the country.² It is documented that Kenya has four belts of minerals - the gold green stone belt in western Kenya, which extends to Tanzania; the Mozambique belt passing through central Kenya, the source of Kenya's unique gemstones; the Rift belt, which has a variety of resources including soda ash, fluorspar and diatomite; and, the coastal belt, which has titanium.³ These mineral resources come with great hopes of boosting the country's development agenda.⁴

To realise this vision of hope and growth in the mining sector, the *Mining Act 2016*⁵ was enacted to give effect to Articles 60, 62b (1) (f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes.⁶ Notably, the Cabinet Secretary is empowered under the Act to make Regulations necessary or convenient for the proper administration and implementation of this Act.⁷ As a result of this, the Cabinet Secretary responsible has since made the following Regulations under the Act: *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*

¹ KPMG, "Analysis of Mining Act 2016," July 2016, p. 1. Available at <https://assets.kpmg/content/dam/kpmg/ke/pdf/kpmg-mining-act-2016-analysis.pdf> [Accessed on 3/7/2019].

² Scola Kamau and Christine Mungai, "Kenya's \$100 billion hidden mineral deposits," *The East African*, Saturday July 20 2013. Available at <https://www.theeastafrican.co.ke/news/Kenya-hits-USD100-billion-rare-earth-jackpot-/2558-1920964-ma895tz/index.html> [Accessed on 3/7/2019].

Mrima Hill, in the coastal county of Kwale, has one of the top five rare earth deposits in the world. The area also has niobium deposits estimated to be worth \$35 billion.

³ East African Community, Investment in Mining, available at <https://www.eac.int/investment/why-east-africa/investment-opportunities/mining> [Accessed on 3/7/2019].

⁴ 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 on 3/7/2019]; Chimboza, R., "More should and can be done to start taking mining sector seriously," *Daily Nation*, Tuesday October 4 2016.

⁵ Mining Act, No. 12 of 2016, Laws of Kenya.

⁶ *Ibid*, preamble.

⁷ Mining Act, 2016, sec. 223.

Goods and Services) Regulations, 2017; Mining (Employment and Training) Regulations, 2017; and Mining (Use Of Assets) Regulations, 2017.

This paper focuses generally on these Regulations and how the same can help in promotion and realisation of the country's dream of a vibrant mining sector that not only promotes national development but one that also benefits the local communities.

2. Kenya's Mining Industry: The Policy, Legislative and Institutional Framework

The Government of Kenya has a ministry dedicated to the development of the mining sector⁸, as part of the efforts to improve mineral exploitation in the country. The Ministry undertakes various functions aimed at enhancing growth of the mining sector in the country as guided by the *Executive Order No. 2 of 2013*⁹. Its mandate includes: Minerals Exploration and mining policy and Management; Inventory and mapping of mineral resources; Mining and minerals development; Policies on the management of quarrying and mining of rocks and industrial minerals; Management of health and safety in mines; Policy around extractive industry; Resource Surveys and remote sensing; and Maintenance of geological data (research, collection, collation, analysis.¹⁰ The Mining sector in Kenya is mainly governed by the Constitution of Kenya 2010, the Mining Act 2016 and numerous Regulations made under the Act to promote proper administration and implementation of the Act.

2.1 Constitution of Kenya 2010

The Constitution of Kenya 2010 makes provisions on "natural resources" which means the physical non-human factors and components, whether renewable or non-renewable, including— *rocks, minerals, fossil fuels and other sources of energy*.¹¹ Article 60 of the Constitution provides for the principles of land policy which include sustainable and productive management of land resources. Under Article 62 (1) (f) of the Constitution "all minerals and mineral oils as defined by law" are classified as public land and by Article 62 (3) they are vested in and are held by the national government in trust for the people of Kenya.

The Constitution also outlines the obligations of the State in respect of the environment which include, inter alia, to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; and utilise the environment and natural resources for the benefit of the people of Kenya.¹² The Constitution further spells out the national values and principles of governance which 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.¹³ This includes any decision-making or implementation of any law affecting the mining

⁸ Ministry of Mining, <http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 3/7/2019].

⁹ Republic of Kenya, Executive Order No.2 of 2013 – Organization of the Government of Kenya, May 2013.

¹⁰ <http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 3/7/2019].

¹¹ See Article 260; and Chapter Five.

¹² Constitution of Kenya, Art. 69.

¹³ Article 10(1), Constitution of Kenya.

10 (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;

sector.¹⁴ The Constitution thus provides some overarching principles that should guide the implementation of any laws governing the mining sector.

2.2 Mining and Minerals Policy, Sessional Paper No. 7 of 2016

The *Mining and Minerals Policy, Sessional Paper No. 7 of 2016* was informed by the lack of predictability and certainty hence low investment in the mining sector, thus necessitating the need for policy framework to provide a clear guidance for sustainable mineral resources development.¹⁵ The Policy was therefore put in place to address gaps that have existed in the mining sector, form the basis for review of the outdated Mining Act of 1940 and align the industry's strategic direction with African Mining Vision, Vision 2030 and Constitutional Provisions. In addition, the Policy was also expected to strengthen the institutional framework and address governance and operational issues, environmental protection, equity, mineral value addition, post-mine closure activities, capacity building and mainstream artisanal and small scale mining. The policy is also meant promote the use of appropriate technology including Geo-spatial technology and airborne geophysical surveying in order to enhance information on the country's mineral potential and increase investment in the mining sector.¹⁶

The overall goal of the Mining and Minerals Policy is to set out frameworks, principles, and strategies to provide for exploration and exploitation of mineral resources for socio-economic development.¹⁷

2.3 Mining Act, 2016

The *Mining Act 2016*¹⁸ was enacted to give effect to Articles 60, 62b (1) (f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes.¹⁹ The Act also came about as a result and part of implementation of the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*²⁰.

(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.

¹⁴ For instance, see *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR, Civil Appeal 105 of 2015:

The national values and principles of governance under **Article 10 (1)** of the Constitution apply to and bind all state organs, state officers, public officers and all persons. The Commissioner as such a public officer charged with making or implementing public policy decisions and in issuing the Mining Licence to Cortec without ensuring the law was complied with, was abdicating his duty and obligations entrusted on him to carry out on behalf of the public. The Commissioner acted in breach of the Mining Act and the Constitution and in breach of the trust bestowed upon him.

¹⁵ Republic of Kenya, Mining and Minerals Policy, Sessional Paper No. 7 of 2016, p. 1.

¹⁶ Republic of Kenya, Mining and Minerals Policy, Sessional Paper No. 7 of 2016, p. 2.

¹⁷ *Ibid*, p.7.

¹⁸ Mining Act, No. 12 of 2016, Laws of Kenya.

¹⁹ *Ibid*, preamble.

²⁰ See para. 3.4.1 Regulating the Mining Sector

Strategy 1: Put in place a simple, stable, predictable, transparent, efficient and unified regulatory framework for the mining sector.

The Act is to apply to the minerals specified in the First Schedule²¹. Notably, the Act does not apply to petroleum and hydrocarbon gases²². The Act establishes a state mining corporation which shall be the investment arm of the national government in respect of minerals.²³

The Act also establishes the Mineral Rights Board whose functions include advising and giving recommendations, in writing, to the Cabinet Secretary on: the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements; the areas suitable for small scale and artisanal mining; the areas where mining operations may be excluded and restricted; the declaration of certain minerals as strategic minerals; cessation, suspension, or curtailment of production in respect of mining licences; fees, charges and royalties payable for a mineral right or mineral; and any matters which under this Act, are required to be referred to the Mineral Rights Board.²⁴

In order to ease access to services, there is also established under the Act the Directorate of Mines; and the Directorate of Geological Survey, each directorate headed by a director.²⁵ The Mining Act has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits²⁶; structures for negotiating mineral agreements²⁷; terms and conditions for minimum activity and work programs, structure for payments²⁸; and artisanal and small scale mining operations²⁹.

To operationalize some of these provisions, the Cabinet Secretary in charge of mining has since made Regulations covering the areas and matters in question. The next section casts a critical look at these Regulations.

2.4 Mining Regulations and Guidelines

a. Mining (Dealings in Minerals) Regulations, 2017

The *Mining (Dealings in Minerals) Regulations, 2017*³⁰ were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 100 and 223 (1) of the Mining Act, 2016. Section 100 of the Act deals with the sale of minerals won by an artisanal miner. These Regulations are to apply to- the export of a mineral by a holder of a mining right; the removal of minerals by a

The Government is in the process of developing a new mining legislation to replace the Mining Act, Cap.306 of 1940, which is both outdated and ineffective. Under the new mining legislation, rights and interests in minerals of all kinds, including construction and industrial minerals will be regulated.

²¹ The classification of minerals under first schedule includes: A. Construction And Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Minerals.

²² These fall under the domain of the Energy Act, No. 1 of 2019, Laws of Kenya; and Petroleum Act, No. 2 of 2019, Laws of Kenya.

²³ Mining Act, 2016, Sec. 22(1).

²⁴ Ibid, secs. 30 & 31.

²⁵ Mining Act, 2016, Sec. 17.

²⁶ Part ix—Surface Rights Compensation and Disputes (sections 151-157).

²⁷ Part Vii—Mineral Agreements (sections 117-142).

²⁸ Part Xii—Financial Provisions (sections 182-190).

²⁹ Mining Act, 2016, Sections 92-100.

³⁰ Legal Notice No. 88, Kenya Subsidiary Legislation, 2017. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN88_2017.pdf

holder of a mineral right for the purposes of sampling, assay or analysis; the holder of a mineral dealer's licence or dealer's permit; the import of any mineral; and any other person who is not a holder of a mineral right, mineral dealer's licence or dealer's permit but requires the removal of minerals for analysis or testing for purposes other than exploration or mining.³¹ However, these Regulations are not to apply to the export and import of rough diamonds.³² There have been numerous reported and unreported cases of illegal dealings in extraction and/or sale of minerals in the country. These Regulations were meant to curb this illegal business and specifically spells out the duties of the holder of a mineral dealer's licence which include to: commence or engage in the trading of a mineral in accordance with the terms and conditions of the licence within thirty days after the date of the issue of the licence; not trade in any mineral other than the mineral or minerals specified in the licence; not trade in minerals except in accordance with the terms and conditions set out in the licence; not knowingly engage in trading of a mineral with a person who has not acquired the minerals lawfully or is otherwise not lawfully entitled to deal in minerals; pay all taxes, charges or levies that are required under the terms and conditions of the licence, the Act or any other written law in Kenya; keep complete and accurate records of all activities conducted under the licence at the registered office and submit a true copy to the Cabinet Secretary in the manner as specified in the Act and these Regulations; permit the authorised officer of the Ministry to inspect any documents or records; and submit if any, the sales contract or agreement the holder may sign with a buyer, seller or holder of a mineral right.³³

The Regulations, alongside the Mining Act 2016, were expected to provide more transparency and credibility for investors in solving issues affecting the mining sector in the country.³⁴ These Regulations have however achieved little, if anything, in curbing illegal trading in minerals. This is exemplified by the continued reports of smuggling of gold and other precious stones in and of the country.³⁵ It is estimated that Africa is losing over \$60 billion annually due to the illicit mineral trade.³⁶ This is because, amongst other factors, most minerals and precious stones from the region are exported in raw form to processing centres in Asia, notably Hong Kong.³⁷

It is therefore unlikely that these Regulations alone, without the support of other security institutions across the region, will curb the illegal dealings in trade. There is a need to ensure that the taxation and royalties regime is regularized and that the same is friendly not only to the multinationals but also the artisanal miners in the country as an incentive to discourage them from dealing with illegal traders in and outside the country.

³¹ Mining (Dealings in Minerals) Regulations, 2017, Regulation 3(1).

³² Ibid, Regulation 3(2).

³³ Mining (Dealings in Minerals) Regulations, 2017, Regulation 9(5).

³⁴ Ali, S., "Govt to make Nairobi a mineral trade hub," Citizen Digital, September 26, 2016. Available at <https://citizentv.co.ke/business/govt-to-make-nairobi-a-mineral-trade-hub-142856/> [Accessed on 8/7/2019].

³⁵ Otieno, R., "Government red tape killing mining sector, claims lobby," Standard Digital, 17th April, 2019. Available at <https://www.standardmedia.co.ke/business/article/2001321316/government-red-tape-killing-mining-sector-lobby> [Accessed on 8/7/2019]; Mnyamwezi, R., "Petroleum CS Munyes exposes minerals smuggling cartels," Standard Digital, 21st August, 2018. Available at <https://www.standardmedia.co.ke/article/2001292787/kenya-losing-billions-to-minerals-smuggling-cartels> [Accessed on 8/7/2019].

³⁶ Senelwa, K., "Nairobi to process gold and gemstones at value addition centre," The East African, Monday February 20 2017. Available at <https://www.theeastafrican.co.ke/business/Nairobi-to-process-gold-and-gemstones/2560-3820176-n8dw6hz/index.html> [Accessed on 8/7/2019].

³⁷ Ibid.

g. Mining (Licence and Permit) Regulations, 2017

The *Mining (Licence and Permit) Regulations, 2017*³⁸ were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 12 (3)³⁹, 153 (3)⁴⁰ and 223 (2), (c), (d), (g), (j), (k) and (1)⁴¹ of the Mining Act, 2016. These Regulations are to apply to all mineral rights.⁴² The *Mining (license and permit) Regulations 2017* (Clause 4) provides that all applications for mineral rights shall be made through the On Line Mining Cadastre (OMC) in order for them to be considered for grant.⁴³

It is a commendable step that these Regulations seek to regulate, inter alia, small-scale mining or artisanal mining operations in line with the Mining Act 2016, by granting permits.⁴⁴ However, there is a need to ensure that the same are not used as a political tool in awarding permits for corrupt dealings in artisanal mining activities. In addition, while the artisanal miners may smoothly get licences and permits (which will cost money to apply), there may be a funding challenge. It has been observed that acute cash shortage caused by poor linkages with the financial sectors of the economy is one of the biggest impediments to the growth of the artisanal and small-scale mining sector.⁴⁵ This is mainly attributed to the fact that being a nascent, capital intense and high-risk sector, it is difficult for local banks to finance it. However, government intervention can go a long way in addressing the funding challenge.

³⁸ Mining (Licence and Permit) Regulations, 2017, Legislative Supplement No. 40, Legal Notice No. 87, Laws of Kenya. Available at

http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN87_2017.pdf

³⁹ (3) Unless otherwise provided for in this Act, the Cabinet Secretary shall make Regulations to prescribe the procedure for— consideration of the applications made under this Act; and negotiation, grant, revocation, suspension or renewal of mineral rights.

⁴⁰ (3) The Cabinet Secretary may make Regulations relating to compensation guarantee bonds.

⁴¹ (2) Without prejudice to the generality of the foregoing, the Cabinet Secretary may make Regulations prescribing-

the fees, royalties, rent and other charges that are payable under this Act or the manner in which they are to be calculated; the royalties that are payable for specific minerals or the manner in which they are to be calculated; the manner in which an area referred to in a mineral right shall be demarcated; the manner in which records, accounts, books and other documents shall be kept, retained and made available for inspection; the procedures to be followed in respect of tendering in areas that have been designated for tendering for large scale operations in accordance with this Act; the measures to be observed in respect of radioactive and other restricted minerals including, the storage and transportation of radioactive and restricted minerals and the sale or supply of such minerals; the measures to be included in programmes for prospecting and mining operations that require the Cabinet Secretary's approval; the measures to be observed to protect and rehabilitate the environment; procedures for the grant of mineral rights and guidelines for exploration and mining in Kenya's territorial sea, exclusive economic zone and the continental shelf;

the areas that are excluded areas under this Act; the categories of mineral rights that are not to be granted in prescribed areas; the form of any licence, permit, form, return or other document to be used for the purposes of this

Act; and anything which may be prescribed under this Act and for the better carrying into effect the provisions of this Act.

⁴² Mining (Licence and Permit) Regulations, 2017, Regulation 3.

⁴³ Mining (Licence and Permit) Regulations, 2017, Regulation 4.

⁴⁴ Part ix — Artisanal Mining Permit.

⁴⁵ Komu, J., "Fund artisanal and small-scale mining," March 26, 2019. Available at <https://www.the-star.co.ke/opinion/columnists/2019-03-26-fund-artisanal-and-small-scale-mining/> [Accessed on 8/7/2019].

It is therefore not enough to regulate licencing and permits relating to mining activities in the country, there is a need to create a level playing ground for the artisanal miners by creating a funding kitty to help them competitively carry out these mining activities. Such a kitty would be similar to those in other African countries whose artisanal and small scale mining sectors are doing well such as 2017 Nigeria's Ministry of Solid Minerals and Steel Development and the Bank of Industry of Nigeria's N5 billion fund to provide loans and bring the sector under a structured system; and Zimbabwe's gold fund introduced in 2016 through the Reserve Bank of Zimbabwe.⁴⁶

h. Mining (Work Programmes and Exploration Reports) Guidelines, 2017

The *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*⁴⁷ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 221 (1)⁴⁸ of the Mining Act, 2016. These Guidelines -provide guidance to applicants for, and holders of, reconnaissance licences, prospecting licences, prospecting permits and retention licences on how to prepare work programmes and exploration reports; and are to assist the Director of Geological Surveys to review work programmes and exploration reports that shall be submitted by applicants for or holders of mineral rights.⁴⁹

While these reports would go a long way in enhancing the right of access to information for the local people as far as the activities of the mining companies are concerned, there is no evidence of any such reports being made public since 2017 or even any being filed with the government agencies at all. As such, there is a need to ensure that these Regulations are not only enforced but also such reports should be made available to the public in light of the right of access to information as guaranteed under Article 35 of the Constitution of Kenya 2010 and Access to Information Act, 2016⁵⁰.

i. Mining (State Participation) Regulations, 2017

The *Mining (State Participation) Regulations, 2017*⁵¹ were enacted by the Cabinet Secretary in exercise of Section 48(4)⁵² of the Mining Act, 2016. The purpose of these Regulations is to provide for State participation in prospecting or mining operations carried out by a holder of a mineral right.⁵³

These Regulations are to apply to all applicants and holders of any mineral right-which entitles the State to a ten percent free carried interest; where the State acquires any additional interest that may be agreed with the holder of a mining licence; and where the State enters into an agreement to

⁴⁶ Ibid.

⁴⁷ Mining (Work Programmes and Exploration Reports) Guidelines, 2017, Legal Notice No. 85 of 2017, Laws of Kenya. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN85_2017.pdf [Accessed on 7/7/2019].

⁴⁸ 221. (1) The Cabinet Secretary may publish and disseminate manuals, codes or guidelines relating to large scale and small scale operations, including in relation to environmental matters.

⁴⁹ Clause 3, Mining (Work Programmes and Exploration Reports) Guidelines, 2017.

⁵⁰ Access to Information Act, No. 31 of 2016, Laws of Kenya.

⁵¹ Mining (State Participation) Regulations, 2017, Legal Notice No. 84 of 2017, Laws of Kenya.

⁵² (4) The Cabinet Secretary shall make regulations to provide for state participation in mining or prospecting operations between the Government and the holder of a mineral right.

⁵³ Mining (State Participation) Regulations, 2017, Regulation 3.

participate in prospecting operations or activities under a prospecting licence held by a holder other than the National Mining Corporation.⁵⁴

In line with the Mining Act 2016, the Regulations reiterate that the National Mining Corporation shall on behalf of the State, be the investment arm of the National Government in respect of all prospecting or mining operations.⁵⁵ The National Mining Corporation - shall hold the State's ten percent free equity participation or free carried interest in all mining operations; shall be responsible for engaging in any operations relating to any additional interest that the State may acquire and which may be agreed with the holder of a mining licence at a fair market value: and may acquire any interest in or enter into a joint venture, farm-in agreement or any other arrangement with a holder of a prospecting licence for the purpose of conducting prospecting operations.⁵⁶

The direct interest and participation of the government, albeit through the National Mining Corporation is a positive step towards ensuring that the mining companies declare all the deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities.

There has been past reported cases of non-disclosure and non-declaration by the mining companies in the country and this requires the government to have its own watchdog on the ground to curb the vice, hence the need for this Corporation.⁵⁷ The Corporation is also useful in promoting capacity building in the sector as far as exploration of minerals in the country is concerned.

j. Mining (Use of Local Goods and Services) Regulations, 2017

The *Mining (Use of Local Goods and Services) Regulations, 2017*⁵⁸ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 223(l) of the Mining Act, 2016. The purpose of these Regulations is 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 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.⁵⁹

These Regulations shall apply to- (a) all applicants and holders of any licence for - the reconnaissance, prospecting and mining of a mineral; the cutting, polishing, processing, refining

⁵⁴ Mining (State Participation) Regulations, 2017, Regulation 4.

⁵⁵ Mining (State Participation) Regulations, 2017, Regulation 5 (1).

⁵⁶ Mining (State Participation) Regulations, 2017, Regulation 5 (2).

⁵⁷ Sanga, B., "Auditor General reveals how mining companies under-declare tax dues," 25th Aug 2016. Available at <https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues> [Accessed on 9/7/2019].

⁵⁸ Mining (Use of Local Goods and Services) Regulations, 2017, Legal Notice No. 83 of 2017, Laws of Kenya.

⁵⁹ Mining (Use of Local Goods and Services) Regulations, 2017, Regulation 3.

and smelting of a mineral; and mine support services; (b) all operators, contractors and other entities involved in any project, operation or activity connected or related to mine support services, mineral activity or operation in Kenya.⁶⁰

The Regulations require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to- materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.⁶¹

Except as otherwise provided in the Act or under these Regulations, an application for a licence should not be granted unless, the applicant has submitted a procurement plan for the purchase of goods and services in Kenya to the Cabinet Secretary.⁶² The plan, if approved, shall form part of the conditions or obligations under the licence.⁶³

The mining sector in the country is expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. One way of alleviating poverty in any mining region would be empowering the local people through creating markets for the locally produced goods and services.⁶⁴ However, there is likely to arise a challenge in getting the mining sector players, both local and foreign, to abide by these rules. They are likely to bypass them on grounds equality in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya. Considering that there are many factors (such as supply and demand, cost of raw materials, machinery, amongst others) that may influence the production cost of goods and services which may ultimately push up the price of these goods and services or worse compromise their quality, it is likely that the companies in question may use such loopholes to source for the same either from their home countries (for foreigners) or other cheaper and better quality goods from foreign countries for the locals.

Implementing these Regulations may therefore call for the Government and other stakeholders to first address these challenges before local traders, service providers and communities can benefit from the legal framework.

⁶⁰ Ibid, Regulation 4.

⁶¹ Ibid, Regulation 5.

⁶² Ibid, Regulation 6(1).

⁶³ Ibid, Regulation 6(4).

⁶⁴ See generally, Musawenkosi, N., "Does mining alleviate or exacerbate poverty: Are local community grievances really'Much Ado about Nothing'?" PhD diss., University of Cape Town, 2017. Available at https://open.uct.ac.za/bitstream/handle/11427/24930/thesis_com_2017_nxele_musawenkosi.pdf?sequence=1&isAllowed=y [Accessed on 9/7/2019]; Pegg, S., "Mining and poverty reduction: Transforming rhetoric into reality," *Journal of cleaner production*, Vol.14, no. 3-4 (2006): 376-387.

k. Mining (Employment and Training) Regulations, 2017

The *Mining (Employment and Training) Regulations, 2017*⁶⁵ were enacted by the Cabinet Secretary in exercise of powers conferred by sections 46(3)⁶⁶ and 223(1) of the Mining Act, 2016. The purpose of these Regulations is 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.⁶⁷

These Regulations shall apply to all applicants and holders, of any licence for- reconnaissance, prospecting and mining; cutting, polishing, processing, refining and smelting of a mineral; a large-scale mineral right which is valid after the coming into force of the Act and these Regulations; and mine support services.⁶⁸

An application for any licence shall not be granted by the Cabinet Secretary-unless the applicant has submitted a plan outlining the proposals for the employment and training of Kenyans.⁶⁹ While these Regulations are well meaning and geared towards ensuring that the mining sector creates jobs, employment and results in specialized training for the Kenyan people, it is based on the assumption that locals have some base knowledge that can be built on to achieve the level of expertise required in the execution of the corresponding duties within the industry.

Exclusive reliance on the foreigners to create expertise through technology transfer may not yield the desired results. The Government must work with the local institutions of higher learning through sponsoring courses for specialized training and to gain experience. There is also a need to ensure that the jobs offered are not only menial in nature since, left unsupervised, the foreign companies may not be willing to place local experts in critical positions within the entire mining value chain as required by the law. The Government must offer technical and financial support to its people in order to uplift them to levels where they can competitively take up key positions in the mining sector and specifically represent the interests of the Government and the country at large within these companies.

l. Mining (Use of Assets) Regulations, 2017

The *Mining (Use of Assets) Regulations, 2017*⁷⁰ were enacted by the Cabinet Secretary in exercise of the powers conferred by Section 149(6)⁷¹ of the Mining Act, 2016. These Regulations shall apply to holders of mining licences requiring them to maintain a complete, up to date and accurate register of all its immovable and movable assets.⁷²

⁶⁵ Mining (Employment and Training) Regulations, 2017, Legal Notice No. 82, Laws of Kenya.

⁶⁶ (3) The Cabinet Secretary shall make regulations to provide for the replacement of expatriates, the number of years such expatriates shall serve and provide for collaboration and linkage with universities and research institutions to train citizens.

⁶⁷ Mining (Employment and Training) Regulations, 2017, Regulation 3.

⁶⁸ Mining (Employment and Training) Regulations, 2017, Regulation 4.

⁶⁹ Mining (Employment and Training) Regulations, 2017, Regulation 5(1).

⁷⁰ Mining (Use of Assets) Regulations, 2017, Legal Notice No. 80 of 2017, Laws of Kenya.

⁷¹ The Cabinet Secretary shall prescribe Regulations on the use of the assets.

⁷² Mining (Use of Assets) Regulations, 2017, Regulations 3 & 4.

These regulations, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the mining companies as they seek to promote accountability and transparency on the income and expenses incurred by these companies. 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. They can however work well where the authorities involved work with different stakeholders such as the revenue collecting agencies to get the actual figures.

3. Regulating the Mining Industry in Kenya: Challenges and Prospects

It is estimated that Africa hosts 30% of the earth's mineral reserves, including 40% of gold, 60% of cobalt, and 70% of platinum deposits, and produce about 30% of the world's gold, 70% of the world's platinum, 28% of the world's palladium, and 16% of the world's bauxite.⁷³ In addition, Africa also produces (yearly, in thousand metric tons) 205,056 of hard coal, 67,308 of nickel-bearing ores, and 29,174 of iron bearing ores, as well as 595,507 kg of gold-bearing ores.⁷⁴ The extractive or mining industries generally have long been touted as key to anchor 'development' or 'economic growth' to alleviate poverty in developing countries.⁷⁵

Despite this, African countries have largely exhibited low levels of development and poor standards of living.⁷⁶ This has been attributed to various factors including exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements, with the result that the Continent has received inadequate returns for its mineral wealth.⁷⁷ At the continental level, the *Africa Mining Vision*⁷⁸ is expected to address most of these challenges if not all.⁷⁹ Despite this Vision document, most of

⁷³ Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In *Social Responsibility*, IntechOpen, 2018, pp. 61-81, at p.63. Available at <https://www.intechopen.com/books/social-responsibility/mining-conflicts-and-corporate-social-responsibility-in-kenya-s-nascent-mining-industry-a-call-for-1> [Accessed on 7/7/2019].

⁷⁴ Ibid, p.63.

⁷⁵ Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.*, 9 (2013): 31, at p.33.

⁷⁶ African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, p. 2. Available at <https://repository.uneca.org/bitstream/handle/10855/23538/b11580379.pdf?sequence=1> [Accessed on 7/7/2019].

⁷⁷ Ibid, p.2; Ezekwe sili, O.K., "Harnessing Africa's natural resources to fight poverty," *Daily Nation*, Wednesday April 15 2009. Available at <https://www.nation.co.ke/oped/opinion/440808-560566-gnl8o6z/index.html> [Accessed on 7/7/2019].

⁷⁸ 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 8/7/2019].

⁷⁹ 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:

- a. Down-stream linkages into mineral beneficiation and manufacturing;
- b. Up-stream linkages into mining capital goods, consumables & services industries;
- c. Side-stream linkages into infrastructure (power, logistics);
- d. communications, water) and skills & technology development (HRD and R&D);

the African countries still struggle with making the mineral resources work for them, in uplifting the lives of their people.⁸⁰ 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.⁸¹

Notably, GDP from Mining in Kenya is estimated to have increased to 12527 KES Million in the fourth quarter of 2018 from 12313 KES Million in the third quarter of 2018. GDP from Mining in Kenya averaged 8963.05 KES Million from 2009 until 2018, reaching an all-time high of 12906 KES Million in the first quarter of 2018 and a record low of 4195 KES Million in the first quarter

e. Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and

f. 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;

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 harness 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.

⁸⁰ 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%20alastair_fraser_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed on 8/7/2019]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.* 9 (2013): 31.

⁸¹ 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 on 3/7/2019]; Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County: HAKIJAMII 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 8/7/2019]; 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 8/7/2019]; 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-nb7rqrz/index.html> [Accessed on 8/7/2019].

of 2009.⁸² According to the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, as at 2016, the sector was contributing 0.8 percent to gross domestic product (GDP) per annum. The contribution to GDP was expected to increase to three (3) percent by 2017 and ten (10) percent by 2030 according to the Medium Term Plan (MTP) II (2013-2017).⁸³

While these statistics paint a hopeful picture with the figures increasing over the last ten years, there is still a lot of room for not only growth in these figures but also positive contribution of the mining sector to the lives of the ordinary citizens especially those to be found within the localities where such mining takes place. Indeed, the discovery of such minerals as the titanium deposits products in the Coastal region gives hope to the expectation of a brighter future for the sector and country at large.⁸⁴ Reserves for Titanium and Niobium, both found in the Coast region, are projected to be worth Sh9 trillion, and Sh3.8 trillion for the estimated of 750 million barrels, according to Tullow Oil's 2017 projections.⁸⁵

As already stated, there are Regulations that were made by the Cabinet Secretary seeking to ensure that the mining activities do not only go on smoothly but also that they benefit the local communities even as they contribute to the national development agenda. These Regulations include: *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 foregoing Regulations are meant to streamline the mining sector in the country by ensuring that some of the main provisions in the Mining Act 2016 are fully and efficiently implemented. Notably, some of these Regulations such as the *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017* are meant to directly empower the local communities by promoting job creation and market for locally produced goods. While these Regulations mean well for the local communities and local industries, a lot still needs to be done to ensure that the environment favours the implementation of such Regulations. For instance, the Regulations on use of local goods and services require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to- materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: *provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.*⁸⁶ This proviso stands to defeat the purpose of

⁸² Trading Economics, "Kenya GDP from Mining," available at <https://tradingeconomics.com/kenya/gdp-from-mining> [Accessed on 3/7/2019].

⁸³ Republic of Kenya, Mining and Minerals Policy, Sessional Paper No. 7 of 2016, p. 1. Available at http://www.mining.go.ke/images/PUBLISHED_MINING_POLICY_-_Parliament_final_.pdf [Accessed on 8/7/2019].

⁸⁴ Michira, M., "The billions buried under Kenyan soil," 2nd May, 2017. Available at <https://www.standardmedia.co.ke/business/article/2001238312/the-billions-buried-under-kenyan-soil> [Accessed on 8/7/2019].

⁸⁵ Ibid.

⁸⁶ Mining (Use of Local Goods and Services) Regulations, 2017, Regulation 5.

these Regulations because, as it may be proved through statistics, there are many factors of production that may, and have indeed, been making locally produced goods more expensive when compared to imported ones. Thus, as long as investors can prove that they can source such goods and/or services at more competitive prices or those with better quality, they will easily bypass the requirements of these Regulations. The manufacturing sector and other factors affecting the local production of goods and services may thus need to be fixed before these Regulations can effectively be implemented.

As already pointed out elsewhere in this paper, the Regulations on employment and Training assume that locals have some base knowledge that can be built on to achieve the level of expertise required in the execution of the corresponding duties within the industry. Exclusive reliance on the foreigners to create expertise through technology transfer may not yield the desired results. There is need for the government to do much more through the local institutions of higher learning through sponsoring courses to build capacity and even having the students/professionals taking such courses leaving the country for specialized training and to gain experience. Such candidates would then be ripe to learn more through any exchange and technology transfer programmes set up under the Mining (*Employment and Training*) Regulations, 2017.

The lack of proper guidelines or failure to implement any existing regulations and guidelines can lead to conflicts as has been witnessed in other African countries such as the Democratic Republic of Congo, where the locals feel sidelined as far as mining benefits sharing is concerned.⁸⁷ For instance, there have been queries on how to manage expectations of the local people living within the mining areas in order to avert possible conflicts in future.⁸⁸ There is a need for ensuring that the constitutional principles of public participation, inclusive decision-making, environmental protection and conservation, respect for human rights and respect for occupational health and safety are taken into account when engaging investors in the mining sector in order to avoid any potential conflicts as well as ensuring that these natural resources benefit communities as well.⁸⁹ These are just few examples of the many challenges that are likely to arise in the implementation of these Regulations and which therefore may need to be addressed before the mining sector can benefit from the well-meaning Regulations as enacted by the Cabinet Secretary. Unless capacity

⁸⁷ Matthysen, K., Montejano, A. Z., & International Peace Information Service (Antwerp), 'Conflict Minerals' initiatives in DR Congo: Perceptions of local mining communities. Antwerp: International Peace Information Service, 2013. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/20131112_HU.pdf; Zalan, K., "Tracing conflict gold in the Democratic Republic of the Congo," Public Radio International, June 23, 2017. Available at <https://www.pri.org/stories/2017-06-23/tracing-conflict-gold-democratic-republic-congo>; BSR, "Conflict Minerals and the Democratic Republic of Congo: Responsible Action in Supply Chains, Government Engagement and Capacity Building," May 2010. Available at https://www.bsr.org/reports/BSR_Conflict_Minerals_and_the_DRC.pdf [Accessed on 8/7/2019].

⁸⁸ 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 8/7/2019]; Mulehi, A., "How it looks to live near mining sites – Kwale," (Natural Resources Alliance of Kenya, Oct 17, 2018). Available at <https://kenra.or.ke/how-it-looks-like-to-live-near-mining-sites-kwale/> [Accessed on 8/7/2019].

⁸⁹ Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited [2001] eKLR, Civil Case 97 of 2001; Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014.

is built across all stages of mineral extraction right from minerals agreements' negotiations all the way to the actual extraction of these resources, then Africa, including Kenya, will continue to lag behind in development despite its rich deposits in minerals.

4. Conclusion

The mining sector in Kenya is relatively young when compared to other countries in the Continent. There are still a lot of challenges that need to be addressed ranging from how the country can safeguard its own interests against foreign investors, how its people can benefit from the accruing benefits and how it can build capacity for future purposes. For a long time, the sector was governed by laws that had been enacted during the colonial times. There have been attempts at modernising the laws to make the country attractive to the foreign investors while safeguarding the country's interests. The Mining Regulations gazetted after the enactment of the Mining Act 2016 are part of these efforts. This paper has highlighted these regulations and how the same can contribute to the vision of making the mining sector a bigger contributor to the country's development agenda. The legal framework discussed above projects a new vision for Kenya. It reflects an ideal in which Kenya and its people can maximally benefit from the exploitation of minerals. It is an ideal that is achievable.

Africa's Agenda 2063: What is in it for Kenya?

Abstract

The African continent has been lagging behind in development when compared to the rest of the world. As such, there have been various efforts by the African Union and African States to boost growth and development and consequently put Africa at par with the rest of the world. One such development plan is the African Union's Agenda 2063 which is the subject of this paper. The paper looks at how this Agenda can contribute and spur development across different states and especially Kenya. The paper also discusses how Kenya can take advantage of the implementation of Agenda 2063 by different stakeholders to achieve its own development agenda.

1. Introduction

This paper is inspired by Africa's Agenda 2063 – *a shared strategic framework for inclusive growth and sustainable development*¹ (Agenda 2063) and it seeks to offer some reflections on how Kenya can contribute and benefit from the realisation of this Agenda. Arguably, Africa's success in realisation of the Agenda 2063 mainly depends on individual states' efforts towards implementation of the Agenda.

Africa's Agenda 2063 was unveiled in 2015 as the continent's new long-term vision for the next 50 years.² The New Partnership for Africa's Development (NEPAD) Agency, the implementing agency of the African Union, has been tasked with fast-tracking the implementation and monitoring of major continental development programmes and frameworks, including Agenda 2063 and the Sustainable Development Goals (SDGs).³

The African Union Commission and NEPAD Agency are supposed to domesticate the first 10 year Implementation plan into national and regional plans to ensure effective and aligned implementation at national, regional and continental levels.⁴ Various authors have discussed what this development Agenda portends for Africa as a continent.⁵ However, there have been few, if

¹ African Union Commission, *Agenda 2063: The Africa we Want*, 2015, ISBN: 978-92-95104-23-5, adopted at the 24th Ordinary Assembly of the African Union (AU) in Addis Ababa in January 2015.

² NEPAD, *Agenda 2063*, available at <http://nepad.org/cop/agenda-2063> [Accessed on 17/6/2019].

³ *Ibid.*

⁴ *Ibid.*

⁵ See generally, Tella, O., "Agenda 2063 and Its Implications for Africa's Soft Power," *Journal of Black Studies* 49, no. 7 (2018): 714-730; Slavova, M., & Okwechime, E., "African smart cities strategies for Agenda 2063," *Africa Journal of Management* 2, no. 2 (2016): 210-229; Vickers, B., *A handbook on regional integration in Africa: Towards Agenda 2063*, Commonwealth Secretariat, 2017; Kararach, G., Besada, H., & Shaw, T., "African development, political economy and the road to Agenda 2063," *Development in Africa: Refocusing the Lens After the Millennium Development Goals* (2015): 365; Ogonnaya, U.M., "Terrorism, Agenda 2063 and the challenges of development in Africa," *South African Journal of International Affairs* 23, no. 2 (2016): 185-199; Ndzendze, B. and Monyae, D., "China's belt and road initiative: linkages with the African Union's Agenda 2063 in historical perspective," *Transnational Corporations Review* (2019): 1-12; Zhang, H., & Tesfaye, N., "Alignment of Belt and Road Initiative with Africa Agenda 2063," In *3rd International Symposium on Asian B&R Conference on International Business Cooperation (ISBCD 2018)*, Atlantis Press, 2018; DeGhetto, K., Gray, J. R., & Kiggundu, M. N., "The African Union's Agenda 2063: aspirations, challenges, and opportunities for management research," *Africa Journal of Management* 2, no. 1 (2016): 93-116; le Pere, G., "Harnessing Africa's External Trade Partnerships for 'Agenda 2063'," (2017);

any, commentaries on how this continental Development Blueprint is likely to influence Kenya's development agenda, if at all. It is against this background that this paper offers some insight on how Kenya can strategically position itself to not only contribute to the realisation of this Agenda but also to benefit from the same.

2. Overview of the Africa's Agenda 2063

The Agenda 2063 contains seven aspirations that are to guide its implementation. These include:⁶ *Aspiration 1*: A prosperous Africa based on inclusive growth and sustainable development⁷; *Aspiration 2*: An integrated continent; politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance⁸; *Aspiration 3*: An Africa of good governance, democracy, respect for human rights, justice and the rule of law⁹; *Aspiration 4*: A peaceful and secure Africa¹⁰; *Aspiration 5*: An Africa with a strong cultural identity, common heritage, shared values and ethics¹¹; *Aspiration 6*: An Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children¹²; and *Aspiration 7*: Africa

Achieng', R.M., "Can We Speak of African Agency?: APRM and Africa's Agenda 2063," *African Sociological Review / Revue Africaine De Sociologie* 18, no. 1 (2014): 49-64.

⁶ African Union Commission, *Agenda 2063: The Africa we Want*, 2015.

⁷ **Aspiration 1**: A Prosperous Africa based on inclusive Growth and Sustainable Development: ending poverty, inequalities of income and opportunity; job creation, especially addressing youth unemployment; facing up to the challenges of rapid population growth and urbanization, improvement of habitats and access to basic necessities of life – water, sanitation, electricity; providing social security and protection; developing Africa's human and social capital (through an education and skills revolution emphasizing science and technology) and expanding access to quality health care services, particularly for women and girls; transforming Africa's economies through beneficiation from Africa's natural resources, manufacturing, industrialization and value addition, as well as raising productivity and competitiveness; radically transforming African agriculture to enable the continent to feed itself and be a major player as a net food exporter; exploiting the vast potential of Africa's blue/ocean economy; and finally putting in place measures to sustainably manage the continent's rich biodiversity, forests, land and waters and using mainly adaptive measures to address Climate change risks.

⁸ **Aspiration 2**: An integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's Renaissance: accelerating progress towards continental unity and integration for sustained growth, trade, exchanges of goods, services, free movement of people and capital through: (i) establishing a United Africa; (ii) fast tracking of the CFTA; (iii) improving connectivity through newer and bolder initiatives to link the continent by rail, road, sea and air; and (iv) developing regional and continental power pools, as well as ICT.

⁹ **Aspiration 3**: An Africa of good governance, respect for human rights, justice and the rule of law: consolidating democratic gains and improving the quality of governance, respect for human rights and the rule of law; building strong institutions for a development state; and facilitating the emergence of development-oriented and visionary leadership in all spheres and at all levels.

¹⁰ **Aspiration 4**: A peaceful and secure Africa: strengthening governance, accountability and transparency as a foundation for a peaceful Africa; strengthening mechanisms for securing peace and reconciliation at all levels, as well as addressing emerging threats to Africa's peace and security; and putting in place strategies for the continent to finance her security needs.

¹¹ **Aspiration 5**: An Africa with a strong cultural identity, common heritage, values and ethics: inculcating the spirit of Pan Africanism; tapping Africa's rich heritage and culture to ensure that the creative arts are major contributors to Africa's growth and transformation; and restoring and preserving Africa's cultural heritage, including its languages.

¹² **Aspiration 6**: An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children: strengthening the role of Africa's women through ensuring gender equality and parity in all spheres of life (political, economic and social); eliminating all forms of discrimination and violence against women and girls; creating opportunities for Africa's youth for

as a strong, united, resilient and influential global player and partner¹³. Notably, the Agenda mainly covers the areas of: social and economic development; integration, democratic governance and peace and security amongst others.¹⁴ The implementation of the Agenda 2063 is to be carried out in phases. The first phase covers the first ten years from the years 2013 to 2023. The First Ten Year Implementation Plan, the first in a series of five ten year plans over the fifty year horizon was adopted by the Summit in June 2015 as a basis for the preparation of medium term development plans of member states of the Union, the Regional Economic Communities and the AU Organs.¹⁵ In summary, the Agenda 2063 First Ten Year Implementation Plan document seeks to: identify priority areas, their associated targets/expected outcomes and indicative strategies to stakeholders; highlight the fast track programmes/ projects that will bring quick wins and generate and sustain the interest of the African Citizenry in the African Agenda; assign responsibilities and accountabilities to all stakeholders in the implementation, monitoring and evaluation of the plan and outline the strategies required to ensure resource and capacity availability and sustained citizen's engagement for plan execution.¹⁶

The focus areas for the implementation of the Agenda include but are not limited to: Sustainable and inclusive economic growth; Human Capital Development; Agriculture/value addition and agro-businesses development; Employment generation, especially the youth and females; Social Protection; Gender / Women development and youth empowerment; Good governance including capable institutions; Infrastructural development; Science, Technology, Innovation; Manufacturing-based industrialization; Peace and Security; and Culture, Arts and Sports.¹⁷

Of utmost importance are the implementation, monitoring and evaluation responsibilities of Key Stakeholders, including Member States, towards the Agenda. The Member States are required to: Adopt/ integrate Agenda 2063 and the associated Ten Year Implementation Plans as the basis for developing their national visions and plans; Use the national planning systems- structures for implementation monitoring and evaluation, methodologies, systems and processes, rules and regulations, forms and formats in the execution of Agenda 2063; Develop policy guidelines on the design and implementation, monitoring and evaluation by various stakeholders; Ensure that the Legislature adopts Agenda 2063 as the blue print for Africa's social, economic and political

self-realization, access to health, education and jobs; and ensuring safety and security for Africa's children, and providing for early childhood development.

¹³ **Aspiration 7:** Africa as a strong, united, resilient and influential global player and partner: improving Africa's place in the global governance system (UNSC, financial institutions, global commons such as outer space); improving Africa's partnerships and refocusing them more strategically to respond to African priorities for growth and transformation; and ensuring that the continent has the right strategies to finance its own development and reducing aid dependency.

¹⁴ . African Union, An Overview of Agenda 2063, available at https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf [Accessed on 17/6/2019].

¹⁵ African Union, Agenda 2063: First Ten-Year Implementation Plan 2014 – 2023, September 2015. Available at <https://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> [Accessed on 17/6/2019].

¹⁶ Ibid. African Union, An Overview of Agenda 2063, available at https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf [Accessed on 17/6/2019].

¹⁷ Ibid.

development in the next 50 years; and encourage all political parties / private candidates use Agenda 2063 as a basis for preparing their political manifestos.¹⁸

This Agenda is also geared towards achieving sustainable development agenda in the greater African continent. It is worth pointing out that the United Nations *2030 Agenda for Sustainable Development*¹⁹ has since been launched. There have even been efforts to integrate the implementation of Agenda 2063 and Agenda 2030 for Sustainable Development in Africa.²⁰ For instance, at the annual Africa Week in October 2015 held at the United Nations headquarters, representatives of the African Union's development institutions held discussions with their UN counterparts on the AU's Agenda 2063 and the newly-adopted Sustainable Development Goals (SDGs). Although they bear some differences, the two agendas were considered to be mutually supportive and coherent.²¹

Also notable is the fact that in achieving the main goals of these development plans, State Parties have specific roles to play towards social and economic development; integration, democratic governance and peace and security amongst others, which themes feature in both Agendas.

It is for this reason that individual African States, including Kenya, have a role to play not only to achieve their national development plans but also to contribute towards achieving the continental Agenda. The next section focuses specifically on Kenya and how the country can contribute towards realisation of Agenda 2063 while also achieving her own domestic development plan, including Vision 2030, the Big Four Agenda, amongst others.

3. Realising Africa's Agenda 2063: Integrating the Agenda 2063 into Kenya's Domestic Development Agenda

Kenya's *Vision 2030* is the long-term development blueprint for the country and is motivated by a collective aspiration for a better society by the year 2030.²²

¹⁸ African Union, *Agenda 2063: First Ten-Year Implementation Plan 2014 – 2023*, op. cit., p. 25.

¹⁹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁰ United Nations Office of the Special Adviser on Africa, "Implementing Agenda 2063 and Agenda 2030 for Sustainable Development in an Integrated and Coherent Manner in Africa: Moving Forward (21 September 2016)", High-level Event, available at <https://www.un.org/en/africa/osaa/events/2016/mdgtosdagenda2063.shtml> [Accessed on 17/6/2019].

"The objective of the side event on "implementing Agenda 2063 and Agenda 2030 in an integrated and coherent manner" was to ensure that the highest offices, including the African group in New York and other relevant stake holders are fully aware of what the continent is doing with regard to the implementation of the regional and global agenda in an integrated manner. It also discussed how to put efforts together to effectively implement the development frameworks in Africa."

²¹ Kuwonu, F., "Agenda 2063 is in harmony with SDGs," *Africa Renewal*, Online Magazine, December 2015, available at <https://www.un.org/africarenewal/magazine/december-2015/agenda-2063-harmony-sdgs> [Accessed on 17/6/2019].

²² Republic of Kenya, 'About Vision 2030', available at <http://vision2030.go.ke/about-vision-2030/> [Accessed on 17/6/2019].

The aim of Kenya Vision 2030 is to create “a globally competitive and prosperous country with a high quality of life by 2030”. 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”.²³

The economic, social and political pillars of Kenya Vision 2030 are anchored on the foundations of macroeconomic stability; infrastructural development; Science, Technology and Innovation (STI); Land Reforms; Human Resources Development; Security and Public Sector Reforms.²⁴ The Vision 2030 is to be implemented through successive five-year medium term plans. The current stage of implementation is the Third Medium Term Plan (MTP III) 2018-2022 whose theme is dubbed *Transforming Lives: Advancing socio-economic development through the “Big Four”*.²⁵ The Second Medium Term Plan (MTP II) 2013-2017 was meant to achieve progress in development and modernisation of infrastructure, improved security, human resource development, job creation, expanding access to affordable health care, and in modernizing the country’s public services.²⁶ As to whether the progress in these areas was felt across the country remains both a development and political question.

Currently, Kenya is thus pursuing the ‘BIG FOUR’ Agenda that seeks to ensure universal health coverage, affordable and decent housing, to increase the manufacturing contribution to the economy from 9.8 per cent to 15 per cent and guarantee food and nutrition security by 2022. The Kenya government’s projects under the Big Four Agenda were allocated \$4.3 billion from the \$28 billion 2019/2020 budget.²⁷ Universal health coverage got \$906 million; manufacturing \$40.8 million; affordable housing \$183 million; and food and nutrition security \$177 million.²⁸

As already pointed out, the Agenda 2063 focuses on several areas of development including but not limited to: Sustainable and inclusive economic growth; Human Capital Development; Agriculture/value addition and agro-businesses development; Employment generation, especially the youth and females; Social Protection; Gender/Women development and youth empowerment; Good governance including capable institutions; Infrastructural development; Science, Technology, Innovation; Manufacturing-based industrialization; Peace and Security; and Culture, Arts and Sports.²⁹

These development themes notably overlap at the national and continental levels and it can thus be argued that the achievement of the national plans can greatly succeed by building synergies with the continental implementation plans especially as captured in the Agenda 2063 First Ten-Year Implementation Plan 2014-2023.

²³ ‘About Vision 2030’, available at <http://vision2030.go.ke/about-vision-2030/> [Accessed on 17/6/2019].

²⁴ Ibid.

²⁵ Republic of Kenya, “Third Medium Term Plan 2018-2022,” available at <http://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/> [Accessed on 20/6/2019].

²⁶ Ibid.

²⁷ Njiraiini Muchira, “Uhuru legacy projects get \$4.3b despite slow progress,” *The East African*, Sunday, June 16, 2019. Available at <https://www.theeastafrican.co.ke/business/Uhuru-legacy-projects-get-allocation/2560-5158394-chdf89z/index.html> [Accessed on 20/6/2019].

²⁸ Ibid.

²⁹ Ibid.

The dream of a successful continent can only be achieved through ensuring that the member States are not only supporting the realisation of Agenda 2063 but also ensuring that their national development plans are in harmony with the Agenda and that they are actually achieved not just a matter of wishful thinking. Kenya's key development issues are especially among those given prominence in the Africa's Agenda 2063. These include infrastructure, health, manufacturing, affordable housing and food and nutrition security, amongst others.

Africa's Agenda 2063 has set forth certain milestones related to integration, prosperity, and African ownership of its development programmes.³⁰ Further milestones are related to structural transformation, human development, good governance and on innovation and technology transfer.³¹ Some of the most significant milestones on innovation and technology transfer are building a better infrastructure, engineering and manufacturing base that shows significant increase in local content and input, increased science, technology and innovation (STI) output at national and regional levels and increased human capacity for science and technology and stimulating entrepreneurship through an increased number of added value products and services.³²

Infrastructure is considered as bedrock for development, whereby, as an essential part of a supportive environment for investment and livelihood, adequate infrastructure promotes economic growth, reduces poverty, and improves delivery of health and other services.³³ A survey by Afrobarometer, a pan-African, non-partisan research network that conducts public attitude surveys on democracy, governance, economic conditions, and related issues across more than 30 countries in Africa, reported that provision of basic service infrastructure remains a challenge. On average across 35 African countries, only about two-thirds of citizens live in communities with an electric grid (65%) and/or piped water infrastructure (63%), and less than one in three have access to sewerage (30%). More than three times as many have access to cell phone service (93%), while about half (54%) live in zones with tarred or paved roads.³⁴ Rural residents continue to be severely disadvantaged in most countries, with urban-rural gaps of more than 40 percentage points in the average availability of an electric grid, sewerage, and piped water infrastructure.³⁵ This is despite the high priority assigned to infrastructure by both citizens and their governments in many African countries. Nevertheless, access to basic services remains highly variable across countries and regions.³⁶

³⁰ Achieng', R.M., "Can We Speak of African Agency? APRM and Africa's Agenda 2063," *African Sociological Review / Revue Africaine De Sociologie* 18, no. 1 (2014): 49-64, p. 61.

³¹ *Ibid*, p.61.

³² *Ibid*, p.61.

³³ Mitullah, W. V., Samson, R., Wambua, P. M., & Balongo, S., "Building on progress: Infrastructure development still a major challenge in Africa," Afrobarometer Dispatch No. 69, 14 January 2016. Available at <https://www.africaportal.org/publications/building-on-progress-infrastructure-development-still-a-major-challenge-in-africa/> [Accessed on 25/6/2019].

³⁴ Mitullah, W. V., Samson, R., Wambua, P. M., & Balongo, S., "Building on progress: Infrastructure development still a major challenge in Africa," Afrobarometer Dispatch No. 69, 14 January 2016, p. 3.

³⁵ *Ibid*.

³⁶ *Ibid*; See also United Nations, "Regional overview: sub-Saharan Africa," *Education for All Global Monitoring Report*, 2011. Available at <https://en.unesco.org/gem-report/sites/gem-report/files/191393e.pdf> [Accessed on 25/6/2019]; Ayodele Odusola, Giovanni Andrea Cornia, Haroon Borhat and Pedro Conceição (eds), "Income Inequality Trends in sub-Saharan Africa: Divergence, Determinants and Consequences," *Overview*, United Nations Development programme, 2017; Deaton, A. S., & Tortora, R., "People in sub-Saharan Africa rate their health and health care among the lowest in the world." *Health Affairs* 34, no. 3 (2015): 519-527.

Africa is also considered as the continent with the world's highest mortality rates, and it is the only continent where deaths from infectious disease still outnumber deaths from chronic disease.³⁷ Indeed, Sub-Saharan Africans' overall evaluation of their well-being has been reported to be lower than that of any other population in the world.³⁸ The Low well-being is also largely attributed to low incomes in sub-Saharan Africa.³⁹ Arguably, this is an indication of the interconnectedness of the various socio-economic rights and thus the need for an integrated approach to development.

The Government of Kenya's *Sector Plan for Science, Technology and Innovation 2013-2017* recognises that Science, Technology and Innovation (ST&I) play a pivotal role in the industrialization, sustainable development and growth of nations. Investments and integration of ST&I into social, economic and governance policies is expected to increase Kenya's global competitiveness, create employment and increase productivity.⁴⁰ This was developed in line with the recognition that the Kenya Vision 2030 and the Constitution explicitly place a premium on the generation and management of a knowledge-based economy and the need to raise productivity and efficiency.⁴¹ While Kenya has made significant progress in the area of science, technology and innovation, it is worth pointing out that this is a sector that requires cooperation among countries especially if the same is to be used to promote and sustain cross-border trade. Also closely related to this is manufacturing and value addition. This will go a long way in enhancing national incomes as well as boosting agricultural production. Investing in people and technology transfer from developed states will boost Africa's manufacturing industries. Value addition for agricultural produce will also boost Africa's standing at the global platform as far as trade and commerce are concerned.

This is why Agenda 2063's focus on promoting the growth and development of science, technology and innovation is a welcome move that requires goodwill and concerted efforts of all stakeholders. Both Agenda 2063 and Kenya's Vision 2030 seek to promote environmental rule of law which is central to sustainable development, a concept that seeks to integrate environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance.⁴² However, while the Constitution of Kenya 2010 and other post constitution statutes and policy documents recognise the centrality of sustainable development, Kenya still has a long way to go in achieving sustainable production and development practices. Agenda 2063 seeks to promote environmentally sustainable climate and resilient economies and communities. Arguably, this will not be achieved unless individual states put in place national measures geared towards this. Individual efforts coupled with concerted efforts from all African

³⁷ Deaton, A. S., & Tortora, R., "People in sub-Saharan Africa rate their health and health care among the lowest in the world." *Health Affairs* 34, no. 3 (2015): 519-527, at p. 519.

³⁸ *Ibid*, p. 520.

³⁹ *Ibid*, p. 521.

⁴⁰ Republic of Kenya, *Sector Plan for Science, Technology and Innovation 2013-2017*, available at research.tukenya.ac.ke/images/Sector-Plan-for-Science-and-Technology.pdf [Accessed on 25/6/2019].

⁴¹ *Ibid*, p.1. Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya, 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.

⁴² See generally, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

governments will ensure that Africa achieves its targets under Agenda 2063 as well as United Nations Agenda 2030 on Sustainable Development.

Sustainable agricultural production features in both AU Agenda 2063 and Kenya's Agenda 2030. If the African continent is to guarantee food and nutritional security for its people, then there must be cooperation amongst states in research and tackling infrastructure challenges that make it difficult to access and/or distribute food across countries and regions. Boosting agricultural production also requires land reforms across various states. There is need for supporting the agricultural sector through modern methods of production, guaranteeing farmers protection from foreign invasion of markets especially those outside Africa, good infrastructure, investing in value addition and enhancing national food storage and preservation facilities, amongst others.

Gender parity is a subject that is still relevant not only in Kenya but across many African societies. Investing in both men and women will go a long way in realisation of Africa's development agenda. Putting in place empowerment measures such as fair labour practices and protection from all forms of violence is important. While having domestic laws on gender equality and equity is important, there is need for strong reporting mechanisms within the Agenda 2063 implementation framework, in order to ensure that no state is left behind as far as this issue is concerned.

Some parts of Kenya and Africa in general still suffer violence and general insecurity. Some concerted efforts towards promoting peace and stability in the continent are still required as a basis for meaningful development.

4. Conclusion

Africa is a Continent that is rich in natural resources and cultural diversity amongst its many communities. However, it has lagged behind in development and protection of its riches both in terms of diverse communities and source of wealth for the rest of the world. Agenda 2063 promises to coordinate the various countries' development agenda through outlining a development blueprint that should be used as a yardstick to ensure that the Continent moves forward as one. Kenya can work closely with other states to not only realise this Agenda but to also benefit from the same. Africa as a continent can certainly achieve the vision of prosperity. There is a lot for Kenya in this dream. Kenya can contribute and benefit from the realisation of Africa's Agenda 2063.

Enhancing Benefits from Natural Resources Exploitation: An Appraisal of the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016

Abstract

This paper critically discusses the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016. It offers some recommendations on how this legislation can be used in enhancing the benefits that accrue to communities from exploitation of natural resources in their regions. The paper also discusses some of the loopholes that must be addressed by the policy makers and other stakeholders in order to realise the full benefits of the Act.

1. Introduction

The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*¹ was enacted in 2016 to give effect to Article 71 of the Constitution of Kenya and for connected purposes.² Article 71 of the Constitution provides that a transaction is subject to ratification by Parliament if it—involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation³ of any natural resource of Kenya; and is entered into on or after the effective date.⁴ This Act was thus enacted in 2016 in line with the constitutional requirement that Parliament should enact legislation providing for the classes of transactions subject to ratification under clause (1).⁵ This provision is similar to the one found in the Constitution of Ghana⁶ which was hailed as a step forward in safeguarding the country's resources against arbitrary grant of concessions to foreign companies by the country's leadership including chiefs especially during the colonial period.⁷ This may not be very far from the reality in Kenya especially in such cases as the Lake Magadi soda ash mining concessions and the infamous Maasai community land disinheritance by the colonial masters.⁸ Kenya has also suffered other instances of skewed contracts whose resultant activities have been characterised by past reported and unreported cases of non-disclosure and non-declaration of income by the mining companies in the country.⁹ Hence, the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016* was a welcome move by the Parliament of Kenya.

¹ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, No. 41 of 2016, Laws of Kenya.

² Preamble.

³ Notably, section 2 of the Act interprets "exploitation" to mean an activity that confers or is aimed at conferring a benefit on the beneficiary of the grant of the concession or right but does not include an activity that is exploratory in nature.

⁴ Article 71(1), Constitution of Kenya 2010.

⁵ Article 71(2), Constitution of Kenya 2010.

⁶ Article 268.

⁷ Wouters, J., Ninio, A., Doherty, T., & Cisse', H. (Eds.), *The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*, The World Bank, 2015, p. 158.

⁸ Kamau, J., "Magadi saga exposes the ugly side of capitalism," *Daily Nation*, Sunday April 21 2019. Available at <https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html> [29/8/2019].

⁹ Sanga, B., "Auditor General reveals how mining companies under-declare tax dues," 25th Aug 2016. Available at <https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues> [Accessed on 9/7/2019].

This paper offers a critical appraisal of the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act* with a view to proposing some recommendations on how the Act can be used in ensuring that the natural resources are exploited and used in a way that benefits communities and the country at large. "Transaction" is used in the Act to mean an arrangement or other dealing between a grantor and a beneficiary under which the beneficiary lawfully acquires a concession or a right to exploit a natural resource of Kenya.¹⁰ While this term may be used to refer to transactions involving *any person* as envisaged in the objective of the Act and Article 71 of the Constitution, this paper will mainly concentrate on transactions involving government or its representatives and investors, both foreign and local. This is due to the fact that the Constitution of Kenya vests all minerals and mineral oils as defined by law in the government of Kenya.¹¹

2. Overview of the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016

This applies to any transaction entered into on or after the effective date which, under Article 71 of the Constitution, is subject to ratification by Parliament on account of the fact that the transaction- involves the grant of a right or concession by or on behalf of any person to another person for the exploitation of a natural resource of Kenya; and falls within the class of transactions designated as subject to ratification by section 4 of this Act.¹²

The Act also applies to any transaction involving the - national government, county government, state organ and all county government entities; and grant of a right or a concession by a private person in cases in which such transaction is required by this Act to be ratified by Parliament.¹³ This clarification is important to reign in on county governments which, in an attempt to diversify their sources of income and possibly power struggles, may enter into exploitation agreements with foreigners or even worse, frustrate any investors with operations in their counties. The County governments must however be involved in the process. For instance, in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*¹⁴, the Court affirmed that an issue involving prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the County Government – even if the primary activity is assigned to the National Government in our scheme of devolution.¹⁵ The Court went on to comment that this is the logical consequence of the cooperative and collaborative two-tier governance system imposed by our Constitution. This is the future prescribed by the Constitution.¹⁶ The Court expressed hope that the National Government will involve the County Governments, as repositories of local priorities and preferences, in public decisions that would affect many of the county citizens, as the Constitutional imprimatur.¹⁷

¹⁰ Sec. 2, Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016.

¹¹ Constitution of Kenya 2010, Article 62 (1) (f) (3).

¹² Sec. 3(1), Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016.

¹³ *Ibid*, sec. 3(2).

¹⁴ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

¹⁵ *Ibid*, para. 104.

¹⁶ *Ibid*, para. 104.

¹⁷ *Ibid*, para. 104.

It can therefore be said that the Parliament is to come in later on in the process after the due process as per the Constitution and other statutory requirements has been complied with.

Section 4 of the Act provides that the classes of transactions set out in the schedule are subject to ratification by Parliament pursuant to Article 71 of the Constitution.¹⁸ The Act spells out the transactions relating to natural resources, which are subject to the Act.¹⁹ The Act lists the transactions requiring ratification by Parliament as those including the following resources: Crude Oil and Natural Gas-Authorization to extract crude oil or natural gas; Minerals-Mineral agreements with a threshold of US\$ 500 million; Water resources-the extraction of sea water within the territorial sea for private commercial use-Underground water resources-the extraction of underground steam within a water conservation or other water resource protected area; Wildlife-extraction of oil, gas, and minerals within a wildlife conservation area or other wildlife protected area; Wildlife-Export and re-export of endangered wildlife species; Wildlife-Excision or change of boundaries of gazetted national park or wildlife protection area; Forests-Long term concession of a gazetted forest resource; Forests-Excision or change of boundaries of gazetted public forests or nature reserves; and any other transaction subject to ratification under an Act of Parliament.²⁰

While this list does not include all the natural resources as envisaged under the Constitution of Kenya²¹ the listed resources are some of the most emotive natural resources as far as economic exploitation of resources is concerned. These resources are so important that the Indian Supreme Court in *M.C. Mehta v Kamal Nath and others*²² affirmed the need for state involvement in their management through emphasizing the essence of the doctrine of public trust in the following terms; *“The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters, and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon government the duty to protect the resources subject to the trust for the enjoyment of the general public rather than to permit their use for private or commercial purposes”*

¹⁸ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, sec. 4 (1).

¹⁹ Schedule [Section 4(1), 4(2)(e)].

²⁰ Schedule [Section 4(1), 4(2) (e)].

²¹ Article 260: “natural resources” means the physical non-human factors and components, whether renewable or non-renewable, including—

- (a) sunlight;
- (b) surface and groundwater;
- (c) forests, biodiversity and genetic resources; and
- (d) rocks, minerals, fossil fuels and other sources of energy.

²² *M.C.Mehta v Kamal Nath and others*, Writ Petition [c] No. 182 of 1996(Supreme Court of India)-Decided on December 13, 1996.

The need for ratification of agreements touching on exploitation of some of these resources thus becomes even more critical.

<i>Resource</i>	<i>Transaction requiring Parliament Ratification</i>
Crude Oil and Natural Gas	Authorization to extract crude oil or natural gas.
Minerals	Mineral agreements with a threshold of US\$ 500 million.
Water resources	The extraction of sea water within the territorial sea for private commercial use.
Underground water resources	The extraction of underground steam within a water conservation or other water resource protected area.
Wildlife	Extraction of oil, gas, and minerals within a wildlife conservation area or other wildlife protected area.
Wildlife	Export and re-export of endangered wildlife species.
Wildlife	Excision or change of boundaries of gazetted national park or wildlife protection area.
Forests	Long term concession of a gazetted forest resource.
Forests	Excision or change of boundaries of gazetted public forests or nature reserves
	Any other transaction subject to ratification under an Act of Parliament.

Fig. 1. Source: *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, Schedule [Section 4(1), 4(2)(e)].*

The Act however exempts some transactions from ratification by Parliament. It provides that notwithstanding subsection (1), certain classes of transactions shall not be subject to ratification by Parliament—(a) subject to paragraph (e), the grant of a concession or right to exploit a natural resource through a permit, licence or other authorization issued in accordance with the requirements of national or county government legislation; (b) the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract; (c) the grant of a concession or right to exploit a natural resource for scientific research, educational or other non-commercial purposes unless the exploitation involves taking the natural resource or an portion of it outside of the jurisdiction of Kenya; (d) the exploitation of a natural resource by a Kenyan national for subsistence purposes in circumstances in which the law does not require that a permit, licence or other authorization be obtained; and (e) the exploitation of a natural resource in quantities falling below a threshold prescribed by the Cabinet Secretary by notice in the Gazette or below a threshold specified in the Schedule to the Act.²³

While this exemption is well meaning, there is potential for abuse or confusion. For instance, where the Act exempts the grant of a concession or right to exploit a natural resource through a permit,

²³ Ibid, sec. 4 (2).

licence or other authorization issued in accordance with the requirements of national or county government legislation from such ratification, what measures will be put in place to determine the seriousness of the transaction in question and the ramifications of such exemption? This, coupled with the exemption of the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract, are both likely to be used for personal gains especially in light of the rampant corruption in the country's governance structures. Would Parliament be compromised to classify a particular transaction as qualifying under these two exemptions for purposes of bypassing the Act's provisions? Again, how will grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract be qualified against the constitutional provisions that vest all minerals and mineral oils as defined by law in the government of Kenya?²⁴ How are the private persons to either benefit from the exploitation or the ones to grant the concession to be determined to prevent abuse? Is it possible for a private person to use the Parliament through insider lobbying to access or get a particular transaction for exploitation of a particular resource? These are some of the questions that may arise in light of the listed exemptions.

Regarding the process of submission, the Act requires that within fourteen days after entering into a transaction, a beneficiary should submit an agreement or other instrument evidencing the transaction, accompanied by a memorandum in the prescribed form, to the Cabinet Secretary responsible for the natural resource that is the subject of the transaction.²⁵ After receipt of the agreement but within seven days of receiving the agreement and the memorandum, the Cabinet Secretary responsible for the natural resource that is the subject of the transaction should submit the agreement and memorandum to Parliament for ratification in terms of Article 71 of the Constitution.²⁶

A transaction which under this Act, is subject to ratification by Parliament shall only be effective once it is ratified, and where Parliament has declined to ratify any transaction under this Act, the transaction shall be null and void.²⁷

The Act spells out certain relevant considerations in deciding whether or not to ratify an agreement: 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.²⁸

²⁴ Constitution of Kenya 2010, Article 62 (1) (f) (3).

²⁵ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, sec. 5.

²⁶ Ibid, sec. 6.

²⁷ Ibid, sec. 7.

²⁸ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, sec. 9.

These considerations, if fully upheld may be useful in giving the ratification process some credence. However, this is based on the assumption that Parliament is above reproach as far as following due process and putting into consideration the general public's interests is concerned. The Act also spells out the process of approval of an agreement by the Parliament which shall commence in the National Assembly.²⁹ Notably, apart from the fact that Parliament includes both the National Assembly and the Senate, the participation of Senate in the ratification process serves another important role-securing the meaningful participation of county representatives in making the important decision of ratification.

The Cabinet Secretary is obligated to establish and maintain an accessible central register of agreements relating to natural resources and other transactions which have been ratified as provided under this Act.³⁰ This is important as it guarantees the general public's constitutional right of access to information.³¹ It may not be clear whether Parliament has ratified any transactions yet but what is certain is that currently there have not been any published summary of the ratified agreements as required by this Act. To this end, the public is therefore not aware of the status of not only the implementation of this Act but also the number of ratified agreements, if any. The Cabinet Secretary responsible needs to take this role up and ensure timely updates of the register and publication of the annual summary reports.

Notably, the Cabinet Secretary responsible for the transaction that is subject to ratification may, pursuant to Article 35 of the Constitution, grant a request that the agreement or portions of it ought not to be publicly disclosed on account of commercial confidentiality, national security or other public interest considerations.³² While this may be a useful safeguard for purposes of commercial confidentiality, there is need for Parliament and other stakeholders to ensure that the same is not abused to hide or deny the public access to useful information.

Arguably, any such non-disclosure should also be done in line with the mining regulations as envisaged under the Mining Act 2016 including but not limited to: Regulations under the Act: *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*. It is assumed that these regulations and other relevant statutory requirements are to be complied with before the agreements reach the ratification stage in order to avoid any foul play as far as due process is concerned.

These Regulations, among others under different statutes dealing with natural resources exploitation³³, are meant to ensure that the benefits flowing from such exploitation get to benefit the communities and the economy in general. Notably, there are still complaints from communities

²⁹ Ibid, secs. 10 & 11.

³⁰ Ibid, sec. 12(1).

³¹ Constitution of Kenya, Article 35; see also Access to Information Act, No. 31 of 2016, Laws of Kenya.

³² Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, sec. 13 (1).

³³ For instance, see Mining Act, No. 12 of 2016, Petroleum Act, No. 2 of 2019, Forests Management and Conservation Act, No. 34 of 2016, Water Act, No. 43 of 2016.

about either lack of involvement or lack of direct benefits such as employment benefits.³⁴ They have been feeling marginalised and sometimes outrightly ignored as far as benefit sharing is concerned.³⁵

The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016* was thus meant to include the Parliament in ensuring that natural resources are exploited in a responsible manner that benefits concerned communities and the people of Kenya in general.

3. Making Natural Resources Work for the People: Challenges and Prospects

It is noteworthy that the Act outlines some of the relevant considerations in deciding whether or not to ratify an agreement as including: 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.³⁶

Apart from these considerations, it is worth pointing out that the Constitution has also laid out some 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.³⁷ The relevant 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.³⁸

It is noteworthy that natural resources exploitation and all the related activities are meant to benefit the country as well as communities that live in the areas where these resources are to be found. The Constitution of Kenya 2010 makes provisions on “natural resources” which means the physical non-human factors and components, whether renewable or non-renewable, including—*rocks, minerals, fossil fuels and other sources of energy*.³⁹ While the Act may not require

³⁴ Cordaid, “Oil Exploration in Kenya: Success Requires Consultation,” Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya, Report, August, 2019; Etyang, H., “No oil will leave Turkana without security and jobs, protesters say,” *The Star*, 27 June, 2018. Available at <https://www.the-star.co.ke/news/2018-06-27-no-oil-will-leave-turkana-without-security-and-jobs-protesters-say/> [29/8/2019].

³⁵ See generally, Schilling, J., Locham, R., & Scheffran, J., “A local to global perspective on oil and wind exploitation, resource governance and conflict in Northern Kenya.” *Conflict, Security & Development* 18, no. 6 (2018): 571-600; see also Mwakio, P., “Mvurya: Public participation in mineral resource exploitation mandatory,” *Standard Digital*, 22nd May, 2019. Available at <https://www.standardmedia.co.ke/business/article/2001326660/mvurya-public-participation-in-mineral-resource-exploitation-mandatory> [Accessed on 29/8/2019].

³⁶ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 9.

³⁷ Article 10(1), Constitution of Kenya 2010.

³⁸ Article 10(2), Constitution of Kenya 2010.

³⁹ See Article 260; and Chapter Five.

ratification of all the transactions involving exploitation of different resources, it is important to note that there are other legal provisions that seek to safeguard the interests of the country and the general public as far as benefit sharing is concerned and should therefore be upheld in entering these agreements.

While the Act is well meaning in its mandate, there are notably some earlier exploitation agreements that were entered into before the enactment of the Act and were not revised in line with the Act.⁴⁰ The Act specifically provides that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.⁴¹

The implication of this provision is that there may have some important transactions that greatly affect communities but do not get the chance to undergo the ratification process. As a result, the communities feel sidelined as far as decision-making is concerned and the environment also gets to suffer. While there are notably other statutory provisions in place to take care of some of these issues, there is the risk of complacency in some government organs and agencies which may mean that due process may not have been followed.

There are still some complaints from some Kenyan communities about how natural resources exploitation activities within their localities are carried out and the lack of inclusion in decision-making and benefit sharing.⁴² For instance, the oil and gas mining activities in the Turkana region have been facing serious challenges from the locals who have been complaining about inadequate consultations, inadequate benefits and a general feeling of marginalization from the Government and the contractors.⁴³ There have also been complaints from other natural resources exploitation about environmental degradation which directly affects the livelihoods of the communities living with such areas.⁴⁴

⁴⁰ For instance, the agreements on exploitation of the oil and gas in Turkana; Titanium mining in Kwale, among others.

⁴¹ Sec. 16, Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016.

⁴² 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 28/8/2019].

⁴³ Johannes, E. M., Zulu, L. C., & Kalipeni, E., "Oil discovery in Turkana County, Kenya: a source of conflict or development?" *African Geographical Review* 34, no. 2 (2015): 142-164; Mkutu Agade, K., "'Ungoverned Space' and the Oil Find in Turkana, Kenya," *The Round Table* 103, no. 5 (2014): 497-515; Enns, C., & Bersaglio, B., "Pastoralism in the time of oil: Youth perspectives on the oil industry and the future of pastoralism in Turkana, Kenya." *The Extractive Industries and Society* 3, no. 1 (2016): 160-170; Enns, C., "Experiments in governance and citizenship in Kenya's resource frontier," PhD diss., University of Waterloo, 2016. Available at <https://core.ac.uk/download/pdf/144149828.pdf>; See also Parliament of Kenya, the Senate, The Hansard, Wednesday, 27th March, 2019, Petitions: Iron Ore Mining In Kishushe Area, Taita-Taveta County, available at <http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2027th%20March%202019.pdf> [Accessed on 29/8/2019].

⁴⁴ 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 28/8/2019]; See also Schilling, J., Locham, R., Weinzierl, T., Vivekananda, J., & Scheffran, J., "The nexus of oil, conflict, and climate change vulnerability of pastoral communities in northwest Kenya," *Earth System Dynamics* 6, no. 2 (2015): 703-717.

There is scarce information on the existing ratifications since 2016 because, although the Act provides that the Cabinet Secretary shall establish and maintain a central register of agreements relating to natural resources and other transactions which have been ratified as per the Act as well as ensuring that on an annual basis, they publish a report on the summary of the transactions submitted under this Act and the status of ratification of transactions, there are no publicly available reports or published summary of such reports. The effect of such laxity on the part of the Ministry is violation of the right to information which is useful for public participation in decision-making processes and any potential pursuit of their other rights in case of perceived violation.

Environmental laws and regulations and other laws that govern natural resources exploitation are meant to ensure that due process and other legal requirements are met but there are still instances where exploitation agreements are still challenged in courts and other forums for alleged failure to abide by the law.⁴⁵ Parliament, through the ratification process can also play a big role in ensuring that in granting the concession or right the applicable law has been complied with. However, as already mentioned elsewhere in this paper, this is based on the assumption and hope that both Houses of Parliament are beyond reproach as far as any potential influence by outside forces seeking to compromise them is concerned.

In order to bring the existing contracts or agreements especially in the extractives industry in line with the law on ratification of agreements, there may be a need to consider incorporating periodic contract review mechanisms. Such reviews would also be in line with international best practices, such as the principles of Extractive Industries Transparency Initiative (EITI)⁴⁶ which set the global standard to promote the open and accountable management of oil, gas and mineral resources.⁴⁷ Through reviews, there may be demonstrated accountability and transparency which is important for the contractors, the government and the communities at large.⁴⁸ Periodic contract review mechanisms, which are provisions in contracts that formally require parties to meet at particular intervals to review the terms of the contract, are mechanisms that may facilitate the process of negotiating contractual changes to accommodate changing circumstances over the term of extractive industries contracts.⁴⁹ Some countries such as Tanzania have sought to renegotiate their

⁴⁵ See Parliament of Kenya, the Senate, The Hansard, Wednesday, 27th March, 2019, Petitions: Iron Ore Mining In Kishushe Area, Taita-Taveta County, available at <http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2027th%20March%202019.pdf> [Accessed on 29/8/2019]; See also Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); Okiya Omtatah Okoiti v Kenya Power and Lighting Company & 10 others [2018] eKLR, Petition No. 14 of 2017.

⁴⁶ See Muigua, K., "Promoting Open and Accountable Management of Extractives in Kenya: Implementing the Extractives Industries Transparency Initiative," August, 2019. Available at <http://kmco.co.ke/wp-content/uploads/2019/08/Implementing-the-Extractives-Industries-Transparency-Initiative-in-Kenya-Kariuki-Muigua-15th-August-2019.pdf> [Accessed on 30/8/2019].

⁴⁷ Extractives Industries Transparency Initiative, "Who we are," available at <https://eiti.org/who-we-are> [Accessed on 30/8/2019].

⁴⁸ Haufler, V., "Disclosure as governance: The extractive industries transparency initiative and resource management in the developing world." *Global Environmental Politics*, vol.10, no. 3 (2010): 53-73; See also African Union, "Africa mining vision," AU, Addis Ababa (2009).

⁴⁹ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *Journal of Sustainable Development Law and Policy (The)*, Vol.7, no. 1 (2016): 116-136, p. 116; Lax, D. A., &

extractives exploitation contracts where it was deemed necessary. The Tanzanian government enacted laws that introduced changes in the exploitation of natural resources in the country's mining sector to ensure that Tanzania's natural resources are exploited to benefit the citizens.⁵⁰ Some of the laws such as the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017⁵¹ are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.⁵² The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 is meant to give powers to parliament to direct the Government to re-negotiate and rectify any term that seem to bear questionable circumstances in the contracts.

It has been observed that various commentators have regarded renegotiation of existing mining agreements as justified particularly:-when rigid contractual terms provide for an excessive duration, secured against any legislative change; when the agreement reflects the one-sided distribution of bargaining power and ability in favor of the transnational corporations; when circumstances have changed considerably so that the agreement needs adjustment to existing usages; and, when the agreement hampers severely the host country's freedom to employ its natural resources as a lever for effective economic development.⁵³

The provision for renegotiation in Tanzania is a notable departure from Kenya's position which is that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.⁵⁴ The question that arises is whether, where such a transaction is later rendered unconscionable due to the prevailing circumstances, is there any legal framework to facilitate renegotiation as is the case in Tanzania.

Notably, where the transaction in question fails to adhere to the requirements under the ratification process, there is lacking in place a procedure to ensure that the same is reviewed and/or renegotiated under this Act. As the balance of risks and benefits changes, parties request modifications to the terms and conditions of the investment. Accordingly, mechanisms are needed in these agreements to smoothen the process of dealing with the inevitability of changing

Sebenius, J. K., *Insecure contracts and resource development*, Division of Research, Graduate School of Business Administration, Harvard University, 1981.

⁵⁰ "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 28/8/2019].

⁵¹ Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No.6 of 2017, Laws of Tanzania. Available at <https://tanzlii.org/tz/legislation/act/2017/6-0>

⁵² "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 28/8/2019].

⁵³ Walde, T.W., "Revision of Transnational Investment Agreements in the Natural Resource Industries," *University of Miami Inter-American Law Review*, Vol.10, no. 2 (1978): 265, at p. 267; Kuruk, Paul. "Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," *Michigan Journal of International Law* 13, no. 1 (1991): 43-82.

⁵⁴ Sec. 16, Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016.

circumstances.⁵⁵ Contractually provided periodic reviews give the parties an opportunity to negotiate and readjust contractual arrangements.⁵⁶ While statutory annual reporting requirements under different laws may seem like a cure for this, it is worth pointing out that there is hardly any mechanism in place to ensure that such reporting is done, and where the Cabinet Secretary in question fails to follow up or raise queries on such reporting, the lack or failure of contractors to report will most likely go unreported and unnoticed.⁵⁷ It may thus be necessary to consider going the Tanzanian way; putting in place a separate law to govern such matters. It has rightly been pointed out that provided that the parties take advantage of the opportunity to renegotiate terms, the contract terms and conditions can be readjusted before the parties are so desperate and frustrated that the investor decides to stop work or the Government decides to terminate permits and concessions.⁵⁸

4. Conclusion

The Constitution of Kenya 2010 calls for concerted efforts of all persons in governance matters including in natural resources governance. This is well captured under Article 10 thereof which spells out the 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.⁵⁹ The values and principles of governance include, inter alia: patriotism, 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.⁶⁰ Sound environmental governance and natural resources ought to consider these values and principles.⁶¹ The Parliament of Kenya is afforded an opportunity to determine how natural resources exploitation is carried out through ratification of agreements. It is important that the Parliament not only considers the ability of the contractor in question to deliver but must also consider the country's development policies and must also remember the affected communities in certain areas with a view to ensuring that the resources in question get to benefit them especially in light of the fact that they may bear the brunt of most of the adverse environmental degradation. A good example would be the people living in Turkana region where oil and gas exploration and exploitation activities are ongoing. The people

⁵⁵ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," op cit., p. 117; Moran, T.H., "Mining companies, economic nationalism, and third world development in the 1990s," *Mineral Wealth and Economic Development*, Washington, DC, Resources for the Future (1992): 19-38.

⁵⁶ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," op cit., p. 117; Haufler, V., "Disclosure as governance: The extractive industries transparency initiative and resource management in the developing world," *Global Environmental Politics* 10, no. 3 (2010): 53-73.

⁵⁷ Stuesson, A., & Zobel, T., "The Extractive Industries Transparency Initiative (EITI) in Uganda: who will take the lead when the government falters?" *The Extractive Industries and Society*, Vol.2, no. 1 (2015): 33-45.

⁵⁸ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," op cit., p. 117; Smith, D. N., & Wells, L. T., "Conflict avoidance and concession agreements," *Harvard International Law Journal* 17 (1976): 51.

⁵⁹ Article 10(1), Constitution of Kenya 2010.

⁶⁰ Article 10(2), Constitution of Kenya 2010.

⁶¹ Prno, J., & Slocombe, D. S., "Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories," *Resources policy*, Vol.37, no. 3 (2012): 346-357.

living in Mui Basin region will also bear the brunt of the adverse effects of coal mining.⁶² Laws are meant to protect the interests of the people and the Parliament must as such ensure that any ratification of agreements that they carry out are geared towards this. Existing agreements should also be reviewed accordingly to ensure that the considerations set out under existing laws and specifically the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016 which was the subject of this paper. An effective national Parliament reflects the political will of the leadership in ensuring that the country's natural resources are not exploited at the expense of the country's national development agenda or with the communities in the affected areas bearing the brunt of the adverse effects of such exploitation. It is important that the policy and legal framework and all the relevant actors work towards enhancing benefits from natural resources exploitation. Natural resources exploitation should contribute to the realisation of the sustainable development goals.⁶³

⁶² Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

⁶³ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development

Abstract

The sustainable development agenda calls for concerted efforts from all stakeholders in the conservation and protection of the environment. It also encourages an integrated approach in the application of scientific and traditional knowledge from communities in achieving the sustainable development goals. This paper argues that for Kenya to achieve these goals there is a need to incorporate and encourage active use and application of traditional ecological knowledge in environmental conservation in Kenya. This also calls for mainstreaming of this knowledge into policy, law and action plans in order to enhance its applicability.

1. Introduction

Africa has a rich and highly diverse array of natural resources. It also has traditional communities' knowledge and environmental governance practices that have been practised over centuries before the advent of colonialization.¹ This was a reflection of the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship of the local people with their environment.² Traditional knowledge incorporates belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment.³

From international law to domestic laws, there have been renewed efforts and calls for environmental conservation and conservation. There has also been a realisation of the critical role that traditional knowledge has played over the centuries especially among indigenous and local communities. This is especially pronounced within the sustainable development discourse. As early as 1970s and 80s, there were attempts at mainstreaming traditional environmental knowledge in policy, law and action plans as a way of promoting sustainable development. This was captured in the Brundtland Commission Report, *Our Common Future*⁴ which notes that 'the processes of development generally lead to the gradual integration of local communities into a larger social and economic framework. But some communities - so-called indigenous or tribal peoples - remain isolated because of such factors as physical barriers to communication or marked differences in social and cultural practices.'⁵ It goes on to state that the isolation of many such people has meant the preservation of a traditional way of life in close harmony with the natural environment. Their very survival has depended on their ecological awareness and adaptation. But their isolation has also meant that few of them have shared in national economic and social development; this may be reflected in their poor health, nutrition, and education.⁶

¹ African Regional Intellectual Property Organization, available at <http://www.aripo.org/index.php/services/traditional-knowledge> [Accessed on 18/08/2019].

² Ibid.

³ Ibid.

⁴ WCED, *Our common future: Report of the World Commission on Environment and Development*, G. H. Brundtland, (Ed.). Oxford: Oxford University Press, 1987.

⁵ Ibid, para. 70.

⁶ Ibid, para. 71.

In 2015, countries adopted the *2030 Agenda for Sustainable Development*⁷ and its 17 Sustainable Development Goals.⁸ The Sustainable Development Agenda envisages a development agenda that integrates the three dimensions of sustainable development (environmental, economic and social).⁹ One of the goals of this Agenda is to ‘end hunger, achieve food security and improved nutrition and promote sustainable agriculture.’¹⁰ Notably, one of the envisaged ways of achieving this goal is to ensure that by 2020, member states will 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.¹¹

Environment and natural resources play an important role in the lives of various communities. For instance, food security is notably related to sustainable environmental governance and management. Environmental sustainability is associated with reduced risk of widespread food insecurity.¹² Food security depends, *inter alia*, on sustainable management of natural resources and the environment since in many indigenous communities, natural resources are the principal sources of their staple food.¹³ Traditional knowledge within indigenous communities thus plays an important role in the achievement of food security for these communities and others since they rely on their traditional ecological knowledge in management of these resources.¹⁴

Environmental sustainability comes with sound environmental decision-making. This is supposed to be an all-inclusive process that involves not only the formal decision-makers but also communities. These communities are a rich source of traditional knowledge that includes environmental knowledge. This paper focuses on traditional environmental knowledge and how the same can be fully incorporated and mainstreamed into environmental governance for sustainable development. ‘Environmental mainstreaming’ has been defined as the informed inclusion of relevant environmental concerns into the decisions of institutions that drive national, local and sectoral development policy, rules, plans, investment and action.¹⁵ This paper thus looks at how traditional environmental knowledge can be mainstreamed not just in the agricultural sector but all areas that have an environmental aspect within them.

⁷ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

⁸ United Nations, “The Sustainable Development Agenda,” available at <https://www.un.org/sustainabledevelopment/development-agenda/> [Accessed on 18/08/2019].

⁹ *ibid.*

¹⁰ Goal 2, Transforming our world: the 2030 Agenda for Sustainable Development.

¹¹ Goal 2.5, Transforming our world: the 2030 Agenda for Sustainable Development.

¹² Pérez-Escamilla, R., "Food security and the 2015–2030 sustainable development goals: From human to planetary health: Perspectives and opinions," *Current developments in nutrition*, Vol.1, no. 7 (2017): e000513, p.4.

¹³ The Rome World Food Summit, Commitment No. 3.

¹⁴ *Ibid.*

¹⁵ Dalal-Clayton, D. B., & Bass, S., *The challenges of environmental mainstreaming: Experience of integrating environment into development institutions and decisions*, No. 1. IeD, 2009.

2. Traditional Environmental Knowledge: Relevance to the Environment and Natural Resources Management

Traditional knowledge has been broadly defined as a cumulative, collective body of knowledge, experience, and values held by societies with a history of subsistence.¹⁶ "Traditional knowledge" is also 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.¹⁷ 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.¹⁸

Traditional knowledge has also been defined as knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.¹⁹ The term "indigenous knowledge" may generally refer to how members of a community perceive and understand their environment and resources, particularly the way they convert those resources through labour.²⁰

Traditional knowledge or traditional ecological knowledge is believed to represent experience acquired over thousands of years of direct human contact with the environment.²¹ A growing recognition of the capabilities of ancient agriculturalists, water engineers and architects led to increased appreciation of ethnoscience, ancient and contemporary, which paved way for the acceptability of the validity of traditional knowledge in a variety of fields.²² One of the fields that embraced the use of traditional knowledge is the environment.

The concept of Traditional Ecological Knowledge has been applied to several categories of information, which are distinguishable on substantive and epistemological grounds.²³ These may include: Factual/rational knowledge about the environment. This includes statements of fact about such matters as weather, ice, coastal waters, currents, animal behaviour, traveling conditions and the like; Factual knowledge about past and current use of the environment (e.g., patterns of land use and occupancy, or harvest levels); Culturally based value statements about how things should be, and what is fitting and proper to do, including moral or ethical statements about how to behave

¹⁶ Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 66.

¹⁷ 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.

¹⁸ *Ibid.*

¹⁹ World Intellectual Property Organisation, 'Traditional Knowledge,' available at <http://www.wipo.int/tk/en/tk/> [Accessed on 18/08/2019].

²⁰ 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).

Available at <http://www.fao.org/docrep/005/ac696e/ac696e09.htm> [Accessed on 18/08/2019].

²¹ Inglis, J., ed., *Traditional ecological knowledge: concepts and cases*, IDRC, 1993, at p. 1.

²² *Ibid.*, p.2.

²³ Usher, P.J., "Traditional ecological knowledge in environmental assessment and management," *Arctic*, 53, no. 2 (2000): 183-193, at p.186.

with respect to animals and the environment, and about human health and well-being in a holistic sense; and culturally based cosmology—the foundation of the knowledge system—by which information derived from observation, experience, and instruction is organized to provide explanations and guidance.²⁴

Traditional ecological knowledge is also seen as bound up with “indigenous stewardship method,” which is defined as the “ecologically sustainable use of natural resources within their capacity to sustain natural processes.”²⁵ Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.²⁶

The resilience of indigenous peoples and local 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.²⁷ They are thus interested parties when it comes to efforts towards achieving sustainable development and should thus be included.

Some communities’ traditional ecological knowledge practices are perceived to promote dry land ecosystems management.²⁸ For instance, in Tanzania, pastoralists reduce risk of livestock mortality by seasonal movement of livestock to the productive and high rainfall areas.²⁹ This may however be criticized for negative effect on some environmental aspects.³⁰ Regarding wildlife in the rangelands, Maasai pastoralists do not consume wild meat and therefore do not aspire to kill wildlife that grazing close to their livestock. They allow wild animals, especially the ungulates to graze with their animals without any disturbances.³¹ This knowledge is passed from generation to

²⁴ Ibid, at p. 186.

²⁵ Whyte, K.P., "On the role of traditional ecological knowledge as a collaborative concept: a philosophical study," *Ecological processes*, Vol.2, no. 1 (2013): 7, at p.3.

²⁶ Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 67.

²⁷ 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 18/08/2019].

²⁸ Olekao, S. K., & Sangeda, A. Z., "Traditional ecological knowledge in management of dryland ecosystems among the Maasai pastoralists in Kiteto District," *Tanzania J Environ Res* 2 (2018); Olekao, S.K., "The role of traditional ecological knowledge in management of dryland ecosystems among the Maasai pastoralists in Kiteto District, Tanzania," PhD diss., Sokoine University of Agriculture, 2017. Available at <http://www.suaire.suanet.ac.tz:8080/xmlui/bitstream/handle/123456789/2073/SAMWEL%20KORINJA%20OLEKAO.pdf?sequence=1&isAllowed=y> [Accessed on 22/08/2019].

²⁹ Ibid, p.8.

³⁰ Ibid, p.9.

³¹ Ibid, p.9. Ungulates are a group of large mammals that are distinguished from other animals by the presence of hooves. They are an extremely well-known and economically important group that includes animals such as horses, camels, cows, sheep, goats, deer, pigs, giraffes, hippos, rhinos and many more. (Basic Biology, available at <https://basicbiology.net/animal/mammals/ungulate>).

generation among the Maasai as part of preservation of their culture and ensuring sustainability of their livelihoods.³²

There are also studies that have demonstrated that the belief system of the Giriama people, through their indigenous knowledge and management systems, demonstrated through indigenous nomenclature, taboos, proverbs and lived experience, has had a great contribution to the conservation of mangroves, fisheries, corals and coral reefs.³³ These are just a few of the many examples that may be cited to demonstrate how Kenyan communities have for years utilised their traditional ecological knowledge in environmental and natural resources conservation.

There are two recognised practical methods for encouraging the use of traditional knowledge in environmental decision-making. The first one includes those methods that are based on official recognition of traditional knowledge, followed the development of rules of procedure for the use of knowledge by institutions of authority. In this "top-down" approach, the structures of governance are constructed accommodate traditional knowledge, but the knowledge itself is not fostered or sought out.³⁴ The second category increases the capacity of indigenous people to bring traditional knowledge to bear on policies and procedures governance and regulation. This "bottom-up" approach is characterized by initiatives designed to encourage learning and transmission of traditional knowledge at community level, as well as developing the means communicate this knowledge within the structures processes of environmental governance.³⁵

This paper envisages the mainstreaming of both approaches into environmental governance through full and meaningful implementation of the existing laws recognising traditional knowledge as well as the constitutional and statutory provisions aimed at empowering communities through encouraging participation and sharing and access to information by communities.

3. International and National Legal Framework on Traditional Environmental Knowledge

3.1 International Framework on Traditional Environmental Knowledge

Notably, at the international level, there has been a growing recognition that traditional knowledge and customary sustainable use underpin indigenous peoples' and local communities' resilience to change including climate change, as well as contribute directly to biological and cultural diversity, and global sustainable development.

³² Tian, X., "Day-to-day accumulation of indigenous ecological knowledge: A case study of pastoral Maasai children in southern Kenya," (2016). Available at <https://pdfs.semanticscholar.org/c3ac/77c4808b83701fe24d46009ec27bea38769f.pdf> [Accessed on 22/08/2019].

³³ Shilabukha, K., "Indigenous Knowledge and Management Systems for Marine Resources among the Giriama of North Coastal Kenya," PhD diss., University of Nairobi, 2015. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/92635/Khamati_Indigenous%20knowledge%20and%20management%20systems%20for%20marine%20resources%20among%20the%20Giriama%20of%20North%20coastal%20Kenya.pdf?sequence=3&isAllowed=y [Accessed on 22/08/2019].

³⁴ Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p.67.

³⁵ *Ibid*, p.67.

At the international level, 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 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* (emphasis added).

The *Convention on Biological Diversity* recognizes the importance of indigenous and local communities to the conservation and sustainable use of biological diversity. The key provisions are to be found in Article 8(j) which requires that the traditional knowledge of indigenous and local communities be respected, preserved and maintained; that the use of such knowledge should be promoted for wider application with the approval and involvement of the holders of such knowledge; and that they should equitably share in the benefits which arise from the use of their knowledge.³⁶

Article 10(c) of the *Convention on Biological Diversity* further provides that each Contracting Party shall, as far as possible and as appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

This is the only international Convention that expressly recognises the role of traditional knowledge in environmental management and sustainable development agenda. The *United Nations Declaration on the Rights of Indigenous Peoples*,³⁷ provides that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.³⁸ In conjunction with indigenous peoples, States are obligated to take effective measures to recognize and protect the exercise of these rights.³⁹

The Food and Agriculture Organization of the United Nations (FAO) opines that the promotion and protection of traditional and local food and agricultural knowledge will require international, intercultural and interdisciplinary approaches, communication and cooperation.⁴⁰ Coordination of indigenous and local communities' sustainable use, conservation and management of food and agriculture within and across ecosystems, landscapes and seascapes will also require synergies that link food security, livelihood sustainability, poverty alleviation and food and agricultural

³⁶ United Nations, *Convention on Biological Diversity* of 5 June 1992, 1760 U.N.T.S. 69, Article 8.

³⁷ 61/295. *United Nations Declaration on the Rights of Indigenous Peoples*.

³⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 31(1).

³⁹ *Ibid*, Art. 31(2).

⁴⁰ Food and Agriculture Organization of the United Nations (FAO), *FAO and traditional knowledge: the linkages with sustainability, food security and climate change Impacts*, 2009, p.9.

productivity to rural development processes based on *in* and *ex situ* conservation of food and agricultural genetic resources.⁴¹ Traditional environmental knowledge from these communities thus becomes relevant in achieving the foregoing.

3.2 National Legal Framework on Traditional Environmental Knowledge

The Constitution of Kenya provides that culture is the foundation of the nation and the cumulative civilization of the Kenyan people and nation.⁴² Specifically, 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 (emphasis added).⁴³ 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.⁴⁴ The State should not just protect the indigenous knowledge but should also actively promote the use of this knowledge for environmental protection and conservation for sustainable environment.

Notably, one of the national values and principles of governance as outlined under Article 10 of the Constitution is sustainable development. The principles of sustainable development as captured in EMCA⁴⁵ 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* (emphasis added); 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. This is a clear indication of the central role that traditional environment knowledge should play in realisation of the sustainable development agenda.

The *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016*,⁴⁶ was enacted to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; and to give effect to Articles 11, 40(5) and 69 of the Constitution. One of the main purposes of the Act is to recognize the intrinsic value of traditional cultures and traditional cultural expressions, including their social, cultural, economic, intellectual, commercial and educational value.⁴⁷ The Act defines “traditional knowledge” as 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 and includes agricultural, *environmental or medical knowledge, and knowledge associated with genetic*

⁴¹ Ibid.

⁴² Art. 11(1), Constitution of Kenya 2010.

⁴³ Ibid, Art. 11(2) (b) & (3) (b).

⁴⁴ Art. 69(1) (c), Constitution of Kenya.

⁴⁵ EMCA, S. 3(5).

⁴⁶ Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016, No. 33 of 2016, (Government Printer, Nairobi, 2016).

⁴⁷ Ibid, s. 2(d).

resources or other components of biological diversity (emphasis added), and know-how of traditional architecture, construction technologies, designs, marks and indications.⁴⁸

While the enactment of this Act marked a milestone in recognition of traditional knowledge, there has been little in terms of evidence of its implementation especially in environmental management and governance matters.

4. Kenya's Environmental Laws: Challenges and Prospects

As already highlighted in the previous section, formal recognition of traditional knowledge has existed in Kenya's laws for some time.⁴⁹ However, this has not marked an increase or even efforts to promote any meaningful or active utilisation of the knowledge held by communities for management of environmental problems in the country. There has been what mostly seems like promoting use of formal and western knowledge at the expense of the traditional one. As a result, communities feel sidelined as they are neither involved in decision-making and management practices and are also expected to respond to the government's directives without any inclusion. This has especially been exemplified by the government efforts at conservation and management of forests and the associated resources. A case in point is the Mau forest issue where the Government of Kenya has been carrying out evictions on families that are accused of encroaching on the Mau forest, the largest of the country's five watersheds. The government in its latest efforts is planning to force an estimated 10,000 people to move elsewhere.⁵⁰ These people have been accused of illegal logging and clearing of forests for settlement and farming.⁵¹ The Government has even indicated that any person holding any title documents to any part of the forest would be evicted without any form of compensation from the Government as they are deemed to have illegally encroached on government land.⁵² These evictions have not been well received in some quarters, with some terming the exercise as politically motivated.⁵³ For instance, an argument has been advanced to the effect that the Mau Forest Complex has about 22 blocks with 21 blocks having been gazetted as national government forest land and already under the management of Kenya Forest Service. On the other hand, block no. 22 is neither gazetted as national government forest land nor is it under the management of the Kenya Forest Service. Instead, the block was set aside as resettlement land held in trust by the County Government of Narok.⁵⁴ According to this view, the people to be affected are on the said block 22 and thus, the evictions should not be going on as they are politically motivated. The communities are also divided, with a section of the

⁴⁸ Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016, s. 4.

⁴⁹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016; Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at <http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONF%20LICT%20MANAGEMENT-25%20April%202016.pdf> [Accessed on 19/08/2019].

⁵⁰ Soi, C., "Kenya to evict thousands to protect Mau forest," Al Jazeera News, 14 March 2019. Available at <https://www.aljazeera.com/news/2019/03/kenya-evict-thousands-protect-mau-forest-190314165702863.html> [Accessed on 22/08/2019].

⁵¹ Ibid.

⁵² Murage, G., "CS Tobiko to order second phase of Mau evictions," The Star, 16 July 2019. Available at <https://www.the-star.co.ke/news/2019-07-16-cs-tobiko-to-order-second-phase-of-mau-evictions/> [Accessed on 22/08/2019].

⁵³ Vidija, P., "Rift Valley MPs turn wrath on Tobiko over Mau evictions," The Star, 29 July 2018. Available at <https://www.the-star.co.ke/news/2018-07-29-rift-valley-mps-turn-wrath-on-tobiko-over-mau-evictions/> [Accessed on 22/08/2019]. Per Hon. Isaac Ruto, former Governor of Bomet County.

⁵⁴ Kenya Citizen TV, *Newsnight*, Published on Aug 20, 2019. Available at <https://www.youtube.com/watch?v=yKChcQ-PqPg> [Accessed on 22/08/2019].

Kalenjin community opposing the evictions while part of the Maasai community supports the exercise.

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*⁵⁵, the Court observed that: “quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The *Convention on Biological Diversity* which Kenya has ratified and which is now part of Kenyan law by virtue of Article 2(6) of the Constitution recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted.”⁵⁶

The Maasai peaceful co-existence with wildlife is however not without challenges especially when environmental co-management is practised. It has been observed that although Maasai knowledge is evoked in conservation planning proposals, Maasai participation as knowledgeable actors in conservation activities on their lands remains extremely limited.⁵⁷ This is compared to situations throughout the world where environmental co-management is said to be taking place between scientists and local communities.⁵⁸ Some argue that the lack of success at ‘integrating’ local knowledge with scientific resource management is the result of reluctance by scientific and state agencies to relinquish power and devolve decision-making and knowledge-creation processes to local people.⁵⁹

In addition to the foregoing, while the Constitution recognises customary law as part of Kenyan law, the same is subjected to written law.⁶⁰ 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.⁶¹ Customary law thus contains important environmental norms and ethics on how to manage the environment. Despite this, customary law and traditional ecological norms have suffered the problem of general acceptance by the law enforcing authorities including those charged with coming up environmental policies, plans and programmes.

⁵⁵ ELC Civil Suit No. 821 of 2012 (OS).

⁵⁶ See also Treaty Making and Ratification Act, No. 45 of 2012.

⁵⁷ Goldman, M., "Tracking wildebeest, locating knowledge: Maasai and conservation biology understandings of wildebeest behavior in Northern Tanzania," *Environment and Planning D: Society and Space* 25, no. 2 (2007): 307-331, at p.308.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Art. 2(4) of the Constitution provides that any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

⁶¹ 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 19/08/2019].

While some instances seem to support and recognise the use of traditional knowledge, there has not been consistency. There is a need to mainstream traditional environmental knowledge for environmental management and governance in Kenya.

5. Mainstreaming Traditional Ecological Knowledge in Kenya's Environmental Governance Framework

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 development that enhance local communities and their environment.⁶²

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.⁶³ Article 1 of the *Aarhus Convention* states that “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.”⁶⁴ It is 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.⁶⁵ Recognition and active utilisation of communities' traditional environmental knowledge can create a viable channel for communities to appreciate government's efforts in effective environmental governance through promoting sustainable use of the environment and its resources.

Traditional knowledge, coupled with other forms of knowledge can enhance predicting and preventing the potential environmental impacts of development, as well as informing wise land-use and resource management especially within the local community setups.⁶⁶ Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.⁶⁷

Traditional knowledge can be 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.⁶⁸ Exploring the community's knowledge and knowledge of

⁶² African Regional Intellectual Property Organization, op cit.

⁶³ Part 3 (Principles 15-24).

⁶⁴ 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.

⁶⁵ Mohammad, N., '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.

⁶⁶ Ellis, S.C., 'Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making,' *Arctic*, Vol. 58, No. 1 (March 2005), p. 66-77 at p. 67.

⁶⁷ *Ibid* at p. 67.

⁶⁸ Gorjestani, N., 'Indigenous Knowledge for Development: Opportunities and Challenges,' in Twarog, S. & Kapoor, P. (eds), 'Protecting and Promoting Traditional Knowledge: Systems, National Experiences and

people dealing with agriculture, is crucial to determine their norms, values, and belief in regards to their activities, particularly in the area of water and land management.⁶⁹ The way people develop such knowledge by understanding their environment through observation and experiences determines the specific group of people's knowledge.

Incorporating provisions recognising traditional environmental knowledge in national environmental laws is commendable but just marks the first step towards mainstreaming such knowledge into effective environmental governance. There is need for actively and meaningfully involving communities in utilising traditional environmental knowledge to practice sustainable production methods.

There is need to cultivate a culture of respect for environment by all. Environmental ethics and consciousness can go a long way in promoting 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.⁷⁰ The objects of the devolution of government are, *inter alia*— 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; and to protect and promote the interests and rights of minorities and marginalised communities.⁷¹ Encouraging and mainstreaming the use of traditional environmental knowledge by communities can go a long way in facilitating participation.

Fostering use of traditional knowledge in conservation and production to active and meaningful participation in decision-making can enable the citizenry appreciate that achieving the sustainable development agenda is not just a State's responsibility but one that requires cooperation between the State actors and the individuals, as envisaged under Article 69(2) of the Constitution.⁷² There is need to empower communities so as to actualise these constitutional provisions. Where they do not perceive a danger to their livelihoods, these communities are likely to embrace development projects and are also not likely to turn to unconventional ways of protecting their livelihoods.⁷³

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 19/8/2019].

⁶⁹ 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.

⁷⁰ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁷¹ Art. 174.

⁷² 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.

⁷³ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

6. Conclusion

One way of protecting and enhancing the use of traditional environmental knowledge in environmental management, while ensuring meaningful inclusion and participation of local communities, is integrating it into the environmental governance framework as this will help achieve sustainable development as contemplated in the sustainable development agenda. Combining western scientific knowledge which forms the bulk of *formal laws, policies and programmes with traditional environmental knowledge for the purpose of improving natural resources and environmental management is important for inclusive and participatory approaches to environmental management* (emphasis added).

With the communities empowered through recognition and utilisation of traditional environmental knowledge in environmental management, then it is possible to hold to account those who flout environmental laws and agreed norms, 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 a need to create conducive environment for promoting mutual respect for both formal and informal sources of knowledge. The implication would be that environmental scientists and policy professionals, indigenous and non-indigenous, should focus more on creating long term processes that allow for the implications of different approaches to knowledge in relation to stewardship and management priorities to be responsibly thought through.⁷⁴

Diverse forms of knowledge including traditional environmental 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. Traditional environmental knowledge should thus be mainstreamed into the national environmental laws, policies, plans and other efforts geared towards achieving the sustainable development agenda. This will improve cooperative environmental and natural resources stewardship and management between indigenous and non-indigenous institutions.⁷⁵

Mainstreaming Traditional Ecological Knowledge in Kenya is a critical step that needs to be taken to enable the country achieve the sustainable development goals.

⁷⁴ Whyte, K.P., "On the role of traditional ecological knowledge as a collaborative concept: a philosophical study." *Ecological processes*, Vol.2, no. 1 (2013): 7, p. 2.

⁷⁵ *Ibid.*, p. 3.

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

Abstract

Land resources are considered as an important part of the social, economic and cultural aspects of the lives of many Kenyan communities especially in the rural areas. However, these resources are finite in nature while the population of these people is growing by the day. This, coupled with other challenges such as poverty and climate change, often leads to conflicts arising from the threatened access and control of the land and its resources. The resultant threat to peace and instability means that these conflicts should be effectively managed. However, due to the sensitive nature of the conflicts, Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms have often been proposed as some of the most viable means of managing the conflicts as their perceived advantages are believed to be capable of balancing the delicate nature of the interests involved. This paper discusses the challenges and prospects involved in the application of these mechanisms in management of land conflicts in Kenya. The author argues that unless these challenges are dealt with first, these mechanisms may not achieve the desired outcome.

1. Introduction

Land is considered to be one of the most important economic resources in Kenya.¹ However, it has not only economic importance attached to it but also has social, cultural and even sentimental value to many people in the country. The fact that Kenya is largely an agricultural based economy with many communities still relying on land to take care of their livelihoods.² This means that the ownership and control of land often comes with conflicts owing to the fact that such land is also a finite resource especially with the ever growing population with non-corresponding national economic growth figures.³ If not well managed, these conflicts are likely to not only lead to instability in the country but also may result in casualties as disagreeing factions resort to unorthodox means of dealing with these conflicts.⁴ The law has thus set out mechanisms that should be used in managing these conflicts. The Constitution envisages formal and informal

¹ See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," University of Helsinki, Department of Geography (2004). Available at http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf [Accessed on 5/10/2019].

² Ibid; see also Quan, J., Tan, S., & Toulmin, C., "Land in Africa: market asset or secure livelihood?" (2004), Proceedings and summary of conclusions from the Land in Africa Conference held in London, November 8-9, 2004. Available at <https://pubs.iied.org/pdfs/12516IIED.pdf> [Accessed on 5/10/2019].

³ Kennedy Jr, B., "Environmental scarcity and the outbreak of conflict," Population Reference Bureau (2001). Available <https://www.prb.org/environmentalscarcityandtheoutbreakofconflict/> [Accessed on 5/10/2019]; Republic of Kenya, Kenya Population Situation Analysis, (National Council for Population and Development (NCPD), July, 2013). Available at https://www.unfpa.org/sites/default/files/admin-resource/FINALPSAREPORT_0.pdf [Accessed on 5/10/2019].

⁴ See Alao, A., Natural resources and conflict in Africa: the tragedy of endowment, Vol. 29, University Rochester Press, 2007; Muigua, K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 4, No 2, (2016), pp. 1-63; Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms," Journal of conflict resolution, vol.49, no. 4 (2005): 508-537.

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mechanisms to address land conflicts. Chapter Ten (Article 159) of the Constitution designates Judiciary as the main arm of the Government to address civil and criminal matters in the country to ensure that justice is done to all.⁵

The Constitution requires that, in exercising judicial authority, the courts and tribunals must be guided by the principles of, inter alia— promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms*, subject to clause (3) (emphasis added).⁶ It is noteworthy that these mechanisms form part of the traditional knowledge since when they are applied in the community setting, they mostly rely on such knowledge for their effectiveness.⁷

In addition to this, Article 60 of the Constitution also provides that one of the principles of land holding in the country is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.⁸ The other principles on how land in Kenya should be held, in addition to being used and managed in a manner that is equitable, efficient, productive and sustainable, are—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; and elimination of gender discrimination in law, customs and practices related to land and property in land.⁹

These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.¹⁰

In addition to the foregoing, the functions of the National Land Commission include, inter alia: to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; and to encourage the application of traditional dispute resolution mechanisms in land conflicts.¹¹ This is a significant provision considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.¹²

⁵ 159. Judicial authority

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

⁶ Ibid, Art. 159(2) (c).

⁷ 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," 2000.

⁸ Article 60 (1)(g), Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

⁹ Ibid, Article 60 (1).

¹⁰ Article 60(2).

¹¹ Ibid, Art. 67(2) (f).

¹² Government of Kenya, Report on 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); See also Akiwumi, A.M., et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

This paper mainly focuses on the edict of encouraging communities to settle land disputes through recognised local community initiatives consistent with this Constitution.¹³ The paper discusses the viability of this approach to management of land disputes in Kenya and the practical and legal challenges that are likely to arise in the implementation of these provisions. Considering that these constitutional provisions may be given force by the proposed *Alternative Dispute Resolution (ADR) Bill, 2019*¹⁴ (*ADR Bill, 2019*), this paper makes reference to the Bill in an attempt to point out not only the inconsistencies in the Bill but also to highlight the challenges that arise in applying Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in management of land conflicts and disputes in the country.

2. Land Conflicts in Kenya

As already pointed out, land ownership and control is an emotive subject in Kenya which means different things to different people hence more often results in conflicts over control and ownership.¹⁵ People may perceive land ownership and control in accordance with social, cultural, ethnic, class and family dimensions. To farmers and pastoralists land is a source and a key element of living while to the elite land is a marketable commodity and access to profits.¹⁶ The implication of this is that land disputes that arise may take different forms according to the underlying causes. In many African cultures, the tribe is at the top of the hierarchy of traditional African communities' socio-political organization. It is the custodian of the community land, resources and customary law. It also brokers inter-community peace pacts, negotiate for peace, grazing land, water and other resources and in compensation arrangements.¹⁷

Despite the existence of the formal conflict management mechanisms, there has been perennial land and natural resource conflicts in the country, hence the need to explore the use of ADR and TDR mechanisms in the management of these conflicts in peaceful way owing to the importance of these resources to majority Kenyan communities.

¹³ 60. Principles of land policy

(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

(g) **encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.**

67. National Land Commission

(2) The functions of the National Land Commission are—

(f) **to encourage the application of traditional dispute resolution mechanisms in land conflicts;**

¹⁴ Senate Bills No. 19 (Government Printer, Nairobi, 2019).

¹⁵ See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," University of Helsinki, Department of Geography (2004), p. 1. Available at http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf [accessed on 30/9/2019].

¹⁶ Ibid, p.1.

¹⁷ 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.45; See also Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965).

3. Management of Land Conflicts in Kenya

Land conflicts management may either be managed through formal mechanisms such as courts and tribunals or through informal mechanisms which include Alternative Dispute Resolution Mechanisms (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs). 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).¹⁸ 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.¹⁹ Despite this, there are key principles such as, inter alia, participatory approaches²⁰, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.²¹

This section explores both the formal mechanisms and the informal mechanisms.

3.1 Management of Land Conflicts through Courts and Tribunals

The Constitution envisaged the establishment of an Environment and Land Court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.²² In order to give effect to Article 162(2)(b) of the Constitution, the Environment and Land Court Act 2011²³ to establish a superior court to be known as the environment and land 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.

Under the Environment and Land Court Act 2011, the jurisdiction of the Court which has and exercises jurisdiction throughout Kenya includes: 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 applicable in Kenya relating to environment and land.²⁴ 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 matters, 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

¹⁸ 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 2/10/2019].

¹⁹ Ibid.

²⁰ 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.

²¹ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

²² Article 162 (2) (b).

²³ Act No. 19 of 2011, Laws of Kenya.

²⁴ Sec. 13(1), Environment and Land Court, 2011.

other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.²⁵ In addition to this, the Act provides that nothing in the Act shall preclude the Court from hearing and determining 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.²⁶ Apart from the matters referred to in subsections (1) and (2), the Court is empowered to exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.²⁷

Furthermore, in exercise of its jurisdiction under this Act, the Court shall have power to 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.²⁸ Notably, courts have held that ‘under Section 13(7) (a) of the Environment and Land Court Act, this court has jurisdiction to issue preservatory orders relating to both civil and criminal processes. That jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.’²⁹

The *Community Land Act 2016*³⁰ which was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes³¹ also specifically provides for judicial proceedings in community land disputes alongside other mechanisms, though as the last resort. Section 42(1) thereof provides that ‘Where all efforts of resolving a dispute under this Act fail, a party to the dispute may refer the matter to court’. The Court may- confirm, set aside, amend or review the decision which is the subject of the appeal; or make any order in connection therewith as it may deem fit.³²

3.2 Management of Land Conflicts through Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms

Although the Environment and Land Court Act 2011 establishes the environment and land court, it also provides for the use of ADR in management of land disputes. It provides that ‘nothing in the 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

²⁵ Sec. 13(2), Environment and Land Court, 2011.

²⁶ Sec. 13 (3).

²⁷ Sec. 13 (4).

²⁸ Sec. 13 (7).

²⁹ Para 10, *National Land Commission v Afrison Export Import Limited & 10 others* [2019] eKLR, ELC Reference No. 1 of 2018; Regarding the possibility of concurrence of High Court and the Environment and Land Court jurisdictions, see *Iddid Ole Tauta & others vs Attorney General (2015) eKLR*; *Patrick Musimba vs. National Land Commission & 4 others (2015) eKLR*; and *Christopher Ngusu Mulwa & 28 others v County Government of Kitui & 2 others [2017] eKLR*.

³⁰ Community Land Act, No. 27 of 2016, Laws of Kenya.

³¹ *Ibid*, preamble.

³² *Ibid*, sec. 42 (2).

mechanisms in accordance with Article 159(2)(c) of the Constitution.³³ In addition, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court should stay proceedings until such condition is fulfilled.³⁴

The use of ADR mechanisms in managing land disputes is also provided for under the *Land Act, 2012*³⁵. The Act provides that in the discharge of their functions and exercise of their powers under this Act, the National Land Commission and any State officer or public officer shall be guided by some values and principles which include—encouragement of communities to settle land disputes through recognized local community initiatives; and alternative dispute resolution mechanisms in land dispute handling and management.³⁶

The applicability of ADR and TDR mechanisms in community land disputes is envisaged under the *Community Land Act 2016*³⁷. Section 39(1) thereof 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’.

Indeed, the Act requires that ‘any dispute arising between members of a registered community, a registered community and another registered community should, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws’.³⁸ Where a dispute or conflict relating to community land arises, the registered community should give priority to alternative methods of dispute resolution.³⁹

In addition, subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body should apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.⁴⁰

³³ Sec. 20 (1).

³⁴ Sec. 20 (2).

³⁵ No. 6 of 2012, Laws of Kenya.

³⁶ Ibid, sec. 4 (2) (g)(m).

³⁷ Community Land Act, No. 27 of 2016, Laws of Kenya.

³⁸ Ibid, sec. 39 (2).

³⁹ Ibid, sec. 39 (3).

⁴⁰ Ibid, sec. 39 (4).

Apart from the applicability of TDRMs, the Community Land Act 2016 also has specific provisions for the application of mediation⁴¹ and/or arbitration⁴².

The *Draft Alternative Dispute Resolution Policy 2019*⁴³ was meant ‘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. It 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’ (emphasis added).⁴⁴ This Draft ADR Policy 2019 together with the ADR Bill, 2019 are meant to formalize the use of ADR and TDR mechanisms in Kenya in management of conflicts including natural resources and land conflicts.

4. Challenges and Prospects

4.1 Recognition and Enforcement of Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms Outcomes

Considering the diversity of ADR and TDR mechanisms based on the different communities as well as the informality that comes with the, enforcement of their outcomes is going to prove difficult. This is also likely to be complicated by the non-binding nature of these mechanisms such as mediation. For instance, in the case of *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others*

⁴¹ Ibid, sec. 40.

40. Mediation

- (1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation.
- (2) The mediation shall take place in private or in informal setting where the parties participate in the negotiation and design the format of the settlement agreement.
- (3) The mediator shall have the power to bring together persons to a dispute and settle the dispute by—
 - (a) convening meetings for the hearing of disputes from parties and keep record of the proceedings;
 - (b) establishing ground rules for the conduct of parties;structuring and managing the negotiation process and helping to clarify the facts and issues; and
- (c) helping the parties to resolve their dispute.
- (4) If an agreement is reached during the mediation process, the agreement shall be reduced into writing and signed by the parties at the conclusion of the mediation.

⁴² Ibid, sec. 41.

41. Arbitration

- (1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.
- (2) Where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act (No.4 of 1995) relating to the appointment of arbitrators shall apply.

⁴³ Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

⁴⁴ Draft Alternative Dispute Resolution Policy 2019 (Zero draft), p.7. Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

[2018] eKLR⁴⁵, the ELC Court at Garissa was called upon by the defendant/applicant to determine an application seeking orders that the proceedings be stayed and that the dispute be referred to the local community elders for resolution.⁴⁶ The Court observed that ‘*Under Article 159 (2) (c) the courts and tribunals are to ensure that there is promotion of Alternative Dispute Resolution mechanism, mediation reconciliation, arbitration and traditional dispute resolution as a means of bringing cohesion and co-existence amongst the people. However, parties have to consent and be willing to be bound by the decision of the decision makers. In this case, the parties had initially agreed to refer the dispute to a panel of elders but the plaintiff later abandoned the process and elected to bring the dispute for resolution to this court*’ (emphasis added). This case illustrates the first challenge that arises when applying ADR and TDR mechanisms in land disputes; the unenforceability of the outcomes of mediation outcomes in land matters.

It is therefore to be seen how outcomes in land matters, are to be enforced by the courts. The only exception would be where both parties mutually agree on the outcome under the law of contract or under some other agreed arrangements and then approach the court to record it as consent. In such instances, it would be easier for the courts to record and adopt such agreed outcomes as an order of the court.⁴⁷

4.2 Recourse to Court and Recognition and Enforcement of Settlement Agreement

Clause 32 of the proposed *Draft ADR Bill, 2019*⁴⁸ provides that all the parties and their advocate(s) should file a certificate with the Court for confirmation that ADR has been considered. While this provision is drafted in broad terms, it is silent on what would be the effect of any of the parties or

⁴⁵ Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR, Environment and Land Case 30 of 2017 (Formerly 77 of 2017, Embu).

⁴⁶ Ibid, para. 1.

⁴⁷ See Law of Contract Act, Cap 23, Laws of Kenya, sec. 3(3); see also Civil Procedure Rules 2010, Order 13, rule 2.] Judgment on;

“2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

Civil Procedure Rules 2010, Order 25, rule 5;

[Order 25, rule 5.] Compromise of a suit.

5. (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.

⁴⁸ Draft Alternative Dispute Resolution Bill, 2019, Senate Bills No. 19 (Government printer, Nairobi, 2019). Available at

http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/AlternativeDisputeResolutionBill_2019.pdf

their advocates failing to file the relevant certificate(s) at the appropriate time. It fails to clarify on whether the Court would send them back in order to comply or whether it would invoke clause 28 (2) (a) of the Bill. Considering that land matters are sensitive, it is critical that it is clarified on what the Courts would do in such instances as the one described above in order to avoid an outcome that one of parties/groups consider invalid.

Clause 33 of the Bill that provides for resort to judicial proceedings is not clear on whether the decision of the High Court or the Court that referred the dispute for resolution through ADR is final or whether the dissatisfied party may move to Court of Appeal. It is important to clarify this since any party or group losing some rights to what they consider their land may resort to other unconventional and non-peaceful means if they feel that justice was not served by the courts. Notably, clause 36 of the Bill which outlines the grounds for referral of recognition or enforcement of settlement agreement provides that:

The recognition or enforcement of a settlement agreement may be refused where—

(a) at the request of the party against whom it is invoked, that party furnishes to the High Court or the court referring the dispute to alternative dispute resolution proof that—

(i) a party to the alternative dispute resolution process was under some incapacity;

(ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the country where the settlement agreement was made;

(iii) the party against whom the settlement agreement is invoked was not given proper notice of the appointment of a conciliator, mediator or traditional dispute resolver;

(iv) the party against whom the settlement agreement is invoked was not given proper notice of the alternative dispute resolution process or was otherwise unable to present its case;

(v) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution, provided that if the decisions on issues referred to alternative dispute resolution can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to alternative dispute resolution may be recognized and enforced;

(vi) the appointment of the conciliator, mediator or traditional dispute resolver was not in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;

(vii) the alternative dispute resolution process was not conducted in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;

(viii) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which that settlement agreement was made; or

(ix) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence;

(b) if the High Court or the court finds that—

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- (i) the subject-matter of the dispute is not capable of settlement by alternative dispute resolution under the law of Kenya; or*
- (ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy (emphasis added).*

The underlined portions raise a number of concerns. To begin with, it is notable that in the definitions/interpretation section, the definitions of the terms ‘conciliation’ ‘mediation’ and ‘traditional dispute resolution’ do not mention anything on the potential international nature of these processes. Unlike the Arbitration Act which defines arbitration to include both domestic and international arbitration, the current ADR Bill 2019 is quiet on this as far as the said processes are concerned. It is therefore questionable whether the given definitions should be inferred to include the international aspects of these processes, especially conciliation and mediation. Secondly, the scope of the Bill as envisaged under clause 4(1) is that Bill shall apply to certain civil disputes including a dispute where the National government, a county government or a State organ is a party. What is not clear is whether this includes disputes involving foreign parties transacting with the National government, a county government or a State organ. Considering that there may be other laws that may oust the jurisdiction of this Bill in as far as resolving disputes with foreign parties is concerned, the Bill should not include the international aspects of the processes in question. Thirdly, it is an established fact TDR mechanisms *are highly subjective and unique to communities and cultures* (emphasis added). It is therefore not viable to contemplate an international TDR decision under the Bill. It may be imperative to reconsider these provisions to avoid the obvious challenges in attempting to enforce such decisions, even assuming that they may exist.

In ADR or TDR referrals which were done by the Court and/or parties filed their respective certificates as contemplated under clause 32 of the Bill, it is not clear as to whether a party would still have the liberty to challenge the decision under some grounds such as “*the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution*”. The Bill is also silent on what happens where the referring court and the parties in their certificates agreed that the dispute in question could be referred for ADR or TDR. It does not address the question on whom the error, if any, is to be revisited. Arguably, it is possible for a ‘losing’ party to avoid filing the certificate or challenging the decision to refer the same for ADR or TDR at the relevant stage and wait until the outcome and use these provisions to delay the process of recognition and enforcement. Again, the Bill does not have any provisions on how these issues are to be reconciled.

Again, even though the outcome of ADR and/or TDR process is binding on the parties, where parties challenge the enforcement and recognition, clause 36 of the Bill is silent on whether a dissatisfied party may appeal the decision of enforcement and recognition to a higher court. This may present challenges as has been the case with arbitration outcomes.

4.3 Determination of the Expertise of the ADR and TDR Practitioners

The formal recognition of traditional dispute resolution mechanisms in the *Draft ADR Bill, 2019* is commendable as these mechanisms have often faced challenges in their application as they mostly depend on particular and differing customs of the different communities. Having a formal basis for their application as envisaged in the Constitution is thus to be lauded.

However, TDR mechanisms still have to face one more hurdle: determination of the expertise of the practitioners. It is assumed that it is under the provisions of this Bill, once enacted that the constitutional provisions on application of ADR and TDR mechanisms to land disputes will be applied.

Clause 27 of the Bill which provides for the competence of a traditional dispute resolver provides at sub clause (1) that “A person shall not act as a traditional dispute resolver unless acquainted with the customary law to be applied in resolving the dispute”. Sub clause (2) (ought to be corrected on the bill to read (3) provides that “the Committee may, in as far as is reasonably practicable, prepare and maintain a list of traditional dispute resolvers”. These provisions may present a challenge to the Committee. For instance, it is not clear on the criteria to be used when determining whether the potential candidate is acquainted with the customary law to be applied in resolving the dispute. The law has been that anyone who seeks to rely on customary law especially in African customary marriages has the onus of proving the same as was held in the celebrated case of *Kimani v. Gikanga [1965] EA 735*, where *Duffus JA* explained the position thus:

“To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case” (emphasis added).

The question that arises therefore is how, under the above provisions of the Bill, the Committee will decide that an applicant is competent and acquainted with the customary law to be applied in resolving the dispute. It is possible that in the Committee, there may be nobody acquainted with the customary law in question. In ensuring that the Committee does not face challenges in coming up with the register, these clauses may need to be reconsidered. The other potential risk is locking out potential candidates where the process and criteria of selection is too formalized. It is possible that the most qualified candidates may not have the formal education or the ‘requisite papers’ to put in during application. It is not clear how the Committee will overcome this potential hurdle. What makes TDR mechanisms attractive is their informality and this ought to be preserved as much as possible in legislating on these processes. It should also not be lost on the drafters that

TDR mechanisms include a number of processes just as is the case in ADR mechanisms and various communities may use different approaches or processes in dealing with diverse cases. This process of determining the applicability of TDR mechanisms may also arise under Clause 28 (2) (a) which provides that “A court before which a dispute is filed or pending may refer a dispute for resolution through a traditional dispute resolution process at any time where— (a) the court determines that traditional dispute resolution will facilitate the resolution of the dispute or a part of the dispute”. Again, the Bill is silent on what procedure or evidence the Court will rely on to assist it in making this decision. It is not yet clear whether the communities involved, in the case of community land under *Community Land Act 2016*⁴⁹, will have a chance to appoint the preferred experts in such TDR process.

Clause 29 (2) of the Bill provides that the traditional dispute resolver must submit to the court a written down settlement agreement as well as a report at the conclusion or termination of the TDR process. Considering that some of the customary experts (mostly elders) may not have formal knowledge of reading and writing, it is debatable as to whether there should be a provision for them to work with an assistant or a court appointed clerk to assist them in coming up with the settlement agreement or the report. Alternatively, they can appear in open court to ‘report’ on the outcome and the magistrate or judge puts it down in writing and records it as the decision of the Court. In other words, such settlements or reports can be treated the same way as provided under clause 29 (3) which states that “Except where a dispute was referred for resolution through traditional dispute resolution or at the request of the parties, a settlement agreement need not be in writing”. The drafters and policy makers may include other viable options to address such challenges. The Bill can include court appointed assistant(s) to work with the resolvers in order to capture in writing what the dispute resolvers conclude.

5. Making Traditional Dispute Resolution Mechanisms work in Managing Land Conflicts in Kenya

ADR and TDR mechanisms when applied in management of disputes and conflicts can create viable channels for public participation in meaningful decision-making processes. Notably, the objects of the devolution of government are, inter alia— 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; and to protect and promote the interests and rights of minorities and marginalised communities.⁵⁰

While the foregoing provisions are laudable in view of the fact that they have envisaged traditional knowledge in terms of traditional dispute resolution mechanisms within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making and conflict management as far as land is concerned. There is a need to move beyond the formality of the proposed Bill to come up with procedures that can actually work. This is especially important in the application of traditional dispute resolution

⁴⁹ Act No. 27 of 2016, Laws of Kenya.

⁵⁰ Art. 174.

mechanisms in land conflicts (Art. 67) as well as dealing with the inter-community and intra community conflicts that are mostly natural resource based.

Traditional conflict resolution practices reflect principles of reconciliation based on long-standing relationships and values.⁵¹ They tend to be effective in addressing intra-community and even inter-community conflict, where relationships and shared values are part of the reconciliation process.⁵² However, there is a need to integrate traditional and formal approaches to conflict management in a way that ensures that the informality of these mechanisms is not lost. Including communities and the affected parties in appointment of these traditional dispute resolvers may help in not only lending credence to the process but also may help in repositioning the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Article 60(1) (g) of the Constitution, is concerned.

There is also a need to consider and carefully capture the spirit of the *Alternative Dispute Resolution Policy (Zero Draft), 2019*⁵³ which may be useful in capturing the spirit of the Constitution, ADR and TDR mechanisms as well as the other relevant laws that deal with these mechanisms. The policy-makers are wary of the risks involved in formalization of ADR processes and the implementation of the ADR Policy which include: over-formalisation of the ADR sector which will undermine its utility as a more flexible, faster, informal mechanisms for justice; technology disruption of working models in ADR; resistance to change by stakeholders and users of ADR; inadequate resources to implement the policy; and competition between formal and ADR mechanisms, and legal and non-legal practitioners.⁵⁴ These precautions are necessary considering that the ADR and TDR mechanisms are perceived to be better off than formal approaches in managing some disputes due to the advantages that they have over the formal processes. Any formalisation approach that takes away these advantages thus defeats the very essence of their use in managing disputes.

In a bid to strengthen the legal framework for ADR in the country, the Draft ADR Policy recommends that there be enacted an Alternative Dispute Resolution Act, which shall be the framework legislation for ADR in the country. The Act should among other things: provide for establishment of mechanisms for linkage and coordination between the formal justice system and ADR system; sector governance; regulation; standards setting; enforcement of decisions; among other things.⁵⁵ The National Council (to be established under the Act) in liaison with stakeholders should promote the full implementation of existing laws that promote ADR, and advocate for similar legal provisions in other needy sectors.⁵⁶ The assumption is that various laws require different mechanisms as well as varying procedural needs. The Council is

⁵¹ Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World,' Black Diaspora Review, Vol. 2(1), Fall 2010.

⁵² Ibid.

⁵³ Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

⁵⁴ Alternative Dispute Resolution Policy (Zero Draft), 2019.

⁵⁵ Ibid, p. 41.

⁵⁶ Ibid, p.41.

thus expected to work closely with other stakeholders to identify and address the special needs under each of the laws and approaches.

As a way of strengthening linkages, coordination and harmonisation in the ADR sector, the Draft Policy also: adopts the principle of subsidiarity in regard to linkage between the ADR systems and the formal court system. This is intended to stem the hegemony of the judiciary, and to allow autonomous operation and growth of ADR without the trappings of judicial conceptions of justice, procedures, retributive approaches, and the individual interests that underpin the method and goals of the formal justice sector; The linkage between the formal justice system and non-court ADR mechanisms are therefore meant to be in areas of mutual benefit such as enforcement, research, and accountability systems; mechanisms and modalities are also to be developed for promotion of coordination and harmonisation between the formal justice system and the ADR sector, and also between actor in the ADR sector itself.⁵⁷

As already pointed out, there is a need to ensure that the legislation process does not defeat the merits of the ADR and TDR processes thus rendering them inapplicable or ineffective when it comes to the specific disputes and conflicts. The drafters of the ADR Bill 2019 should thus revisit the above listed aims of the draft Policy to ensure that they capture these goals and aspirations.

Some of the above listed potential challenges in the application of TDR mechanisms in management of land conflicts can be overcome if these policy goals are well captured and implemented through the ADR Bill. It is important to ensure that the informality and potentially inexpensive and/or cost effectiveness of the ADR and TDR is preserved.

The purpose of the ADR 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. It 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.⁵⁸ It is important that the legal framework on ADR and TDR mechanisms not only captures but also promotes this purpose of the policy framework. This is especially important in order to ensure that communities appreciate and remain in touch with the legal framework on the regulation and application of ADR and TDR mechanisms in management of their everyday disputes and conflicts such as the ones that relate to land and natural resources.

6. Conclusion

ADR and TDR mechanisms are associated with many advantages when appropriately used in management of land and other natural resource conflicts. However, as discussed in this paper, while these processes may have many intrinsic values that make them preferable to the formal mechanisms in management of land conflicts and disputes, there are procedural and appropriateness challenges that should be addressed to make them legally and practically applicable. It is hoped that the challenges discussed in this paper will be considered by the Kenyan

⁵⁷ Ibid, p.42.

⁵⁸ Alternative Dispute Resolution Policy (Zero Draft), 2019, p. 7.

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policy and decision makers in mainstreaming the use of ADR and TDR in management of land conflicts and disputes in the country. Effective application of TDRMs in the management of land conflicts in Kenya is possible. However, a lot needs to be done before this goal is realised.

Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya

Abstract

Inter-ethnic conflicts in Kenya have become so common in some parts of the country that they are considered a perennial problem. While these conflicts have been attributed to many factors, environmental and natural resources are considered to be the main cause. The successive governments of Kenya over the years have responded in various ways to the security situation, including by way of deploying security forces in the affected regions. This paper discusses the connection between the availability of natural and environmental resources and the emergence of inter-ethnic conflicts in Kenya. The author argues that one of the most effective ways of tackling this perennial problem of inter-ethnic conflicts is enhancing environmental justice in these regions.

1. Introduction

This paper discusses the connection between the availability of natural and environmental resources and the emergence of inter-ethnic conflicts in Kenya. The paper specifically looks at the role of natural resources availability or scarcity in fueling inter-ethnic conflicts in Kenya. The paper discusses this in the context of environmental justice and offers suggestions on how the perennial challenge of inter-ethnic conflicts among the mostly pastoralist communities can be addressed through enhancing their right to environmental justice.

It is however worth pointing out that while this paper focuses on inter-ethnic conflicts in Kenya, it has rightly been pointed out that within-country conflicts account for an enormous share of deaths and hardship in the world today.¹ Notably, internal conflicts often appear to be ethnic in nature.² Conflicts have been defined differently by various scholars. Conflict is viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.³ Conflict can be defined as an existing state of disagreement or hostility between two or more people.⁴ Conflict has also been 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.⁵ Conflict is seen as an inevitable phenomenon in human society's sphere of life since the entire life of humankind is manipulated by the prevalence of conflict within the society when people set opinion against opinion, run interest against interests.⁶ It has been observed that almost all societies, regardless of their location in time and space, have laws and mechanisms for handling disputes/conflicts and achieving resolution of differences.⁷

¹ Esteban, J., Mayoral, L., & Ray, D., "Ethnicity and conflict: Theory and facts," *science* 336, no. 6083 (2012): 858-865, at p.858.

² *Ibid*, p. 858.

³ Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*.

⁴ Libiszewski, S., "What is an environmental conflict?" *Journal of peace research* 28, no. 4 (1991): 407-422.

⁵ 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 pp.225-226.

⁶ *Ibid*, p.226.

⁷ *Ibid*, p. 226.

Arguably, most of these internal conflicts are related to resources. 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.⁸

Natural resource conflicts are 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.⁹ 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.¹⁰

Competition for scarce resources may lead to a 'survival of the fittest' situation.¹¹ In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.¹² 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).¹³ 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.¹⁴ 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.¹⁵ These situations arise due to the resultant environmental insecurity suffered by some of the aggrieved groups.

While these natural resource conflicts may take many forms or shapes, this paper mainly restricts itself to those that take ethnic lines within a country, and in this case, Kenya. The next section looks at the nature and causes of these inter-ethnic conflicts.

⁸ 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.

⁹ Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at <https://www.ciaonet.org/attachments/20068/uploads> [Accessed on 6/09/2016].

¹⁰ 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

¹¹ 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 6/9/2019].

¹² 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 6/9/2019].

¹³ 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.

¹⁴ *Ibid.*

¹⁵ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

2. Inter-Ethnic Conflicts in Kenya: Meaning and Causes

Ethnic conflict can be defined as a form of conflict in which the objectives of at least one party are defined in ethnic terms, and the conflict, its antecedents, and possible solutions are perceived along ethnic lines.¹⁶ Notably, the conflict is usually not about ethnic differences themselves but over political, economic, social, cultural, or territorial matters.¹⁷

Inter-ethnic conflicts amongst Kenyan communities especially those practising pastoralism have a long history.¹⁸ These conflicts are mostly armed, with competing groups using either crude weapons or illegally acquired arms. Armed conflict is defined as a mechanism of social transformation that may originate either in competing claims over resources, power, or in conflicting cultural or social values, and is often aggravated by low levels of human security.¹⁹

Several factors such as competition over scarce resources, the age-set system as a quasi-military interest group and the ideals of warrior-hood have been cited as some of the causes of warfare amongst East African herders.²⁰ These inter-ethnic tensions have often been experienced in several parts of Kenya, attributable to different factors, but mainly the struggle for access to the scarce environmental resources.²¹

2.1 Causes of Inter-Ethnic Conflicts in Kenya

It has rightly been argued that while armed conflicts have been prevalent throughout history, in some cases having very great consequences, to win, one needs to understand the characteristics of an armed conflict and be prepared with resources and capabilities for responding to its specific challenges.²² Armed conflicts have been attributed to disagreements on controlling territory, economic interests (such as natural resources), religion, culture, and ideology.²³ Ethnic conflicts within a state have also been referred as those that belong to identity conflicts that are a type of

¹⁶ "Ethnic conflict", Encyclopedia Britannica, available at <https://www.britannica.com/topic/ethnic-conflict> [Accessed on 6/9/2019].

¹⁷ Ibid.

¹⁸ See generally, Bollig, M., "Ethnic conflict in North-West Kenya: Pokot-Turkana Raiding 1969-1984," *Zeitschrift für Ethnologie*, 115 (1990), pp.73-90.

¹⁹ Wangeci, N. L., Njoroge, M. N. and Manyasa, E., "Causes of armed ethnic conflict and the implication for peace education in Nakuru county, Kenya," *Journal of Special Needs and Disabilities Studies*, 2014. Available at <https://ir-library.ku.ac.ke/handle/123456789/13574> [Accessed on 2/9/2019].

²⁰ Bollig, M., "Ethnic conflict in North-West Kenya: Pokot-Turkana Raiding 1969-1984," *Zeitschrift für Ethnologie* 115 (1990), pp. 73-90, at p.76.

²¹ Rohwerder, B., "Conflict analysis of Kenya," Birmingham: GSDRC University of Birmingham (2015). Available at <http://www.gsdrc.org/wp-content/uploads/2015/12/KenyaConflictAnalysis.pdf> [Accessed on 6/9/2019]; Makoloo, M. O., Ghai, Y. P., & Ghai, Y. P., *Kenya: Minorities, indigenous peoples and ethnic diversity*, London: Minority Rights Group International, 2005. Available at <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-147-Kenya-Minorities-Indigenous-Peoples-and-Ethnic-Diversity.pdf> [Accessed on 6/9/2019]; International Crisis Group, "Kenya's Rift Valley: Old Wounds, Devolution's New Anxieties," Report No. 248 / Africa 30 May 2017. Available at <https://d2071andvip0wj.cloudfront.net/248-kenya-s-rift-valley-old-wounds-devolution-s-new-anxieties.pdf> [Accessed on 6/9/2019]; Murunga, G.R., *Spontaneous or Premeditated?: Post-election Violence in Kenya*. Nordiska Afrikainstitutet, 2011. Available at <http://www.diva-portal.org/smash/get/diva2:451262/FULLTEXT01.pdf> [Accessed on 6/9/2019].

²² Esteban, J., Mayoral, L., & Ray, D., "Ethnicity and conflict: Theory and facts," *science* 336, no. 6083 (2012): 858-865, at p.865.

²³ Ibid, p. 865.

internal conflicts.²⁴ Besides identity conflicts there are other types of internal conflicts such as ideological conflicts, governance conflicts, racial conflicts and environmental conflicts.²⁵ Some authors have even proposed that there was a connection between ethnic divisions and colonialism in Africa.²⁶ Some theories on ethnic conflict, argue that ethnic conflict is the response to a perceived threat to one's identity.²⁷ The ethnic tensions in Kenya may arguably fall within this classification, as they are often fueled by some kind of dissatisfaction by one group in matters relating to environmental, social, economic or political spheres.²⁸

This section discusses some of these causative factors of inter-ethnic conflicts in the context of Kenya. The paper however generally has a bias towards environmentally fueled ethnic conflicts in Kenya. In addition, while there may be many factors that fuel inter-ethnic conflicts, this paper looks at three main reasons which may be considered to be the major ones.

m. Climate Change and Environmental Resources Scarcity

Some scholars have persuasively argued that not all environmental problems lead to conflict, and not all conflicts stem from environmental problems, and that indeed it is rare for linkages to be directly and exclusively causative.²⁹ They argue that while environmental phenomena contribute to conflicts, they can rarely be described as sole causes: there are too many other variables mixed in such as inefficient economies, unjust social systems and repressive governments, any of which can predispose a nation to instability-and thus, in turn, make it especially susceptible to environmental problems.³⁰ While this may be true, it is noteworthy that the link between the two is more pronounced in developing countries, like Kenya, where most people derive their livelihoods from the environment.³¹

Thus, while some argued that there is no direct and linear relationship between climate change and violent conflict, under certain circumstances climate-related change can influence factors that lead to or exacerbate conflict. Reduced access to water and extreme weather events may e.g. negatively

²⁴ Ismayilov, G., "Ethnic Conflicts and Their Causes," (2008). Available at https://scholar.google.com/scholar?cluster=11638631732520705425&hl=en&as_sdt=0,5&scioq=Causes+of+Inter-Ethnic+Conflicts+ [Accessed on 2/9/2019].

²⁵ Ibid.

²⁶ See generally, Tembo, N.M., "Ethnic Conflict and the Politics of Greed Rethinking Chimamanda Adichie's," *Matatu*, 40, no. 1 (2012): 173-189.

²⁷ Azuimah, F., "Perception as a Social infrastructure for sustaining the escalation of ethnic conflicts in divided societies in Ghana," *Journal of Alternative Perspectives in the Social Sciences*, vol.3, no. 1 (2011): 260-278, p. 265.

²⁸ Mghanga, M., "Usipoziba Ufa Utajenga Ukuta: Land, Elections, and Conflict in Kenya's Coast Province, Heinrich Böll Stiftung (2010). Available at https://ke.boell.org/sites/default/files/usipoziba_ufa_utajenga_ukuta_book_index.pdf [Accessed on 6/9/2019]; Kenya Human Rights Commission, "Ethnicity and Politicization in Kenya", May 2018, ISBN: 978-9966-100-39-9. Available at <https://www.khrc.or.ke/publications/183-ethnicity-and-politicization-in-kenya/file.html> [Accessed on 6/9/2019].

²⁹ Myers, N., "Environmental Security: What's New and Different?" Available at <http://www.envirosecurity.org/conference/working/newanddifferent.pdf> [Accessed on 11/10/2015], p.3.

³⁰ Ibid, p.3; See also generally, N.R. Biswas, "Is the Environment a Security Threat? Environmental Security beyond Securitization," *International Affairs Review*, Vol. XX, No. 1, Winter 2011.

³¹ See S. Bocchi, et al, 'Environmental Security: A Geographic Information System Analysis Approach—The Case of Kenya,' *Environmental Management* Vol. 37, No. 2, 2005, pp. 186–199, pp. 191-195.

affect food security and undermine the livelihoods of vulnerable households and communities.³² This is especially relevant in understanding the conflicts that often emerge in Kenya's drier regions such as Northern Kenya and Coastal areas, among others.³³

It has rightly been observed that social conflict is not always a bad thing: mass mobilization and civil strife can produce opportunities for beneficial change in the distribution of land and wealth and in processes of governance.³⁴ However, fast-moving, unpredictable, and complex environmental problems can overwhelm efforts at constructive social reform.³⁵ Natural resources are important for meeting the basic needs of most communities in Kenya and the world over. However, these resources are under threat due to various factors which include poverty, climate change, desertification, unsustainable exploitation and environmental degradation, among others. Climate change and biodiversity conservation have thus been said to be the common concern of humanity as all States derive benefits from protective action taken either unilaterally or collectively.³⁶ Indeed, the impacts of climate change are increasingly viewed as global security risks, which will have far-reaching implications for both human and renewable natural systems.³⁷

The Bali Principles of Climate Justice of 2002 (Bali Principles)³⁸ 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. Notably, deforestation has been one of the major problems contributing to climate change in Kenya.³⁹ This problem was even

³² SIDA, "The relationship between climate change and violent conflict," 2018, p.4. Available at <https://www.sida.se/contentassets/c571800e01e448ac9dce2d097ba125a1/working-paper---climate-change-and-conflict.pdf> [Accessed on 2/09/2019].

³³ Human Rights Watch, "There is No Time Left", Climate Change, Environmental Threats, and Human Rights in Turkana County, Kenya, October 15, 2015. Available at <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> [Accessed on 6/09/2019]; Osamba, J., "Political Economy: A Social Cubism Perspective," *ILSA Journal of International & Comparative Law* 8, no. 3 (2002): 941-961; Constitution And Reform Education Consortium, "Building A Culture Of Peace In Kenya: Baseline Report On Conflict-Mapping And Profiles Of 47 Counties In Kenya," April, 2012. ISBN: 978-9966-21-158-3. Available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/CREC_O_2012.pdf [Accessed on 6/09/2019]; Menkhaus, K., "Conflict Assessment: Northern Kenya and Somaliland." Available at SSRN 2589109 (2015).

³⁴ Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases." *International security* 19, no. 1 (1994): 5-40.

³⁵ *Ibid.*

³⁶ Cullet, P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law*, (Aldershot: Ashgate, 2003), p. 3-5.

³⁷ World Economic Forum, "We need to do more to understand how climate change and conflict are linked. Here's why," 2018. Available at <https://www.weforum.org/agenda/2018/09/we-need-to-do-more-to-understand-how-climate-change-and-conflict-are-linked-heres-why/> [Accessed on 2/09/2019].

³⁸ Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 2/09/2019].

³⁹ United Nations Environment Programme, "Deforestation Costing Kenyan Economy Millions of Dollars Each Year and Increasing Water Shortage Risk," 5 November 2012. Available at <https://www.unenvironment.org/news-and-stories/press-release/deforestation-costing-kenyan-economy-millions-dollars-each-year-and> [Accessed on 6/09/2019]; VOA, Kenya Experiencing the Effects of Deforestation, Climate Change, November 1, 2009. Available at <https://www.voanews.com/archive/kenya-experiencing-effects-deforestation-climate-change-0> [Accessed on 6/09/2019]; Republic of Kenya, A report

acknowledged in the Climate Change Policy and there have been attempts to address the same through the enactment of the *Climate Change Act, 2016*⁴⁰ which is meant to provide for the legal and institutional framework for the mitigation and adaptation 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,⁴¹ amongst other efforts by the stakeholders such as the eviction of communities living in Kenya's five water towers - Mau Forest Complex, Mount Kenya, the Aberdares, Mount Elgon and Cherangani.⁴²

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.

There are three types of environmental scarcity: supply-induced scarcity is caused by the degradation and depletion of an environmental resource; demand-induced scarcity results from population growth within a region or increased per capita consumption of a resource, either of which heightens the demand for the resource; and structural scarcity arises from an unequal social distribution of a resource that concentrates it in the hands of relatively few people while the remaining population suffers from serious shortages.⁴³

Environmental deficiencies supply conditions which render conflict all the more likely. They can serve to determine the source of conflict, they can act as multipliers that aggravate core causes of conflict, and they can help to shape the nature of conflict. Moreover they can not only contribute to conflict, they can stimulate the growing use of force to repress disaffection among those who suffer the consequences of environmental decline.⁴⁴ This has been the case in Kenya's arid and

on Forest Resources Management and Logging Activities in Kenya: Findings and Recommendations, April, 2018. Available at <http://www.environment.go.ke/wp-content/uploads/2018/05/Task-Force-Report.pdf> [Accessed on 6/09/2019].

⁴⁰ No. 11 of 2016, Laws of Kenya.

The Act 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 (s.2).

⁴¹ 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)).

⁴² Amnesty International, et al, "Nowhere to go Forced Evictions in Mau Forest, Kenya," Briefing Paper, April 2007. Available at <http://www.knchr.org/Portals/0/GroupRightsReports/Mau%20Forest%20Evictions%20Report.pdf> [Accessed on 6/09/2019]; Rita, D., "Mau eviction will be humane, settlers to get 60 grace period," The Star, 28 August, 2019.

⁴³ Percival, V., & Homer-Dixon, T., "Environmental scarcity and violent conflict: the case of South Africa," *Journal of Peace Research* 35, no. 3 (1998): 279-298, at p.280.

⁴⁴ Myers, N., "Environmental Security: What's New and Different?"

semi-arid areas where pastoralists' tribal clashes over resources have recurred over the years with no successful intervention by the Government.⁴⁵ The limited water and pasture resources creates competition and tension amongst these communities, often leading to conflicts.

The *Bali 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 world-especially those who are vulnerable and marginalized, in particular children and elderly people. These principles envisage a situation where countries will put in place measures geared towards addressing and eliminating any unsustainable production and consumption practices in their territories in a bid to curb environmental degradation.

Indeed, scientists have warned that climate change will hit many African countries more severely than previously thought.⁴⁶ The scientists, from Britain's Meteorological Office and Leeds University, have argued that people in Africa will likely be among the hardest hit by climate change over the coming decades – with less capacity to deal with the impact.⁴⁷ The adverse effects of these climatic changes especially in the Sub-Saharan region, including Kenya have been affirmed and documented by various authors.⁴⁸

The UNESCO has observed that the effects of global warming and climate change impacts are already contributing to increased state fragility and security problems in key regions around the world – conflict in the Middle East and Africa, tensions over fisheries in the South China Sea, and a new political and economic battleground in a melting Arctic Ocean.⁴⁹ UNESCO goes on to state that climate change stresses on natural resources – combined with demographic, economic and political pressures on those resources – can degrade a nation's capacity to govern itself.⁵⁰ This

Available at <http://www.envirosecurity.org/conference/working/newanddifferent.pdf> [Accessed on 11/10/2015], p.4.

⁴⁵ Oba, G., "The Importance Of Pastoralists 'indigenous Coping Strategies For Planning Drought Management In The Arid Zone Of Kenya," *Nomadic Peoples* (2001): 89-119; Oba, G., & Lusigi, W. J., *An overview of drought strategies and land use in African pastoral systems*, Agricultural Administration Unit, Overseas Development Institute, 1987; Oba, G., *Ecological factors in land use conflicts, land administration and food insecurity in Turkana, Kenya*. London: ODI, 1992; Kenya National Commission on Human Rights, "Public Inquiry on Insecurity in the Baringo and the North Rift of Kenya: Literature Review," October 2015, available at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Literature%20Review.pdf?ver=2016-06-20-122534-937> [Accessed on 6/9/2019].

⁴⁶ VOA For Citizen Digital, "Climate change to cause chaos in Africa, warn scientists," Published on: August 6, 2019 07:15 (EAT). Available at <https://citizentv.co.ke/news/climate-change-cause-chaos-africa-warn-scientists-267811/> [Accessed on 2/09/2016].

⁴⁷ Ibid.

⁴⁸ Serdeczny, O., Adams, S., Baarsch, F., Coumou, D., Robinson, A., Hare, W. & Reinhardt, J., "Climate change impacts in Sub-Saharan Africa: from physical changes to their social repercussions," *Regional Environmental Change* 17, no. 6 (2017): 1585-1600.

⁴⁹ UNESCO, "Climate change raises conflict concerns," the UNESCO Courier, 2018-2, available at <https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns> [Accessed on 2/09/2016].

⁵⁰ Ibid; United Nations, "Renewable Resources and Conflict," Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts, 2012. Available at https://www.un.org/en/events/environmentconflictday/pdf/GN_Renewable_Consultation.pdf [Accessed on 6/9/2019]; Sherbinin, A. D., Carr, D., Cassels, S., & Jiang, L., "Population and environment," *Annu. Rev.*

includes its ability to meet its citizens' demands for basic resources – like food, water, energy and employment – also known as its output legitimacy. The threat to output legitimacy can contribute to state fragility, internal conflict, and even state collapse. Seen through this lens, climate change may present a serious challenge to state stability and legitimacy in the Horn of Africa – a region already grappling with numerous challenges before climate change became a factor.⁵¹

The Horn of Africa which includes some of the most vulnerable states in the world – Somalia, Ethiopia, Eritrea, Kenya, Sudan and South Sudan has been reported as a region that exhibits some of the clearest indications of a connection between climate change and conflict – namely, conflicts between agricultural and pastoral communities precipitated by climate-exacerbated droughts and water variability.⁵²

Climate-related environmental change influences violent conflicts when: (a) it negatively affects people's livelihoods; (b) it influences the tactical considerations of armed groups in ongoing conflicts; (c) elites exploit social vulnerabilities and resources; and (d) it displaces people and increases migration in vulnerable and highly vulnerable natural resource dependent contexts.⁵³

Studies have shown that the risk of violence increases, particularly among farmers and pastoralists who depend directly on agro-ecosystems for their livelihoods, when drought, floods or land

Environ. Resour. 32 (2007): 345-373; Evans, A., "Resource scarcity, climate change and the risk of violent conflict." World Development Report 2011: Background Paper. Available at http://web.worldbank.org/archive/website01306/web/pdf/wdr%20background%20paper_evans_0.pdf [Accessed on 6/9/2019]; Yohe, G., Lasco, R., Ahmad, Q. K., UK, N. A., Cohen, S., Janetos, T. & Malone, T., "Perspectives on Climate Change and Sustainability 3." *change* 25, no. 48 (2007): 49; Black, R., Kniveton, D., Skeldon, R., Coppard, D., Murata, A., & Schmidt-Verkerk, K., "Demographics and climate change: future trends and their policy implications for migration," Development Research Centre on Migration, Globalisation and Poverty, Brighton: University of Sussex (2008).

⁵¹ Ibid; See also Vallings, C., & Moreno-Torres, M., Drivers of fragility: What makes states fragile? No. 668-2016-45529. 2005; Rotberg, R.I., "Failed states, collapsed states, weak states: Causes and indicators," State failure and state weakness in a time of terror 1 (2003): 25; DiJohn, J., Conceptualising the causes and consequences of failed states: a critical review of the literature. London: Crisis States Research Centre, 2008. Available at <http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/wp25.2-conceptualising-the-causes-and-consequences.pdf>.

⁵² Ibid; See also Reliefweb, "Greater Horn of Africa Climate Risk and Food Security Atlas," Report from Government of Sweden, Intergovernmental Authority on Development, World Food Programme, Published on 27 Sep 2018 Available at <https://reliefweb.int/report/world/greater-horn-africa-climate-risk-and-food-security-atlas> [Accessed on 6/9/2019]; Reliefweb, "Climate Change Profile: Greater Horn of Africa," Report

from Government of the Netherlands, Published on 05 Feb 2019. Available at <https://reliefweb.int/report/world/climate-change-profile-greater-horn-africa> [Accessed on 6/9/2019]; Mengisteab, K., Critical factors in the Horn of Africa's raging conflicts. Nordiska Afrikainstitutet, 2011; United Nations Economic Commission for Africa, "Human and Economic Cost of Conflict in the Horn of Africa: Implications for a Transformative and Inclusive Post-Conflict Development," 2016. Available at <https://repository.uneca.org/bitstream/handle/10855/23726/b11836143.pdf?sequence=1> [Accessed on 6/9/2019].

⁵³ World Economic Forum, "We need to do more to understand how climate change and conflict are linked. Here's why," 2018. Available at <https://www.weforum.org/agenda/2018/09/we-need-to-do-more-to-understand-how-climate-change-and-conflict-are-linked-heres-why/> [Accessed on 2/09/2019].

overuse and degradation lead to decreasing production and economic loss.⁵⁴ This is usually explained as reduced opportunity costs of using violence to seize control over resources compared to traditional livelihoods. As already pointed out above, these are the risks that persistently face the arid and semi-arid areas in Kenya and the horn of Africa in general.

n. The Impact of Politics and Government Policies on Ethnic Conflicts

It has been argued that environmental scarcity emerges within a political, social, economic, and ecological context and interacts with many of these contextual factors to contribute to violence.⁵⁵ Arguably, contextual factors include the quantity and vulnerability of environmental resources, the balance of political power, the nature of the state, patterns of social interaction, and the structure of economic relations among social groups.⁵⁶ These factors, it has been observed, affect how resources will be used, the social impact of environmental scarcities, the grievances arising from these scarcities, and whether grievances will contribute to violence.⁵⁷

Notably, when some groups of people fight across ethnic lines it is nearly always the case that they fight over some fundamental issues concerning the distribution and exercise of power, whether economic, political, or both.⁵⁸ Notably, groups engaged in internal conflict are often united by a common ethnic or religious identity.⁵⁹ The tribal conflicts in Kenya over the past decades have often taken this shape, with some informed by political influences while others are based on resource scarcity but ultimately, they may all be connected as political power cannot be divorced from resource control.⁶⁰

Arguably, government policies sometimes also play a role in causing or worsening ethnic or internal conflict situations. For instance, the *Endorois case*,⁶¹ where the Endorois 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 demonstrates

⁵⁴ SIDA, "The relationship between climate change and violent conflict," 2018, p.10. Available at <https://www.sida.se/contentassets/c571800e01e448ac9dce2d097ba125a1/working-paper---climate-change-and-conflict.pdf> [Accessed on 2/09/2019].

⁵⁵ Percival, V., & Homer-Dixon, T., "Environmental scarcity and violent conflict: the case of South Africa," *Journal of Peace Research* 35, no. 3 (1998): 279-298, at p.279.

⁵⁶ *Ibid.*, p.279.

⁵⁷ *Ibid.*, p. 279; see also Gleditsch, N.P., "Armed conflict and the environment: A critique of the literature," *Journal of peace research* 35, no. 3 (1998): 381-400.

⁵⁸ Brown, G. K., & Stewart, F., "Economic and political causes of conflict: An overview and some policy implications," *Managing Conflict in a World Adrift* (2015): 199-227, at p. 204.

⁵⁹ *Ibid.*

⁶⁰ Wangeci, N. L., Njoroge, M. N. and Manyasa, E., "Causes of armed ethnic conflict and the implication for peace education in Nakuru county, Kenya," *Journal of Special Needs and Disabilities Studies*, 2014. Available at <https://ir-library.ku.ac.ke/handle/123456789/13574> [Accessed on 2/9/2019]; Kagwanja, P.M., "Facing Mount Kenya or facing Mecca? The Mungiki, ethnic violence and the politics of the Moi succession in Kenya, 1987–2002," *African Affairs* 102, no. 406 (2003): 25-49; Kanyinga, K., "The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya." *Journal of Contemporary African Studies* 27, no. 3 (2009): 325-344; Mueller, S.D., "Dying to win: Elections, political violence, and institutional decay in Kenya," *Journal of Contemporary African Studies* 29, no. 1 (2011): 99-117.

⁶¹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, No. 276 / 2003.

how the Government's policies that exclude communities from decision-making policies can adversely affect the livelihoods of such group of people resulting in conflicts. The African Commission on Human and Peoples' Rights (ACHPR) found Kenya to be in violation of the African Charter,⁶² 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. There is no evidence so far that this decision was acted upon by the Government.⁶³

Such scenarios as the one of Endorois community can fuel internal conflicts where, if and when such a group of people is displaced, they have to look for new settlement areas. More often than not, they will seek to settle among other communities. The resultant friction and tension can result in ethnic conflicts. While the governments' capacity to repress rebellions may quell the open conflict, it has been argued that they often fail to address the underlying economic, social, or political causes.⁶⁴ Political refugees have often suffered under the hands of locals who consider them foreign, either in their country or other countries.⁶⁵

There is scholarly evidence to suggest that economic and social horizontal inequalities⁶⁶ provide the conditions that lead to dissatisfaction among the general population and, consequently, give rise to the possibilities of political mobilization, but political exclusion is likely to trigger conflict by giving group leaders a powerful motive to organize in order to gain support.⁶⁷ There is also often a provocative cultural dimension in group mobilization.⁶⁸ The 2007/2008 post-election violence in Kenya may be explained this way.⁶⁹

Political tensions such as those witnessed in post-election violence of 2007-2008 in Kenya also caused ethnic conflicts resulting in deaths.⁷⁰ This mainly involved a class of political leaders using certain ethnic groups to either capture power or remain in power.⁷¹ Another example of political

⁶² 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).

⁶³ Koech, G., "Agency wants proof that Ogieks can protect water towers," *The Star*, 10 June, 2019. Available at <https://www.the-star.co.ke/news/2019-06-10-agency-wants-proof-that-ogieks-can-protect-water-towers/> [6/9/2019].

⁶⁴ Brown, G. K., & Stewart, F., "Economic and political causes of conflict: An overview and some policy implications," *Managing Conflict in a World Adrift* (2015): 199-227, at p. 199.

⁶⁵ Human Rights Watch, *Forced to Flee: Violence against the Tutsis in Zaire*, 1 July 1996, A802, available at: <https://www.refworld.org/docid/3ae6a8200.html> [accessed 5/9/ 2019].

⁶⁶ Horizontal inequalities are multidimensional, involving access to a variety of resources along economic, social, and political vectors or dimensions.

⁶⁷ Brown, G. K., & Stewart, F., "Economic and political causes of conflict: An overview and some policy implications," *Managing Conflict in a World Adrift* (2015): 199-227, at p. 206.

⁶⁸ *Ibid*, p. 206.

⁶⁹ Stewart, F., "Horizontal inequalities in Kenya and the political disturbances of 2008: some implications for aid policy," *Conflict, Security & Development* 10, no. 1 (2010): 133-159.

⁷⁰ Maupeu, H., "Revisiting Post-Election Violence," *The East African Review*, No. 38, 2008, p. 193-230. Available at <https://journals.openedition.org/eastafrica/719> [Accessed on 5/9/2019].

⁷¹ Lafargue, J., & Katumanga, M., "Kenya in turmoil: Post-election violence and precarious pacification," *Les Cahiers d'Afrique de l'Est/The East African Review* 38 (2008): 11-32; Centre for Strategic and International Studies, "Background on the Post-Election Crisis in Kenya," August 6, 2009. Available at <https://www.csis.org/blogs/smart-global-health/background-post-election-crisis-kenya> [Accessed on 5/9/2019]; Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of

influence coupled with natural resource scarcity on eruption of inter-ethnic conflicts is the Rwanda genocide of 1994.⁷² It has been documented that the discontentment of the poor peasantry driven by environmental and population pressures, in conjunction with drought and famine, made leaders of the Tutsi rebellion based in Uganda believe that there was an opening for war against the regime. When the country became deeply entangled in the war, radical leaders were able to re-center the political dialectic, from rich versus poor, to Tutsi against Hutu, inciting ethnic hatred and the spiral of political violence which led to genocide in 1994.⁷³

It has been observed that with scarcity, distributional conflicts over access to natural resources will become much more pressing, both within and between countries.⁷⁴ As a result, it has been argued that while seeking to address the all the above mentioned three factors of environmental degradation, population growth and inequalities, deemed as 'sources' of environmental scarcity and conflict, they must be understood as resulting from political decisions.⁷⁵ They must therefore not be depoliticized wholly as government policies may affect the direction that such a conflict takes.⁷⁶ This is because inequalities in access to and control over resources cannot be detached from the political economic conflicts already existent in society.⁷⁷

o. Extreme Levels of Poverty

Eradicating extreme poverty, promoting sustainable consumption and production, and managing the planet's natural resource base for the benefit of all are considered as the overarching challenges of sustainable development.⁷⁸ Notably, most Kenyan communities either rely on agriculture or pastoralism or both and any adverse climatic conditions may subject them to extreme levels of poverty due to the lost livelihoods.⁷⁹

Governance," March 16, 2008. Available at <https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance> [Accessed on 5/9/2019].

⁷² Moodley, V., Gahima, A., & Munien, S., "Environmental causes and impacts of the genocide in Rwanda: Case studies of the towns of Butare and Cyangugu," *African Journal on Conflict Resolution* 10, no. 2 (2010); Human Rights Watch, *Forced to Flee: Violence Against the Tutsis in Zaire*, 1 July 1996, A802, available at: <https://www.refworld.org/docid/3a66a8200.html> [accessed 5 September 2019]; Gasana, J.K., *Natural resource scarcity and violence in Rwanda, 1999*. Available at https://www.iisd.org/pdf/2002/envsec_conserving_4.pdf [Accessed on 5/9/2019].

⁷³ Gasana, J.K., *Natural resource scarcity and violence in Rwanda, 1999*, at p.207. Available at https://www.iisd.org/pdf/2002/envsec_conserving_4.pdf [Accessed on 5/9/2019]; Uvin, P., "Prejudice, crisis, and genocide in Rwanda," *African Studies Review* 40, no. 2 (1997): 91-115; Batware, B., "Rwandan Ethnic Conflicts: A historical look at Root Causes," Unpublished master's thesis). Peace and Conflicts Studies, European Peace University, Austria (2012).

⁷⁴ Department of Economic and Social Affairs of the United Nations Secretariat, "World Economic and Social Survey 2013: Sustainable Development Challenges," E/2013/50/Rev. 1S T/ESA /34 4, p.20. Available at <https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [Accessed on 5/9/2019].

⁷⁵ MacDermott, J., "The livelihood conflicts approach on trial in Rwanda: towards a political critique," *Development Studies Institute Working Paper No. 01 21* (2001), p.4. Available at <http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP21.pdf> [Accessed on 5/9/2019].

⁷⁶ *Ibid*, p.4.

⁷⁷ *Ibid*, p.4.

⁷⁸ Department of Economic and Social Affairs of the United Nations Secretariat, "World Economic and Social Survey 2013: Sustainable Development Challenges," E/2013/50/Rev. 1S T/ESA /34 4, p.3. Available at <https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [Accessed on 5/9/2019].

⁷⁹ FAO, "FAO in Kenya: Kenya at a Glance," available at <http://www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/> [Accessed on 6/9/2019].

It has been argued that environmental degradation interacted with population growth and inequalities cause a loss of livelihoods and subsequently render a large part of the population as ready perpetrators of violence such as was the case in the Rwanda genocide.⁸⁰ In such a scenario, it has been observed, poverty is integrated in the concept in that the loss of livelihood is presented as a “rapid transition from a previous stable condition of relative welfare into a condition of poverty or destitution”.⁸¹ This, it is contended paves the way for mobilisation of popular support for violent conflict at a rate that would not otherwise be possible to achieve.⁸² Thus, livelihood losses are conceived of as a result of the three factors: environmental degradation; population growth; and/or inequalities.⁸³

Thus, environmental insecurity coupled with extreme levels of poverty often give rise to conflicts as the affected group of people seek to meet their basic needs.⁸⁴ 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.⁸⁵ 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.⁸⁶

A broader conception of environmental security, it has been argued, is crucial because, at least in the long term, security, even in the traditional sense, can be ensured only if security in the environmental sense is emphasized. Only where ecological balance is maintained, resources are protected, and supplies ensured, will the potential for conflict be significantly reduced.⁸⁷ While arguing for the connection between environmental security and human security as envisaged in the sustainable development agenda, it has been argued that *few threats to peace and survival of the human community are greater than those posed by the prospects of cumulative and irreversible degradation of the biosphere on which human life depends. True security cannot be achieved by mounting buildup of weapons (defence in a narrow sense), but only by providing basic conditions*

⁸⁰ MacDermott, J., "The livelihood conflicts approach on trial in Rwanda: towards a political critique," Development Studies Institute Working Paper No. 01 21 (2001), p.1. Available at <http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP21.pdf> [Accessed on 5/9/2019].

⁸¹ Ibid, p. 1.

⁸² Ibid, p.1.

⁸³ Ibid, p.1; see also Meierding, E., "Climate change and conflict: avoiding small talk about the weather." *International Studies Review* 15, no. 2 (2013): 185-203; Upreti, B. R., & Sharma, S. R., *Nepal: Transition to Transformation*, Edited by Kailash Nath Pyakuryal, Human and Natural Resources Studies Center, Kathmandu Univ., 2008.

⁸⁴ Voices of Youth, "The relationship between poverty and the environment," November 5, 2016. Available at <https://www.voicesofyouth.org/blog/relationship-between-poverty-and-environment> [Accessed on 5/9/2019]; Department of Economic and Social Affairs of the United Nations Secretariat, "World Economic and Social Survey 2013: Sustainable Development Challenges," E/2013/50/Rev. 1S T/ESA /34 4, available at <https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [Accessed on 5/9/2019].

⁸⁵ 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.

⁸⁶ 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.

⁸⁷ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016, p.164.

for solving non-military problems which threaten them. Our survival depends not only on military balance, but on global cooperation to ensure a sustainable environment (emphasis added).⁸⁸

The persistence of inequalities, whether in incomes, or in access to services, decent jobs, land or technology, it has been observed, hints at their entrenched structural causes. Discrimination and exclusion, based on gender, age, disability or ethnicity, have to be tackled directly in order that greater inclusiveness and transformative change may be achieved.⁸⁹

Arguably, as long as the communities living in arid and semi-arid areas in Kenya suffer disproportionate levels of environmental injustice and continue living in abject poverty coupled with feelings of discrimination and exclusion, it may not be possible for the Government of Kenya to guarantee security in these regions. Peace initiatives must look deeper than the symptoms of conflicts: they must address the environmental injustice in these regions and the associated political issues.

3. Environmental Justice in Context

Notably, the concept of environmental justice was first developed in the early 1980s during the social movement in the United States on the fair distribution of environmental benefits and burdens.⁹⁰ It has been defined as “the fair treatment and meaningful involvement of all people regardless of race, color, sex, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies”.⁹¹ It has also been opined that 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.⁹²

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.⁹³

⁸⁸ World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, 1987, A/42/427.

⁸⁹ Department of Economic and Social Affairs of the United Nations Secretariat, “World Economic and Social Survey 2013: Sustainable Development Challenges,” E/2013/50/Rev. 1S T/ESA /34 4, p.21. Available at <https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [Accessed on 5/9/2019].

⁹⁰ Liu, L., Liu, J., & Zhang, Z., "Environmental justice and sustainability impact assessment: In search of solutions to ethnic conflicts caused by coal mining in Inner Mongolia, China," *Sustainability*, vol.6, no. 12 (2014): 8756-8774, at p.8760.

⁹¹ *Ibid*, p. 8760.

⁹² 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.

⁹³ Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006), p.8. Available at

In Africa, environmental justice mostly entails the right to have access to, use and control over natural resources by communities.⁹⁴ The lack of framework to ensure this thus often results in conflicts. Most of Kenyan communities also heavily rely on environmental resources to sustain their livelihoods and any climatic conditions that affect these resources may easily strain relations among communities sharing the common resources such as water and land resources.

It is in recognition of these environmental rights and hazards that the 2010 Constitution of Kenya 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 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.⁹⁵ Further, 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.⁹⁶

These obligations are therefore meant to inform all the laws, policies, plans and programmes that the state puts in place in discharging their constitutional mandate on environmental protection and natural resources conservation.

While there have been efforts at ensuring that the constitutional principles on sound environmental governance are incorporated into the post-constitution laws and policies, their implementation remain slow. Communities living in arid and semi-arid areas continue to suffer disproportionate levels of environmental injustice, especially in the face of climate change. The *Climate Change Act 2016* establishes the National Climate Change Council⁹⁷ whose functions include to, *inter alia*: advise the national and county governments on legislative and other measures necessary for mitigating and adapting to the effects of climate change; provide coordination between and amongst various governmental and non-governmental stakeholders dealing with matters related to climate change; advise the national and county governments on regional and international conventions, treaties and agreements on climate change to which Kenya is a party or should be a party to and follow up the implementation of the conventions, treaties and agreements to which Kenya is a party; and coordinate negotiations on climate change related issues at the local, regional and international levels.⁹⁸

<http://www.gov.scot/resource/doc/123822/0029776.pdf> [Accessed on 3/09/2019].

⁹⁴ Obiora, L., "Symbolic Episodes in the Quest for Environmental Justice," *Human Rights Quarterly*, Vol.21, No. 2, 1991, p. 477.

⁹⁵ Constitution of Kenya 2010, Art. 69(1).

⁹⁶ *Ibid*, Art. 69(2).

⁹⁷ S. 4(1).

⁹⁸ s. 5, No. 11 of 2016, Laws of Kenya.

However, there is no evidence yet of what county governments, especially in the most affected regions have done in line with the provisions of the Act to shield the communities from the adverse climatic changes. Most of the county governments in the arid and semi-arid regions still heavily rely on the national government when disaster strikes to supply relief food and water and other basic needs, despite annual allocation of funds.⁹⁹

Incidences of hunger and famine especially from Northern Kenya region are still rampant. These situations also come with conflicts among communities over grazing land and water.¹⁰⁰ In 2017, the Kenyan government declared a drought that affected 23 counties a national disaster. Nearly 2.7 million people were estimated to be in need of food aid, representing approximately 20 percent of the population in pastoral areas and 18 percent in marginal agricultural areas. The government also appealed for foreign aid back then.¹⁰¹ In 2019, there were still reports of hunger related deaths and conflicts among the same communities.¹⁰²

These incidences have become too common, with the hunger reports being aired every year, and no tangible evidence of long-term plans in place. The affected communities are never empowered to tackle these harsh climatic conditions but instead, they are left at the mercies of relief food donors and governments every year. This is despite the constitutional and statutory legal and institutional frameworks that are meant to address these situations.

4. Addressing Inter-Ethnic Conflicts Through Enhanced Environmental Justice in Kenya for Sustainable development

It has rightly been pointed out that widespread insecurity causes large-scale migration of citizens away from the war-torn homelands resulting in economic stagnation and decline. There is a suggestion that conflicts are not the result of just one single factor, such as the perceived difference between peoples of different ethnic affiliations. As already pointed out elsewhere in this paper, conflicts occur when people (or parties) perceive that, as a consequence of a disagreement, there is a threat to their needs, prospects, interests or concerns.¹⁰³

⁹⁹ Gulleid, M., "Nearly one million drought-hit Kenyans at risk of starvation," TRTWorld News Africa, 19 March, 2019. Available at <https://www.trtworld.com/africa/nearly-one-million-drought-hit-kenyans-at-risk-of-starvation-25088> [Accessed on 7/9/2019].

¹⁰⁰ Mutanu, B., "Thousands of Kenyans facing starvation after harsh weather: report," Daily Nation, Saturday January 19 2019. Available at <https://www.nation.co.ke/news/New-report-shows-thousands-of-Kenyans-are-faced-with-starvation/1056-4941392-l8ma79/index.html> [Accessed on 7/9/2019]; see also Gulleid, M., "Nearly one million drought-hit Kenyans at risk of starvation," TRTWorld News Africa, 19 March, 2019. Available at <https://www.trtworld.com/africa/nearly-one-million-drought-hit-kenyans-at-risk-of-starvation-25088> [Accessed on 7/9/2019];

¹⁰¹ Gulleid, M., "Nearly one million drought-hit Kenyans at risk of starvation," TRTWorld News Africa, 19 March, 2019. Available at <https://www.trtworld.com/africa/nearly-one-million-drought-hit-kenyans-at-risk-of-starvation-25088> [Accessed on 7/9/2019].

¹⁰² Ibid; Mutanu, B., "Thousands of Kenyans facing starvation after harsh weather: report," Daily Nation, Saturday January 19 2019. Available at <https://www.nation.co.ke/news/New-report-shows-thousands-of-Kenyans-are-faced-with-starvation/1056-4941392-l8ma79/index.html> [Accessed on 7/9/2019].

¹⁰³ Azuimah, F., "Perception as a Social infrastructure for sustaining the escalation of ethnic conflicts in divided societies in Ghana," *Journal of Alternative Perspectives in the Social Sciences*, vol.3, no. 1 (2011): 260-278, p. 268.

The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy.¹⁰⁴ Environmental justice ensures equitable treatment of people in ensuring access to and sharing of environmental resources and justice in environmental matters.¹⁰⁵

Environmental justice is touted as the minimum ethical stance of environmental ethics, with two dimensions: distributive environmental justice and procedural/participatory environmental justice.¹⁰⁶ Distributive environmental justice concerns the equal distribution of environmental benefits and burdens, whereas participatory environmental justice focuses on opportunities to participate in decision-making.¹⁰⁷

Environmental justice has also been defined and articulated in two parts. The first part is justice as a right: environmental justice refers to “the right to a safe, healthy, productive, and sustainable environment for all, where ‘environment’ is considered in its totality to include the ecological (biological), physical (natural and built), social, political, aesthetic, and economic environments.”¹⁰⁸ Second, environmental justice is a set of conditions that support the fulfillment of that right, “whereby individual and group identities, needs, and dignities are preserved, fulfilled, and respected in a way that provides for self-actualization and personal and community empowerment.”¹⁰⁹ Such a comprehensive definition extends beyond a traditional view of environmental justice as a matter of distribution of benefits and risks.

In order to achieve environmental justice, there are four broad areas where changes in policy and practice are needed: **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; **Assessment**: projects and policies need to be assessed for their distributional impacts; **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 **Integration**: of social and environmental policy aims (emphasis added).¹¹⁰

¹⁰⁴ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), p. 332.

¹⁰⁵ United States Environmental Protection Agency, ‘Environmental Justice Analysis’, available at <http://www.epa.gov/sustainability/analytics/environmental-justice.htm> [Accessed on 5/09/2019].

¹⁰⁶ Yang, T., ‘Towards an Egalitarian Global Environmental Ethics,’ *Environmental Ethics and International Policy*, op cit., p. 32.

¹⁰⁷ Ibid, p. 32.

¹⁰⁸ Braun, A., "Governance Challenges in Promoting Environmental Justice," *Beyond Intractability* (2011). Available at <https://www.beyondintractability.org/essay/environmental-justice-challenges> [Accessed on 5/09/2019].

¹⁰⁹ Ibid.

¹¹⁰ ESRC Global Environmental Change Programme, ‘Environmental Justice: Rights and Means to a Healthy Environment for All,’ Special Briefing No.7, University of Sussex., November 2001. Available at https://www.foe.co.uk/sites/default/files/downloads/environmental_justice.pdf [Accessed on 5/9/2019], p. 11.

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.¹¹¹ Ideally, having in place the necessary policy, legal and institutional framework is crucial in ensuring environmental justice at the global, regional and national levels. However, even with these, it may not be possible to achieve environmental justice if the people are not meaningfully empowered to utilize these frameworks. People should be able to participate meaningfully and to take advantage of the existing policy, legal and institutional framework. This is not possible where people do not fully appreciate the implications of environmental sustainability on their lives. Environmental education comes in handy in empowering people to participate in finding viable solutions for environmental protection and conservation.¹¹²

The World Economic Forum has rightly observed that the climate–conflict linkage primarily plays out in contexts that are already vulnerable to climate change, and where income is highly dependent on agriculture and fishing.¹¹³ Therefore, it is important to support the development of alternative sources of income, to increase the coping capacity of communities to manage temporary losses of income and to strengthen communities’ resilience in order to mitigate conflict risks.¹¹⁴ Some of the suggestions that have been made in reference to this include insurance schemes that smooth out the annual income of vulnerable populations, a reduction in income sensitivity to climate conditions, legal reform and improved land rights, drought preparedness programmes and agricultural assistance.¹¹⁵ This is because previous programmes, such as food assistance programmes, have been followed by either a decrease or an increase in violence at different periods of implementation, as they are likely to alter the power relations in a community.¹¹⁶

Food assistance programmes are temporary measures that cannot be expected to deal with this perennial problem of hunger and famine. The affected communities will continue to compete for the scarce resources and conflicts may thus be inevitable.

Empowerment may be the only way that these inter-ethnic conflicts may be fully addressed. Such empowerment may be social, economic or political. However, as already pointed out, environmental and natural resources form the basis of the livelihoods of most communities whether

¹¹¹ ESRC Global Environmental Change Programme, ‘Environmental Justice: Rights and Means to a Healthy Environment for All,’ op cit.; See also Mbote, P.K. & Cullet, P., ‘Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management,’ op cit.

¹¹² Burer, S., "Influence of environmental education on conserving environment in Kenya: Case study Moiben Constituency, Uasin Gishu County (Unpublished Master’s Thesis, University of Nairobi)," Research Project, University of Nairobi (2014). Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/74208/Burer_Influence%20of%20Environmental%20Education%20on%20Conserving%20Environment%20In%20Kenya%2C%20Case%20Study%20Moiben%20Constituency%2C%20Uasin%20Gishu%20County.pdf?sequence=3&isAllowed=y [Accessed on 6/9/2019]; Le Grange, L., "Think piece: sustainability education and (curriculum) improvisation," Southern African Journal of Environmental Education 32, no. 1 (2016): 26-36; Sauvé, L., "Environmental education and sustainable development: A further appraisal," Canadian Journal of Environmental Education 1 (1996): 7-34.

¹¹³ World Economic Forum, “We need to do more to understand how climate change and conflict are linked. Here's why,” 2018. Available at <https://www.weforum.org/agenda/2018/09/we-need-to-do-more-to-understand-how-climate-change-and-conflict-are-linked-heres-why/> [Accessed on 2/09/2019].

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

pastoralists or farmers. As a result, the conservation of these environmental and natural resources needs to be enhanced as a way of promoting environmental justice.

The disproportionate burden of environmental pollution and degradation borne by some communities especially in the arid and semi-arid regions ought to be addressed by the county and national governments appropriately.

There is need for the governments, both national and county, to use inclusive and collaborative efforts with communities to study and address environmental challenges that lead to inter-ethnic conflicts. The Constitution requires that the national values and principles of governance 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.¹¹⁷ These national values and principles of governance include, 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; and sustainable development.¹¹⁸ These values and principles require that the government stakeholders should not make decisions, including those on environmental and natural resources governance, without including the communities who may be affected by the said decisions.

Inclusion may be achieved in different ways including through participatory conflict management mechanisms such as Alternative Dispute Resolution (ADR) mechanisms which include negotiation and mediation, as envisaged under the Constitution of Kenya¹¹⁹ and other statutory provisions¹²⁰. Conflict management is 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.¹²¹ Conflict management is seen as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively.¹²² Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.¹²³ Communities' involvement and inclusion is thus important. They may participate directly or through traditional dispute resolution mechanisms, peace committees, Non-Governmental organisations, religious bodies, among other bodies within the communities. These processes should include the different stakeholders or players in order to come up with lasting peace outcomes.

¹¹⁷ See Articles 10 (1) and 69, Constitution of Kenya.

¹¹⁸ Article 10 (2), Constitution of Kenya.

¹¹⁹ Article 60, 67, 159, Constitution of Kenya 2010.

¹²⁰ See Community Land Act, No. 27 of 2016, Laws of Kenya (Government Printer, Nairobi, 2016); Land Act, No. 6 of 2012, Laws of Kenya; Environment and Land Act, No. 19 of 2011, Laws of Kenya.

¹²¹ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food And Agriculture Organization of The United Nations, Rome, 2005), available at http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf [Accessed on 5/9/2019].

¹²² Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 5/9/2019].

¹²³ Ibid.

Courts should also be actively involved in ensuring that where communities fail to be included¹²⁴, such government decisions should not be upheld until the constitutional provisions are reflected in such processes. This is because courts also have a critical role to play in environmental conservation and protection.¹²⁵

Apart from inclusion in decision-making and governance matters, these communities should be empowered economically and socially in a way that ensures that they have a diversified source of livelihood in order to insulate them against climate change and other adverse environmental factors. This is also a way of ensuring that pressure on available environmental resources is minimised and subsequently reduce or prevent emergence of inter-ethnic conflicts.

5. Conclusion

Inter-ethnic conflicts in Kenya may be attributed to different factors. However, some of the major ones revolve around environmental resources. This paper argues that addressing inter-ethnic conflicts in Kenya requires first dealing with the environmental challenges that prevent achievement of environmental justice in Kenya. This minimizes the predisposing factors that may aggravate the conflict situation. Ensuring that communities living in ethnic conflict prone areas enjoy environmental justice can go a long way in effectively addressing inter-ethnic conflicts in Kenya.

¹²⁴ Article 10, 21, Constitution of Kenya 2010.

¹²⁵ Article 10, 21, 42, 70, Constitution of Kenya 2010; Peter K. Waweru v Republic [2006] eKLR, Misc. Civil Application No. 118 of 2004.

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Abstract

Environmental pollution has become a major challenge, not only in Kenya but also across the globe, especially in the era of seeking faster economic development to take care of the ballooning human population in different countries. The Sustainable development agenda was formulated to help achieve the balance between development and environmental protection. Despite the development of the comprehensive sustainable development principles, there seems to have been slow progress in their implementation especially in curbing environmental pollution. Kenya has only seen increase in environmental pollution across the country and this threatens not only the environment but also human beings livelihoods that rely on a healthy environment. In the context of the constitutionally guaranteed right to a clean and healthy environment, this paper discusses how the problem of pollution can be dealt with in Kenya as a key step towards achieving sustainable development.

1. Introduction

Recently, the Kenyan media has been awash with reports of increased and unregulated cases of pollution. This has ranged from water, air and soil pollution, among others.¹ However, this does not imply that pollution is a Kenyan problem only. On the contrary, there have been increased cases of various forms of pollution the world over.² This is despite the presence of some legal and institutional frameworks meant to control the problem. At the international level and national environmental laws, environmental law has evolved to recognize substantive rights with relation to the environment, such as the rights implied in the common heritage of mankind and the right to be free from toxic pollution, among others.³

The Constitution of Kenya guarantees the right of every person to a clean and healthy environment including 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 69.⁴ One of the obligations of the State under Article 69 is to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the

¹ Odinga, T., "Focus on miners, farmers as soil pollution rises," Business daily, Tuesday, December 4, 2018. Available at <https://www.businessdailyafrica.com/datahub/3815418-4881226-11dxf1kz/index.html> ; Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," BMC public health 14, no. 1 (2014): 377.

² World Health organization, "9 out of 10 people worldwide breathe polluted air, but more countries are taking action," 2 May 2018. Available at <https://www.who.int/news-room/detail/02-05-2018-9-out-of-10-people-worldwide-breathe-polluted-air-but-more-countries-are-taking-action>

³ United Nations, UNEP Compendium on Human Rights and the Environment: Selected international legal materials and cases, United Nations Environment Programme; Center for International Environmental Law (2014). Available at <http://wedocs.unep.org/handle/20.500.11822/9943>

⁴ Art. 42; Art. 70(1) of the Constitution 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.

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equitable sharing of the accruing benefits.⁵ According to the Kenya's National Land Policy 2009⁶, Kenya faces a number of environmental problems including the degradation of natural resources such as forests, wildlife, water, marine and coastal resources as well as soil erosion and the pollution of air, water and land. No doubt mining will escalate the situation unless environmental management is integrated into mining activities. There have been nationwide reports indicating that raw water in Kenya is too polluted with chemicals and heavy metals to be fit for irrigation or human and livestock consumption.⁷

This paper seeks to add to the existing literature on how the problem of pollution in Kenya can be dealt with effectively. While this paper discusses environmental pollution in Kenya, it will specifically focus on air, water, land and noise pollution since these are the most common forms of pollution in Kenya.⁸

2. Environmental Pollution: Meaning and Forms

Environmental pollution has been defined as 'the contamination of the physical and biological components of the earth/atmosphere system to such an extent that normal environmental processes are adversely affected'.⁹ Environmental Pollution has also been defined as 'any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life'.¹⁰

Pollutants strain ecosystems and may reduce or eliminate populations of sensitive species. Contamination may reverberate along the food chain causing mass destruction.¹¹ An example is the use of herbicides and pesticides in agricultural land. Some of these chemicals seep into rivers that flow through protected areas, causing poisoning of wildlife which drinks from the river. Another problem is the dumping of solid waste into rivers that flow through protected areas. Solid

⁵ Art. 69(1) (a), Constitution of Kenya, 2010.

⁶ Republic of Kenya, National Land Policy (Government Printer, Nairobi, 2009).

⁷ Nasike, C., "Enforce measures to curb water pollution," *Business Daily*, Thursday, August 22, 2019. Available at <https://www.businessdailyafrica.com/analysis/letters/Enforce-measures-to-curb-water-pollution/4307714-5245596-tdpn9y/index.html> [Accessed on 9/9/2019].

⁸ This list is not exhaustive as such Acts as the Radiation Protection Act, Cap 243, Laws of Kenya Revised Edition 2012 [1985], seeks to provide for the protection of the public and radiation workers from the dangers arising from the use of devices or material capable of producing ionizing radiation and for connected purposes. Sec. 8 (1) thereof prohibits any person, subject to such exemptions as may be prescribed under regulations made under this Act, to—(a) manufacture or otherwise produce; (b) possess or use; (c) sell, dispose of or lease, loan or deal with; (d) import or cause to be imported; or (e) export or cause to be exported, any irradiating device or radioactive material except under and in accordance with a licence issued under this Act.

⁹ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013, p.2.

¹⁰ Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> [Accessed on 9/9/2019].

¹¹ FIAN International, 'Study 3: Ecodestruction and the Right to Food: The Cases of Water and Biodiversity,' *Starving the Future*, June 2002, available at <http://www.fian.at/assets/Ecodestruction02.pdf> [Accessed 20/9/2019].

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waste management which is constitutionally delegated to county governments has been a big problem across the country.¹²

Pollution has been attributed to many factors which include but not limited to waste by-products emanating from industrialization of our society, the introduction of motorized vehicles, and the explosion of the human population, leading to an exponential growth in the production of goods and services.¹³ This is mainly because of the indiscriminate discharge of untreated industrial and domestic wastes into waterways, the spewing of thousands of tons of particulates and airborne gases into the atmosphere, the "throwaway" attitude toward solid wastes, and the use of newly developed chemicals without considering potential consequences has resulted in a lot of environmental disasters throughout the world.¹⁴

A major cause of pollution in coastal ecosystems is construction of hotels and other facilities in areas that are not on the sewerage lines.¹⁵ Beach resorts and some households in Mombasa have constructed onsite sewage management systems such as septic tanks and soakage pits.¹⁶ However, these often cause groundwater contamination which in turn causes considerable coral reef dieback and threatens the proliferation of marine life.¹⁷ The Wildlife Conservation and Management Act, 2013¹⁸ deals with pollution by making it an offence to pollute wildlife habitats.¹⁹ The Act applies the polluter pays principle and environmental restoration alongside payment of hefty fines for persons convicted of polluting wildlife habitats.²⁰ EMCA has very substantive provisions on pollution of the environment and gives deterrent penalties for violation of those provisions. The courts have further upheld the provisions of EMCA relating to pollution of wildlife resources and one such incidence was in the case of *Kwanza Estates LTD v Kenya Wildlife Service*,²¹ where the court issued an injunction stopping the construction of a public toilet on the beachfront without approval from NEMA holding that the actions had potentially negative effects on the environment. Environmental pollution is a threat to not only the sustainable development agenda but also to the very existence of the humankind. Environmental law thus seeks to control the use of one's property and human behaviour so as to permit a habitable environment and to minimize adverse ecological effects.²²

¹² Schedule 4, Constitution of Kenya 2010.

¹³ Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> [Accessed on 9/9/2019].

¹⁴ Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> [Accessed on 9/9/2019].

¹⁵ Businge, M.S., et al., 'Environment and Economic Development' in Kenya State of the Environment and Outlook 2010 (NEMA, 2011) 2, p.14.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ No. 47 of 2013, laws of Kenya.

¹⁹ S. 89.

²⁰ S. 89(2).

²¹ Civil Case 133 of 2012 [eKLR].

²² Kutner, Luis. "The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus," University of Miami Inter-American Law Review 9, no. 2 (1977): 257.

3. Types of Pollution in Kenya

The most common types of pollution perceived in our environment include: water pollution; land pollution; noise pollution; and air pollution.²³

4. Land and Water pollution

It is estimated that about 30 to 50 per cent of nitrogen applied to soils leaches into rivers and the air, suffocating aquatic life, worsening climate change and shortening lives through contamination.²⁴ Nutrient pollution, or an excess of nutrients such as nitrogen and phosphorus in the water which enter the rivers as runoff from farmlands and residential areas, can lead to a host of health and environmental problems.²⁵ Nutrient pollution is attributed to fertilizer, animal manure, sewage treatment plant discharge, detergents, storm water runoff, cars and power plants, failing septic tanks and pet waste.²⁶

Nutrient pollution of rivers is considered to be one of the most widespread human impacts on water resources.²⁷ This is especially more serious in agriculture based economies such as Kenya where most people in rural areas engage in farming using modern chemicals that end up in water bodies. This not only pollutes the water but have a residue effect on the soil thus polluting the soil. Apart from farming chemicals, Sewerage water, industrial wastes and disposals are also sources of water pollution.²⁸

Target 6.3 of the Sustainable Development Goals (SDGs) requires that states should ensure that “by 2030, they improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.

²³ Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria." Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf>; Ndungu, N.J., "Pollution in Thika Municipality: Assessment Of Community-Based Awareness and Perception." (2003), available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/19013/Ndungu%20John%20Ndiraku_Pollution%20in%20Thika%20Municipality-%20Assessment%20of%20Community-based%20Awareness%20and%20Perception.pdf?sequence=3&isAllowed=y; Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013.

²⁴ Onyango, L., "Nema shuts down four firms for polluting Nairobi River," *Daily Nation*, Monday August 26 2019. Available at <https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html>

²⁵Thompson, E., "How Land Use Affects Nutrient Pollution in a Changing Climate," *Earth & Space Science News* (sourced from *Journal of Geophysical Research: Biogeosciences*), 4 September, 2019. Available at <https://eos.org/research-spotlights/how-land-use-affects-nutrient-pollution-in-a-changing-climate>

²⁶ United Nations Environmental Protection Agency, "The Facts about Nutrient Pollution," available at https://www.epa.gov/sites/production/files/2015-03/documents/facts_about_nutrient_pollution_what_is_hypoxia.pdf

²⁷ Stevenson, R., "Nutrient Pollution: A Problem with Solutions," In book: *River Conservation: Challenges and Opportunities*, Chapter: 4, Publisher: Fundacion BBVA, Editors: Sergi Sabater, Arturo Elosegui, pp.77-104, at p.77.

²⁸ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1, No. 6, June 2013.

4.1 Noise and Air Pollution Control in Kenya

Some scholars have defined the term noise to describe sounds that are disagreeable or unpleasant produced by acoustic waves of random intensities and frequencies.²⁹ Noise from industry, traffic, homes and recreation can cause annoyance, disturb sleep and effects health. Thus, sound is considered to be a potential serious pollutant and threat to the environmental health.³⁰

Air pollution can be defined as “the introduction of chemicals, particulate matter, or biological materials that cause harm or discomfort to humans or other living organisms, or cause damage to the natural environment or built environment, into the atmosphere”.³¹ Air pollution is now considered to be a significant public health problem, responsible for a growing range of health effects in many regions of the world.³² Indeed, it has been documented that air pollution has overtaken poor sanitation and a lack of drinking water to become the main environmental cause of premature death.³³ Nitrogen oxides, Sulphur dioxide, Carbon Monoxide, Ammonia and Ozone are considered to be the major air pollutants.³⁴

The United Nations observes that most recorded air pollution-linked deaths occur in developing countries, where laws are weak or not applied, vehicle emission standards are less stringent and coal power stations more prevalent.³⁵ Kenya’s air condition in most major cities and towns has been rated as some of the most polluted in the world.³⁶ This is mainly attributed to the unsustainable policies in sectors such as transport, energy, waste management and industry.³⁷

It has been argued that while other parts of the world, particularly the developed nations, also have the problem of air pollution mainly caused by burning of hydrocarbons for transport that can be addressed by tackling fuel usage through electric vehicles, and car-free zones, African cities have entirely different problems; pollution is mainly due to the burning of rubbish, cooking with inefficient solid fuel stoves, millions of small diesel electricity generators, cars which have had their catalytic converters removed and petrochemical plants, all pushing pollutants into the air over

²⁹ Ibid.

³⁰ Ibid; Mead, M.N., "Noise Pollution: The Sound behind Heart Effects," *Environmental Health Perspectives* 115, no. 11 (2007): A536; Owen, D., "Is Noise Pollution the Next Big Public-Health Crisis?" *The New Yorker*, May 13, 2019 Issue. Available at <https://www.newyorker.com/magazine/2019/05/13/is-noise-pollution-the-next-big-public-health-crisis>

³¹ Sharma, S. B., Jain, S., Khirwadkar, P., & Kulkarni, S., "The effects of air pollution on the environment and human health," *Indian Journal of Research in Pharmacy and Biotechnology* 1, no. 3 (2013): 391-396; Ghorani-Azam, A., Riahi-Zanjani, B., & Balali-Mood, M., "Effects of air pollution on human health and practical measures for prevention in Iran," *Journal of research in medical sciences: the official journal of Isfahan University of Medical Sciences* 21 (2016); Rani, B., Singh, U., & Maheshwari, R., "Menace of air pollution worldwide," *Advances in Biological Research* 2, no. 1 (2011): 1-22.

³² Kelly, F. J., & Fussell, J. C., "Air pollution and public health: emerging hazards and improved understanding of risk," *Environmental geochemistry and health* 37, no. 4 (2015): 631-649.

³³ Ibid.

³⁴ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1, No. 6, June 2013.

³⁵ United Nations Environment Programme, "Air pollution hurts the poorest most," 9 May, 2019. Available at <https://www.unenvironment.org/news-and-stories/story/air-pollution-hurts-poorest-most>

³⁶ Chasant, M., "Air Pollution In Kenya: Causes, Effects And Solutions," 4 July, 2019. Available at <https://www.atcmask.com/blogs/blog/air-pollution-in-kenya>

³⁷ Ibid.

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the cities.³⁸ According to the World Health Organization, approximately 19,000 people die prematurely in Kenya annually because of air pollution.³⁹ This is mainly attributed to PM 2.5 annual exposure, which, according to the United Nations, are 70 per cent over the safe level in Nairobi.⁴⁰

Kenya has had its own share of air and noise pollution despite the existence of laws meant to curb the same.⁴¹

4.2 International and Regional Law and Pollution Control

The *International Covenant on Economic, Social and Cultural Rights*⁴², recognises the right to be free from pollution and states that ‘the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: the improvement of all aspects of environmental and industrial hygiene.’⁴³

The United Nations *Montreal Protocol on Substances that Deplete the Ozone Layer*⁴⁴ aims to reduce and eventually eliminate the emissions of man-made ozone depleting substances.

The *1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*⁴⁵ requires the parties to reduce to a minimum the transboundary movements of hazardous wastes; to ensure that such wastes are managed and disposed of in an environmentally sound manner, as close as possible to their source of generation; and to reduce to a minimum the generation of hazardous wastes at the source. The *1992 Framework Convention on Climate Change*⁴⁶ requires parties to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

³⁸ Vidal, J., “‘There is no escape’: Nairobi’s air pollution sparks Africa health warning,” *The Guardian*, 10 July, 2016. Available at <https://www.theguardian.com/cities/2016/jul/10/no-escape-nairobi-air-pollution-sparks-africa-health-warning>

³⁹ United Nations Environment Programme, “Nairobi matatus’ odd engine idling culture pollutes, harms health,” 19 December, 2019. Available at <https://www.unenvironment.org/news-and-stories/story/nairobi-matatus-odd-engine-idling-culture-pollutes-harms-health>

⁴⁰ *Ibid.*

⁴¹ Sfrican City Planner, “Nairobi, Kenya, faces a Growing Challenge of Noise Pollution,” October 17, 2016. Available at <http://africacityplanner.com/nairobi-kenya-faces-growing-challenge-noise-pollution/>; Barczewski, B., "How well do environmental regulations work in Kenya?: a case study of the Thika highway improvement project." Center for Sustainable Urban Development (2013); Jammah, A., “Kenya needs to address the crisis of air pollution,” *Standard Digital*, 18th March, 2016. Available at <https://www.standardmedia.co.ke/article/2000195290/kenya-needs-to-address-the-crisis-of-air-pollution>.

⁴² 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.

⁴³ *International Covenant on Economic, Social and Cultural Rights*, Article 12 (1)(2)(b).

⁴⁴ UN General Assembly, *Protection of global climate for present and future generations of mankind: resolution / adopted by the General Assembly*, 6 December 1988, A/RES/43/53.

⁴⁵ UN General Assembly, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Basel, 22 March 1989, United Nations, *Treaty Series*, vol. 1673, p. 57.

⁴⁶ UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

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The other *Protocol to the Nairobi Convention is the Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region*⁴⁷ which was adopted in 1985. Article 2 of the Protocol provides that it applies to “marine pollution incidents which have resulted in or which pose a significant threat of, pollution to the marine and coastal environment of the Eastern African region or which adversely affect the interests of one or more of the Contracting Parties.” The other Protocol relating to the East Africa region, is the Protocol for the Protection of the West Indian Ocean Marine Environment from Land-Based Sources and Activities (LBSA Protocol)⁴⁸, enacted in 2010.

The *Nairobi Convention*⁴⁹ together with its three protocols constitutes the current regional legal framework for the protection and conservation of the marine and coastal environment of the Western Indian Ocean region. The Convention is meant to ensure there is a joint regional legal framework that coordinates the efforts of the member states to build their capacity to protect, manage and develop their coastal and marine environment.⁵⁰ This would include capacity to keep these areas pollution free. This is because transnational pollution would require cooperation among states sharing major water bodies like Indian Ocean.⁵¹ These legal instruments are to offer guidelines to states on how to conserve the various aspects of the environment and also curb pollution.

5. Legal and Institutional Framework on Pollution Control in Kenya: Challenges and Prospects

5.1 Constitution of Kenya 2010

Under the Constitution of Kenya 2010⁵² Although the national government, has the role of protecting the environment and natural resources,⁵³ county governments have a role in pollution control⁵⁴ and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry.⁵⁵ The Counties should however work closely with the national government and other stakeholders in discharging some of these duties considering that they may traverse various counties and may require some major steps from both national and county levels of government.

⁴⁷ United Nations, Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region, Jun 21, 1985, Nairobi. Entry into force: May 30, 1996

⁴⁸ Protocol for the Protection of the Marine and Coastal Environment of the Western Indian Ocean from Land-Based Sources and Activities. Adopted in Nairobi, Kenya on 31 March 2010

⁴⁹ <https://www.unenvironment.org/nairobiconvention/>

⁵⁰ Ibid.

⁵¹ See generally, Mendis, C., "Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamudram Ship Channel Project," Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, NY(USA). 67 (2006): 2006, see also Caron, D.D., "Liability for Transnational Pollution Arising from Offshore Oil Development: A Methodological Approach," *Ecology Law Quarterly* (1983): 641-683; Kutner, L., "The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus," *University of Miami Inter-American Law Review* 9, no. 2 (1977): 257.

⁵² Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

⁵³ Ibid, Fourth Schedule, S. 22.

⁵⁴ Ibid, S. 3 of Part II.

⁵⁵ Ibid, S. 10.

5.2 Environmental Management and Coordination Act (EMCA), 1999

The Environmental Management and Coordination Act (EMCA), 1999⁵⁶, is the framework law on environmental management and conservation. EMCA establishes among others institutions; National Environment Management Authority, National Environment Complaints Committee⁵⁷, National Environment Tribunal and County Environment Committees.

EMCA provides the general guidelines and standards to be observed in management and conservation of various aspects of the environment. It is therefore supposed to be implemented through enactment of sectoral laws that should focus on the various aspects of the environment. In order to align the Act with the Constitution, EMCA was amended in 2015 by the *Environmental Management and Co-ordination (Amendment) Act* (No 5 of 2015). While EMCA contains provisions on almost all the aspects of the environment, it is worth pointing out that the procedural aspects of the regulation of these aspects heavily depends on regulations and other laws that expound on the EMCA provisions.

5.3 National Environment Management Authority (NEMA)

The National Environment Management Authority (NEMA) was established as the principal instrument of government charged with the implementation of all policies relating to the environment, and to exercise general supervision and coordination over all matters relating to the environment. In consultation with the lead agencies, NEMA is empowered to develop regulations, prescribe measures and standards and, issue guidelines for the management and conservation of natural resources and the environment. The Act provides for environmental protection through; Environmental impact assessment; Environmental audit and monitoring; and Environmental restoration orders, conservation orders, and easements.

Notably, NEMA can delegate its functions under EMCA to any lead agency, being the oversight authority, and where it carries out a delegated duty, it can recover costs from the relevant body for any of such functions.⁵⁸

5.4 Health Act, 2017

The Health Act, 2017⁵⁹ was enacted to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.⁶⁰ In seeking to promote and advance public and environmental health, the Act obligates the national health system to ensure that measures for managing environmental risk factors to curtail occurrence and distribution of diseases are put in place and implemented. In particular such measures should target, inter alia—the reduction of disease burden arising from poor environmental hygiene, sanitation, occupational exposure and environmental pollution.⁶¹

⁵⁶ No. 8 of 1999, Laws of Kenya.

⁵⁷ See Environmental Management and Co-ordination (Amendment) Act (No 5 of 2015), Laws of Kenya.

⁵⁸ Sec. 12, EMCA.

⁵⁹ Act No. 21 of 2017, Laws of Kenya.

⁶⁰ Ibid, Preamble.

⁶¹ Health Act, 2017, Sec. 68 (2)(a).

5.5 Public Health Act

The *Public Health Act*⁶² was enacted to make provision for securing and maintaining health.⁶³ The Act empowers the Cabinet Minister in charge to make rules concerning port health matters. Specifically, the Cabinet Secretary may make rules, inter alia: or the destruction of rats, mice or insects in, vessels, the disposal of bilge or other water on board, the cleansing of vessels, the provision of a supply of pure water on board, and for preventing the pollution of the water of the port with excreta and manure or any infective or offensive matter.⁶⁴

It also places a duty on local authority to protection of water supplies. Specifically, It provides that it shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures—for preventing any pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes (whether such supply is derived from sources within or beyond its district); and for purifying any such supply which has become so polluted, and to take measures (including, if necessary, proceedings at law) against any person so polluting any such supply or polluting any stream so as to be a nuisance or danger to health.⁶⁵ The Act also empowers the Cabinet Secretary on the advice of the Central Board of Health, to make, and impose on local authorities and others the duty of enforcing, rules in respect of defined areas—prohibiting bathing in, and prohibiting or regulating the washing of clothes or other articles or of animals in, or in any place draining into, any such water supply as is mentioned in section 129; and prohibiting or regulating the erection of dwellings, sanitary conveniences, stables, cattle-kraals, pig-styes, ostrich-pens, dipping tanks, factories or other works likely to entail risk of harmful pollution of any such water supply, or prohibiting or regulating the deposit in the vicinity of, or in any place draining into, any such supply of any manure, filth or noxious or offensive matter or thing, and generally, for preventing the pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes and for purifying any such supply which has become so polluted, and for preventing the pollution of streams so as to be a nuisance or a danger to health.⁶⁶

Regarding disposal of sewage, the Act provides that no person should dispose of solid or liquid sewage or sewage effluent in such a manner or in such a position as to cause or be likely to cause dampness in any building or part thereof, or to endanger the purity of any water supply, or to create any nuisance, with exception of disposal of waste water from baths, lavatory basins or kitchen sinks by a satisfactory method of surface irrigation or sub-irrigation in such a manner that neither dampness of buildings, the breeding of mosquitoes, the pollution of water supplies nor other form of nuisance is caused thereby.⁶⁷

While this Act seems comprehensive in its provisions, its implementation and enforcement seems minimal or non-existent considering that all that it seeks to prohibit is what has been happening across the country and especially in major towns and cities such as Nairobi and Mombasa. Nairobi

⁶² Public Health Act, Cap. 242, Laws of Kenya Revised Edition 2012 [1986].

⁶³ Ibid, preamble.

⁶⁴ Ibid, sec. 73 (d).

⁶⁵ Ibid, sec. 129.

⁶⁶ Sec. 130.

⁶⁷ Sec. 63; See also EMCA's Water quality Regulations, 2006 (Legal notice No. 121); Water Act, 2016.

River is enough evidence of lack of implementation of the Public Health Act owing to its current pathetic state and absolute pollution as has been highlighted severally in the media. The ripple effect has been the pollution of other watercourse downstream such as the River Athi.⁶⁸ This affects not only human beings and animals but also adversely affects agricultural production and also causes the double tragedy of people consuming polluted and contaminated foodstuffs produced with the polluted water. There is thus a heightened need for protection of the public health from industrial pollution in Kenya which may range from water, air and land pollution.

5.6 Suppression of Noxious Weeds Act

Considering that land degradation and pollution can be caused by various factors including noxious weeds, the *Suppression of Noxious weeds Act*⁶⁹ was enacted to provide for the suppression of noxious weeds.⁷⁰ The Cabinet Secretary may by notice in the Gazette declare a plant to be a noxious weed in any area, which shall be specified in the notice, and which may consist either of the whole of Kenya or of one or more districts or portions thereof.⁷¹ Where a weed is declared as noxious, any person in charge of such land should clear the noxious weed, or cause it to be cleared, from that land.⁷² Such weeds may be injurious to agricultural or horticultural crops, natural habitats or ecosystems, or humans or livestock, hence the need to control them.⁷³

b. Water pollution Control

National Environment Management Authority (NEMA) has made considerable attempts at controlling water pollution in the country.⁷⁴ However, this may be considered to be a reactive measure which was only taken after media houses' expose on the extent of pollution that is taking place in the country, especially perpetrated by the corporate bodies. This begs the question where NEMA was and whether the requisite measures during the licensing of these companies were taken. Environmental Impact Assessment (EIA)⁷⁵ and Strategic Environment and Social Assessment (SESA)⁷⁶ assessments as required by the law were supposed to address this problem; follow up measures by NEMA to ensure that there is compliance were evidently missing. This has resulted in various companies dropping their guard and engaging in wanton destruction of water bodies through uncontrolled and untreated discharge of pollutants into the water bodies. NEMA Director General has been on record stating that some of the closed down companies do not have

⁶⁸ Kienja, K., "Pollution of urban waterways in Nairobi: a case study of Mathare 4B village, Nairobi, Kenya." Master Thesis, University of Canterbury (2017). Available at <https://pdfs.semanticscholar.org/06b6/abcabbe413610fe725ee8bb27ac61971868a.pdf>

⁶⁹ Suppression of Noxious weeds Act, Cap 325, Laws of Kenya, Revised Edition 2012 [1983].

⁷⁰ Ibid, Preamble.

⁷¹ Ibid, sec. 3.

⁷² Ibid, sec. 4.

⁷³ Gbèhounou, G., Guidance on Weed Issues and Assessment of Noxious Weeds in a Context of Harmonized Legislation for Production of Certified Seeds, Plant Production and Protection Division, Food and Agriculture Organization of the United Nations, 2013. Available at <http://www.fao.org/3/a-i3493e.pdf>

⁷⁴ Onyango, L., "NEMA shuts down four firms for polluting Nairobi River," Daily Nation, Monday August 26 2019. Available at <https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html>

⁷⁵ Sec. 68, EMCA.

⁷⁶ Sec. 57A, EMCA.

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efficient waste water treatment plants.⁷⁷ This is worrying as it may mean that there are many more out there doing the same and its only that they have not been discovered.

The *Water Quality Regulations 2006*⁷⁸ apply to drinking water, water used for industrial purposes, water used for agricultural purposes, water used for recreational purposes, water used for fisheries and wildlife, and water used for any other purposes.⁷⁹ The Regulations not only obligate every person to refrain from any act which directly or indirectly causes, or may cause immediate or subsequent water pollution, but also seek to regulate through licensing the various uses and interaction with water. They also set standards by which every user of water and water bodies must observe.

The Water Act 2016⁸⁰ also carries provisions that seek to curb contamination and pollution of water sources and establishes institutions that should enforce the Act. Despite the enactment of this Act, there are still many cases of pollution of water bodies due to lack of enforcement of the prescribed standards and little has changed if at all, in the quality of water across the country as far as water hygiene is concerned.

c. Land pollution Control

Land pollution and degradation is closely related to water pollution as this can also result in water pollution, hence the need to tackle the problem. Land degradation in Kenya is often attributed to both natural and human factors which include biophysical (natural) factors related to climatic conditions and extreme weather events such as droughts and floods, and catchment factors such as steep slopes and highly erodible soils.⁸¹ However, human activities carry the greatest share of blame, and these include unsustainable land management practices (anthropogenic) factors such as destruction of natural vegetation, over-cultivation, overgrazing, poor land husbandry and excessive forest conversion.⁸²

Land degradation may include: biological/Vegetation degradation (loss of biodiversity/vegetation); Soil erosion by water; Wind erosion; Water resources degradation; Chemical degradation; and physical degradation.⁸³ Considering that the above factors fall under different sectors, land pollution is governed by various policies and laws that range from agricultural laws, forestry laws, climate change laws and water laws among others.⁸⁴

⁷⁷ Onyango, L., "Nema shuts down four firms for polluting Nairobi River," Daily Nation, Monday August 26 2019. Available at <https://www.nation.co.ke/news/Nema-shuts-down-four-firms-for-polluting-Nairobi-River/1056-5250274-dlwt1iz/index.html>

⁷⁸ Water quality Regulations, 2006 (Legal notice No. 121).

⁷⁹ Regulation 2.

⁸⁰ No. 43 of 2016, Laws of Kenya.

⁸¹ Republic of Kenya, Report Of the Land Degradation Assessment (LADA) In Kenya: Based On A Study Of Land Degradation Assessment (Lada) With Remote Sensing And GIS, For Sustainable Land Management (SLM) In Kenya, March 2016. Available at <http://www.environment.go.ke/wp-content/uploads/2018/08/LADA-Land-Degradation-Assessment-in-Kenya-March-2016.pdf>

⁸² Ibid.

⁸³ Ibid.

⁸⁴ See Agricultural Sector Development Strategy 2010–2020, the Kenya Vision 2030, the National Environment Policy, 2013, the Environment Management and Coordination Act 1999, the National Livestock Policy, 2013, the National Ocean and Fisheries Policy, 2008, the National Food and Nutrition Security Policy, 2011, the National Horticulture Policy, 2012, the Forest Policy, 2014, the Sessional Paper No. 3 of 2009 On National Land Policy, the Draft National Land Use Policy, 2016, the National Spatial Plan

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Article 60 of the Constitution requires that in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the principles of sustainable and productive management of land resources; and sound conservation and protection of ecologically sensitive areas, among others.

The Constitution also obligates 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; protect genetic resources and biological diversity; 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.⁸⁵ It also requires 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.⁸⁶

The *Kenya Vision 2030* also commits the country to mitigate unintended adverse land degradation. The various policies and laws thus seek to curb or mitigate the above forms of land pollution/degradation. However, the situation on the ground paints a grim picture and serves as an indication that little has been achieved despite the existence of these legal instruments.

d. Noise pollution Control

The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009*⁸⁷ defines “noise” to mean any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment. These Regulations prohibit any person from making or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment.⁸⁸ However, there are some exemptions to these prohibitions.⁸⁹

(NSP) 2015-2045, the Natural Resources Benefit Sharing Bill, the Forest Conservation and Management Act, No. 34 of 2016, the Community Land Act No. 27 of 2016, the Agriculture and Food Authority Act (No 13 of 2013) Crops Act 2013 No 16 of 2013, The Kenya Agricultural and Livestock Research Act, 2013 (No. 17 of 2013), the Fisheries Management and Development Act, 2016, Biosafety Act, No. 2 of 2009, the Kenya Plant Health Inspectorate Service Act, No. 54 of 2012, the Seeds and Plant Varieties Act, Cap 326, the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013), the County Governments Act, 2012 (No.17 of 2012), the Urban Areas and Cities Act, 2011 (No. 13 of 2011), the Land Adjudication Act (Cap. 284), Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan, the Livestock and Livestock Products Development and Marketing Bill, 2016, the Food Security Bill, 2017, and the National Drought Management Authority Act, No. 4 of 2016.

⁸⁵ Article 69 (1).

⁸⁶ Article 69 (2).

⁸⁷ Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, Legal Notice No. 61 of 2009.

⁸⁸ *Ibid*, Regulation 3 (1).

⁸⁹ Regulation 7.

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In the case of **Pastor James Jessie Gitahi and 202 others vs Attorney General**⁹⁰, the court recognized one of the components of a clean and healthy environment to be the prevention of noise and vibration pollution. The National Environmental Management Authority (Nema) inspectors have made attempts at noise pollution control in the country.⁹¹ Despite the Regulations, noise pollution is however still a major problem in the country because of lack of enforcement of the Regulations and possibly the public's ignorance on the levels of noise that may be considered as air pollution.

e. Air pollution Control

The *Air Quality Regulations 2014* seek to provide for prevention, control and abatement of air pollution to ensure clean and healthy ambient air. They also seek to ensure that there is establishment of emission standards for various sources such as mobile sources (e.g. motor vehicles) and stationary sources (e.g. industries) as outlined in the Environmental Management and Coordination Act, 1999.⁹² As already pointed, despite the existence of these Regulations, there has been massive pollution of air especially around major towns due to industrial development and unsustainable mode of transport, mainly public service vehicles (matatus) and other unroadworthy vehicles. Some authors have rightly pointed out that developing countries such as Kenya have limited air quality management systems due to inadequate legislation and lack of political will, among other challenges. In addition, maintaining a balance between economic development and sustainable environment is usually a challenge; there are no investments in pollution prevention technologies.⁹³ More attention goes to the short-term benefits from increased production and job creation where the lack of air quality management capability translates into lack of air pollution data, hence the false belief that there is no problem.⁹⁴ Under EMCA, projects and activities that are likely to cause air pollution are also to be subjected to Environmental Impact Assessment⁹⁵.

6. Towards an Effective framework on Pollution Control in Kenya

6.1 Effective Waste Management

Effective disposal and management of waste is considered as one of the ways of pollution control.⁹⁶ Achievement of sustainable waste management mechanisms in Kenya has been attributed to such

⁹⁰ [2013] eKLR, petition No. 683 of 2009.

⁹¹ Omullo, C., "Nema shuts four Nairobi clubs over noise pollution," *Business Daily*, Thursday, January 11, 2018. Available at <https://www.businessdailyafrica.com/news/Nema-shuts-four-Nairobi-clubs-over-noise-pollution/539546-4260126-1u5arqz/index.html>

⁹² The Environment Management And Co-Ordination (Air Quality) Regulations, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171

⁹³ Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

⁹⁴ *Ibid.*

⁹⁵ Sec. 68, EMCA.

⁹⁶ Spiegel, J., & Maystre, L. Y., "Environmental pollution control and prevention." *Encyclopedia of Occupational Health and Safety*. 4th ed. Geneva: International Labour Office 2 (1998).

factors as lack of adequate consumer awareness, poor policy frameworks and lack of structured Extended Producer Responsibility Schemes, among others.⁹⁷

6.2 Real Time Air Pollution Monitoring

Under the Kenya Bureau of Standards legal provisions of 2014, the Kenya Bureau of standards offers pre-export inspection of used vehicles to determine whether they conform to the code regulations in a bid to control pollution.⁹⁸ Investing in technology that will enable the government agencies to achieve real time air pollution monitoring can go a long way in ensuring that pollutants are kept within acceptable levels as defined by the World Health Organisation standards. As already pointed out, air pollution is worst in the major cities and towns and these efforts should be concentrated more on these areas due to their high susceptibility and the high population living in these areas. Kenya can develop and invest in the relevant sensors through tapping into the local experts skills.⁹⁹

There is a need to invest in pollution prevention technologies like emission controls especially for factories and heavy industries with strict enforcement to ensure that people living in such areas do not pay the heavy cost of air pollution. The risk of such pollution is not just restricted to the urban areas. Research has concluded that ‘pollution from industries negatively impacts the health of employees and neighbouring communities and the potential for adverse health outcomes is heightened when the industries are located in rural areas where the bulk of the population is vulnerable because of limited information about their rights and limited capacity to defend themselves or influence policy decisions’.¹⁰⁰

There is need to fully operationalize the *Air Quality Regulations 2014* which ensure clean and healthy ambient air. There is need for strict enforcement of compliance with the emission standards for various sources such as mobile sources (e.g. motor vehicles) and stationary sources (e.g. industries) as outlined in the *Air Quality Regulations 2014 and Environmental Management and Coordination Act, 1999*.¹⁰¹

6.3 Incentive-Based Regulatory Approaches for Pollution Control

There are other regulatory approaches that can be used to promote and attain environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which are all now considered as part of

⁹⁷ Wakiaga, P., “Incentivising waste management is way to go,” *Business Daily*, Sunday, August 25, 2019. Available at <https://www.businessdailyafrica.com/analysis/letters/Incentivising-waste-management-is-way-to-go/4307714-5248640-ym86ov/index.html> [Accessed on 17/9/2019].

⁹⁸ Uttamang, P., Aneja, V. P., & Hanna, A. F., Assessment of gaseous criteria pollutants in the Bangkok Metropolitan Region, Thailand, *Atmospheric Chemistry and Physics*, 18(16), 12581-12593.

⁹⁹ Mugendi, E., “Measuring Nairobi’s air quality using locally assembled low-cost sensors: How low cost sensors are tracking air quality in East Africa’s largest city,” May 9, 2018. Available at <https://medium.com/code-for-africa/measuring-nairobis-air-quality-using-locally-assembled-low-cost-sensors-94a356885120>

¹⁰⁰ Omanga, E., Ulmer, L., Berhane, Z., & Gatari, M., "Industrial air pollution in rural Kenya: community awareness, risk perception and associations between risk variables," *BMC public health* 14, no. 1 (2014): 377.

¹⁰¹ The Environment Management And Co-Ordination (Air Quality) Regulations, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171

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the framework of international and national environmental law and health law.¹⁰² Scholars have argued that market-based instruments “harness market forces” so that they use market signals to affect behaviour (of both consumers and firms) towards pollution control. They are also called Economic Incentives for pollution control (EI) and include pollution charges or levies, taxes and tradable permits.¹⁰³

Some authors have argued that incentive-based policy instruments are more efficient means of achieving environmental goals such as reductions in polluting emissions and fostering the delivery of ecosystem services.¹⁰⁴

Both a charge system and a tax system use financial instruments to persuade polluters to reduce pollution, by making pollution more costly to the polluter, thus forcing firms to reduce emissions.¹⁰⁵ Kenya has been making progress in adopting these approaches, with the latest being the Green Bond Programme - Kenya, which aims to promote financial sector innovation by developing a domestic green bond market.¹⁰⁶ Such measures are commendable for promoting sustainability and reducing climate change¹⁰⁷, which is one of the results of pollution, through funding renewable energy and afforestation projects.¹⁰⁸ Banning of non-reusable plastic bags in August 2017 was also a major step in curbing pollution in the country and this has received accolades across the globe.¹⁰⁹ This has not only been embraced by companies but also the general public.

Using such incentives and investing in technology, the Government of Kenya can succeed in achieving sustainable solid waste management in the country which is still a big menace. Notably, the poorly disposed solid waste causes water, air and soil/land pollution. The Government should also invest more in modern modes of transport that emit fewer polluting gases through offering relevant tax breaks/exemptions to encourage investment in the sector. It is hoped that in the long

¹⁰² 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 28/09/2019].

¹⁰³ Di Falco, S., "Economic incentives for pollution control in developing countries: what can we learn from the empirical literature?." *Politique Agricola Internazionale (PAGRI)* 2, no. 2 (2012): 7-24, at p.7.

¹⁰⁴ de Vries, F. P., & Hanley, N., "Incentive-based policy design for pollution control and biodiversity conservation: a review." *Environmental and Resource Economics* 63, no. 4 (2016): 687-702.

¹⁰⁵ Di Falco, S., "Economic incentives for pollution control in developing countries: what can we learn from the empirical literature?." *Politique Agricola Internazionale (PAGRI)* 2, no. 2 (2012): 7-24, at p.9.

¹⁰⁶ “The Green Bonds Programme – Kenya,” available at <https://www.greenbondkenya.co.ke/>

¹⁰⁷ Kenya Bankers Association, Kenya Green Bond Guidelines Background Document (Draft 02). Available at <https://www.nse.co.ke › products-services › debt-securities › the-green-bond>

¹⁰⁸ Ngugi, B., “Kenya sets stage for first ever green bond after approving rules,” *Business Daily*, Wednesday, February 20, 2019. Available at <https://www.businessdailyafrica.com/markets/capital/Kenya-sets-stage-for-first-ever-green-bond/4259442-4990946-y3k2y4z/index.html>

¹⁰⁹ National Environment Management Authority, “Government Bans Plastic Carrier Bags,” *NEMA News: NEMA Quarterly magazine*, January-March, 2017. Available at <http://www.nema.go.ke/images/Docs/Awarness%20Materials/NEAPS/NEMA%20Quarterly%20Magazine-Jan-March%202017.pdf>

run, this will see Kenya achieve a cleaner environment for all, thus moving closer to achieving the right to a clean and healthy environment.

6.4 Pollution Control in the Context of Sustainable Development

Sustainable Development Goals (SDGs) 3.9 requires that by 2030, countries should substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.¹¹⁰

In addition to the 2030 SDGs, *Agenda 21*¹¹¹ 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.¹¹² The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.

Chapter 3 of the *Agenda 21* deals with combating poverty. Clause 3.2 thereof 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. Clause 4.5 thereof notes that special attention should be paid to the demand for natural resources generated by unsustainable consumption and to the efficient use of those resources, consistent with the goal of minimizing depletion and reducing pollution.¹¹³ *Agenda 21* basically seeks to enable all people to achieve sustainable livelihoods through integrating factors that allow policies to address issues of development, sustainable resource management and poverty eradication simultaneously.¹¹⁴

The *Forest Principles*¹¹⁵ 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.¹¹⁶

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,

¹¹⁰ SDG 3 requires countries to ensure healthy lives and promote wellbeing for all at all ages.

¹¹¹ (A/CONF.151/26, vol. II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

¹¹² Ibid, Preamble.

¹¹³ Ibid, Clause 4.5.

¹¹⁴ Ibid, Clause 3.4.

¹¹⁵ 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).

¹¹⁶ Ibid, Preamble.

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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.¹¹⁷

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.¹¹⁸

6.5 Public Empowerment and Participation

The Constitution provides that every person has a duty to cooperate with the State in discharging of its obligations towards the environment. Noting that the general public is as much a partaker in generation of pollution as it is a victim of its effects, there is need to involve them in combating pollution in the country. Creating awareness on the harmful effects of the various forms of pollution as well as creating incentives for the public to desist from activities that cause pollution is necessary. This must however be accompanied by providing alternative means of production that are sustainable. Environmental education and ethics should be promoted in the country. They should also be involved through other participatory tools such as the Environmental Impact Assessment (EIA)¹¹⁹ and Strategic Environmental Assessment (SEA)¹²⁰ in order to make environmentally sound decisions which also consider their views.

There is also a need to put in place a working public/citizen complaint mechanism that provides the opportunity for citizens to lodge complaints and grievances about the violation/infringement of their right to a clean and healthy environment by companies polluting the environment. The acceptance speech by Nobel Laureate, the late Prof. Wangari Maathai, summarises the importance of public participation and empowerment in environmental protection and conservation as follows: *“.....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.*

¹¹⁷ Principle 2 (b).

¹¹⁸ Principle 4.

¹¹⁹ See Article 69 (1), Constitution; Sec. 68, EMCA.

¹²⁰ See 57A, Environmental Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015).

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They then make connections between their own personal actions and the problems they witness in the environment and in society.... (Emphasis added).”¹²¹

6.6 Proper and Effective Spatial Planning

There have been various reports of demolition of buildings deemed to have been built in riparian land and other ecologically sensitive areas. There is a need to put in place effective spatial planning management systems as well as a working system for monitoring development activities. This will avoid situations where people not only suffer losses but also eliminate all chances of corruption by government officers who may be in the habit of illegally issuing clearances. The means of achieving some of these are well set out in the *National Spatial Plan 2015-2045*¹²² whose specific objectives are:-To create a spatial planning context that enhances economic efficiency and strengthens Kenya’s global competitiveness; To promote balanced regional development for national integration and cohesion; To optimize utilization of land and natural resources for sustainable development; To create livable and functional Human Settlements in both urban and rural areas; To secure the natural environment for high quality of life; and to establish an integrated national transportation network and infrastructure system. Full implementation of this Plan can go a long way in not only controlling pollution but also eliminating any factors that may lead to pollution in future.

6.7 Role of Courts in Environmental Conservation

The Constitution of Kenya places an obligation on national Courts and tribunals to protect and enforce environmental rights and especially the right to a clean and healthy environment.¹²³ The Court, especially the Environment and Land Court has made impressive efforts to discharge this duty. These efforts date to the pre-2010 Constitution era as evidenced by such cases as *Peter K. Waweru v Republic*,¹²⁴ where the Court 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....’ 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.¹²⁵ The Court, while borrowing from such jurisdictions as India¹²⁶, also affirmed

¹²¹ 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 20/9/2019].

¹²² National Spatial Plan, 2015-2045 (Government Printer, Nairobi, 2015).

¹²³ Articles 21, 22, 42, 70, Constitution of Kenya.

¹²⁴ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

¹²⁵ p.14.

¹²⁶ The Supreme Court of India held in *Subhash Kumar v. State of Bihar*, that the “right to life guaranteed by Art. 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, 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 Art. 21 of the

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the broad scope of the right to a 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.’¹²⁷

The recognition of the right to a clean and healthy environment as now guaranteed under Article 42 of the Constitution of Kenya has been reaffirmed by the Environment and Land Court in several more recent decisions¹²⁸. It is a commendable step towards realising the right to a clean and healthy environment free from pollution for the courts to protect the rights of all especially those that seem to have been ignored in decision making processes during the setting up of industries that affect their environment adversely.

7. Conclusion

The 2030 SDGs acknowledge that social and economic development depends on the sustainable management of our planet’s natural resources. The goal is therefore to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife. They also seek to ensure that countries promote sustainable tourism, tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.¹²⁹ Combating pollution in all its forms is thus critical if the sustainable development agenda is to be achieved. This calls for concerted efforts from all stakeholders including state organs, private sector and individuals. Kenya still has a lot to do in its fight against pollution and all its ills. If the Vision 2030, which seeks to ensure that Kenya achieves a newly industrialised state by 2030 through sustainable means of production and manufacturing is to be achieved, environmental pollution must receive more attention than it is receiving currently. So far the various phases of the Vision 2030 have not performed satisfactorily in curbing pollution. Pollution threatens national development as well as achievement of sustainable livelihoods for the Kenyan people. Safeguarding the environment through effective pollution control in Kenya is essential. It is worth the effort for the sake of the current and future generations.

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.”

¹²⁷ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.8.

¹²⁸ Friends of Lake Turkana Trust v Attorney General & 2 others, [2014] eKLR, ELC Suit No. 825 of 2012; In The Matter of the National Land Commission [2015] eKLR; Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR, Environment and Land No. 273 of 2013; Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, ELC Civil Suit No. 821 of 2012 (OS); Joseph Owino Muchesia & another v Joseph Owino Muchesia & another [2014] eKLR; John Mining Temoi & Another v Governor Of County Of Bungoma & 17 Others [2014] EKLR; Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR; Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.

¹²⁹ Target 33.

Providing Legal Advice on Corporate Environmental Compliance In Kenya

Abstract

This paper discusses the concept of corporate environmental compliance in Kenya and proposes solutions on how the same can be enhanced to promote sustainable development. In light of the provisions of the Constitution of Kenya, 2010 and the Environmental Management and Co-Ordination Act, the environmental regime in Kenya has been strengthened and corporations now face both civil and criminal liability for acts and omissions related to the environment. The paper delves into corporate environmental compliance challenges in Kenya and highlights how they affect the right to a clean and healthy environment in addition to other human rights before suggesting how corporations can tackle these challenges.

1. Introduction

The importance of corporations in a society can hardly be overemphasized. The vast majority of economic activities around the world are organized through corporations.¹ It has further been argued that some corporations have undergone dynamic growth and gained powers traditionally vested only upon states thus asserting influence on the global stage and affecting the lives of millions of people around the world.² In Kenya, corporations play an important role in facilitating economic growth.

Corporations have often faced the dilemma of striking a balance between economic development and environmental conservation.³ Consequently, many environmental pollution activities are perpetrated by corporations. In Kenya, it has been observed that corporate bodies are involved in acts and omissions which violate the right to a clean and healthy environment such as pollution and non-compliance to statutory obligations including undertaking environmental impact assessments and audits.⁴ The main concern of corporates engaged in such acts is their economic growth and they engage in acts of pollution to save costs through acts and omissions such as failure to treat effluent before discharging into water bodies.⁵

However, with the increased environmental challenges such as climate change, the acts and omissions of corporations can no longer go unregulated. The concept of environmental liability has emerged at both the national and global level to curb against environmental damage by corporations. Further, corporate governance principles such as corporate social responsibility require corporations to consider the social consequences of their economic actions in decision

¹ Rauterberg. G, 'The Corporation's Place in Society' available at http://michiganlawreview.org/wp-content/uploads/2016/04/114MichLRev.913_Rauterberg.pdf (Accessed on 30/11/2019)

² Monshipouri. M, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' Human Rights Quarterly, No. 25 of 2003, P 965-989

³ Sozinova. A et al, 'Economic Environmental Activities of Russian Corporations' International Journal of Economics and Financial Issues, Volume 6, Issue 1, 2016, p 52-56

⁴ Kamweti D et al, 'Nature and Extent of Environmental Crime in Kenya' available at <https://www.files.ethz.ch/isn/111770/M166FULL.pdf> accessed on 28/11/2019

⁵ Ibid

making.⁶ It has been argued that the concept of environmental governance is an important aspect of corporate social and environmental responsibility.⁷

The paper seeks to examine the concept of corporate environmental compliance in Kenya. It begins by analysing the legal framework governing corporate environmental compliance in Kenya. The paper then addresses corporate environmental compliance challenges in Kenya and liability of corporations for breach of their environmental obligations under the law. It then proposes recommendations to enhance corporate environmental compliance in Kenya.

2. Legal and Institutional Framework for Corporate Environmental Compliance

2.1 International Legal Framework

The international framework on corporate environmental compliance is based on a number of treaties, standards and principles aimed at facilitating enforcement and compliance with environmental laws and regulations. While such treaties, principles and standards generally bind states, they are directly applicable to corporations since a state can control the activities of a corporation within its jurisdiction in compliance with its requirements under international law.

The *United Nations Framework Convention on Climate Change, Paris Agreement 2015*⁸, is an Agreement aimed at strengthening the global response to the threat of climate change in the context of sustainable development. The Agreement contains provisions aimed at holding the rise in global temperature levels and controlling green-house gas emissions.⁹

*The Montreal Protocol*¹⁰ is an international Treaty which aims to regulate the production and use of chemicals that contribute to the depletion of ozone layer. It sets limits on the production of chlorofluorocarbons (CFCs) and related substances that may lead to the depletion of the ozone layer.

*The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment*¹¹ contains provisions on compensation for damage to victims of environmental liability and requires member states to adopt laws that provide for liability and compensation to victims of environmental damage such as pollution. This has been captured in Kenya under the Environmental Management and Co-Ordination Act which imposes both civil and criminal liability for environmental damage.

⁶ Buckley, P 'Can Corporations Contribute directly to society or only through regulated behavior' *Journal of the British Academy*, 6 (sl), p 323-374

⁷ MSV. Prasad, 'Corporate Environmental Governance: A Perception of Indian Stakeholder', available at https://ecoinsee.org/conference/conf_papers/conf_paper_18.pdf, accessed on 28/11/2019

⁸ Paris Agreement, United Nations, 2015, available at https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf (Accessed on 01/12/2019)

⁹ *Ibid*, Article 2

¹⁰ Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987).

¹¹ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, available at <https://legal.un.org/avl/ha/dunche/dunche.html>

*The Rio Declaration on Environment and Development*¹² captures several principles aimed at protecting the integrity of the global environment and developmental system. These include sustainable development, public participation, inter and intra generational equity, precautionary principle and the polluter pays principle.

ISO 14000 entails a number of standards developed by the International Organization for Standardization to help organizations take a proactive approach to managing environmental issues.¹³ The standards challenge organizations to undertake a number of activities related to environmental governance which include taking stock of their impacts on the environment, establishing objectives and targets towards environmental management, committing to effective and reliable solutions such as prevention pollution and taking personal responsibility for conduct related to the environment.¹⁴ The existence of such standards is important since it allows organisations to gauge their environmental efforts against the generally accepted international criteria.

2.2 National Legal Framework

2.2.1 Constitution of Kenya 2010

The Constitution of Kenya accords every person the right to a clean and healthy environment,¹⁵ which includes the right to have the environment protected for the benefit of present and future generations through measures contemplated in article 69¹⁶; and to have obligations relating to the environment fulfilled under Article 70.¹⁷ These Constitutional provisions bind both the state and every person. Corporations thus have environmental obligations under the Constitution since they are artificial persons. Breach of these obligations could result in enforcement of environmental

¹² The United Nations Conference on Environment and Development, Rio Declaration 1992, Available http://www.unesco.org/education/pdf/RIO_E.PDF (Accessed on 01/12/2019)

¹³ Environmental Management: The ISO 14000 family of International Standards, available at https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/theiso14000family_2009.pdf (Accessed on 30/11/2019)

¹⁴ Ibid

¹⁵ Article 42, Constitution of Kenya 2010, Government Printer, Nairobi

¹⁶ Article 69 sets out 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.

¹⁷ 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.

rights against the corporation and sanctions such as compensation for any victim of a violation of the right to a clean and healthy environment under Article 70 (2) (c).

2.2.2 Environmental Management and Co-Ordination Act (EMCA)

It is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment.¹⁸ The Act entitles every person to a clean and healthy environment and requires every person to cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.¹⁹ EMCA also stipulates several measures for protection and conservation of the environmental subsectors including rivers, lakes, seas, wetlands, mountain areas, forests, biological resource and the ozone layer.²⁰

These provisions bind both the state and individuals and their violation could result in commission of environmental offences set out under the Act. When these offences are committed *by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence (emphasis added).*²¹

To aid in environmental protection and conservation, the Act lists several environmental management tools such as *Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA), Strategic Environmental and Social Assessment (SESA), Environmental Audits and Monitoring (emphasis added).*

2.2.3 Companies Act

The Act calls upon directors while discharging the duty to promote the success of a company to have regard to the impact of the operations of the company on the community and the environment.²² The Act further mandates directors while preparing their reports to include information about environmental matters and take into account the impact of the business of the company on the environment.²³

2.2.4 Climate Change Act

The Act provides a regulatory framework for enhanced response to climate change and measures and mechanisms aimed at achieving low carbon climate development.²⁴ The Act applies in all sectors of the economy and requires measures to be taken towards mainstreaming climate change responses in development planning, providing incentives and obligations for private sector contribution in achieving low carbon climate development and promotion of low carbon technologies.²⁵ *It also imposes climate change duties upon private entities which may also be required to prepare reports on the status of performance of such obligations (emphasis added).*²⁶ The Act empowers the National Environmental Management Authority (NEMA) to

¹⁸ Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, Government Printer, Nairobi

¹⁹ Ibid, S 3 (2A)

²⁰ Ibid, Part V

²¹ Ibid, S 135

²² Companies Act, No. 17, S 143 (1) (d), Government Printer, Nairobi

²³ Ibid, S 655 (4) (b)

²⁴ Climate Change Act, No. 11 of 2016, Government Printer, Nairobi

²⁵ Ibid, S 3

²⁶ Ibid, S 16

monitor, investigate and report whether public and private entities are in compliance with their duties under the Act.²⁷

Corporates need to bear in mind the provisions of the Climate Change Act in carrying out their activities since it is relevant to corporate environmental compliance.

2.2.5 Water Act

It is an Act of Parliament to provide for the regulation, management and development of water resources.²⁸ It enshrines the right to clean and healthy water and contains provisions that seek to curb contamination and pollution of water sources and establishes institutions to enforce the Act. Despite enactment of the Act, there are still many cases of pollution of water bodies some which are perpetrated by corporations through discharge of untreated wastes. Enforcement and compliance with the Act is necessary in attainment of the right to clean and healthy water.

2.2.6 Sectoral Regulations

In addition to these legal instruments, there are several sectoral regulations which govern environmental compliance in Kenya. *The Environmental (Impact Assessment and Audit) Regulations, 2003*²⁹ provide for a system governing the Environmental Impact Assessment process and environmental audits. *The Air Quality Regulations 2014*³⁰ provide for prevention, control and abatement of air pollution to ensure clean and healthy ambient air. The regulations further provide for establishment of *emission standards* for various sources *including industries* as outlined in the Environmental Management and Coordination Act, 1999 (emphasis added). *The Water Quality Regulations 2006*³¹ provides for the right to clean and healthy water and obligates every person to refrain *from acts and omission that may cause water pollution (emphasis added)*. The *Waste Management Regulations 2006*³² provide a system to govern management of wastes including industrial and hazardous wastes.

3. Environmental Compliance Requirements Under Emca

Environmental compliance *entails adherence to environmental laws, standards, regulations and other requirements*. The need for *environmental compliance is important among corporations due to the potential of environmental liability as a result of non-compliance (emphasis added)*.³³ Corporations thus have to adhere to the various environmental laws, regulations and standards set out under EMCA and other environmental sectoral laws. EMCA sets out various environmental management tools such as Environmental Impact Assessment (EIA), Environmental Audits, Strategic Environmental Assessment (SEA) and Strategic Environmental and Social Assessment (SESA).

²⁷ Ibid, S 17

²⁸ Water Act, No. 43 of 2016, Government Printer, Nairobi

²⁹ Legal Notice No. 101, The Environmental (Impact Assessment and Audit) Regulations, 2003

³⁰ The Environment Management And Co-Ordination (Air Quality) Regulations, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171

³¹ Legal Notice No. 121, Water Quality Regulations, 2006

³² Legal Notice, No. 121, Environmental Management and Co-Ordination (Waste Management) Regulations, 2006

³³ Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' available at <https://www.google.com/search?client=firefox-b-d&q=environmental+compliance>

3.1 Environmental Impact Assessment

Environmental Impact Assessment (EIA) refers to a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.³⁴ It has been described as an important tool in environmental conservation and management since it makes it possible to identify environmental problems and provide solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development.³⁵ Since most development activities and projects in Kenya are undertaken by companies, EIA becomes an important aspect of the corporate governance discourse. It has been argued that EIA *can be a powerful tool for keeping the corporates including Multinational Corporations (MNCs) operating in the country in check* (emphasis added).³⁶

The need for EIA is so important that the Environmental (Impact Assessment and Audit) Regulations, 2003 makes it mandatory to conduct an EIA study and have it approved before undertaking a project likely to have environmental effects.³⁷ The Regulations require a proponent to prepare a Project Report that covers *inter alia*; the nature of the project, activities to be undertaken during construction of the project and the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project.³⁸ In addition, the regulations require a proponent to submit to NEMA an Environmental Impact Assessment Study Report that deals with among other things the environmental effects of the project and an Environmental Management Plan (EMP) proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment.³⁹

Failure to comply with EIA requirements under EMCA has seen instances where projects have been halted. In *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, the Applicant was issued with a mining license without complying with the EIA requirements under EMCA. In cancelling the license, the Environment and Land Court decided that:

*'To the extent that the Commissioner for mines was not furnished with a NEMA Licence as required under the EMCA Act and the Regulations made thereunder my view is he could not issue a valid Mining Licence and the Licence he issued to the Applicant on 7th March 2013 was null and void and of no legal effect.'*⁴⁰

³⁴ EMCA, S 2, Government Printer, Nairobi

³⁵ Al Ouran, N.M., 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

³⁶ Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit

³⁷ The Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No.101, available at <http://www.nema.go.ke/images/Docs/Regulations/Revised%20EIA%20Regulations-1.pdf> (Accessed on 29/11/2019), Government Printer, Nairobi

³⁸ Ibid, Regulation 7

³⁹ Ibid, Regulation 18

⁴⁰ *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/109485> ; See also *Save Lamu & 5 Others v NEMA & another*, Tribunal Appeal No. NET 196 of 2016, where the license was cancelled on account of lack of public participation.

It is important for corporations to comply with EIA requirements under EMCA in order to minimise the environmental impacts of their projects and promote sustainable development.

3.2 Strategic Environmental Assessment (SEA)

Strategic Environmental Assessment (SEA) is defined as a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives before their final adoption.⁴¹ EMCA requires all entities, including corporations, to undertake preparations for SEAs at their own expense and submit them to NEMA for approval.⁴² It has been observed that the object of SEA is to enhance environmental protection and promote sustainable development through contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.⁴³

3.3 Environmental Audits and Monitoring

The requirement for environmental audits and monitoring has been enshrined under the Constitution of Kenya as part of the obligations in respect of the environment.⁴⁴ Under EMCA, environmental audit is defined as the *systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment (emphasis added)*. Environmental audits and monitoring act as follow up tools to determine the extent to which activities being undertaken conform to the environmental impact assessment study report issues in respect of the particular project. The aim of this process is to guard against deviation from the study report which could have detrimental effects on the environment. NEMA is mandated under EMCA to undertake environmental audits of all activities that are likely to have *significant effect on the environment and in consultation with lead agencies, monitor all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts (emphasis added)*.⁴⁵

3.4 Public Participation

The principle of Public participation has become essential under the current Constitutional dispensation in Kenya. It is enshrined under the Constitution as one of the national values and principles that binds all persons (including corporations) in the implementation of policy decisions.⁴⁶ The principle is fundamental in environmental governance and all policies, plans and processes related to the environment are to be subjected to public participation. In *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, the court recognized the importance of this principle and observed that, ‘One of the environmental governance principles emphasized by the legal

⁴¹ EMCA, S 2

⁴² EMCA, S 57 A (3)

⁴³ Environmental protection Agency, ‘Strategic Environmental Assessment,’ Available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> (Accessed on 29/11/2019); See also Muigua, K, ‘Legal Aspects of Strategic Environmental Assessment (SEA) and Environmental Management,’ available at <http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf> (Accessed on 01/12/2019)

⁴⁴ Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi

⁴⁵ EMCA, S 68 and 69

⁴⁶ Constitution of Kenya, 2010, Article 10

framework is the principle of public participation in the development of policies, plans and processes for the management of the environment and natural resources.⁴⁷

This principle has also been captured under EMCA. The Act requires the Environment and Land Court in exercising jurisdiction conferred upon it by the Act to be guided by principles of sustainable development including participation of the people in in the development of policies, plans and processes for the management of the environment.⁴⁸ Further, under the Environmental (Impact Assessment and Audit) Regulations, 2003, a project proponent is required to seek the views of persons who may be affected by the project while conducting an environmental impact assessment study.⁴⁹

Public participation has been hailed as an important tool of environmental governance in Kenya since it guarantees social acceptance of projects thus facilitating peace and development.⁵⁰ However, this principle has on some occasions been neglected by corporations while undertaking projects. This has led to instances where EIA licenses have been revoked to lack of public participation in conducting the EIA study.⁵¹

3.5 Sustainable Development

Sustainable development has been enshrined as one of the national values and principles under the Constitution.⁵² The principle has also been captured under EMCA and includes public participation, inter and intra generational equity, polluter pays principle, precautionary principle *inter alia*.⁵³ The importance of sustainable development has been further enhanced through the adoption of Sustainable Development Goals (SDGs) by the United Nations member states in 2015 as a universal call of action towards targets such as ending poverty and protecting the planet.⁵⁴ The SDGs set various targets such as sustainable management of water and sanitation for all, attainment of affordable and clean energy, promotion of inclusive and sustainable industrialization and taking action to combat climate change.⁵⁵ Corporations can assist towards promoting sustainable development through compliance with the targets set out under the SDGs.

⁴⁷ Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/140427> (Accessed on 29/11/2019)

⁴⁸ EMCA, S 3 (5) (a)

⁴⁹ The Environmental (Impact Assessment and Audit) Regulations, 2003, Regulation 17

⁵⁰ Muigua, K, 'Towards Meaningful Public Participation in Natural Resource Management in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> (Accessed on 29/11/2019)

⁵¹ See *Save Lamu & 5 Others vs NEMA & another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR

⁵² Constitution of Kenya, 2010, Article 10 (2) (d)

⁵³ EMCA, S 3 (5)

⁵⁴ Sustainable Development Goals, available at https://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf (Accessed on 01/12/2019)

⁵⁵ *Ibid*

4. Challenges Related to Corporate Environmental Compliance in Kenya

4.1 Environmental Pollution

EMCA defines pollution as the direct or indirect alteration of any part of the environment through discharge, emission or deposition of wastes.⁵⁶ Environmental pollution has also been defined as ‘any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life’.⁵⁷ *Environmental pollution occurs in various forms including water pollution, air pollution, noise pollution and land pollution (emphasis added).*⁵⁸ Environmental pollution has become a major challenge across the world due to the rapid economic development to cater for the rising human population.⁵⁹

The problem of pollution especially by manufacturing industries is well documented in Kenya. It has been pointed out that a number of manufacturing industries discharge untreated effluent into rivers resulting in high pollution levels in the Nairobi and Ngong Rivers.⁶⁰ According to the National Environment Management Authority (NEMA), many factories in the country have been contravening provisions of the Water Quality Regulations, 2006 by either discharging untreated effluent into a public sewer or discharging into the environment without an effluent discharge license.⁶¹ These incidences of pollution have recently been highlighted by the media resulting in crackdown by the National Environment Management Authority (NEMA) against the perpetrators.⁶² According to NEMA, as a result of the crackdown, it has closed down several companies including Synresins, Sameer Agriculture and Livestock Limited (Daima), Kamongo Waste Recycling, Modern Lithography, Associated Battery Manufacturers (ABM), Apex Coating East Africa, Thorlite Kenya.⁶³

In addition to water pollution through discharge of effluent, other forms of environmental pollution by corporations have also been reported in Kenya. There have been reports of lead poisoning in Owino Ohuru slums in Mombasa County due to the presence of a lead battery recycling factory in

⁵⁶ EMCA, S 2, Government Printer, Nairobi

⁵⁷ Coker, A.O. "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> [Accessed on 29/11/2019]

⁵⁸ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," International Journal of Education and Research, Vol. 1 No. 6 June 2013.

⁵⁹ Muigua K, ‘Safeguarding the Environment through Effective Pollution Control in Kenya’ available at <http://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf> (Accessed on 29/11/2019)

⁶⁰ National Environment Management Authority (NEMA), ‘Environment, People and Development’ available at <http://www.nema.go.ke/images/Docs/Regulations/KenyaSoECh1.pdf> (Accessed on 29/11/2019)

⁶¹ National Environment Management Authority, ‘Factories Closed, Owners Arrested for Polluting the Environment’ available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454 (Accessed on 29/11/2019)

⁶² Onyango. L, ‘Kenya Regulator Shuts Down 4 Firms for Polluting Nairobi River’ The EastAfrican, 27th August, 2010, available at <https://www.theeastafrican.co.ke/scienceandhealth/firms-shut-down-for-polluting-Nairobi-River/3073694-5250300-xrjq6bz/index.html> (Accessed on 29/11/2019)

⁶³ NEMA, ‘Factories Closed, Owners Arrested for Polluting the Environment’ Op cit

the area. It has been reported that leakages from the factory have significantly increased lead concentration in the slum's environment which poses environmental health risks especially to children living in the slum.⁶⁴ Further, studies have also indicated that this has contributed to soil pollution in the area.⁶⁵

Despite the existence of laws and regulations to curb against pollution such as the Water Quality Regulations, Waste Management Regulations and Air Quality Regulations, the problem of pollution has persisted in the country. This calls for concerted efforts involving both the regulatory agencies such NEMA and corporations to enhance effective environmental compliance.

4.2 Human Rights Violation

It has been noted that environmental rights are intertwined with other human rights especially the economic and social rights.⁶⁶ The Constitution enshrines these rights which include the right to health, accessible and adequate housing, right to food, clean water and the right to education.⁶⁷ Realization of the economic and social rights is largely dependent on the quality of the environment which is a basic condition of life, indispensable to the promotion of human dignity, welfare and the fulfillment of other human rights.⁶⁸ Thus, acts and omissions by corporations related to the environment are likely to have impact on the realization of socio-economic rights enshrined in the Constitution. Where water sources are polluted due to effluent discharge from industries, the rights to clean water and health are likely to be compromised. Further, soil pollution is likely to affect the right to food due to its effect on agricultural activities. The right to housing may be affected in instances where people are displaced to cater for economic activities by corporations such as mining. The link between environmental rights and other human rights was succinctly captured by the High Court of Kenya in *Peter K. Waweru –v- Republic*, (2006) 1 KLR (E&L) 677 at 691 where the court observed as follows:

“We have added the dictionary meaning of life which gives life a wider meaning, including its attachment to the environment. Thus a development that threatens life is not a sustainable and ought to be halted. In Environmental law, life must have this expanded meaningthe environment is ‘essential to the enjoyment of basic rights – even the right to life itself’”⁶⁹

Corporations therefore have a role to play in the attainment of socio-economic rights in Kenya through environmental compliance.

⁶⁴ Consumer Federation of Kenya, ‘Lead Poisoning in OwinO Ohuru Slums in Mombasa-Kenya’ available at <https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf> (Accessed on 29/11/2019)

⁶⁵ Caravanos, ‘Conflicting Conclusions or Competing Methodologies? Documenting Soil Lead Pollution in Owino Uhuru, Kenya’ *Journal of Health & Pollution*, Vol. 9, No. 21, March 2019

⁶⁶ Muigua. K and Kariuki. F, ‘Safeguarding Environmental Rights in Kenya’ available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/90689/Muigua_Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf?sequence=1&isAllowed=y (Accessed on 30/11/2019)

⁶⁷ Constitution of Kenya, 2010, Article 43

⁶⁸ Patricia Birnie & Alan Boyle, *International Law and the Environment*, op.cit; See also Philippe Sands, *Principles of International Environmental Law*, 2nded. (Cambridge: Cambridge University Press, 2003) and Phillippe Cullet, “Definition of an Environmental Right in a Human Rights Context”

⁶⁹ Peter K. Waweru –v- Republic, (2006) 1 KLR (E&L) 677 at 691

5. Environmental Liability by Corporations in Kenya

5.1 Civil Liability

Civil liability against corporations for environmental breaches occurs in the form of compensation and damages aimed at bringing the property or person affected by such acts as far as possible to the condition they were before the breaches occurred.⁷⁰ Civil remedies for environmental protection can be classified according to their intended function which could be preventive, compensatory, reparatory or natural restitution.⁷¹ In addition to enshrining the right to clean and healthy environment, the Constitution sets out obligations in respect of the environment.⁷² Breach of these obligations may result in enforcement of environmental rights under article 70 of the Constitution which empowers the Environment and Land Court to grant civil remedies such as compensation to the victim or orders of injunction to prevent, stop or discontinue any act or omission that is harmful to the environment. In addition to these remedies, EMCA provides for environmental restoration orders, conservation orders, and easements as part of civil remedies for environmental breaches.⁷³

Consequently, corporations in Kenya found liable for environmental breaches have been imposed with civil consequences. In *John Mutungu Waititu –vs- China Wuyi (Kenya) Co. Limited (2018)*⁷⁴, the Respondent had leased the Appellant's land for a period of one year, with the purpose of excavating murrum. After excavating the murrum, the Respondent had failed to push back the top soil in order to make the ground level and leave the ground the way they had found it. This in turn left the land vulnerable and prone to grave environmental degradation. The Court found the Respondent liable and imposed civil remedies including; nominal damages of Kshs. 25,000 and a Restoration order directing the Respondent move to the Appellant's land and ensure that the same is restored to sound environmental standards not harmful to the environment and to the area residents and animals.

Civil liability for environmental breaches by corporations follows common law principles such as the strict liability rule. The rule was laid down in the case of *Rylands vs Fletcher*⁷⁵ which imposes strict liability on the owner of land for damage caused by the escape of substances to his or her neighbour's land.

Courts in Kenya have applied the strict liability rule and imposed civil liability on corporations for actions that have resulted in damage to the adjacent lands. In *Esther Wanjiru Mwangi & 3 Others*

⁷⁰ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176

⁷¹ Muigua, K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit

⁷² Constitution of Kenya, 2010, Articles 42 and 69, Op Cit

⁷³ EMCA, Part IX (Sec. 108-116)

⁷⁴ *John Mutungu Waititu –vs- China Wuyi (Kenya) Co. Ltd*, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR

⁷⁵ *Rylands vs Fletcher* [1861-73] ALL ER REP 1, the rule states that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God.

*vs Xinghui International (K) Limited*⁷⁶, the defendant dumped large quantities of lead wastes on a road adjoining the Plaintiffs' land and as a consequence, the hazardous wastes negatively affected the Plaintiff's crops and animals. The plaintiffs lost three cows due to indigestion of the poisonous waste material and argued that continued dumping and staying on site of the waste pose real danger to their health as well as to their animals and crops. The court found the Defendant liable for negligence as established in *Rylands –vs-Fletcher* and granted several civil remedies in favour of the Plaintiffs including Kshs. 270,000/= being the value of the dead cows, an order directing the defendant to remove the dumped lead contaminated soil and waste on the road between its land and the Plaintiffs' parcels and a mandatory injunction restraining the Defendant from dumping any contaminated waste from its factory to the Plaintiff's land parcels. Corporations therefore have to guard against instances of environmental damage since their actions can give rise to civil liability.

5.2 Criminal Liability

EMCA stipulates various environmental offences which including offences related to *inspection*, offences *related to Environmental Impact Assessment*, offences related to records and *standards and offences related to hazardous wastes (emphasis added)*.⁷⁷ The Act also prescribes penalties for these offences.⁷⁸ The Act also empowers environmental inspectors appointed under the Act, subject to the Constitution and section 29 of the Office of the Director of Prosecution Act, *to institute and undertake criminal proceedings* against any person before a court of competent jurisdiction (other than a court martial) in respect of any *offence alleged to have been committed by that person under EMCA (emphasis added)*.⁷⁹ Corporates need to be aware of the legal provisions in regard to civil and criminal liability and comply accordingly to avoid incurring liability.

6. Way Forward

6.1 Enhanced Corporate Environmental Compliance

Environmental compliance is required by corporate organizations under EMCA. The foregoing discussion has demonstrated that breach of environmental compliance may result in civil and criminal sanctions upon an organization. *It has been argued that the survival of a corporate organization may depend on how environmental compliance issues are handled (emphasis added)*.⁸⁰ This relates to the sanctions that may be imposed for breach of environmental compliance requirements such as damages or closure of the corporation.

Officers of corporations such as directors and company secretaries have to ensure that all environmental laws, regulations and policies are adhered to. Breach of this duty may result in both civil and criminal liability under EMCA. The Act provides that, *when an offence is committed by a body corporate, the body Corporate and every director or officer who had knowledge of the*

⁷⁶ Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited, High Court of Kenya at Nakuru, Civil Suit No. 144 of 2009 (2016) eKLR

⁷⁷ EMCA, S 137-146

⁷⁸ Ibid

⁷⁹ EMCA, S 118 (b)

⁸⁰ Muigua. K, 'Role of the Company Secretary in Environmental Compliance' available at http://kmco.co.ke/wp-content/uploads/2018/08/078_ROLE-OF-THE-C-S-IN-ENVIRONMENTAL-COMPLIANCE.pdf

*commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with the Act shall be guilty of an offence (emphasis added).*⁸¹

Thus, where an Environmental Impact Assessment is required, a corporation should ensure that it is prepared in accordance with EMCA and the Environmental (Impact Assessment and Audit) Regulations, 2003. Where an environmental audit is required, the corporation should conduct it as provided by EMCA and the regulations. Further, corporations in the manufacturing sector should comply requirements on hazardous wastes and chemicals in handling wastes from their industries.

6.2 Adhering to Principles of Sustainable Development

Sustainable development has been defined as development that meets the needs of the present generation without compromising the ability of future generation to meet their own needs.⁸² It is enshrined as one of the national principles under the Constitution and binds all persons including corporations.⁸³ Sustainable development is also captured under EMCA and incorporates the principles of public participation, international co-operation, inter and intra generational equity, polluter pays principle and the precautionary principle.⁸⁴

The principle of public participation requires the views of those who are likely to be affected by policies, plans and processes related to the environment to be taken into account before their implementation.⁸⁵ Corporations should comply with this principle when undertaking Environmental Impact Assessment studies before implementation of projects.

The Polluter Pays Principle provides that the polluter bears the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.⁸⁶ It is a principle of equity aimed at introducing environmental costs in economic decision making in order to achieve sustainable development.⁸⁷ This principle has been enforced by courts in Kenya by compelling corporations to undertake environmental restoration orders and pay damages for environmental pollution.⁸⁸ Corporations should therefore comply with such orders since they are responsible for their acts and omissions that affect the environment.

The Precautionary Principle is provided for under the Rio Declaration on Environment and Development that requires a precautionary approach to be undertaken in order to protect the

⁸¹ EMCA, S 145 (1)

⁸² Report of the World Commission on Environment and Development: Our Common Future, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (Accessed on 01/12/2019)

⁸³ Constitution of Kenya, 2010, Article 10 (2) (d)

⁸⁴ EMCA, S 3 (5)

⁸⁵ Muigua, K, 'Towards Meaningful Public Participation in Natural Resource Management in Kenya' Op cit

⁸⁶ OECD, Environmental Principles and Concepts, (Organisation For Economic Co-Operation And Development, Paris, 1995),

⁸⁷ Vícha, 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 (Accessed on 01/12/2019)

⁸⁸ See John Mutungu Waititu –vs- China Wuyi (Kenya) Co. Ltd, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR and Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited, High Court of Kenya at Nakuru, Civil Suit No. 144 of 2009 (2016) eKLR

environment where there are threats of serious and irreversible damage.⁸⁹ The principle is aimed at providing guidance for governance and management decisions in responding to environmental uncertainties. Corporation should comply with this principle and *err on the side of caution when undertaking plans and policies related to the environment (emphasis ours)*. This can be through technological responses, prohibitions and other measures that can limit the impact of environmental activities.⁹⁰

The Principle of *intra and inter-generational equity* requires the right of development to be fulfilled so as to equitably meet both the developmental and environmental needs of present and future generations.⁹¹ This is essential principle of sustainable development since it safeguards against instances such as depletion of natural resources.

Under the Companies Act, a corporation while pursuing its economic activities is required to take into account the *impact of its operations on the community and the environment*.⁹² Corporations should therefore adhere to the principles of sustainable development to ensure that their economic activities meet the needs of both the present and future generations.

6.3 Corporate Social and Environmental Responsibility

Related to sustainable development is the idea of Corporate Social Responsibility (CSR). However, while sustainable development is a legal requirement, CSR is a voluntary undertaking. CSR has been defined as a transparent business practice based on ethical values, legal requirements compliance and respect for the community, people and the environment within which the business operates.⁹³ *Corporate Social Responsibility has been defined as the behaviour and activities of a corporation that go beyond its economic interest to positively affect social and nonsocial stakeholders.*⁹⁴ *CSR has an environmental dimension (emphasis added).*⁹⁵

It has been argued that CSR contributes to the economic success of an organization since it meets the needs of stakeholders who are critical to its existence.⁹⁶ According to proponents of CSR, a firm's success is dependent on how it is able to safeguard relationship with stakeholders such as employees, communities and customers since socially responsible helps it gain support from such stakeholders.⁹⁷ In Kenya, studies have shown that *corporations that have undertaken CSR initiatives such as environmental conservation programs have witnessed success in areas such as*

⁸⁹ Principle 15, 1992 Rio Declaration on Environment and Development http://www.unesco.org/education/pdf/RIO_E.PDF (Accessed on 01/12/2019)

⁹⁰ 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 01/12/2019]

⁹¹ Principle 3, 1992 Rio Declaration on Environment and Development http://www.unesco.org/education/pdf/RIO_E.PDF (Accessed on 01/12/2019)

⁹² Companies Act, No. 17 of 2015, S 143 (1) (d)

⁹³ Arora, R., & Richa, G. D. (2013). 'Corporate Social Responsibility—Issues and Challenges in India.' *International Journal of Research in Finance & Marketing*, 3 (2).

⁹⁴ Agan Y et al, 'The Relationships Between Corporate Social Responsibility, Environmental Supplier Development and Firm Performance' *Journal of Cleaner Production*, 2014 (1-10)

⁹⁵ Ibid

⁹⁶ Freeman, E, and Velamuri, R, 'A New Approach to CSR: Company Stakeholder Responsibility' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186223 (Accessed on 01/12/2019)

⁹⁷ Ibid

*sales and market share (emphasis added).*⁹⁸ Corporations should therefore pursue corporate environmental responsibilities such as environmental conservation programmes which may include clean up exercises, restoration activities, tree planting exercises and environmental awareness campaigns. These activities have the ability to contribute to the economic growth of an organization.

6.4 Environmental Insurance

Environmental Insurance can be used as a tool for environmental management. This however is yet to be popularized in Kenya and EMCA does not have provisions on environmental insurance. It has however been suggested that environmental insurance can be popularized in the country for both medium and large corporations to shield them against environmental liability which could turn out to be too costly.⁹⁹ Some insurance providers have packages on environmental liability covering environmental damage and clean-up costs for pollution.¹⁰⁰ It is therefore important to popularize environmental insurance in the country since *some cases of environmental liability may not be foreseen by a corporation and could arise due to natural acts (emphasis added)*. However, the strict liability rule imposes liability on the corporation even where such acts could not be foreseen. Through environmental insurance, it may be possible to shield a corporation from cases of environmental liability.

7. Conclusion

Corporate environmental compliance remains a central theme in the environmental governance debate in Kenya. In light of the sustainable development agenda in Kenya, corporations are now required to ensure that their activities adhere to the environmental laws, rules and regulations set out under the Constitution and EMCA. In case of violation of these rules, both civil and criminal liability may be imposed upon the corporation. Corporations can therefore ensure environmental compliance by *adhering to environmental laws, rules and regulations, promoting sustainable development, engaging in Corporate Social Responsibility activities and taking up environmental liability insurance (emphasis added)*. Corporate Environmental Compliance is thus vital in the quest for attainment of sustainable development.

⁹⁸ Mwancha. Y, and Ouma. C, 'Effects of Social Responsibility Initiatives on Performance of Safaricom Kenya Limited' International Journal of Innovative Research & Development, Volume 6, Issue 8, August 2017

⁹⁹ Muigua. K. 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit

¹⁰⁰ <https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability>

Attaining Energy Justice in Kenya

Abstract

Energy is increasingly being recognised as an essential human need. The importance of energy cannot be overemphasized. It is vital for economic development in any given country. This has seen massive investment being channelled in the energy sector across the globe and particularly in Kenya. However, despite the efforts made in the energy sector, injustices are still prevalent in areas such as access to energy, energy costs and energy governance. The paper discusses the concept of energy justice which is aimed at addressing such injustices. It begins by conceptualising energy justice and its components which are distributional justice, procedural justice and recognition justice. The paper then analyses the legal framework on energy in Kenya to determine whether it promotes energy justice in the country. The paper also discusses some of the energy justice concerns in Kenya and proposes reforms geared towards promoting energy justice in the country.

1. Introduction

Access to energy is a fundamental human need and the driving force of human development.¹ Energy is critical to economic development and poverty eradication.² Indeed there is growing evidence linking access to energy with the attainment of socio-economic rights such as the right to education, right to food and the right to health.³ Reliable supply of electricity and adequate lighting can aid learners in their academic activities; further electricity can be utilised for farming activities such as irrigation. To this extent, it has been asserted that energy is “not just another commodity, but the precondition of all commodities, a basic factor equal with air and water.”⁴ Access to clean energy has been equated to a ‘golden thread’ which has the ability to stimulate development by connecting the Sustainable Development Goals (SDGs) and unlocking sustainable economic growth.⁵ It has been pointed out that no country in the recent past has been able to substantially reduce poverty levels without an increase in energy services.⁶

The importance of energy has been given recognition at the global stage with Sustainable Development Goal number 7 being geared towards ensuring access to affordable, reliable,

¹ Guruswamy. L, ‘Energy Justice and Sustainable Development’ Colorado Journal of International Environmental Law & Policy, Volume 21, No. 2.

² Muigua. K., ‘Access to Energy as a Constitutional Right in Kenya’, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Access-to-Energy-as-a-Constitutional-Right-in-Kenya-NOVEMBER-2013.pdf> (Accessed on 02/01/2020).

³ The World Bank, ‘Sustainable Development Goal on Energy (SDG7) and the World Bank Group’, available at <https://www.worldbank.org/en/topic/energy/brief/sustainable-development-goal-on-energy-sdg7-and-the-world-bank-group> (Accessed on 03/01/2020).

⁴ Goldthau. A & Sovacool. B., ‘The Uniqueness of the Energy Security, Justice and Governance Problem’ Energy Policy, 41 (2012) 232-240.

⁵ Ibid.

⁶ Yoshida. T., & Zusman. E., ‘Achieving the Multiple Benefits of a Sustainable Development Goal for Energy’ Available at https://iges.or.jp/en/publication_documents/pub/bookchapter/en/4934/08_Ch8_Achieving_the_SDGs_.pdf (Accessed on 18/12/2019).

sustainable and modern energy.⁷ Energy is described as being central to every major opportunity and challenge that the world faces today as it connects with the other Sustainable Development Goals.⁸

However, despite its importance, access to clean and affordable energy remains a challenge especially in Sub-Saharan Africa. Studies have shown that in these countries, nearly 83% of the population depends on traditional fuels while 74% lack access to electricity thus contributing to energy poverty.⁹ Energy poverty in such countries is caused by a number of factors including low levels of electrification due to economic constraints and insufficient institutions.¹⁰ In Kenya, despite attempts by the government to enhance electricity connectivity through measures such as subsidizing the costs, many households especially in rural areas cannot afford the initial connection charges thus have low access.¹¹ Further, the high costs of modern sources of energy such as Liquefied Petroleum Gas (LPG) also contribute to energy poverty.

2. Energy Justice

The inequalities witnessed in the energy sector has led to emergence of the concept of energy justice. Energy justice has been defined as a global energy system that fairly disseminates both the benefits and costs of energy services, and one that has representative and impartial energy decision-making.¹² It seeks to apply basic principles of justice and fairness to the inequalities witnessed in the availability, affordability, sustainability and due process in the energy sector.¹³ Energy justice seeks to influence decision making in the energy sector by incorporating justice and ethical considerations in such decisions; for example, disconnecting electricity for citizens who fail to pay their bills on time could affect their day to day lives yet failing to do so could overburden other paying citizens.¹⁴

Energy justice thus poses a justice and ethical dilemma of allocating the benefits of scarce energy resources among citizens and between the present and future generations.¹⁵ To this extent, energy justice forms a crucial component of the sustainable development agenda and the principles of intra and inter- generational equity. These principles as enunciated in the Rio Declaration on

⁷ United Nations Development Programme, 'Sustainable Development Goals' available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (Accessed on 23/01/2020).

⁸ United Nations Sustainable Development Goals, 'Goal No. 7: Ensure Access to Affordable, Reliable, Sustainable and Modern Energy' available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (accessed on 23/01/2020).

⁹ Bildirici. M & Ozaksoy.F., 'Woody Biomass Energy Consumption and Economic Growth in Sub-Saharan Africa' *Procedia Economics and Finance* 38 (2016) 287 – 293.

¹⁰ Njiru. C.W & Letema. S.C., 'Energy Poverty and its Implication on Standard of Living in Kirinyaga, Kenya' *Journal of Energy*, 2018.

¹¹ *Ibid.*

¹² Benjamin K. Sovacool & Michael H.Dworkin, *Global Energy Justice: Problems, Principles and Practices* (Cambridge Univ. Press, 2014).

¹³ Heffron. J.R., & McCauley. D., 'The Concept of Energy Justice across the Disciplines' *Energy Policy* 105 (2017) 658-667.

¹⁴ Benjamin K. Sovacool & Michael H.Dworkin, *Global Energy Justice: Problems, Principles and Practices*, Op Cit.

¹⁵ Sovacool. B.K., 'Energy Decisions Reframed as Justice and Ethical Concerns' *Energy Justice* 1, available at <https://core.ac.uk/download/pdf/42579074.pdf> (Accessed on 28/01/2020).

Environment and Development are aimed at achieving development that equitably meets developmental and environmental needs of both the present and future generations.¹⁶ Through energy justice, affordability, sustainability and availability in the energy sector can be achieved thus promoting human and economic development.

There are three core tenets of energy justice; *distributional justice, recognition justice and procedural justice* (emphasis added). Distributional justice is aimed at establishing existing injustices in the energy sector and means of resolving them.¹⁷ It assesses issues such as uneven distribution, production and consumption of energy. The location of energy production facilities such as wind power stations, dams and gas power stations could create inequalities in access to energy thus raising justice concerns. Recognition justice is aimed at determining the section of the population ignored or misrepresented in energy access in order to cure such ills.¹⁸ Procedural justice is aimed at streamlining the decision making processes in the energy sector that engages all stakeholder to ensure inclusivity non-discrimination.¹⁹ This can be achieved through measures such as public participation and Environmental Impact Assessment (EIA) in relation to energy projects. It has the ability to foster acceptance and ownership of such projects whilst promoting environmental conservation and sustainable development. The aim of energy justice is to apply these three tenets in the energy policy and systems so as to enhance availability, affordability, sustainability and due process in the energy sector.²⁰

The concept of energy justice is paramount to Kenya which is at critical stage in defining its energy future.²¹ The country faces a challenge to enable a 'just transition' to lower carbon economy that simultaneously delivers poverty reduction and climate change resilience.²²

3. Legal Framework On Energy Justice in Kenya

3.1 Constitution of Kenya, 2010

The Constitution enshrines economic and social rights including a right to the highest attainable standard of health, right to food, right to clean and safe water and right to education.²³ Access to energy is crucial for the realisation of most of these rights.²⁴ Furthermore, the Constitution recognises energy as part of natural resources.²⁵ Consequently, the state has an obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural

¹⁶ The United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development' 1992, Principles 3 and 4.

¹⁷ Jenkins. K., et al, 'Energy Justice: A Conceptual Review' Energy Research & Social Science 11 (2016) 174-182.

¹⁸ Ibid.

¹⁹ Heffron. J.R., & McCauley. D., 'The Concept of Energy Justice across the Disciplines' Op Cit.

²⁰ Jenkins. K., et al, 'Energy Justice: A Conceptual Review' Energy Research & Social Science 11 (2016) 174-182, Op cit.

²¹ Newell. P., & Philips. J., 'Neoliberal Energy Transitions in the South: Kenyan Experience' Geoforum, 74 (2016) 39-48.

²² Ibid.

²³ Constitution of Kenya, 2010, Article 43, Government Printer, Nairobi.

²⁴ Muigua. K., 'Access to Energy as a Constitutional Right in Kenya' Op Cit.

²⁵ Constitution of Kenya, 2010, Article 260; 'natural resources' means the physical non-human factors and components, whether renewable or non-renewable, including inter alia rocks, minerals, fossil fuels and other sources of energy'.

resources including energy, and ensure the equitable sharing of the accruing benefits from such resources.²⁶ The Constitution further identifies sustainable development as one of the national values and principles that is to guide the development agenda in the country.²⁷ Sustainable exploitation and utilisation of energy as a natural resource will guarantee energy justice by achieving intra and inter-generational equity.

3.2 Energy Act, No. 1 of 2019

The Act mandates the government to facilitate the provision of affordable energy services to all persons in Kenya.²⁸ Part III of the Act establishes National Energy Entities which are the Energy and Petroleum Regulatory Authority, Energy and Petroleum Tribunal, Rural Electrification and Renewable Energy Corporation and Nuclear Power and Energy Agency. The Energy and Petroleum Regulatory Authority is mainly tasked with regulatory activities related to *inter alia* the generation, importation, exportation, distribution and supply of electric energy, petroleum and petroleum products, renewable energy and other forms of energy.²⁹ The Energy and Petroleum Tribunal is established for purposes of hearing and determining disputes and appeals relating to the energy and petroleum sector in accordance with the Act.³⁰ The Rural Electrification and Renewable Energy Corporation is tasked with overseeing the implementation of the rural electrification programme and promoting the use of renewable energy and technologies among other functions.³¹ The Nuclear Power and Energy Agency is tasked with *inter alia* implementation of the nuclear energy programme and promoting the development of nuclear electricity generation in Kenya.³²

Implementation of the Act is important in enhancing energy justice in Kenya. The National Energy Entities established under the Act have the ability to promote attainment of the right to energy in Kenya. Further, the Energy and Petroleum Tribunal can contribute to enhancing energy justice in Kenya through its decisions and pronouncements.

3.3 National Energy Policy, 2018

The policy recognises energy as a critical component in the economy, standard of living and national security of a country.³⁴ It is geared towards achieving several objectives which include *inter alia* improving access to affordable, competitive and reliable energy services, promoting energy efficiency and conservation and promoting diversification of energy supply sources in Kenya to ensure security of supply.³⁵ It sets out several policies and strategies towards the use, development and conservation of energy sources in the country such as coal resources, renewable energy and electricity. The Policy also contains Energy efficiency and conservation measures aimed at reducing energy consumption without sacrificing productivity or increasing costs.³⁶

²⁶ Ibid, Article 69 (1) (a).

²⁷ Ibid, Article 10.

²⁸ Energy Act, No.1 of 2019, S 7(1), Government Printer, Nairobi.

²⁹ Ibid, S 10.

³⁰ Ibid, S 25.

³¹ Ibid, S 44 (1).

³² Ibid, S 56 (1).

³³ Ministry of Energy, National Energy Policy, 2018, Government Printer, Nairobi.

³⁴ Ibid, S 1.1.

³⁵ Ibid, S 1.2.

³⁶ Ibid, S 5.0.

It is an ambitious policy document that is central to the attainment of the national development blueprint, Kenya Vision 2030 and the Government's Big Four Agenda.³⁷ Effective implementation of the Policy may promote energy security and justice in the country.

4. Energy Justice Concerns in Kenya

4.1 Access to Energy

It has been reported that Kenya has witnessed one of the fastest growth in electrification within Sub-Saharan Africa with 75% of the population having access to electricity by the year 2018.³⁸ The National Electrification Strategy is geared towards achieving universal electricity access to all households and businesses by the year 2022. The country has also been hailed for making notable progress in deploying renewable sources of energy.³⁹ However, while the country has made great strides towards electrification, there exists a wide disparity in electrification between urban and rural areas with 84% of the population in rural areas not having electricity connection.⁴⁰ Further, it has been reported that a household in Nairobi is 36 times more likely to have electricity than a household in Turkana or Tana River Counties.⁴¹ Such disparity in access to energy creates energy justice concerns with the poor and rural areas being the most affected. With the essential importance of energy as human need, it is necessary to ensure equity and fairness in respect to energy access.

4.2 Energy Costs

Energy costs relate to the expenses of being connected and equipped with energy sources and the cost of the energy used. Energy affordability remains a challenge in most sub-Saharan African Countries due to the high cost of power relative to income.⁴² Consequently, reports have shown that electricity prices in Kenya are higher than the global average at the rate of 0.224 U.S Dollar per kWh for households and 0.192 U.S Dollar for businesses against a global average of 0.15 U.S Dollar per kWh for households and 0.12 U.S Dollar for businesses.⁴³ Other sources of energy such as kerosene are affected by international prices thus unpredictable and unreliable especially among the poor.⁴⁴

³⁷ Government of Kenya, 'Towards 2030' available at <https://vision2030.go.ke/towards-2030/> (Accessed on 28/01/2020)

³⁸ International Energy Agency, 'Africa Energy Outlook 2019' available at https://webstore.iea.org/download/direct/2892?fileName=Africa_Energy_Outlook_2019.pdf Accessed on (21/01/2020).

³⁹ Ibid.

⁴⁰ Moner-Girona. M et al, 'Decentralized Rural Electrification in Kenya: Speeding Up Universal Energy Access' Energy for Sustainable Development, Volume 52, October 2019, p 128-146.

⁴¹ World Health Organization, 'Opportunities for Transition to Clean Household Energy in Kenya: Application of the WHO Household Energy Assessment Rapid Tool (HEART)' available at <https://apps.who.int/iris/bitstream/handle/10665/311281/9789241514989-eng.pdf> (Accessed on 23/01/2020)

⁴² International Energy Agency, 'Africa Energy Outlook 2019' (Op Cit).

⁴³ GlobalPetrolPrices.Com 'Kenya Electricity Prices' available at https://www.globalpetrolprices.com/Kenya/electricity_prices/ (Accessed on 23/01/2019).

⁴⁴ Morrissey.J., 'The Energy Challenge in Sub-Saharan Africa: A Guide for Advocates and Policy Makers' Oxfam, 2017, available at <https://www.oxfamamerica.org/static/media/files/oxfam-RAEL-energySSA-pt2.pdf> (Accessed on 28/01/2020).

4.3 Disclosure and Public Participation in Energy Matters

The Constitution of Kenya 2010 guarantees the right of access to information.⁴⁵ However, some of the energy providers do not readily provide information on such matters as tariffs, pollution, real costs and other cost and affordability-related issues.⁴⁶ This hinders effective decision making for most people on the available sources of energy. Further, while undertaking energy projects, some of the stakeholders have violated the constitutional principle of public participation. Public participation has been defined as the process by which public concerns, needs and values are incorporated into governmental and corporate decision-making with the overall goal of better decisions that are supported by the public.⁴⁷ It is an important constitutional safeguard that ensures that the views of those who are likely to be affected by development projects are taken into account before such projects are implemented.⁴⁸ The importance of public participation was pronounced in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*⁴⁹, where the Constitutional Court observed that:

'Public participation is a national value that is an expression of the sovereignty of the people as articulated under Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. Our jurisprudence has firmly established that Courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold.'

The principle of public participation has also been upheld by the Supreme Court in *The Matter of the National Lands Commission* where it was observed that:

'The participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments,

⁴⁵ Constitution of Kenya, 2010, Article 35; See also the Access to Information Act, No. 31 of 2016.

⁴⁶ Muigua. K., 'Access to Energy as a Constitutional Right in Kenya' Op Cit.

⁴⁷ Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya' Glenwood Publishers Limited (2015).

⁴⁸ For purposes of public participation, the court in *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok* defined the public as 'the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised. Courts have also insisted on meaningful public participation. In *Robert N. Gakuru & Others v Governor Kiambu County & 3 others*, the court decided that 'public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.' The Public Participation, No. 2 Bill 2019 seeks to give effect to the constitutional principle of public participation. It defines public participation as the involvement and consultation of the public in the decision making processes of the relevant state organs and public offices. The bill sets out several guiding principles in conducting public participation including the need to provide timely access to relevant information. Further, it sets out several obligations in conducting public participation including establishing structures to facilitate effective participation and ensuring fair and equal access to the public participation processes for all persons. If enacted into law, the Act will enhance public participation in environmental decision making in Kenya.

⁴⁹ Constitutional Petition No. 305 of 2012 (2015) eKLR.

*as well as commissions and independent offices. It is a device for promoting democracy, transparency, openness, integrity and effective service delivery.*⁵⁰

Public participation in environmental governance is provided for under the Constitution which mandates the state to encourage public participation in the management, protection and conservation of the environment.⁵¹ It is an essential principle in natural resources management.⁵² Public participation in environmental governance is aimed at furthering environmental democracy which connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making.⁵³ Utilisation of the views of the public in decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development.⁵⁴ In the context of energy justice, public participation fosters procedural justice by engaging with all stakeholders and promoting inclusivity and non-discrimination.⁵⁵

Further, with regard to environmental projects, the Environmental Management and Co-Ordination Act requires project proponents to undertake public participation in the process of preparing the Environmental Impact Assessment Study Report.⁵⁶ Lack of community engagement through public participation has often seen energy projects stall due to opposition by affected communities. This was vividly seen in the case of Kinangop Wind Park Limited which sought to erect a 60.8 Megawatt wind turbine farm to be in Kinangop, Nyandarua County. However, the project stalled due to community protests over lack of proper engagement, sensitization and compensation.⁵⁷

In *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, the National Environment Tribunal revoked an Environmental Impact Assessment License issued to Amu Power Company Limited to set up an intended 1050 MW coal fired power plant in Lamu for lack of effective public participation among other grounds. In its decision, the Tribunal noted that ‘human beings are justifiably concerned about the environmental impacts of projects to their location and especially where those projects are novel in nature....., being concerned about

⁵⁰ In the Matter of the National Land Commission, Supreme Court Advisory Reference No. 2 of 2014 (2015) eKLR.

⁵¹ Constitution of Kenya, 2010, Article 69 (1) (d).

⁵² Muigua. K., Wamukoya. D & Kariuki. F., ‘Natural Resources and Environmental Justice in Kenya’ Op Cit.

⁵³ Muigua. K & Musyimi. P.N, ‘Enhancing Environmental Democracy in Kenya’ available at http://kmco.co.ke/wp-content/uploads/2018/08/072_Envtal_Dem_Kenya.pdf (Accessed on 29/01/2020); See also Muigua. K., ‘Realising Environmental Democracy in Kenya’ available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf> (Accessed on 29/01/2020).

⁵⁴ Ibid.

⁵⁵ Jenkins. K, et al, ‘Energy Justice: A Conceptual Review’ Energy Research & Social Science 11 (2016) 174-182, Op Cit.

⁵⁶ Environmental Management and Co-Ordination Act, No. 8 of 1999, S 59, Government Printer, Nairobi

⁵⁷ Business & Human Rights Resource Centre, ‘Kinangop Wind Park's Suit Against Kenya Govt For Alleged Failure To Stop Local Community's Opposition To Project Dismissed’ available at <https://www.business-humanrights.org/en/kinangop-wind-parks-suit-against-kenya-govt-for-alleged-failure-to-stop-local-communities-opposition-to-project-dismissed> (Accessed on 29/01/2020).

all these environmental effects of a project the people most affected by a project must therefore have a say on each and every aspect of the project and its impact.’⁵⁸

Public participation is thus an essential principle in projects, including energy-related ones, which needs to be upheld in order to enhance energy justice.

5. Way Forward

5.1 Enhancing Access to Energy

Household energy needs entail two components: access to clean cooking facilities and access to electricity. While Kenya has made notable progress towards enhancing access to electricity through measures such as the rural electrification programme, progress remains slow in promoting clean cooking facilities. Bio-energy sources such as charcoal, wood fuel and dung remain the most common source of energy in Kenya especially among the rural population.⁵⁹ However use of these sources is associated with environmental challenges such as air and soil pollution and environmental degradation through deforestation. Further, it is estimated that almost 500, 000 premature deaths per year in Africa are related to household air pollution from the lack of access to clean cooking facilities, with women and children the worst affected.⁶⁰ There is thus an urgent need to enhance access to clean cooking facilities in Kenya. Liquefied Petroleum Gas (LPG) has been promoted as an alternative but its use is largely concentrated in urban areas due to its associated costs. Under the Energy Act, the government is mandated to facilitate provision of affordable energy services to all persons in Kenya.⁶¹ Measures can be put in place to enhance access to clean energy sources such reducing the costs of LPG to promote its affordability. Further, costs related to electricity such as connection charges and billing costs should be made affordable for the benefit of all Kenyans especially those in rural areas.

5.2 Promoting Transparency and Accountability in Energy Governance

The country has in recent past witnesses several scandals in the energy sector that have threatened to derail progress towards energy efficiency and security in the country. Kenya Power, which owns and operates most of the electricity transmission and distribution system in the country, has been hit with fraud allegations through manipulation of power bills and electricity tokens that saw many Kenyans pay electricity bills up to five times than what they had consumed.⁶² Further, the botched Mwananchi Gas Project by the Ministry of Petroleum that was aimed at providing LPG cylinders to Kenyans at subsidized costs saw taxpayers lose more than Kenya Shillings 870 million due to

⁵⁸ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR

⁵⁹ Muchiri. L., ‘Gender and Equity in Bioenergy Access and Delivery in Kenya’ Practical Action East Africa, 2008, available at

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiY2P29z6PnAhUEiFwKHQlyCLOQFjAAegQIBRAB&url=http%3A%2F%2Fwww.cas.ed.ac.uk%2F__data%2Fassets%2Fword_doc%2F0007%2F24793%2FGender_and_Equity_in_Bio_energy_Access_and_Delivery_in_Kenya_final.doc&usq=AOvVaw2AKp1mvTSC9tafkIKJ-36_ (Accessed on 23/01/2020).

⁶⁰ *Ibid.*

⁶¹ Energy Act, No. 1 of 2019, S 7 (1).

⁶² Achuka. V., ‘How Kenya Power Staff Stole Millions in Bills Scandal’ Daily Nation, Tuesday, December 24, 2019.

shortcomings in its implementations.⁶³ Effective implementation of such a plan would have been crucial in enhancing access to clean cooking facilities in the country.

Such scandals have contributed to energy injustices in the country since they hinder the ability of citizens to access reliable and affordable energy services. There is need to strengthen accountability mechanisms in the energy sector and ensure that the perpetrators of such acts are held accountable for their misdeeds. Energy Service providers such as Kenya Power should also be transparent in their affairs and ensure that citizens are aware of their obligations and are billed according to the services they consume. The Energy Act mandates the Director of Public Prosecutions (DPP) to appoint a public prosecutor for purposes of prosecuting offences under the Energy Act.⁶⁴ This is an important step in ensuring prosecution of perpetrators of energy injustices in the country with a view of promoting energy justice.

5.3 Facilitating Inclusivity and Public participation in the Energy Sector

The foregoing discussion has shown that stakeholder inclusivity through public participation is an important component of energy justice as it promotes procedural justice. Energy projects such oil extraction and coal mining have potential environmental and human effects since they can result in environmental degradation and displacement of citizens. Community consultation through meaningful public participation is important to ensure that there is public acceptance and cooperation with such projects.⁶⁵ This is in line with Principle 10 of the Rio Declaration, 1992 which acknowledges that environmental issues are best handled with the participation of all concerned citizens, at the relevant level.⁶⁶ Public participation has also been enshrined as one of the national values and principles under the Constitution.⁶⁷

Through public participation, energy entities are able to put into consideration the views of those likely to be affected by energy projects in their implementation. The National Environment Management Authority (NEMA) should be satisfied that sufficient stakeholder engagement through public participation has been undertaken and reflected in the Environmental Impact Assessment (EIA) study reports before issuing an EIA Licence necessary for commencement of such projects.

5.4 Promoting Renewable Sources of Energy

The Energy Act defines renewable energy as ‘non-fossil energy generated from natural non-depleting resources including but not limited to solar energy, wind energy, biomass energy, biological waste energy, hydro energy, geothermal energy and ocean and tidal energy.’⁶⁸ Renewable energy has been hailed for its advantages which include ensuring the security of energy supply.⁶⁹ Energy security is an essential component of energy justice since it guarantees availability

⁶³ Mutai. E, ‘Taxpayers Lose Sh870 Million in Botched Cooking Gas Subsidy Plan’ Business Daily, Monday, July 8, 2019.

⁶⁴ Energy Act, No. 1 of 2019, S 220.

⁶⁵ Muigua. K., ‘Access to Energy as a Constitutional Right in Kenya’ Op Cit.

⁶⁶ The United Nations Conference on Environment and Development, ‘Rio Declaration on Environment and Development’ 1992.

⁶⁷ Constitution of Kenya, 2010, Article 10 (2) (a).

⁶⁸ Energy Act, No. 1 of 2019, S 2.

⁶⁹ Nizic. M.K., ‘The Advantages and Disadvantages of Renewable Energy in the Tourist Destination’ Conference Paper, available at

of energy necessary to fulfil basic human needs.⁷⁰ The Energy Act establishes the Rural Electrification and Renewable Energy Corporation whose functions include *inter alia* to develop, promote and manage in collaboration with other agencies, the use of renewable energy and technologies, including but not limited to biomass (biodiesel, bio-ethanol, charcoal, fuel-wood, biogas) municipal waste, solar, wind, tidal waves, small hydropower and co-generation but excluding geothermal.⁷¹ The Corporation needs to further its efforts in promoting renewable sources of energy apart from biomass which still remains the most common source of energy in Kenya. This will be vital in promoting energy security which is an important element of energy justice.

6. Conclusion

The importance of energy as a human need necessary for fostering human development is not in doubt. However, inequalities are still witnessed in the energy sector globally and Kenya in particular in aspects such as energy access, energy costs and energy decision making. Energy Justice has emerged as a global concept aimed at dealing with such inequalities witnessed in the energy sector. It is aimed at promoting distributional, recognition and procedural justice in the energy sector by ensuring equality, fairness, transparency, accountability, participation and energy security. For Kenya to attain its development agenda, energy justice is of utmost importance due to the clear link between energy and development. Energy Justice as an ideal is attainable. There must however be a concerted effort by all stakeholders to move forward together towards energy justice in Kenya for sustainable development.

https://www.researchgate.net/publication/320584990_The_Advantages_and_Disadvantages_of_Renewable_Energy_in_the_Tourist_Destination/link/59ef0c1c4585152de64db7cc/download (Accessed on 24/01/2020).

⁷⁰ Azzuni. A., and Breyer. C., 'Definitions and Dimensions of Energy Security: A Literature Review' available at <https://onlinelibrary.wiley.com/doi/pdf/10.1002/wene.268> (Accessed on 24/01/2020).

⁷¹ Energy Act, No. 1 of 2019, S 44 (1) (j).

Exploring Conflict Management and the Environment: The Kenyan Journey

Abstract

This paper is meant to capture the main themes that have featured in Kariuki Muigua's work, his contribution to the academia, policy and legal development in Kenya. It traces the running thread through his work with the aim of demonstrating that conflict management and environmental matters are not linear subjects and should be treated as such as they impact on every sphere of the human life. The paper is also important in that it traces the jurisprudential development of these themes within the Kenyan framework to show how far we have come as a country in guaranteeing environmental rights and creates an opportunity for the stakeholders in the justice sector and environmental management to reflect on the successes, challenges and the future prospects in ensuring that every Kenyan will access justice and a right to clean and healthy environment.

1. Introduction

The discourse on conflict management and the environment in Kenya has come a long way. Various authors have voiced their opinion on the debates based on the developing international jurisprudence and the evolving domestic laws. One author who has been very consistent in exploring the same has been Kariuki Muigua. He has explored different topics including but not limited to: Access to Justice; Alternative Dispute Resolution; Arbitration; Alternative Dispute Resolution and Access to Justice; Sustainable Development; Environment/Bridges; Mediation; Negotiation; and Democracy/Environmental Democracy. His immense knowledge and understanding of the topics has not only been instrumental in informing legal debates but also in creating real change as far as practical application to real situations is concerned. His expertise has earned him both national and international accolades, with him being described as '*a highly respected arbitrator and mediator with a sterling background in commercial and constitutional cases, as well as matters relating to the environment and natural resources*'.¹ His works have not only assisted students and academicians but also have been widely quoted by courts' decisions. This paper offers a recap of the works of Kariuki Muigua related to the above listed topics.

2. Exploring Conflict Management and the Environment: Tracing the Steps

2.1 Access to Justice

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 some of the works by Muigua that predate the 2010 Constitution acknowledged the place of Courts in the access to justice agenda, they also recommended the exploration of alternative means that would address such challenges as cost-effectiveness, time, physical accessibility and literacy levels among consumers of justice, among others.²

¹ <https://www.chambersandpartners.com/123/645/editorial/2/1/global-kenya-dispute-resolution-arbitrators>

² 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>).

Kariuki Muigua has also published extensively after the 2010 Constitution on the subject of access to justice.³ Apart from the publications, Kariuki Muigua has also widely consulted on the subject for both public bodies and the Non-Governmental Organizations (NGOs).⁴ Notably, Kariuki Muigua has also published some works exploring the link between access to justice and Alternative Dispute Resolution mechanisms⁵, access to justice and natural resources, among others. However, these will be revisited under different thematic subtitles in this paper.

2.2 Alternative Dispute Resolution Mechanisms

Before the current constitutional dispensation, there was little local literature on the topic of Alternative Dispute Resolution (ADR) mechanisms. When Muigua first set out to formally contribute to the debate on the role of ADR mechanisms in not only enhancing access to justice but also the applicability of these mechanisms to various conflicts such as natural resource related conflicts, he wrote his Master of Laws (LLM) Thesis on the topic of ‘resolution of natural resource conflicts in Kenya through arbitration and mediation’ in 2005⁶. This is however not to say that before then he had not written or published anything on ADR mechanisms.⁷ In 2011, he completed his Ph.D thesis on the applicability of mediation in resolving environmental conflicts in Kenya.⁸ The thesis critically examined the nature and scope of environmental conflicts in Kenya; the legal and institutional mechanisms in place at the time to address these conflicts; and their adequacy. The main focus of the discourse was if and how mediation could be applied in resolving

³ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015; Muigua, K., *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*, Workshop on Access to Justice Tuesday, 23rd October 2012 at Sankara Hotel, Westlands. Available at <http://www.kmco.co.ke/index.php/publications>; Muigua, K. & Kariuki, F., ‘ADR, Access to Justice and Development in Kenya,’ *Strathmore Law Journal*, Vol. 1, No. 1, June 2015.

⁴ Engaged as a Consultant by the Commission for the Implementation of the Constitution and IDLO in preparing the report on the “**Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya**”- September to October 2012; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a “**Report for Review of Policy, Legislation and Administrative Structures on Access to Justice: Existing Gaps and Proposed Reforms to Align with the Constitution**”- 2015; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a “**Report for the Institutionalization of Traditional Dispute Resolution Mechanisms (TDRMs) and other Community Justice Systems-2015**”; Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on “**Baseline Assessment, Situational Analysis & Recommendation Report of Kenya’s ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes**”- January 2018;

⁵ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015; He has also immensely contributed to the *Chartered Institute of Arbitrators (Kenya) Journal*, *Alternative Dispute Resolution*, where he is also the Managing Editor, among many other journals, both local and international. His publications dwell on various aspects of access to justice and their link with ADR mechanisms.

⁶ Muigua, K., “The Resolution of Natural Resource Conflicts in Kenya through Arbitration and Mediation”- A Dissertation submitted in partial fulfillment of the requirements for the Degree of Master of Laws of the University of Nairobi, March 2005.

⁷ His active membership and contribution to the activities of the *Chartered Institute of Arbitrators* goes beyond the year 2005.

⁸ **Doctor of Philosophy in Law (Ph.D.) -2011;**

Thesis titled “Resolving Environmental Conflicts in Kenya through Mediation” at the University of Nairobi on 02/12/2011 focusing on the areas of Public Participation, Mediation and Environmental Democracy.

environmental conflicts in Kenya. His publications and writings cover the whole spectrum of ADR including arbitration, mediation, negotiation, conciliation and the hybrid methods falling under each of these.

2.2.1 Arbitration

Arbitration is one of the mechanisms that are commonly referred to as alternative dispute resolution mechanisms (ADR). Arbitration is defined as a mechanism for the settlement of disputes, which usually takes place in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law, or if so agreed, other considerations after a full hearing, such decision being enforceable at law.⁹

In line with his vast experience in arbitration matters, Kariuki Muigua has papers and books on arbitration. ‘*Settling Disputes through Arbitration in Kenya*’ is a book that is currently in its third edition.¹⁰ The book’s publication was largely informed by the author’s desire to ensure that the continued growth and embracing of ADR as part of access to justice framework in Kenya is supported by progressive literature that would allow more people to appreciate the place of ADR. Before the publication of this book, there was little local literature to support the work of arbitration institutions that offer training services, such as the Chartered Institute of Arbitrators, among others. The book has been instrumental in not only making it easier for both practitioners and students to understand and appreciate the elements as well as stages of arbitration process but has also demystified the arbitration process for the general reader who is looking for general knowledge. Judges and magistrates looking for quick reference materials have also found the book and his other related articles useful.¹¹

⁹ Barnstein, R. *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998), p.313.

¹⁰ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017.

¹¹ See **Shafi Grewal Kaka (Chairperson) & 3 others v v International Air Transport Association (IATA), Civil Case 605 of 2015**, para. 38:

38. This was a clear intimation that the Plaintiff was not the appropriate party to seek the review and thus want of the locus standi.

In the treatise of **SETTLING DISPUTES THROUGH ARBITRATION IN KENYA BY DR. KARIUKI MUIGUA** page 46 the author opines that;

“Applicant must be a party to an arbitration agreement or at least a person claiming through is a personal representative or trustee in bankruptcy. This requirement is in view of the doctrine of privity of a contract which is to the effect that only parties to a contract can enforce it and a stranger to a contract cannot enforce it”

See also **Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017**:

[121] Confidentiality is also important in many commercial transactions. Some parties do not want their business secrets to be divulged to the entire public as is often the case with litigation. In this regard, one of the reasons why Arbitration is preferred as a means of dispute resolution is because it enhances confidentiality and creates a less tense atmosphere of dispute resolution. As Dr. Kariuki Muigua has observed:

“Unless parties agree otherwise in an Arbitration agreement ... all the aspects of the case are confidential. ... For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure.”[13 Kariuki Muigua (Dr.), *Constitutional Supremacy over Arbitration in Kenya*, March, 2016, pp. 11]

[149] Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy.

Kariuki Muigua's work has been very instrumental in promoting the uptake of arbitration especially within the business and commercial community.¹²

2.2.2 Mediation

Mediation results from a process where two or more parties fail to resolve their differences through negotiation, hence the need to involve a third party to facilitate the negotiation process. While a lot has been written on the advantages and disadvantages of mediation, Kariuki Muigua's writings on mediation are unique in a number of ways. Kariuki Muigua has not only immensely contributed to the teaching of mediation in Kenya but has also consulted widely for the Judiciary and has been playing an instrumental role in setting up a formal framework for mediation practice in the country.¹³ His work titled *Resolving Conflicts through Mediation in Kenya*¹⁴ discusses the process of mediation in the context of African traditional setting. The book acknowledges the context within which mediation in the African traditional societies was conducted, and that is, the ultimate end was to foster peaceful coexistence through collaborative conflict resolution.¹⁵ The

Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent[29 Kariuki Muigua (Dr.), *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015, pp. 116, 117.] of the Arbitration Act.

See also *Cape Holdings Limited v Synergy Industrial Credit Limited* [2016] eKLR, Miscellaneous Civil Application 114 & 126 of 2015 (Consolidated):

96. under section 17 of the Arbitration Act, the arbitrator is empowered to decide on the existence and validity of an arbitration agreement, however, the arbitrator is bound by the terms of the reference and the issues in dispute must be "contemplated by the parties in the agreement to arbitrate as a subject of a reference. See **Settling Disputes Through Arbitration In Kenya By Dr K Muigua page 93**".

¹² See *Modern Holdings (EA) Limited v Kenya Ports Authority* [2020] eKLR, Petition 20 of 2017:

40. We agree with the appellant that arbitrations are private proceedings. As Dr. Kariuki Muigua has observed:

"Unless parties agree otherwise in an Arbitration agreement ... all the aspects of the case are confidential. ... For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure." [4 Kariuki Muigua (Dr.), *Constitutional Supremacy over Arbitration in Kenya*, March, 2016, pp. 11]

¹³ Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on "Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes"- January 2018; Engaged as a Consultant by CIC and IDLO in preparing the report on the "Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya"- September to October 2012; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "Report for Review of Policy, Legislation and Administrative Structures on Access to Justice: Existing Gaps and Proposed Reforms to Align with the Constitution"- 2015; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "Report for the Institutionalization of Traditional Dispute Resolution Mechanisms (TDRMs) and other Community Justice Systems-2015; Muigua, K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Paper presented at the Judiciary's 1st Annual Tribunals' Symposium held on 24th May 2019 at Sarova Whitesands Beach Hotel, Mombasa.

¹⁴ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017.

¹⁵ See Chapter Two, Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017; See also Chapter Eight on the Mediation Paradigm.

book also recognises the fact that mediation process involves more than appreciating the issues in conflict as it also encompasses the parties' psychological issues. The psychological issues as discussed in this book require the mediator to come up with creative solutions that would help them address the parties' needs.¹⁶

'Resolving Conflicts through Mediation in Kenya' is a book that prepares anyone willing to start their journey in mediation through first, understanding the basic concepts of mediation, secondly, the process of mediation in terms of dos and don'ts and finally, on the skills required to conduct a successful mediation. While it is acknowledged that one may require advanced professional training in mediation, this book is definitely an important resource in offering the first step towards this journey.

Kenyan Judiciary has since embraced and put in a place a framework for court-annexed mediation. The Court Annexed Mediation has so far played an important role in enhancing access to justice in Kenya. The judiciary acknowledges that for cases that have been referred to mediation, the average time for their conclusion is less in comparison to the time taken under the normal court process.¹⁷ Its continued success will however depend on how effectively the stakeholders preserve the positive aspects of the process which make it attractive. Even as the ADR Policy gears towards mainstreaming the mediation process, the key benefits of a mediation process must be upheld.

2.2.3 Negotiation

Negotiation has been part of the African culture for centuries since it has always been the first port of call in resolving conflicts among communities. The applicability of negotiation and its various forms has been discussed extensively in Kariuki Muigua's work.¹⁸ Notably, negotiation is the first step towards mediation process. Article 159 of the 2010 Constitution of Kenya acknowledges this as it lists negotiation as part of the acceptable ADR processes in Kenya. It is also a part of conciliation as confirmed by Kenyan courts.¹⁹ Negotiation becomes even more relevant with the formal introduction of mediation into the Kenyan judicial process.

¹⁶ See Chapter Nine, Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017.

¹⁷ Muigua, K., *Enhancing The Court Annexed Mediation Environment in Kenya*, A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4th to 6th March 2020 in Mombasa, Kenya. Available at <http://kmco.co.ke/wp-content/uploads/2020/03/Enhancing-The-Court-Annexed-Mediation-Environment-in-Kenya-00000002.pdf>

¹⁸ See Chapter Seven, Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017.

¹⁹ *Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union* [2018] eKLR, Civil Appeal 100 of 2013:

"ADR mechanisms are flexible and parties retain control of their dispute settlement. The Industrial Justice System would be slowed down considerably, if parties went seeking for support of trade dispute proceedings from the Civil Courts. There were options open to the claimant, but the exercise of these options would have resulted in delay. The role of Labour Officers under the Employment Act 2007 is to facilitate parties in their attempt to arrive at a voluntary settlement. There is no obligation imposed on an employee who is unfairly dismissed to initially seek the intervention of the Labour Office. Failure to seek the assistance of the Labour Office in any event would not invalidate a claim filed in Court. It should always be understood that even in embracing the ADR mechanisms, parties are mindful of other statutory constraints such as time limits. A party should not be compelled to go through the non-adjudicatory mechanism if in so doing for instance, that party ends up having his/her claim time-barred under section 90 of the Employment Act. Diplomatic

*'Resolving Conflicts through Mediation in Kenya'*²⁰, *Settling Disputes through Arbitration in Kenya*²¹ and *Alternative Dispute Resolution and Access to Justice in Kenya*²² books all carry comprehensive discussions on negotiation process and the various aspects of negotiation.

Notably, the Mediation Book, *'Resolving Conflicts through Mediation in Kenya'* does not discuss negotiation as an abstract process but ably establishes the relationship between negotiation and mediation. It clearly demonstrates the link between the negotiation process and the mediation process for both the general reader and the professional mediation enthusiasts.²³

2.3 Alternative Dispute Resolution and Access to Justice

The publication *'Alternative Dispute Resolution and Access to Justice in Kenya'* was written to not only expound on the role of ADR in enhancing access to justice²⁴ in Kenya but also exploring the foundations of ADR²⁵ as well as the legal and institutional frameworks governing ADR in Kenya as a tool for access to justice. The book also offers rich discussions on if and how ADR practice can be regulated for current and future purposes²⁶, in order to enhance its effectiveness. The book ably establishes the link between ADR and access to justice²⁷ in a way that has made it easier for the stakeholders in the local ADR industry to promote ADR as a tool for realisation of access to justice for all. This is in line with the provisions of Article 159 of the Constitution of Kenya which requires Kenyan courts and tribunals to promote ADR.

The book cautions the stakeholders in the justice system on the challenges that they are likely to face when putting in place the court-annexed ADR processes, and especially mediation. However, it offers some possible considerations that may go a long way in overcoming such challenges.²⁸

The book on ADR and access to justice²⁹ paints a bright future for ADR practice in the country but subject to a few adjustments in its practice and regulation.³⁰ Some of the recommendations by Muigua as captured in this book are being implemented through different channels by the Judiciary as well as other policy makers.

means of settlement should be seen as complimentary to Adjudication. **Negotiation in particular, as seen daily in the work we do here, is not closed out by initiation of litigation...."**

²⁰ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi – 2013.

²¹ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017.

²² Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²³ See Chapters one and seven, *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi – 2013.

²⁴ See Chapter six, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁵ See Chapter Three, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁶ See Chapter Seven, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁷ See Chapter six, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁸ See Chapter five, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

²⁹ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

³⁰ See Chapter Nine, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

The proposition of a lawyer as a negotiator, mediator and peacemaker³¹ has also seen such professional institutions as the Law Society of Kenya collaborating more with ADR professional training bodies to equip the lawyers and advocates with the necessary skills, a step in the right direction. Muigua's publication³² also argues that with adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may well be aware of their right of access to justice but lacking means of realizing the same. It calls for consolidating and harmonizing the various statutes relating to ADR with the Constitution, in order to ensure access to justice by all becomes a reality. As advocated for in this publication, that continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large will also boost support for ADR mechanisms in all possible aspects as contemplated under the Constitution and various statutes, there have been an increase in efforts geared towards achieving this.³³ The book acknowledges that a full appreciation of the workings of ADR mechanisms is key in achieving widespread yet effective use of ADR and TDR mechanisms for access to justice.

The recommendations made in the ADR and Access to Justice Book were informed by the fact that the 2010 Constitution and the resultant statutes have been widening the scope of application of ADR mechanisms. The book could not therefore have come at a better time. The timing of the ADR and Access to Justice Book was also critical considering that the Judiciary, the Nairobi Centre for International Arbitration and other key stakeholders in the justice sector has since come up with the *Draft National ADR Policy*³⁴ whose ultimate goal was to lay the framework for the ADR legislation.

2.4 Sustainable Development-The Bridges that Bind?

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. Kariuki Muigua's work, *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers, Nairobi – 2016) discusses in depth the various bridges that emerge from sustainable development and development activities. The underlying thread in this book 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. For instance, the book addresses the national obligations on environment and sustainable development; basic principles of sustainable development; general approaches to

³¹ See Chapter Eight, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

³² Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

³³ For instance, Kariuki Muigua was Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on "Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes"- January 2018.

This consultancy also involved several public for a where various stakeholders exchanged their views.

³⁴

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.

As rightly captured in Muigua's book on sustainable development, sustainable development agenda is not only concerned with environmental matters. Instead, it adopts both anthropocentric and ecocentric approaches. Muigua's work argues 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 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.³⁵

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.³⁶

Thus, as seen in Muigua's work, the sustainable development agenda advocates for an integrated approach to tackling environmental management challenges as well as social problems affecting the society.³⁷ 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.³⁸ 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.³⁹

Muigua's work succinctly captures the interconnectedness of the various themes on sustainable development and ably captures the justifications for an integrated approach to the realisation of the

³⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, pp. xi-xii.

³⁶ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. xii.

³⁷ See also Hussein Abaza and Andrea Baranzini, *Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes* (Edward Elgar Publishing 2002).

³⁸ 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 6/4/2020]; 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 2020;

³⁹ 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 2020.

sustainable development goals.⁴⁰ Notably, the themes of Poverty Eradication⁴¹, Food Security⁴², Environmental Democracy⁴³, Environmental Justice⁴⁴, Environmental Security⁴⁵, Public Participation⁴⁶, Gender Equity⁴⁷, Access To Information⁴⁸, Conflicts Management⁴⁹, combating

⁴⁰ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. 343.

⁴¹ Muigua, K., *Utilizing Africa's Natural Resources to Fight Poverty*, available at <http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa's%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf>

⁴² Muigua, K., *Achieving the Right to Food for Sustainable Development in Kenya*, Paper Presented at the Public Engagement Forum on the Right to Food Inception Meeting held on 24th July 2018 at the African Population and Health Research Center (APHRC) Campus, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf> ; Muigua, K., *Food Security and Environmental Sustainability in Kenya*. (Available at <http://www.kmco.co.ke/index.php/publications/129-food-security-and-environmental-sustainability-in-kenya>);

⁴³ Muigua, K., 'Enhancing Environmental Democracy in Kenya,' *The Law Society Law Journal*, Vol. 4, No. 1, 2008; Muigua, K., *Realising Environmental Democracy in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf> .

⁴⁴ 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); Muigua, K. and Kariuki, F., 'Towards Environmental Justice in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017); Muigua, K., *Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice*, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at <http://www.kmco.co.ke/index.php/publications>); Muigua, K., *Reflections on ADR and Environmental justice in Kenya* (Available at <http://www.kmco.co.ke/index.php/publications/97-reflections-on-adr-and-environmental-justice-in-kenya>).

⁴⁵ Muigua, K., *Achieving Environmental Security in Kenya*, available at <http://www.kmco.co.ke/attachments/article/165/Environmental%20Security%20in%20Kenya%2027th%20October%202015.pdf> .

⁴⁶ Muigua, K., *Towards meaningful Public Participation in Natural Resource Management in Kenya*. (Available at <http://www.kmco.co.ke/index.php/publications/126-towards-meaningful-public-participation-in-natural-resource-management-in-kenya>).

⁴⁷ Muigua, K., 'Attaining Gender Equity for Inclusive Development in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 2, No 2, (2018).

⁴⁸ Muigua, K., 'Information Security Management: Demystifying the Role of the Company Secretary,' *The Professional Management Journal* for the institute of Certified Public Secretaries of Kenya, May, 2010.

⁴⁹ Muigua, K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development,' *Journal of Conflict Management and Sustainable Development*, Volume 3, No 1, (May, 2019); Muigua, K. and Maina, N., 'Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017); Muigua, K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Paper presented at the Judiciary's 1st Annual Tribunals' Symposium held on 24th May 2019 at Sarova Whitesands Beach Hotel, Mombasa; Muigua, K., *Natural Resources and Conflict Management in East Africa*, Paper Presented at the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th & 26th September, 2014. (Available at <http://www.kmco.co.ke/index.php/publications>); Muigua, K., *Conflict Management Mechanisms for Effective Environmental Governance in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Conflict-Management-Mechanisms-for-Environmental-Governance-Kariuki-Muigua-September-2018.pdf> ; Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management* in Kenya, available at

climate change⁵⁰, impact of resource extraction⁵¹, environmental health⁵², and environmental conservation for the sake of the Mother Nature are not only discussed in his text books but have also been critically explored in his other works published as academic papers and articles.

2.5 Environment and Human Rights

2.5.1 Right to a clean and Healthy Environment

Even before the 2010 Constitution of Kenya which constitutionally guaranteed the right of every person to a clean and healthy environment and even provided for the legal basis for one to pursue justice before courts if the same is violated, Kariuki Muigua's scholarly work had argued for this approach in order to assure the justiciability of the same, seeing that environment is critical to the protection of the right to life. It is commendable that this right is no longer in doubt in Kenya and there even exists several court decisions affirming every person's right to pursue the same⁵³. However, this did not mark the push for clearer framework to protect and implement this right.

<http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf>.

⁵⁰ Gichira, P.S, Agwata, J.F & Muigua, K.D, 'Climate Finance: Fears and Hopes For Developing Countries,' *Journal of Law, Policy and Globalization*, Vol. 22 (2014), pp. 1-7.

⁵¹ Muigua, K., "Utilising Kenya's Marine Resources for National Development", in Herausgegeben von Prof. Dr. Patricia Kameri-Mbote, Prof. Dr. Alexander Paterson, Prof. Dr. Oliver C. Ruppel, LL.M., Prof. Dr. Bibobra Bello Orubebe, Prof. Dr. Emmanuel D. Kam Yogo (eds), *Law | Environment | Africa*, January, 2019, 724 S., Gebunden, ISBN 978-3-8487-5287-4, Publication of the 5th Symposium | 4th Scientific Conference | 2018 of the Association of Environmental Law Lecturers from African Universities in cooperation with the Climate Policy and Energy Security Programme for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung and UN Environment.; Muigua, K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya,' *The Law Society of Kenya Journal*, Vol. 15, No. 1, 2019: 1-42; Muigua, K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development,' *Journal of Conflict Management and Sustainable Development*, Volume 3, No 1, (May, 2019); Muigua, K., 'Safeguarding Environmental Rights in Kenya,' *Kenya Law Review Journal*, Vol. IV, (2012-2013), pp. 279-294; Muigua, K., *Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice*, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at <http://www.kmco.co.ke/index.php/publications>); Muigua, K., *Multinational Corporations, Investment and Natural Resource Management in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf>; Muigua, K., *Devolution and Natural Resource Management in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Devolution-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-September-2018-1.pdf>; Muigua, K., *Balancing Trade Environment and Development for Sustainability*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Balancing-Trade-Environment-and-Development-for-Sustainability-Kariuki-Muigua-August-2018.pdf>; Muigua, K., *Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Managing-Environmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-August-2018.pdf>.

⁵² 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.

⁵³ 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.

In his work, *Securing Our Destiny through Effective Management of the Environment*⁵⁴, Muigua revisits the missteps that as a country we may have made, inadvertently presenting new hurdles to its full implementation. He observes that where the existing jurisprudence is that that 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 violated. His argument however, is that 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.⁵⁵

2.5.2 Gender and Development

The call for public participation and the involvement of all stakeholders in the sustainable development agenda comes with the need to ensure that the gender aspect is also considered. This position is also constitutionally supported by Article 27 of the Constitution which guarantees the right of every person to equality and freedom from discrimination.⁵⁶ Bearing that environmental and natural resources and the related conflicts impact on both men and women, Kariuki Muigua's work has substantively delved into the subject of gender. In his work, 'Attaining Gender Equity for Inclusive Development in Kenya,'⁵⁷ Muigua advocates for more effective legal and institutional framework on gender equity and human rights with a view to making a case for the practical empowerment of all gender for national development.⁵⁸ His argument is based on a legal and moral argument in support of the need for full participation of both gender in the sustainable development efforts.⁵⁹

His work on gender and development also touches on inclusion of both men and women in conflict management efforts. While advocating for the use of ADR and TDR mechanisms in conflict management, Muigua rightly points out that traditionally, these mechanisms have often

⁵⁴ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

⁵⁵ 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;

56 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.

⁵⁷ Muigua, K., 'Attaining Gender Equity for Inclusive Development in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 2, No 2, (2018).

⁵⁸ Ibid.

⁵⁹ See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, chapter Twelve.

demonstrated some gender discrimination against women.⁶⁰ He points out that TDR mechanisms have traditionally had some disadvantages such as: potential disregard for basic human rights and gender imbalance in the composition of the committees, among others.⁶¹ It is in this recognition that the Land Act, 2012⁶² which is the substantive regime for matters pertaining to land in Kenya lays down the guiding values and principles of land management and administration which include *inter alia*: elimination of gender discrimination in law, customs and practices related to land and property in land; participation, accountability and democratic decision making within communities, the public and the Government in land dispute handling and management.⁶³

Muigua correctly points out that some of the traditional practices have negative impacts such as discrimination of women and persons with disabilities,⁶⁴ and it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.⁶⁵ This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.⁶⁶

Kariuki Muigua thus asserts that in a community where gender and age is discriminated, these prejudices will continue to be perpetuated by their customs, unless the community is sensitized about these issues. Mainstreaming of gender and equality rights and what the law provides will go a long way in ensuring that ADR and TDR mechanisms respect the rights of all humans.⁶⁷

Environmental and natural resources exploitation and the resultant conflicts affect both men and women especially based on their perceived traditional roles and this creates the urgent need to ensure that both groups are actively and meaningfully included in all management issues. Kariuki Muigua observes that Women elders also played a key role in resolving conflicts.⁶⁸ This is buttressed by the fact that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.⁶⁹ 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

⁶⁰ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

⁶¹ Ibid.

⁶² Land Act, No. 6 of 2012, Laws of Kenya.

⁶³ Ibid, S. 4.

⁶⁴ 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.

⁶⁵ Art. 159(3).

⁶⁶ Art. 23.

⁶⁷ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

⁶⁸ Ibid.

⁶⁹ Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13.

*sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you”.*⁷⁰

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.⁷¹

However, while the above is true, Muigua is quick to point out that 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.⁷² Thus, while the Constitution of Kenya calls for empowerment and protection of traditionally marginalised and vulnerable groups such as women, it is important that these efforts are not only limited to national leadership positions but also ensure that they are reflected across the different spheres of everyday lives. Empowering both men and women individually will create stronger institutions even as the policy makers and legislators ensure that conflict management systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female conflict resolvers such as mediators and arbitrators when appropriate, like when land rights are involved.⁷³

2.5.3 Democracy/Environmental Democracy

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.⁷⁴

⁷⁰ 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).

⁷¹ Brock-Utne, B., *Indigenous Conflict Resolution in Africa*, op cit.

⁷² 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 6/4/2020].

⁷³ 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 12/4/2020].

⁷⁴ Article 10 (1), Constitution of Kenya, 2010.

The lack of environmental democracy was largely informed by the top-down approach previously adopted in Kenya.⁷⁵ 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.⁷⁶ Further, it fosters meaningful communication in the decision-making process thus contributing to effective management of the marine resources.⁷⁷

Kariuki Muigua's work has largely contributed to the debate leading to this transition.⁷⁸ *In the Matter of the National Land Commission [2015] eKLR*⁷⁹, 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."*⁸⁰

The Supreme Court went further to capture the place of democracy (including environmental democracy) in the following words:

[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*

⁷⁵ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

⁷⁶ *Ibid*; Article 10, Constitution of Kenya.

⁷⁷ *Ibid*.

⁷⁸ Muigua, K., 'Enhancing Environmental Democracy in Kenya,' *The Law Society Law Journal*, Vol. 4, No. 1, 2008; see also **Doctor of Philosophy in Law (Ph.D.) -2011**; Thesis titled "Resolving Environmental Conflicts in Kenya through Mediation" at the University of Nairobi on 02/12/2011 focusing on the areas of Public Participation, Mediation and Environmental Democracy; Muigua, K., *Realising Environmental Democracy in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf>.

⁷⁹ *In the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference 2 of 2014.

⁸⁰ *Ibid*, para. 346.

*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.”⁸¹*

[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.”*

⁸¹ 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 jurisdictions; 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.”*

2.5.4 International investments/Trade, Environment and Human rights

International investments and trade have come to be acknowledged to have a great impact on not only the environment but also human rights. Kariuki Muigua has ably discussed the relationship that exists between these concepts and how they affect each other. In his work, *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, he has discussed how they all relate to the sustainable development agenda. He bases his argument on the fact that trade is considered as one of the driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.⁸² 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.⁸³ 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.⁸⁴

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.⁸⁵ 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

⁸² ‘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.

⁸³ 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.

⁸⁴ *Ibid*, pp. 3-4.

⁸⁵ 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).

agricultural materials in the flow of primary products from developing to industrial countries.⁸⁶ 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 2020.⁸⁷

His work supports the assertion that equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer⁸⁸, 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.⁸⁹ 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.⁹⁰

In his work, he acknowledges that trade can be instrumental for growth and development under appropriate conditions. Trade provides a means to overcome constraints posed by small domestic markets and allows countries to access larger external markets, as well as skills, technology and capital, which in turn enable a better use of productive resources to catalyse structural transformation.⁹¹ Muigua supports the idea that while environment, trade and development are clearly linked, an integrated approach that fully incorporates environmental concerns, fair trade and sustainable development is desirable.⁹²

He also promotes the idea that an effective investment law and policy regime should be geared towards promoting sustainable development. It should also ensure minimal or no environmental damage.⁹³ In addition, he argues that human rights must at all times be upheld. He argues that for

⁸⁶ Ibid, para. 40.

⁸⁷ United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, op cit., para. 17.11.

⁸⁸ 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."

⁸⁹ 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 05/04/2020].

⁹⁰ Ibid, p.10.

⁹¹ 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 05/04/2020].

⁹² Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, chapter Ten.

⁹³ 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.

long lasting and sustainable investment policies that positively impact on the lives of communities, there is a need to ensure that the same are in line with the principles of sustainable development especially those that seek to safeguard human rights as well as sound environmental management and governance.⁹⁴

2.5.5 Traditional Ecological Knowledge, Conflict Management and Environmental Management

While discussing the place of ecological knowledge in achieving effective environmental and conflict management for sustainable development, Kariuki Muigua's work extensively discussed not only the use of formal knowledge but also traditional ecological knowledge. His work explores the place of traditional or indigenous knowledge in environmental management and conflict management. This is based on African traditional practices and the subsequent international recognition that that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.⁹⁵ His position therefore, has been that the international recognition of indigenous knowledge means that national governments ought to give this knowledge more recognition and facilitate active uptake and use of the knowledge by communities.⁹⁶

In addition, his position is that while there are commendable statutory and constitutional provisions in view of the fact that they have envisaged indigenous or traditional knowledge within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making. There is a need to move beyond recognition of traditional knowledge in Kenya to ensuring that the same has been fully incorporated and reflected in decision-making and also implemented where the Constitution so requires.⁹⁷

Furthermore, Muigua argues that there is a clear need to integrate traditional and formal sciences for participatory monitoring, and taking feedback to achieve adaptive strategies for management of natural resources.⁹⁸ His position is that management of natural resources cannot afford to be the subject of just any single body knowledge such as the Western science, but it has to take into consideration the plurality of knowledge systems. There is a more fundamental reason for the integration of knowledge systems. Application of scientific research and local knowledge contributes both to the equity, opportunity, security and empowerment of local communities, as well as to the sustainability of the natural resources. Local knowledge helps in scenario analysis, data collection, management planning, designing of the adaptive strategies to learn and get feedback, and institutional support to put policies in to practice. Science, on the other hand, provides new technologies, or helps in improvement to the existing ones. It also provides tools for networking, storing, visualizing, and analyzing information, as well as projecting long-term trends so that efficient solutions to complex problems can be obtained.⁹⁹ Through assimilation of

⁹⁴ Ibid.

⁹⁵ 61/295. United Nations Declaration on the Rights of Indigenous Peoples, Preamble.

⁹⁶ See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. 254.

⁹⁷ Ibid, pp. 257-258.

⁹⁸ 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 13/04/2020].

⁹⁹ Ibid.

indigenous knowledge, it is possible to capture the interests and genuine desires of the locals in natural resource exploitation activities. This reduces conflict, not only amongst the members of the concerned communities, but also between the communities and the authorities. Where they do not perceive a danger to their livelihoods, these communities are likely to embrace development projects and are also not likely to turn to unconventional ways of protecting their livelihoods.¹⁰⁰ Traditional ecological knowledge is therefore an important part and parcel of solving environmental problems and effective conflict management, thus making Kariuki Muigua's work relevant and timely in the debate.

2.5.6 Role of science and Technology in environmental management

Kariuki Muigua has extensively contributed to the debate on the role of science and technology in environmental management. This is in line with the constitutional provisions acknowledging the place of science and technology in achieving sustainable development.¹⁰¹ This is an internationally agreed concept that indeed science, technology and innovation all have a role to play in realising the sustainable development agenda.¹⁰² This critical role also extends to environmental management, a central element of SDGs.¹⁰³ Science for sustainable development also forms the basis of Chapter 35 of Agenda 21 which calls for: strengthening the scientific basis for sustainable management; enhancing scientific understanding; improving long-term scientific assessment; and building up scientific capacity and capability.¹⁰⁴

Kariuki Muigua's paper on "*Utilising Science and Technology for Environmental Management in Kenya*"¹⁰⁵ advocates for the use of science and technology for environmental management in Kenya. It critically discusses the various environmental management tools in Kenya. The paper

¹⁰⁰ Muigua, K., *Nurturing Our Environment for Sustainable Development*, p. 258.

¹⁰¹ 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;

¹⁰² 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.

¹⁰³ 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".

¹⁰⁴ 'Science.. Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/topics/science>> accessed 14 April 2020.

¹⁰⁵ Kariuki Muigua, 'Utilising Science and Technology for Environmental Management in Kenya' 23. Available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf> [Accessed on 10/4/2020].

argues that environmental management tools in Kenya have not been fully effective in environmental protection and conservation as evidenced by several environmental concerns such as pollution and degradation. Muigua calls for the enhancement of science and technology as an environmental management tool in Kenya in order to effectively achieve the right to a clean and healthy environment and promote sustainable development.¹⁰⁶

Muigua supports the view that while Science and technology have resulted in many environmental problems, they can and have provided effective solutions to most, if not all, environmental problems facing the world especially in relation to: climate change, waste management and environmental degradation.¹⁰⁷ This can be achieved through the use of science and technology in industrial waste management in order to enhance environmental management and protection; adoption of green and clean technologies; and climate change mitigation measures.¹⁰⁸ While Kenya has made some notable progress in adopting the same, Muigua argues for greater uptake and adoption of measures that will see more sectors embracing science, technology and innovation. He provides suggestions that would make this a reality.

These recommendations also notably feature in his other work such as the book on *Nurturing Our Environment for Sustainable Development*¹⁰⁹ and the 2020 book on *Securing Our Destiny through Effective Management of the Environment*¹¹⁰, whose main running themes include the Role of Law in Environmental Management and Governance; Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya; Role of Corporations in Environmental Conservation and Sustainable Development in Kenya; Achieving Environmental Security for Sustainable Development in Kenya; The Extractives Industry and Environmental Management in Kenya: the (Dis) Connect; Harnessing the Blue Economy: Challenges and Opportunities for Kenya; Environmental and Natural Resources and Equitable Benefit Sharing in Kenya; Adopting an Integrated Approach to Environmental Management and Conservation for Sustainable Development in Kenya; Environmental Liability Regime in Kenya and Sustainable Development; Managing Environmental and Land Related Conflicts Through Traditional Dispute Resolution Mechanisms; Effective Environmental Management and Governance for Peace Building in Kenya and Environmental Justice.

The book links these themes with environmental conservation and management and argues a case for effective management of the environment through an integrated approach that brings all stakeholders on board. Notably, the publication acknowledges the interconnectivity among the various environmental themes and thus cannot have come at a better time. While Kenya has a Constitution that acknowledges this interconnectivity and the different but important roles of the stakeholders in social, economic and environmental sectors play, there have been some sectoral yet disjointed efforts and approaches towards achieving the same. Muigua provides the much needed insight on how these disjointed efforts cannot work thus creating the need for reevaluation.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, p. 12.

¹⁰⁸ Ibid.

¹⁰⁹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

¹¹⁰ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited(2020), ISBN: 978-9966-046-06-1.

2.5.7 Climate Change

Over the years, climate change has become an international concern due to its adverse effects on both the environment and human livelihoods. Kariuki Muigua has thus dedicated a good chunk of his scholarly works in addressing the challenge. He establishes a link that demonstrates that climate change is a serious problem that affects all sectors of the environment and human life.¹¹¹ This discussion is also based on the fact that climate change efforts are connected to the sustainable development agenda and poverty eradication. Muigua thus calls for combined efforts from national, regional to international community to tackle the problem of climate change and this will ultimately impact positively on the fight against poverty.¹¹² The urgency to address climate change is informed by the fact that impacts of climate change are disproportionately felt by among others: women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and the elderly. The local communities, affected people and indigenous peoples have also been kept out of the global processes to address climate change. This is despite the fact that 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 world- especially those who are vulnerable and marginalized, in particular children and elderly people.¹¹³

He thus offers practical recommendations geared towards addressing climate change through facilitative public participation such as: science based and ecosystem-based climate change mitigation and adaptation measures.

3. Telling the African Story: A Voice from the South

A noteworthy thread across Kariuki Muigua's scholarly work is that it not only focuses on the African continent's problems and challenges but also how the same can be solved using homegrown solutions; he seeks to tell the African story as seen from the eyes of the African people. The narrative of solving African problems using local solutions is based on the fact that 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.¹¹⁴ Africa has a large quantity of natural resources like oil, gold, diamonds, iron, cobalt, copper, bauxite, silver, uranium, titanium, petroleum among others.¹¹⁵ The natural resources wealth of Africa rightfully belongs to the people of Africa. The power to safeguard these resources is entrusted in the governments of African countries. The utilisation of Africa's resources should contribute to the realization of economic rights of the people of Africa as envisaged in various international law instruments and national laws.¹¹⁶

¹¹¹ 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.

¹¹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

¹¹³ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

¹¹⁴ 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 10/04/ 2020].

¹¹⁵ World Resources, 'Natural Resources of Africa', available at www.worldresources.envi.org/natural-resources-africa/ [Accessed on 13/4/2020].

¹¹⁶ Muigua, K., *Nurturing Our Environment for Sustainable Development*, p. 107.

Muigua has observed that while a cursory glance of Africa would paint a picture of a rich continent with the expectation of a people enjoying a high standard of living and excellent development; with good infrastructure, high employment levels, high quality education, good health and long life expectancy; and a conflict free zone where everyone is comfortable with life owing to the abundance of resources, ironically, the situation in Africa is strikingly the opposite.¹¹⁷ Instead of being used to solve African people's problems, Africa's resources are fueling the world economy while Africa itself remains economically crippled; exploited and neglected.¹¹⁸ He attributes the sad state of affairs largely to the national leaders who are entrusted with the mandate of safeguarding natural resources for the benefits of the people have betrayed the trust through: high levels of corruption in the application of revenue from the natural resources; and the fact that when they enter into resource extraction contracts, they do not carry people's interests at heart. In effect, Africans have been deprived of their right to benefit and control the utilisation of their natural resources. Poverty level is very high with a minority of extremely wealthy class and a majority of poor people.¹¹⁹

At the continental level, the *Africa Mining Vision 2009*¹²⁰ 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.¹²¹ However,

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ 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 on 13/4/2020].

¹²⁰ 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 13/4/2020].

¹²¹ 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 on 13/4/2020].

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:
 - o Down-stream linkages into mineral beneficiation and manufacturing;
 - o Up-stream linkages into mining capital goods, consumables & services industries;
 - o Side-stream linkages into infrastructure (power, logistics; communications, water) and skills & technology development (HRD and R&D);
 - o Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and
 - o 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;

as Muigua observes, African countries still struggle with making the mineral resources work for them, in uplifting the lives of their people.¹²² 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.¹²³

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.¹²⁴ 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.

-
- A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;
 - 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.

¹²² 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_frasier_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed on 13/4/2020]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.* 9 (2013): 31.

¹²³ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

¹²⁴ 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 on 13/4/2020]; 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 13/4/2020]; 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 13/4/2020]; 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 13/4/2020].

Despite its launch in 2009, the *Africa Mining Vision* which also binds the country and seeks to promote transparent, equitable and optimal exploitation of mineral resources is yet to have an impact in not only Kenya but also many other African countries as there are still rampant cases of illicit financial flows, lack of mineral value addition and poverty among communities living in mining areas.¹²⁵

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.¹²⁶ 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 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.¹²⁷

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.¹²⁸ 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.¹²⁹ In the spirit of ensuring that African countries and especially Kenya only adopts what works for them, Kariuki Muigua argues that 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.¹³⁰ It

¹²⁵ 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 13/4/2020].

¹²⁶ 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.

¹²⁷ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

¹²⁸ 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 on 13/4/2020].

¹²⁹ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

¹³⁰ 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

is therefore recommended that the Government of Kenya has 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.¹³¹

Muigua's work does not however only paint a grim picture of the continent as he also offers 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.¹³² Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.¹³³ 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.¹³⁴

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 utilisation of such revenues in promoting growth, development and investment in other sectors of the economy.¹³⁵ 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.¹³⁶ 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.¹³⁷ 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.¹³⁸ In addition to discussing how African resources can be used to benefit the African people, Muigua has thus also extensively written on conflict management in the African continent and how

<http://kcsfog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/> [Accessed on 13/4/2020].

¹³¹ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

¹³² Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

¹³³ *Ibid*, p.61.

¹³⁴ *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 on 13/4/2020].

¹³⁵ *Ibid*.

¹³⁶ 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 13/4/2020].

¹³⁷ Samdong, 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 13/4/2020].

¹³⁸ Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

indigenous conflict management mechanisms can be utilised alongside the judicial systems to address the many conflicts that have ravaged the continent for long.

In his 2020 Book, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), Muigua rightly points out that 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.¹³⁹ In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.¹⁴⁰ 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).¹⁴¹ 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.¹⁴² 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.¹⁴³

Considering that most of these conflicts have underlying issues that may not be fully addressed through the adversarial court system, Kariuki Muigua has offered recommendations on the use of ADR and 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.¹⁴⁴ ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the Constitution of Kenya.¹⁴⁵ This is the true essence of environmental democracy; affording communities guaranteed and meaningful participation in the decision making process by

¹³⁹ 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 15/1/2020].

¹⁴⁰ 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 15/1/2020].

¹⁴¹ 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.

¹⁴² Ibid.

¹⁴³ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

¹⁴⁴ 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.

¹⁴⁵ See Art. 60(1) (g); Art. 159.

presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.¹⁴⁶

These processes have been indigenous to the African continent for centuries and as comprehensively discussed by Muigua in his other works on ADR and TDR mechanisms, hold a key in addressing these conflicts with a relatively high degree of success.¹⁴⁷ His works thus offers insights on addressing the natural resources and environmental related conflicts in Africa and Kenya in particular.

4. Entrenching Environmental Rights and Effective Conflict Management Mechanisms in Kenya: The Future of Environmental Governance

As observed in the foregoing discussion, the actualisation of environmental rights within Kenya's policy, legal and institutional frameworks has come a long way. If sustainable development is to be achieved in the country, then there needs to be struck a balance between active promotion and protection of the citizenry's environmental rights and the ecocentric approach that seeks to protect the environment from adverse human activities. Where conflicts related to environmental and natural resources arise, the same should be addressed effectively using mechanisms that address the concerns of all stakeholders. Muigua's work offers useful insights for the policy makers on how these can be addressed. For instance, his book, *Nurturing Our Environment for Sustainable Development*, 2016 (op.cit.), carries the themes revolving 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. The book argues that due to its critical role in the human, social and economic development of the country, the environment is one of the most important elements necessary for the existence of the human life. 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 make sure that their health is not sacrificed at the altar of national development.¹⁴⁸

Muigua proposes that both scientific and traditional knowledge approaches can be applied in conflict management. He goes on to propose that harnessing this knowledge is not a one person affair but instead calls for concerted efforts from all quotas. Non-Governmental organisations, academia and government institutions directly concerned can collaborate in creating awareness of

¹⁴⁶ 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 [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 15/1/2020].

¹⁴⁷ 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).

¹⁴⁸ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016, p. xi.

the ways in which the scientific knowledge can be applied concurrently with traditional or indigenous knowledge to manage environmental conflicts for peace and sustainable development. Churches and other religious organisations can also come in to facilitate the actual processes of conflict management and also foster awareness creation efforts. 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.¹⁴⁹ He supports his proposition on involving everyone with the fact that it is affirmed in the Constitution which 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.¹⁵⁰

It is imperative for the policy makers to ensure that the best international practices do not remain on paper but they are fully implemented. However, as rightly observed in Muigua's work, these practices need to not only be domesticated but also customised through concurrent application with local communities' traditional knowledge. This is not only important for enhancing their practicality but also ensuring that the local communities embrace them.

Environmental rights such as the right to clean and healthy environment are critical to the survival of the human race. As demonstrated recently by the *Covid-19* pandemic, a clean and healthy environment can indeed be equated to right to life as currently, the main preventive measure as currently advocated for by health professionals is maintaining personal hygiene and the environment around human dwellings.¹⁵¹

However, human health is not only dependent on hygiene but also food security, human security and access to proper healthcare. There is a need for concerted efforts from all stakeholders to ensure that human life is protected. Investment in terms of research, funding, science, technology and innovation should be encouraged. All these form part of the bigger puzzle-achieving sustainable development agenda.

5. Conclusion

Kariuki Muigua thus advocates 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 peacebuilding, 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. Environmental justice and democracy is also important for fighting climate change, environmental degradation and meaningful participation in environmental management and governance issues. These themes are evident across his work. He has also ably been able to establish the link between ADR and TDR Mechanisms and how the same can be used in enhancing access to justice for the Kenyan people and Africa in general.

¹⁴⁹ Ibid, p. 264.

¹⁵⁰ Constitution of Kenya 2010, Art. 69(2).

¹⁵¹ 'WASH (Water, Sanitation & Hygiene) and COVID-19'

<<https://www.worldbank.org/en/topic/water/brief/wash-water-sanitation-hygiene-and-covid-19>> accessed 14 April 2020.

This paper has offered an overview of the themes that have characterised Kariuki Muigua's academic journey and his contribution to the rule of law and sustainable development for a better future for the children of Kenya. Notably, the discussion is also intertwined with Kenya's story as far as achieving efficiency in the conflict management and environmental management framework for realisation of the sustainable development agenda. The academic work discussed in this paper aptly captures Kenya's successes, challenges and dreams as far as achievement of the sustainable development agenda is concerned. It offers valuable lessons on the thematic areas discussed for the policy makers and legislators in Kenya on the future of the country's aspirations on sustainable conflict management and environmental management. The work also offers a solid ground for current and future students of environmental law and conflict management for them to advance their research on the related areas of study.

National Environment Tribunal, Sustainable Development and Access to Justice in Kenya

Abstract

The paper discusses the role played by the National Environment Tribunal (NET) in promoting access to justice and enhancing the principles of sustainable development in Kenya. The paper also discusses establishment of the National Environment Tribunal and its jurisdiction. It further analyses the role played by NET towards environmental protection and conservation in Kenya and promotion of human rights. The paper also highlights some of the challenges facing the tribunal and proposes recommendations towards enhancing the effectiveness of the tribunal.

1. Introduction

Tribunals are an integral component of the justice system in Kenya and play an important role in reducing pressure on courts and facilitating expeditious access to justice.¹ They have the potential to facilitate faster management of disputes and deal with specialised matters under different statutes.² The Constitution recognises tribunals as part of subordinate courts in the judicial hierarchy.³ Constitutional recognition of tribunals as part of the judiciary demonstrates their importance in the administration of justice in Kenya. Under the previous constitutional dispensation, tribunals were under the respective ministries.⁴ This posed several challenges such as undermining the independence of tribunals. Consequently, under the new constitutional dispensation, the judiciary is undertaking measures towards integrating tribunals as part of the judiciary. The purpose of transitioning tribunals is to delink them from the executive and integrate them into the judiciary in order to enhance their independence.⁵ With independence, tribunals are able to discharge their mandate in facilitating the administration of justice and enhancing access to justice by reducing pressure on courts.

The National Environment Tribunal (NET) is established under the Environmental Management and Co-Ordination Act (EMCA).⁶ The jurisdiction of the Tribunal is set out under section 125 of the Act. The Tribunal hears and determines appeals concerning: *grant of a licence or permit or refusal to grant a licence or permit; imposition of any condition, limitation or restriction on a licence; revocation, suspension or variation of a licence; the amount of money required to be paid as fee under the Act or imposition against the person of an environmental restoration order or environmental improvement order by the Authority under the Act or its regulations* (emphasis added).⁷ The Act requires appeals to be lodged with the Tribunal within sixty days of the

¹ Muigua.K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, available at <http://kmco.co.ke/wp-content/uploads/2019/05/Presentation-Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-23rd-May-2019.pdf> (Accessed on 27/02/2020)

² Ibid

³ Constitution of Kenya, 2010, Article 169 (1) (d), Government Printer, Nairobi

⁴ The Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018, March 2019, Available at <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> p. 66, Accessed on 09/03/2020

⁵ Ibid

⁶ Environmental Management and Co-Ordination Act, No. 8 of 1999, S 125, Government Printer, Nairobi

⁷ Ibid, S 129 (1)

occurrence of the event which a person is dissatisfied with.⁸ In addition, the jurisdiction of the Tribunal extends to appeals against decisions of the Director General of the National Environment Management Authority (NEMA), the Authority, committees of the Authority or its agents.⁹ In interpreting NET's jurisdiction, the Environment and Land Court in *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another*¹⁰, held that:

'In the jurisprudence interpreting the two categories of appeals filed to the NET under Sections 129 (1) and (2) the NET and the superior courts of record have held that the framework in Sections 129 (1) and 129 (2) relate to two different categories of appeals: the framework in Section 129 (1) relates to an appeal by a person who was a party to a decision or determination made by NEMA within the framework of EMCA; and Section 129 (2) provides a framework for an appeal by a person who was not a party to a decision or determination made by NEMA within the framework of EMCA.'

Upon hearing an appeal, the Tribunal may: *confirm, set aside or vary the order or decision in question, exercise any of the powers that could have been exercised by the Authority; make orders as to costs and those necessary to enhance the principles of sustainable development; make orders maintaining the status quo of any matter or activity which is the subject of an appeal until the appeal is determined or review its orders upon application by a party (emphasis added).*¹¹ This provision demonstrates that the jurisdiction of the tribunal is wide and it enjoys important powers of enhancing the principles of sustainable development in Kenya. The tribunal can upon hearing an appeal, exercise powers that would ordinarily be done by the National Environment Management Authority (NEMA) such as grant of an Environmental Impact Assessment (EIA) Licence and environmental restoration orders.¹²

2. Net and Sustainable Development

Courts and tribunals in exercising judicial authority are mandated to be guided by several principles which include the protection and promotion of the purpose and principles of the Constitution.¹³ Among these principles is sustainable development.¹⁴ Sustainable development has been defined as that which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.¹⁵ EMCA defines sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.¹⁶ It has further been pointed out that sustainable development seeks to address *intra generational equity*; which is equity among present generations and *inter-generational equity*;

⁸ Ibid

⁹ Ibid, S 129 (2)

¹⁰ *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another* ELC Civil Appeal No. 100 of 2015, (2017) eKLR

¹¹ EMCA, S 129 (3)

¹² Ibid

¹³ Constitution of Kenya, 2010, Article 159 (2)

¹⁴ Ibid, Article 10 (2) (d)

¹⁵ Report of the World Commission on Environment and Development: Our Common Future, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (Accessed on 09/03/2020)

¹⁶ EMCA, S 2

which is equity between generations.¹⁷ In the case concerning the *Gabcikovo-Nagymoros Project*, it was opined that sustainable development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other.¹⁸ It reconciles the human rights to development and protection of the environment by ensuring that the right to development resonates with the reasonable demands of environmental protection.¹⁹

In Kenya, courts are key actors in the sustainable development discourse in terms of developing environmental jurisprudence geared towards environmental protection and conservation.²⁰ The Constitution of Kenya, 2010 enshrines both the human rights to development and environmental protection.²¹ Consequently, it obligates 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.²² This position was succinctly captured in the case of *Patrick Musimba vs National Land Commission & 4 Others (2016) eKLR*, 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.”²³

The Constitution further provides a framework for enforcement of environmental rights through an application to court which 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.²⁴

¹⁷ Weiss, E.B., “In Fairness to Future Generations and Sustainable Development” *American University International Law Review*, Vol. 8, 1992.

¹⁸ *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997)

¹⁹ *Ibid*

²⁰ Muigua.K., Wamukoya.D & Kariuki.F., ‘Natural Resources and Environmental Justice in Kenya’ Glenwood Publishers Ltd, 2015; See also the case of *Peter K. Waweru v Republic (2006) eKLR*

²¹ Constitution of Kenya, 2010, Chapter Four on Bill of Rights, Articles 42 and 43, Government Printer, Nairobi

²² *Ibid*, Article 69 (1) (a)

²³ *Patrick Musimba vs National Land Commission & 4 Others*, Petition No. 613 of 2014, (2016) eKLR

²⁴ *Ibid*, Article 70

NET plays a central role in the sustainable development discourse in Kenya. Under EMCA, upon any appeal, the Tribunal may grant several remedies including *orders to enhance the principles of sustainable development* (emphasis added).²⁵ In discharging this mandate, NET has on several occasions issued orders such as revocation of Environmental Impact Assessment (EIA) Licenses and subsequent cancellation of projects which do not adhere to sustainable development principles including public participation. In *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, the Tribunal while setting aside the decision by the National Environment Management Authority (NEMA) to issue an EIA Licence held as follows:

*'The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. (emphasis added)*²⁶

Further, in *Narok County Council & another vs National Environment Management Authority & another*,²⁷ the Tribunal quashed the decision of NEMA to approve development activities on several parcels of land in Narok County. It further, directed the proponent to prepare a full Environmental Impact Assessment study report in accordance with EMCA and its Regulations, and stop any development activities on the project site until the report was approved by NEMA. These examples illustrate the central role played by NET in fostering sustainable development in Kenya. When environmental management institutions fail to discharge their obligations in accordance to the law, the tribunal has acted by issuing orders aimed at enhancing sustainable development and promoting environmental conservation in Kenya.

3. Net and Access to Environmental Justice

Access to justice has been described as a situation where people in need of legal redress 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.²⁸ It has also been used to refer to judicial and administrative remedies and procedures available to a person who is aggrieved or likely to be aggrieved by an issue.²⁹ The Constitution enshrines the right of access to justice.³⁰ Access to justice is also one of the pillars of the Agenda 2030 on Sustainable Development Goals (SDGs). SDG

²⁵ EMCA, S 129 (3) (c)

²⁶ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR

²⁷ *Narok County Council & another vs National Environment Management Authority & another*, Tribunal Referral NET 07/2006, (2006) eKLR

²⁸ Ladan. M., 'Access to Justice as a Human Right under the ECOWAS Community Law' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336105 (Accessed on 11/03/2020)

²⁹ Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya', Op Cit, page 59

³⁰ Article 48 of the Constitution of Kenya, 2010 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.

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*’ (emphasis added).³¹

Access to justice has an environmental dimension. Environmental justice is associated with two elements of justice which are: *procedural justice* and *distributive justice*. Procedural environmental justice is concerned with environmental decision making and encompasses the concept of participation.³² Distributive environmental justice acknowledges the right of every person to a clean and healthy environment.³³

NET facilitates both distributive and procedural justice by providing a framework through which the right to a clean and healthy environment can be enforced. Through some of its decisions, the Tribunal has ensured that the state’s obligations in respect of the environment enshrined under the Constitution have been undertaken.³⁴ These include *public participation, environmental impact assessment and environmental audits* (emphasis added).³⁵ The tribunal further promotes access to justice by providing an avenue through which persons who are aggrieved by some of the decisions of NEMA can seek recourse.³⁶ NET is thus an integral tribunal in Kenya. It is supposed to enhance the principle of sustainable development enshrined under the Constitution. It should further promote the right of access to justice stipulated under article 48 of the Constitution.

4. Challenges

In discharge of its mandate, the National Environment Tribunal has been faced with certain challenges that threaten to undermine its efficiency. Some of these challenges include:

i. Jurisdiction

Despite the wide mandate granted to the National Environment Tribunal under the Constitution and EMCA, courts have often adopted a narrow interpretation of its jurisdiction. In *Republic v National Environmental Tribunal & 2 others ex-parte Athi Water Services Board*,³⁷ the court held that:

³¹ UNDP, Sustainable Development Goals, 2015, available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (accessed on 13/03/2020)

³² Muigua.K., Wamukoya.D & Kariuki.F., ‘Natural Resources and Environmental Justice in Kenya’, Op Cit, page 30

³³ Constitution of Kenya, 2010, Article 42, 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. The right to a clean and healthy environment is a justiciable right which is enforceable under article 70 of the Constitution. Under article 70 (3) of the Constitution and section 3 (4) of EMCA, there is no requirement of locus standi in enforcement of the right to a clean and healthy environment.

³⁴ See for example the cases of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR, Op Cit

³⁵ Constitution of Kenya, 2010, Article 69 (1) (d) (f), See also EMCA, s 57A on strategic environmental assessment on environmental audits.

³⁶ EMCA, S 129 (1)

³⁷ *Republic v National Environmental Tribunal & 2 others ex-parte Athi Water Services Board*, (2015) Eklr.

'It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.'

Further, in *Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited*,³⁸ the court held that:

".....the powers of the Respondent Tribunal are not unrestricted. The Tribunal's powers to entertain appeals are limited to decisions made under powers given to NEMA (Authority) or to NEMA's Director General or Committee of NEMA... This is about where the jurisdiction of the Respondent Tribunal ends...On the other hand, the High Court has both an original and appellate jurisdiction commencing from the provisions of Section 3(3) of the Act which for the purposes of emphasis I set out again."

This restricted interpretation of NET's jurisdiction has seen some of its decisions being overturned by the High Court through judicial review or the Environment and Land Court on Appeal. However, with the 2015 amendments, EMCA was aligned with the new constitution with consequently saw the jurisdiction of NET being enhanced. Under EMCA, the Tribunal can *inter alia* exercise any of the powers which could have been exercised by NEMA and *make any orders to enhance the principles of sustainable development* (emphasis added).³⁹ These are wide powers which make the Tribunal a vital component of the sustainable development and environmental justice discourse in Kenya. The jurisdiction of the tribunal needs to be broadly interpreted and upheld in order to enable it discharge its functions effectively.

f. Capacity

The Tribunal is composed of persons appointed under section 125 (1) of EMCA. Its staff is derived from either the judiciary or the Ministry of Environment and Forestry. This poses a challenge when it comes to supervision as well as the appraisal of staff.⁴⁰ This coupled with other problems facing tribunals in Kenya including budgetary constraints and inadequate space may hinder the operational capacity of the National Environment Tribunal. Data from the judiciary shows that there were a number pending cases before the Tribunal at the end of the Financial Year 2018/2019.⁴¹ It is important to address these capacity constraints in order to enhance the capacity of the National Environment Tribunal to promote access to environmental justice in Kenya.

³⁸ *Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited*, Miscellaneous Application Number 391 of 2006.

³⁹ EMCA, S 129 (3)

⁴⁰ Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2018/2019' available at <https://www.judiciary.go.ke/resources/reports/> (accessed on 12/03/2020)

⁴¹ *Ibid*

5. Way Forward

5.1 Capacity Building

There is need for continued development of skills and competency of members of the Tribunal in environmental matters. With emerging environmental issues such as climate change, the role of NET in promoting sustainable development becomes more critical. It is thus important for members of the tribunal to be equipped with relevant skills on such areas to enhance their capacity in handling environmental matters. There is also need for appraisal of the Tribunal's staff seconded from the judiciary and the ministry in order to further promote competence at the tribunal.

5.2 Upholding NET's Jurisdiction

The foregoing discussion has demonstrated some of the jurisdictional pitfalls faced by the Tribunal. Some of its decisions have been subject of appeals to the Environment and Land Court and judicial review proceedings before the High Court. These courts have often not fully appreciated the Tribunal's jurisdiction as demonstrated by the above decisions. There is need for recognition of the importance of tribunal as part of the justice system and its role in easing pressure from the courts, promoting sustainable development and ensuring access to environmental justice is realised.

5.3 Public Awareness

Despite the important role being played by NET in Kenya, there is limited public awareness on its existence and operations. There is a limited number of cases being lodged in the Tribunal with many being filed in courts.⁴² NET can assist in enhancing sustainable development and environmental conservation in Kenya.⁴³ There is need for public awareness on the role of NET due its importance. Through this, many of the cases currently being filed at the Environment and Land Court will end up in the tribunal which will enable it to further develop environmental jurisprudence in Kenya and enhance the principles of sustainable development.

5.4 Integrating the Use of Alternative Dispute Resolution in Case Management

The Constitution mandates courts and tribunals to promote alternative forms of dispute resolution in exercising judicial authority.⁴⁴ Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilised to manage disputes without resort to the often costly adversarial litigation.⁴⁵ These mechanisms include negotiation, mediation, arbitration and Traditional Dispute Resolution (TDR) mechanisms. Some of these mechanisms have been hailed for their advantages which include expeditious dispute resolution, flexibility, cost effectiveness and addressing the root causes of conflicts.⁴⁶

⁴² Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2017/2018' available at <https://www.judiciary.go.ke/resources/reports/> (accessed on 12/03/2020)

⁴³ Under section 129 (3) (c) of EMCA, upon any appeal, the Tribunal may make such other orders to enhance sustainable development.

⁴⁴ Constitution of Kenya, 2010, Article 159 (2) (c)

⁴⁵ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015

⁴⁶ *Ibid*

It has been asserted that increased application of ADR can lead to faster dispensation of cases, particularly in tribunals.⁴⁷ However, these mechanisms have also been criticised for their shortcomings such as the inability to grant urgent remedies such as injunctions, power imbalances and enforceability of decisions.⁴⁸ Due to the important role played by NET in promoting environmental conservation and enhancing sustainable development, application of ADR would lean towards a mechanism that can guarantee enforceability of decisions, grant interim remedies necessary for environmental conservation while promoting other principles such as expediency. However, not all matters filed before the Tribunal may be suitable for ADR. This calls for a case to case analysis of matters before the tribunal to determine the most appropriate mechanism for their disposal depending on the facts and issues in dispute.⁴⁹ There may be need for an enabling legal and institutional framework to entrench the use of ADR mechanisms within the justice system which includes tribunals. Adoption of the ideals of the Alternative Dispute Resolution policy can go a long way towards achieving this aim.⁵⁰

5.5 Promotion of Human Rights

The right to clean and healthy environment is a fundamental right and a prerequisite for full enjoyment of all the other rights.⁵¹ This right is interwoven with the realisation and enjoyment of other fundamental rights such as the right clean water, housing, food and health.⁵² In the absence of a clean and healthy environment, it is difficult to enjoy the other human rights. To this extent, the right to a clean and healthy environment has been equated to the right to life.⁵³ Thus, while promoting the right to a clean and healthy environment, NET is also fostering other human rights including the right to health, clean water, food and housing. NET should never forget its role a promoter of human rights and should actively uphold the same.

6. Conclusion

Tribunals in Kenya have been critical in facilitating access to justice. The National Environment Tribunal however plays a more important role of enhancing the principles of sustainable development and promoting human rights. Its jurisdiction therefore flows from the Constitution which enshrines sustainable development as a principle of governance.⁵⁴ However, NET's

⁴⁷ Muigua.K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Op Cit

⁴⁸ See generally Owen Fiss, "Against Settlement", 93Yale Law Journal 1073(1984)

⁴⁹ Muigua.K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Op Cit

⁵⁰ See the 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 12/03/2020). The formulation of an ADR policy is ongoing. This is against the backdrop of important international developments such as the coming into force of the Singapore Convention on International Settlement Agreements Resulting from Mediation and the UNCITRAL Model Law on Mediation and Conciliation.

⁵¹ Muigua.K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf> (Accessed on 14/03/2020)

⁵² Ibid

⁵³ See the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others* (smoking case), AIR 1999 Ker 385

⁵⁴ Constitution of Kenya, 2010, Article 10 (2) (d) 'National values and principles of governance include sustainable development'

jurisdiction has on several instances been narrowly interpreted thus posing a threat to its role. This coupled with other problems such as its capacity and limited funding are hindrances to the effectiveness of the tribunal. There is an urgent need to deal with these challenges. Creating an ideal environment that will enable NET to enhance sustainable development, promote human rights and enable access to justice is an imperative whose time has come.

Utilising Science and Technology for Environmental Management in Kenya

Abstract

The paper advocates for the use of science and technology for environmental management in Kenya. It critically discusses environmental management tools in Kenya which include the law, ethics, Environmental Impact Assessment, market forces and institutions such as national courts and tribunals and the public while pointing out their shortcomings. The paper argues that environmental management tools in Kenya have not been fully effective in environmental protection and conservation as evidenced by several environmental concerns such as pollution and degradation. It presents a case for the enhancement of science and technology as an environmental management tool in Kenya in order to effectively achieve the right to a clean and healthy environment and promote sustainable development.

1. Introduction

The importance of the right to a clean and healthy environment cannot be overemphasized. It is an essential human right that has been equated to the right to life in Kenya.¹ Since it contains virtually all the ingredients necessary for human survival, the natural environment is often susceptible to human action such the use and exploitation of natural resources including water, minerals and energy. Some of these activities have resulted in environmental degradation threatening the right to a clean and healthy environment.

Environmental management is essential towards attainment of the right to a clean and healthy environment in Kenya. It regulates human interaction with the environment. Environmental management combines science, policy, and socioeconomic application in finding solutions to practical problems that people face in cohabitation with the environment, resource exploitation and waste production.² The Environmental Management and Co-Ordination Act (EMCA) defines environmental management to include the protection, conservation and sustainable use of the various elements or components of the environment.³

However, in Kenya, environmental management has often taken a human approach with little emphasis on the role of science and technology towards achieving this goal. The paper analyses environmental management tools in Kenya and points out the shortcomings in the human approach towards environmental management. It proposes an integrated approach towards environmental management in Kenya that fully recognises and incorporates the use of science and technology.

¹ See the case of Peter K. Waweru v Republic, Misc. Civil Application No. 118 of 2004, (2006) eKLR

² National Environment Commission, 'Environmental Management Tools and Techniques' available at https://www.undp.org/content/dam/bhutan/docs/Energy_environment/Env-publications/2011-NEC-Env%20Mgt%20Tools.pdf (accessed on 17/03/2020)

³ Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, S 2, Government Printer, Nairobi

2. Environmental Management Tools in Kenya

2.1 Role of Law in Environmental Management

The Constitution of Kenya, 2010 enshrines the right to a clean and healthy environment.⁴ It further sets out certain obligations in respect of the environment.⁵ These include the requirement of the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources; and to encourage public participation in the management, protection and conservation of the environment.⁶

In addition to the Constitution, environmental management in Kenya is also governed by various sectoral legislations.⁷ The *Environmental Management and Coordination Act* is the principal legal instrument for the management of the environment in Kenya.⁸ The Act also establishes an institutional framework for management of the environment in Kenya.⁹ It further sets out several measures aimed at protection and conservation of the environment and several environmental management tools such as Strategic Environmental Assessment, Environmental Impact Assessment, Environmental Audit and Monitoring and Environmental Quality Standards.¹⁰

Environmental management is also governed by a number of systems and standards. The ISO 14000 entails a number of standards developed by the International Organization for Standardization to help organizations take a proactive approach to managing environmental issues.¹¹ The ISO standards provide a framework through which governments and regulatory bodies can structure their environmental management tools to ensure alignment and consistency both nationally and internationally.¹² EMCA also establishes environmental quality standards aimed at protecting various sectors of the environment through placing limits on discharge and emissions. These include water quality standards, air quality standards, standards for waste and standards for noise.¹³

⁴ Constitution of Kenya, 2010, Article 42: ‘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.

⁵ Ibid, Article 69 (1)

⁶ Ibid

⁷ Environmental sectoral legislations in Kenya include the Environmental Management and Co-Ordinations Act, No. 8 of 1999, Wildlife Conservation and Management Act, No. 47 of 2011, Forest Conservation and Management Act, No. 34 of 2016, Climate Change Act, No. 11 of 2016, Mining Act, No. 12 of 2016 and Water Act No. 43 of 2016. They govern various environmental sub sectors including water, forests and minerals.

⁸ Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, Government Printer, Nairobi

⁹ Section 7 of the Act establishes the National Environment Management Authority whose object and purpose is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

¹⁰ EMCA, Parts V, VI, VII and VIII.

¹¹ Environmental Management: The ISO 14000 family of International Standards, available at https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/theiso14000family_2009.pdf (Accessed on 03/04/2020).

¹² Ibid

¹³ EMCA, Part VIII

Despite law being an essential tool for environmental management in Kenya, it is clouded by certain weaknesses that hinder its efficacy towards this course. These weaknesses include complex institutional set ups, differing and overlapping mandates of state agencies tasked with environmental management and conflicting management and enforcement methods over similar resources.¹⁴ Further, there exist enforceability challenges as can be witnessed in aspects such as solid waste management.¹⁵

2.2 Role of National Courts and Tribunals in Environmental Management

Courts play an important role in environmental management in Kenya through the promotion and protection of environmental rights.¹⁶ The Constitution provides the framework for enforcement of environmental rights through an application to court.¹⁷ On such an application, a court may grant appropriate remedies including an order to prevent, stop or discontinue an act or omission that is harmful to the environment or provide compensation to a victim of violation of the right to a clean and healthy environment.¹⁸

Courts and tribunals including the Environment and Land Court¹⁹ and the National Environment Tribunal²⁰ have facilitated this role through developing environmental jurisprudence and promoting the principles of sustainable development. In *Peter K. Waweru v Republic*²¹, the court while upholding the principles of sustainable development equated the right to a clean and healthy environment with the right to life and held that:

'We have added the dictionary meaning of life which gives life a wider meaning including its attachment to the environment. Thus a development that threatens life is not sustainable and ought to be halted. In environmental law life must have this expanded meaning as a matter of necessity.'

¹⁴ Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya' Glenwood Publishers Limited, 2015

¹⁵ Haregu Nigatu. T., An assessment of the evolution of Kenya's solid waste management policies and their implementation in Nairobi and Mombasa: analysis of policies and practices , Environment and Urbanization, Vol. 29, Issue 2, 2017

¹⁶ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal' available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-Safeguarding-Environmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf> (accessed on 19/03/2020)

¹⁷ Constitution of Kenya, 2010, Article 70 provides that if a person alleges that the 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.

¹⁸ Ibid, Article 70 (2)

¹⁹ The Environment and Land Court is established under section 4 of the Environment and Land Court Act, No. 19 of 2011. In the context of environment management, the Court hears and determines disputes relating to environmental planning and protection, climate issues, mining, minerals and natural resources.

²⁰ The National Environment Tribunal is established under section 125 of the Environmental Management and Co-Ordination Act, No. 8 of 1999. Its jurisdiction entails hearing appeals in relation to inter alia grant of a licence or permit or refusal to grant a licence or permit.

²¹ Peter K. Waweru v Republic, Misc. Civil Application No. 118 of 2004, (2006) eKLR

In *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, the National Environment Tribunal while setting aside the decision by the National Environment Management Authority (NEMA) to issue an EIA Licence held as follows:

‘The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. (emphasis added)’²²

This demonstrates that national courts and tribunals are essential in environmental management in Kenya through development of environmental jurisprudence and promoting the principles of sustainable development.²³ However, this role can be hindered by factors such as case load, costs of litigation, delays and procedural technicalities which continue to affect the judicial system in Kenya.²⁴

2.3 Role of the Public in Environmental Management

The Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level.²⁵ In Kenya, public participation is a key aspect of environmental and natural resources management.²⁶ It allows persons who are likely to be affected by environmental laws, policies and projects within their localities to express their views for consideration in implementation of such laws, policies and projects.²⁷ Public participation has been enshrined as one of the national values and principles under the Constitution.²⁸ The Constitution further obligates the state to encourage public participation in the management, protection and conservation of the environment.²⁹

The role of public participation environmental management was succinctly captured in *Patrick Musimba v National Land Commission & 4 others*, where it was held that:

‘We have no doubt that 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 healthy environment. However physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also

²² *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR

²³ Muigua. K., ‘The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal’ Op Cit

²⁴ Ibid

²⁵ Rio Declaration on Environment and Development, 1992, A/CONF.151/26 (Vol. I), Principle 10

²⁶ Muigua. K., Wamukoya. D., & Kariuki. F., ‘Natural Resources and Environmental Justice in Kenya’ Glenwood Publishers Limited, 2015.

²⁷ Ibid

²⁸ Constitution of Kenya, 2010, Article 10 (2) (a)

²⁹ Ibid, Article 69 (1) (d)

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 (emphasis added).'

Public participation is an essential tool of environmental management in Kenya which ensures that the views of the public are taken into account in environmental decision making. However, public participation in environmental decision making raises certain concerns such as the quality and extent of participation and the need to ensure that it is not enough for people to participate but there is need for them to be able to appreciate the real implications of any decision being made.³⁰ Without this, public participation is reduced to a matter of formality without any real benefit or achieving the desired end.³¹

2.4 Fiscal Incentives

Incentives are forms of rewards extended to business players as a way of encouraging them to adopt measures that help in preserving the environment while discarding or avoiding those that contribute to the degradation of the environment.³² They take several forms including tax/fiscal measures.³³ EMCA provides for tax and other fiscal incentives, disincentives or fees as may be proposed by the government to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation.³⁴ Under the Act, such 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 and 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.³⁵

However, one of the shortcomings of incentive based mechanisms is that they do not fit every problem hence not widely used in environmental protection.³⁶ Further, there may be bureaucratic obstacles to the successful use of incentives such as difficulties of the economic calculations involved.³⁷

2.5 Environmental Ethics

It has been asserted that economic and judicial methods cannot solve environmental challenges on their own with a call of appeal to human beings' limitless internal ethical resources in the quest for

³⁰ Muigua. K., Towards Meaningful Public Participation in Natural Resource Management in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> (accessed on 01/04/2020)

³¹ Ibid

³² Muigua. K., Wamukoya. D., & Kariuki.F., Natural Resources and Environmental Justice in Kenya, Glenwood Publishers, 2015

³³ Ibid

³⁴ EMCA, S 57 (1)

³⁵ Ibid, S 57 (2) (b)

³⁶ Andre. F., Firms and the Environment: Ethics or Incentives? Corporate Social Responsibility Series, (Ashgate Publishing Ltd., 2005)

³⁷ Ibid

environmental conservation.³⁸ Environmental ethics is aimed at providing ethical justification and moral motivation for the cause of global environmental protection.³⁹ This calls for adoption of an appropriate attitude towards nature and establishment of an ethical relationship between human beings and nature in order to foster environmental conservation. However, environmental ethics is yet to be fully embraced in Kenya as evidenced by numerous cases of environmental pollution perpetrated by human beings.

2.6 Environmental Education

Environmental degradation has been attributed to among other factors, poverty and low levels of education.⁴⁰ Provision of education is therefore a crucial step towards elimination of bad environmental practices.⁴¹ Education has the ability to empower people and give them alternative means of making a living as opposed to relying on the environment for their sustainability.⁴² Further education has the ability to enhance sustainable development by improving the capacity of citizens to address environmental and developmental issues.⁴³ If empowered through education, citizens are able to make environmentally sound decisions in matters relating to exploitation of natural resources, Environmental Impact Assessment (EIA) and those having a bearing on the environment.⁴⁴

3. Role of Science and Technology in Environmental Management in Kenya

It has been argued that science and technology can provide effective solutions to most, if not all, environmental problems facing the world.⁴⁵ In the context of environmental management, environmental science studies the mechanisms and processes underlying our interactions with the natural environment whereas environmental technology allows application of such knowledge through actions geared towards environmental protection and conservation.⁴⁶ Technology not only refers to machines and equipment, but also includes the knowledge, abilities, skills, processes and systems necessary to facilitate environmental conservation and protection.⁴⁷ To this extent, technology has been classified as *soft technology* which entails information, training, research and capacity building and *hard technology* comprising of equipment.⁴⁸

³⁸ Yang, T., Towards an Egalitarian Global Environmental Ethics, *Environmental Ethics and International Policy*, available at <http://publishing.unesco.org/chapters/978-92-3-104039-9.pdf> (accessed on 03/04/2020)

³⁹ Ibid

⁴⁰ See UNESCO, 'Educating for a Sustainable Future: A Transdisciplinary Vision for Concerted Action' available at <https://unesdoc.unesco.org/ark:/48223/pf0000110686> (accessed on 03/04/2020)

⁴¹ Ibid

⁴² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers Limited, 2016

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Huesemann, M.H., 'Can Pollution Problems Be Effectively Solved by Environmental Science and Technology? An Analysis of Critical Limitations, *Ecological Economics*, Volume 37, Issue 2, May 2001, pg 271-287

⁴⁶ Voulvoulis, N., & Burgman, M.A., *The Contrasting Roles of Science and Technology in Environmental Challenges*, *Critical Reviews in Environmental Science and Technology*, Volume 49, 2019, issue 12

⁴⁷ Srinivas, H., 'Introduction: Technology and Environment' available at <http://www.gdrc.org/techtran/introduction.html> (accessed on 18/03/2020)

⁴⁸ Ibid

Science and technology have resulted in many environmental problems but can also be key to addressing environmental concerns such as climate change, waste management and environmental degradation.⁴⁹ It has been described as a double edged sword capable of both doing and undoing environmental damage.⁵⁰ Most environmental challenges such as global warming and climate change can be attributed to technological innovations since they are majorly caused by industrial pollution and fuel emissions from motor vehicles.⁵¹ Addressing these environmental concerns requires the input of science and technology through measures such as reducing greenhouse gases, conserving biological diversity, providing clean energy and expanding the adoption of green technologies for climate change mitigation⁵²

Environmental management and decision making in Kenya is governed by laws, regulations, and policies. Due to the shortcomings of such laws, regulations and policies, there is need for these processes to be informed by scientific evidence.⁵³ Indeed, science has the ability to remedy the shortcomings of laws and regulations through effective solutions tailor made to specific problems. The outbreak and spread of the Covid-19 pandemic is a clear example. Whereas countries have applied laws such as lock downs, curfews, quarantine and travel restrictions, spread of the virus still continues and the most effective solution to the pandemic would be through scientific knowledge and research to discover a cure and a viable vaccine.⁵⁴ In the context of environmental management, there is need to link law and science in order to ensure effective environmental management.⁵⁵

In Kenya, the Constitution obligates the state to recognize the role of science and indigenous technologies in the development of the nation.⁵⁶ To this effect, strides have been made towards the use of science and technology in environmental management. The ban on the manufacture, importation, supply, distribution and use of plastic bags and the subsequent adoption of woven bags has helped to curb environmental pollution.⁵⁷ However, more needs to be done to integrate the use of science and technology in environmental management in Kenya. Adoption of cleaner

⁴⁹ Nichols. M.R., 'How Technology Can Save the Environment' available at <https://born2invest.com/articles/technology-save-environment/> (accessed on 03/04/2020)

⁵⁰ Hsiang Kung. W., The Role of Science in Environmental Protection: Is the Development of Environmental Law Toward More Protective and Productive Way, or Distorted to Inequality, Through the Involvement of Science?, available at <https://poseidon01.ssrn.com/delivery.php?ID=893002127097024114071115075119005086117078019060066055110020095103024092069022098068013121004003017116060026103006068079097117116082071048061020026097093088117111003050062091116092001083026120014098122100070091110000102071109121123123124101104081026&EXT=pdf> (accessed on 01/04/2020)

⁵¹ Ibid

⁵² Juma. C., 'Exponential Innovation and Human Rights: Implications for Science and Technology Diplomacy', Science, Technology and Globalization, February, 2018

⁵³ Moore. J.W et al, Towards Linking Environmental Law and Science, available at <https://www.facetsjournal.com/doi/pdf/10.1139/facets-2017-0106> (accessed on 01/04/2020)

⁵⁴ Human Rights Dimension of Covid-19 Response, available at <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> (accessed on 03/04/2020)

⁵⁵ Ibid

⁵⁶ Constitution of Kenya, 2010, Article 11 (2) (b)

⁵⁷ National Environment Management Authority, 2 years on: Say no to plastic bags, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=296&catid=2&Itemid=451 (Accessed on 20/03/2020)

technologies in such areas as transport, energy production and food production can be an effective preventive measure.⁵⁸ Scientific knowledge is also useful in helping the citizenry adopt healthy lifestyles for a better, cleaner and healthier environment.⁵⁹ Some of the measures that can be adopted towards integrating the use of science and technology in environmental management in Kenya include:

a. Industrial Waste Treatment

In Kenya, most of the waste discharged from industries is not treated before recycling or disposal.⁶⁰ This poses health risks and causes damage to the environment since such waste is often discharged into water sources.⁶¹ Consequently, the industries involved in pollution have found themselves at war with environment entities including the National Environment Management Authority.⁶² Some of the measures that have taken by NEMA include closure of industries allegedly engaged in these acts.⁶³ However, with recent reports of industrial pollution of river sources such as the Nairobi River, questions still linger on the effectiveness of measures adopted in dealing with this challenge.⁶⁴

Industrial pollution is a global problem which is not alien to Kenya. Scientific measures that have been adopted to deal with industrial waste include use of materials such as zeolites, geopolymers, activated carbons and nanomaterials due to their characteristics such as ion exchange capacity, adsorption and photocatalytic action.⁶⁵ However, use of science and technology in industrial waste treatment has not been fully appreciated in Kenya. NEMA acknowledges that waste treatment technologies have not been fully embraced in the country which can be attributed to a number of factors such as lack of awareness and knowledge of such technologies; inadequate funding; limited technical competence and slow adoption of modern technological options.⁶⁶ There is need for the use of science and technology in industrial waste management in order to enhance environmental management and protection.

⁵⁸ Muigua.K., Reconceptualising the Right to a Clean and Healthy Environment in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf> (accessed on 04/04/2020)

⁵⁹ Ibid

⁶⁰ National Environment Management Authority, 'The National Solid Waste Management Strategy', available at <http://www.nema.go.ke/images/Docs/Media%20centre/Publication/National%20Solid%20Waste%20Management%20Strategy%20.pdf>, accessed on 28/03/2020.

⁶¹ Ibid

⁶² The National Assembly Departmental Committee on Environment and Natural Resources, Report on an Inquiry Into Complaints of Environmental Pollution, available at http://www.parliament.go.ke/sites/default/files/2019-09/LDK%20REPORT_compressed.pdf, accessed on 28/03/2020

⁶³ National Environment Management Authority (NEMA), Factories Closed, Owners Arrested for Polluting Environment, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454 (accessed on 06/04/2020)

⁶⁴ Kamau. J., How Nairobi River Lost Pollution Battle, Daily Nation, Monday, August 19, 2019

⁶⁵ De Luca. P et al, Industrial Waste Treatment by ETS-10 Ion Exchanger Material, available at <https://www.mdpi.com/1996-1944/11/11/2316> (accessed on 28/03/2020)

⁶⁶ National Environment Management Authority, 'The National Solid Waste Management Strategy' Op Cit

b. Adoption of Green and Clean Technologies

Green technology is an umbrella term that refers to the use of science and technology to create products and processes that are environmentally friendly for sustainable development.⁶⁷ Clean technology refers to products or services that improve operational performance while reducing costs, energy consumption, waste or negative effects on the environment.⁶⁸ These technologies can be used to protect the environment and in some instances repair damage done in the past. They provide the best eco-friendly option to ensure future sustainability.⁶⁹ Such technologies include recycling of waste and use of renewable sources of energy solar, wind and geothermal energy.⁷⁰

Kenya has made some significant strides towards the adoption of green and clean technologies especially in the area of renewable energy. The country has been ranked as the largest producer of renewable energy in Africa with 70% of its electricity generation coming from renewable sources such as geothermal, hydropower, wind and solar sources.⁷¹ The government through the National Environment Management Authority imposed a ban on plastic carrier bags which has led to the use of eco-friendly non-woven bags.⁷² Such measures are to be lauded since they offer significant promise in the country's endeavour towards green and clean technologies. There is however need for more measures towards this endeavour such as the adoption of agricultural methods and technologies that are eco-friendly as opposed to the polluting and dangerous chemicals.⁷³

c. Climate Change Mitigation

The United Nations Framework Convention on Climate Change (UNFCCC) defines climate change as change of climate which is attributed directly or indirectly to human activities which alter the composition of the global atmosphere and which are in addition to natural climate variability observed over comparable time periods.⁷⁴ Climate change has become a global concern in the 21st century and has been a dominant subject in political and scientific discussions.⁷⁵ It is majorly caused by human activities that lead to atmospheric concentration of green-house gases such as burning of fossil fuels, deforestation and increase in carbon dioxide levels. In order to curb

⁶⁷ Ali.M., Model of Green Technology Adaptation in Small and Medium –Sized Tannery Industry, *Journal of Engineering and Applied Sciences*, 12 (4), 2017

⁶⁸ Kenton. W., Green Tech, available at https://www.investopedia.com/terms/g/green_tech.asp (accessed on 29/03/2020)

⁶⁹ National Environment Management Authority (NEMA), Green Initiatives in Kenya, available at <http://nema.go.ke/images/Docs/Media%20centre/Brochures/Green%20Economy%20Booklet.pdf> (accessed on 29/03/2020)

⁷⁰ Ibid

⁷¹ Kenya News Agency, New Push on Green Technologies, available at <https://www.kenyanews.go.ke/new-push-on-green-technologies/>, accessed on 29/03/2020

⁷² National Environment Management Authority, Ban on Manufacture, Importation, Supply, Distribution and use of Plastic Carrier Bags in Kenya, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=296&catid=2&Itemid=451 (accessed on 29/03/2020)

⁷³ Muigua. K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers Limited, 2016

⁷⁴ United Nations Framework Convention on Climate Change (UNFCCC), United Nations, 1992, available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed on 30/03/2020)

⁷⁵ Owusu. P.A., & Asumadu-Sarkodie. S, *A Review of Renewable Energy Sources, Sustainability Issues and Climate Change Mitigation*, available at <https://www.tandfonline.com/doi/pdf/10.1080/23311916.2016.1167990?needAccess=true> (accessed on 30/03/2020)

this problem, nations under the Paris Agreement have come together under a common cause to undertake ambitious measures aimed at combating climate change and adapting to its effects.⁷⁶ The Agreement is aimed at holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels in recognition that this would significantly reduce the risks and impacts of climate change.⁷⁷ The Agreement recognises the role of science in climate change mitigation and calls upon states to adopt a country-driven, gender-responsive, participatory and fully transparent approach guided by the *best available science* and, as appropriate, *traditional knowledge, knowledge of indigenous peoples and local knowledge systems* (emphasis added).⁷⁸

Kenya like the rest of the world is faced with the threat of climate change. The Kenya National Adaptation Plan acknowledges the role of science, technology and innovations matched to local needs and risks towards climate change mitigation.⁷⁹ It proposes thoughtful prioritisation of research funding and policy to encourage innovation that will grow Kenya's knowledge-based economy, building resilience through climate-compatible development whilst also encouraging the expansion of technology and expertise exports.⁸⁰ The country should be more proactive in adoption of technological and scientific measures aimed at curbing climate change such as the use of clean energy sources.

4. Conclusion

The right to a clean and healthy environment is a salient human right that has been equated to the right to life in Kenya. However, environmental challenges that continue to be witnessed in the country such as pollution, environmental degradation, deforestation and the threat of climate change necessitate the need for a more collaborated approach towards environmental protection and conservation in Kenya. The role of science and technology in environmental protection and conservation in Kenya has often been neglected with more emphasis being placed on legal and other approaches. With environmental concerns still being witnessed in Kenya, the shortcomings of these measures is evident. There is need for enhancement of the use of science and technology in environmental protection and conservation in Kenya in order to secure the right to a clean and healthy environment which equates to the right to life.⁸¹ Utilising science and technology in environmental conservation and protection in Kenya is vital. It cannot be ignored.

⁷⁶ United Nations Framework Convention on Climate Change, Paris Agreement, 2015, available at http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf (accessed on 30/03/2020)

⁷⁷ Ibid, Article 2 (1) (a)

⁷⁸ Ibid, Article 7 (5)

⁷⁹ Ministry of Environment and Forestry, National Climate Change Action Plan 2018-2022, available at <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/10/8737.pdf> (accessed on 31/03/2020)

⁸⁰ Ibid

⁸¹ See the case of Peter K. Waweru v Republic, Misc. Civil Application No. 118 of 2004, (2006) eKLR

Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa

Abstract

Despite its huge wealth of natural resources, the African continent remains largely underdeveloped with majority of its population poor and living in dehumanizing conditions. While these resources would naturally be expected to spur growth and development, the opposite has been the reality for Africans. The Continent has been afflicted by natural resource-based conflicts resulting from either scramble for scarce resources or the fight for control and management of abundant resources. This is what is often referred to as 'natural resource curse'. This paper critically discusses the challenge of natural resource curse in Africa and offers some recommendations on how best the African countries can overcome the challenge and utilise their resources to promote growth and development for their people.

1. Introduction

There is documented evidence from majority of resource-rich countries, especially those endowed with depletable natural resources (i.e. fuels, ores, minerals and metals), which suggests that resource riches can be a “curse” rather than a “blessing”.¹ It has been observed that while one might expect to see better development outcomes after countries discover natural resources, resource-rich countries tend to have higher rates of conflict and authoritarianism, and lower rates of economic stability and economic growth, compared to their non-resource-rich neighbors.² This paper explores the topic of resource curse in Africa which has led to the exploitation and dehumanization of African people who struggle with high levels of poverty despite most countries in the Continent being rich in diverse natural resources that would have otherwise uplifted the livelihoods of these people.

2. The Resource Curse Phenomenon and Natural Resource-Based Conflicts

Natural resource conflicts may be divided into two broad types: Type one conflict encompasses situations where armed conflict is financed or sustained through the sale or extra-legal taxation of natural resources, and Type two conflict results from competition over resources among various groups.³ Normally, it is countries with environmental and natural resources scarcity that are faced with a high risk of conflicts and even violence. Environmental scarcities greatly affect populations, including violent conflicts in many parts of the developing world.⁴ Considering that in many parts of the poor and developing world, natural resources form the main source of livelihood for the majority of the poor communities. As a result, any conflicts relating to access and control of these

¹ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds, 'Resources Policy, 38(2013), pp.181–195, p. 181.

² Natural Resource Governance Institute, “The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth,” NRG Reader, March, 2015, p. 1. Available at https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf [Accessed on 26/5/2020].

³ United States Agency for International Development (USAID), ‘United States Agency for International Development (USAID), ‘Conflict over Natural Resources at the Community Level in Nepal Including Its Relation to Armed Conflict’, May 2006 , p. v. Available at pdf.usaid.gov/pdf_docs/PNADF990.pdf[Accessed on 27/5/2020].

⁴ Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," International security 19, No. 1 (1994): 5-40 at p. 6.

resources are usually more devastating in these poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.⁵

On the other hand, there are natural resource based conflicts that arise from the abundance of resources in a country. Indeed, many oil-, gas- and mineral-rich countries, have failed to reach their full potential as a result of their natural resource wealth. In general, they are also more authoritarian, more prone to conflict, and less economically stable than countries without these resources.⁶ The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.⁷ The ‘resource curse’ phenomenon, also commonly referred to as the ‘Dutch Disease’ or the *paradox of plenty* refers to the failure of many resource-rich countries to benefit fully from their natural resource wealth, and for governments in these countries to respond effectively to public welfare needs.⁸

Under the scarcity theory, a number of challenges which include rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to aggravate poverty levels and income inequality in many of the world’s least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict.⁹ An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya¹⁰, and with the distrust between local communities around the region against each other¹¹ leading to constant conflicts as well as cross border conflicts.¹² The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. A scramble for the scarce resources has often led to poverty and even violent and armed conflict.¹³

⁵ Ibid., p.6.

⁶ Natural Resource Governance Institute, “The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth,” NRG Reader, March, 2015, p. 1. Available at https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf [Accessed on 26/5/2020].

⁷ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*, 2007, p.8.

⁸ Natural Resource Governance Institute, “The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth,” NRG Reader, March, 2015, p. 1. Available at https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf [Accessed on 26/5/2020].

⁹ Ibid., p.8.

¹⁰ Turkana County –United Nations Joint Programme 2015-2018, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at <https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf> [Accessed on 27/5/2020].

¹¹ Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. <http://www.jstor.org/stable/25842144>. [Accessed on 27/5/2020].

¹² Johannes, E.M., et al, ‘Oil discovery in Turkana County, Kenya: a source of conflict or development?’ *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

¹³ ‘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_peace_prize_winners_acceptance_sp/ [Accessed on 27/5/2020].

On the other hand, it is commonly expected that countries that are rich in natural resources such as oil and gas can base their development on these resources, and use them as a key path for sustained economic growth.¹⁴ However, that is not always the case. There are a good number of countries that have huge reserves of natural resources but are far from being considered economically stable and/or even successful.¹⁵ Thus, those who view abundance as a problem argue that it is in fact resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the “resource curse”—corruption, economic stagnation, and violent conflict over access to revenues.¹⁶

Apart from the adverse effect of the conflict on the environment, the illegal trade of minerals bars communities from benefiting from its resources.¹⁷ Communities expect that availability of environmental goods and services in their region will improve their livelihoods by ‘real’ development, which may not always be the case.¹⁸ Poor and low economic development¹⁹ and consequently, failed economies result in conflicts,²⁰ as a result of environmental and natural resources’ bad governance or mismanagement.²¹ Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.²²

¹⁴ Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134, at p. 123.

¹⁵ ‘Why Natural Resources Are a Curse on Developing Countries and How to Fix It - The Atlantic’ <<https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/>> accessed 28 May 2020; ‘Few Developing Countries Can Climb the Economic Ladder | St. Louis Fed’ <<https://www.stlouisfed.org/publications/regional-economist/october-2015/trapped-few-developing-countries-can-climb-the-economic-ladder-or-stay-there>> accessed 28 May 2020; Van der Ploeg, F., "Africa and natural resources: managing natural resources for sustainable growth." (2008), available at https://www.economics.ox.ac.uk/images/Documents/OxCarre_Policy_Papers/oxcarrepp200801.pdf [Accessed on 27/5/2020].

¹⁶ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*, 2007, p.8.

¹⁷ See ‘Diamonds in Sierra Leone, A Resource Curse?’ available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 27/5/2020]; Kinniburgh, C., ‘Beyond “Conflict Minerals”’: The Congo’s Resource Curse Lives On,’ *Dissent Magazine*, Spring 2014, available at <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 27/5/2020]; Free the Slaves, ‘Congo’s Mining Slaves: Enslavement at South Kivu Mining Sites,’ *Investigative Field Report*, June 2013. Available at <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 27/5/2020].

¹⁸ Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 27/5/2020].

¹⁹ See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012).

²⁰ Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

²¹ Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, ‘Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,’ (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf> [Accessed on 27/5/2020].

²² Saboe, N.T., ‘Benefit Sharing Among Local Resource Users: The Role of Property Rights,’ *World Development*, Vol. 72, pp. 408–418, 2015, p. 408.

As far as the abundance theory is concerned, rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption,²³ which is a threat to protected human security.²⁴ Natural and environmental resources exploitation is capable of degenerating into a war. Effective governance of these resources is thus necessary for security and peace. Thus, competition for scarce resources, as well as inequality in access to accruing environmental benefits where there are abundant resources, both have the effect of heightened animosity and potential cause for violence.²⁵ The natural resource-based conflicts often arise from the different uses for such resources such as forests, water, pastures and land, or the desire to control or manage them. While environmental factors are rarely, if ever, the sole cause of violent conflict, the exploitation of natural resources and related environmental stresses can be implicated in all phases of the conflict cycle, from contributing to the outbreak and perpetuation of violence to undermining any prospects for peace.²⁶ Disagreements arise when different groups' interests and needs are incompatible, or when the priorities of some user groups are not considered in policies, programmes and projects. There are four conditions that may influence how access to resources could become contested. These are: the scarcity of a natural resource; the extent to which two or more groups share the supply; the relative power of those groups; the degree of dependence on this particular resource, or the ease of access to alternative sources.²⁷ Such conflicts are especially usually prevalent among pastoralist and agricultural communities who are usually faced with challenges which arise from the constant shrink in the land they use for these practices.

3. The Resource Curse in Africa: So Much yet so Little

Some scholars have rightly argued that mineral endowment in Africa is a “resource curse” rather than a blessing mainly because of the corrupt collusion of African political elites and some of the so-called “investors” in the mining sector.²⁸ This has resulted in the continued African continent's struggle with development issues.²⁹ For instance, extractive industries, particularly in sub-Saharan Africa, have been associated with increasing levels of political, social, technical and environmental

²³ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds, 'Resources Policy, 38(2013), pp.181–195, p. 184.

²⁴ Alao, A., Natural Resource Management and Human Security in Africa, in Abass, A., Protecting Human Security in Africa (ISBN-13: 9780199578986, Oxford University Press, 2010); Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' Africa in Fact, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 27/5/2020].

²⁵ See Muigua, K., Kariuki, F., Wamukoya, D., Natural Resources and Environmental Justice in Kenya, Glenwood Publishers, Nairobi, 2015.

²⁶ United Nations Environment Programme, 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment,' p. 5. Available at http://www.unep.org/Themes/Freshwater/PDF/FromConflict_to_Peacbuilding.pdf [Accessed on 27/5/2020].

²⁷ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management' (FAO, Rome, 2005), p. 22.

²⁸ Mupambwa, G. and Xaba, M.B., "Chapter Ten “Investors” or Looters? A Critical Examination of Mining and Development in Africa." Grid-locked African Economic Sovereignty: Decolonising the Neo-Imperial Socio-Economic and Legal Force-fields in the 21st Cen (2019): 292.

²⁹ Ibid.

risk.³⁰ This has been the case in countries like Sudan, Democratic Republic of Congo³¹ and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources as well as significant environmental degradation.³² A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.³³ Notably, environmental degradation may be as a result of either overexploitation of resources or total disregard for the environmental laws by corporations especially in the extractives industry. In Nigeria, despite the oil revenue, poverty rates are generally higher and infrastructure is poorer in the oil-rich states and there is disproportionate allocation of such funds.³⁴ It has been documented in the past that while oil exports had fuelled real GDP growth of over 5 per cent a year in Nigeria, the official unemployment rate climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates were estimated to be as high as 60 per cent.³⁵

The relationship between industrial mining and communities in Ghana is complex and highly contested, because, despite macroeconomic growth fueled by the mining boom, Ghana remains a country with high rural poverty.³⁶ There have even been instances of misappropriation of mineral benefits distributed through the grassroots leaders, namely, village chiefs who are supposed to ensure that the funds are invested well for the benefit of the communities.³⁷ The result has been unending poverty despite the presence of resources.

It has been observed that unlike other resources, natural resources (i.e., oil, gas and minerals) do not need to be produced, but only extracted. Because the generation of natural resource wealth is not a result of production, it can occur relatively independently of other economic processes and does little to create employment.³⁸ As a result, the presence of these resources in a country does

³⁰ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda*, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48; see also Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*,

(International Finance Corporation, February 2015), p. 55. Available at <https://commdev.org/wpcontent/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf> [Accessed on 27/5/2020].

³¹ 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 27/5/2020].

³² 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.

³³ '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_peace_prize_winners_acceptance_sp/ [Accessed on 27/5/2020].

³⁴ Shaxson, N., 'Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?' (Royal Institute of International Affairs, 2009), p. 4.

³⁵ Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' *Africa Progress Report 2013*, p. 31. Available at http://appcdn.acwupload.co.uk/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf [Accessed on 27/5/2020].

³⁶ Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *Resources Policy*, vol. 40, 2014, pp.74–82, p. 75.

³⁷ *Ibid.*

³⁸ Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134, at p. 124.

not always translate to job opportunities as demonstrated by the aforementioned countries. The soda ash mining in Lake Magadi where the poverty and lack of investments in Magadi, after 100 years of exploitation of trona worth trillions of shillings, has been attributed to the lack of transparency in the governance of natural resources, corruption, and illegal outflows.³⁹ Thus, the locals, despite suffering adverse environmental effects from the mining activities, have not benefitted from the resources.

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.⁴⁰ One of the goals of the *Agenda 2030 on Sustainable Development*⁴¹ is promoting human development. Natural resources are expected to contribute to national development, where development carries 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.⁴²

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. It also seeks to achieve a number of goals which include, poverty reduction, promotion of human rights, promotion of equitable opportunities, environmental conservation and the assessment of impacts of development activities.⁴³

³⁹ Kamau, J., "Magadi saga exposes the ugly side of capitalism," Daily Nation, Sunday April 21 2019. Available at <https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html> [Accessed on 26/5/2020].

⁴⁰ 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.

⁴¹ 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.

⁴² 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 http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf [Accessed on 26/5/2020].

⁴³ 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.

The *Agenda 21*⁴⁴, under Chapter 15 acknowledges that the current decline in biodiversity is largely the result of human activity and represents a serious threat to human development.⁴⁵

Resource-based conflicts usually are a major threat to the sustainable development of natural resources in Africa and usually have the result of undermining economic development, sustainability and definitely human development.⁴⁶ Conflicts usually complicate the exploitation of the natural resources and as such there are usually no resulting benefits to the various parties. It is important to note that overdependence on natural resources is also a potential source of conflicts among communities in different countries especially when these resources get exhausted. It is thus imperative that countries diversify their economies in order to ensure that various sectors of the economy contribute to the well-being of the people and that other sectors of the economy are also given the importance deserved.

Kenya's development Blueprint, the *Vision 2030*⁴⁷, 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.⁴⁸ Sustainable human development is, therefore, inextricably linked to people's livelihoods, and is thus requisite in moving towards environmental justice. Despite such ambitious development blueprints, which may be found in many other African countries, there is usually the risk of resource capture by the powerful elites in natural resource-rich countries, who are less likely to invest in productive enterprises, such as job-creating manufacturing industries, and instead pursue *rent-seeking*, that is, fight for control of these resources, or *rent-seizing*, that is, politicians or government officials purposefully dismantling societal checks or creating new regulations to get access to these resources or to provide access to friends or family.⁴⁹ Rent-seeking and rent-seizing promotes corruption and is damaging to institutional development.⁵⁰

The mismanagement of resources and the resultant failure to invest in crucial socio-economic sectors such as education, job creation and health has led to low human development with Africa still recording high levels of poverty, diseases and illiteracy.⁵¹ The *2018 UN report on Human Development* noted that South Asia was the fastest growing region during the period 1990–2017, at 45.3 percent, followed by East Asia and the Pacific at 41.8 percent and Sub-Saharan Africa at 34.9 percent.⁵² This is despite Africa being one of the richest in terms of natural resources wealth.

⁴⁴ Agenda 21 (A/CONF.151/26, vol.II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.

⁴⁵ Agenda 21, Para. 15.2.

⁴⁶ Abba Kolo, A., 'Dispute settlement and sustainable development of natural resources in Africa,' in Botchway, F. (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar Publishing, 2011).

⁴⁷ Republic of Kenya, *Kenya Vision 2030*, Government of Kenya, 2007.

⁴⁸ *Kenya Vision 2030*, Government of Kenya, 2007.

⁴⁹ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 4.

⁵⁰ *Ibid*, p.4.

⁵¹ Conceição, P. "Human development report 2019." *Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century*. New York, UNDP (2019). Available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf> [Accessed on 26/5/2020].

⁵² UNDP, UNDP. "Human development indices and indicators: 2018 statistical update." (2018): 22-25, at p.22.

4. Overcoming the Resource Curse in Africa for economic and Human Development

Natural resource wealth is often expected to offer three large benefits for poor economies. First, the income stream from resource extraction can boost real living standards by financing higher levels of public and private consumption. Second, resource extraction can finance higher levels of investment, both directly out of natural resource income, and indirectly from borrowing made possible by that income. Third, since resource income typically accrues largely to the public sector, and indeed to the public budget, it can remove a huge barrier to development: the lack of fiscal resources needed to finance core public goods, including infrastructure.⁵³ Despite this, the natural resource curse has led to a situation where many countries in Africa and the Middle East rich in oil and other natural resources, have their people continuing to experience low per capita income and a low quality of life.⁵⁴

Since minerals and hydrocarbons and indeed most natural resources are finite resources, developing countries rich in these resources should come up with strategies to harness the opportunities created with the extractive industries to support sustainable economic development.⁵⁵ It has been acknowledged that some resources such as oil, mineral and gas wealth is distinct from other types of wealth because of its large upfront costs, long production timeline, site-specific nature, scale (sometimes referred to as large *rents*), price and production volatility, non-renewable nature, and the secrecy of the industry.⁵⁶ However, there are a few success stories from the African continent and beyond that would offer valuable lessons to the other countries on how best they can utilise their resources to build their economies and uplift their people from abject poverty. Botswana is one such country.

4.1 The Case of Botswana: A Success Story

The extractives industry has promoted socio-economic development in some African countries without falling into the trap of resource curse. 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.⁵⁷ Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.⁵⁸

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

⁵³ Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134, at p. 124.

⁵⁴ *Ibid*, p. 124.

⁵⁵ Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimizing Value Retention In Host Countries*, UNCTAD/SUC/2012/1 (New York and Geneva, 2012), p. 1. Available at https://unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf [Accessed on 26/5/2020].

⁵⁶ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 1.

⁵⁷ Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

⁵⁸ *Ibid*, p.61.

credit ratings.⁵⁹ It has been observed that Botswana's approach has not been based on offering low-tax incentives, but on a stable, open and transparent policy regime, free of corruption and political interference, that allows investors freedom to operate once agreements have been reached.⁶⁰

Botswana has also achieved favourable balance of payments and fiscal positions. In addition, there has been great attention to how these revenues are spent, with an overriding objective of devoting mineral revenues – derived from the sale of a non-renewable asset – to investment in other assets (economic, social and financial) that will help to generate future economic growth.⁶¹ In addition, significant financial reserves have been built up that enable the economy to get insulation against the economic shocks that may come with risks and uncertainties in mineral commodities.⁶²

Despite scholarly evidence that mineral-dependent economies perform worse than other, otherwise similar economies across the gamut of development indicators and the argument that mineral dependent states have particularly low living standards, high poverty rates, and high income inequality, Botswana seems to have figured it out to go against the grain and achieved high economic development through its mineral resources.⁶³ Other countries like Indonesia, Chile and Tanzania have also mitigated the resource curse effects of their substantial mineral sectors and used those sectors to achieve strong development outcomes in many areas.⁶⁴

4.2 Utilising Natural resources to Address Poverty in Africa

The *Agenda 21*⁶⁵ which was adopted in 1992 to facilitate 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.⁶⁶ It 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.⁶⁷ Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.⁶⁸

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

⁵⁹ 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.aspx> [Accessed on 26/5/2020].

⁶⁰ Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.62.

⁶¹ Ibid, p. 62.

⁶² Ibid, p.62; See also Kojo, N.C., *Diamonds are not forever: Botswana medium-term fiscal sustainability*, The World Bank, 2010. Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/3962/WPS5480.pdf?sequence> [Accessed on 26/5/2020].

⁶³ Dougherty, M., "A Policy Framework for New Mineral Economies: Lessons from Botswana," *Research Paper C1-2011* (2011): 2; See also Limi, A., "Escaping from the Resource Curse: Evidence from Botswana and the Rest of the World." *IMF Staff Papers* 54, no. 4 (2007): 663-699.

⁶⁴ Ibid.

⁶⁵ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

⁶⁶ Ibid, Preamble.

⁶⁷ Ibid, Clause 3.2.

⁶⁸ Ibid, Clause 3.2.

consequently, empowering communities for overall national development. The *2030 Agenda for Sustainable Development*⁶⁹ acknowledges that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.⁷⁰

The mining sector and all other commercially viable resources in any country are expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. One way of alleviating poverty in such regions would be empowering the local people through job opportunities such as direct employment opportunities or creating markets for the locally produced goods and services.⁷¹ Income growth is touted as the main contributor to directly increasing the capabilities of individuals and consequently the human development of a nation since it encapsulates the economy's command over resources.⁷² Improving levels of education and health should have priority or at least move together with efforts to directly enhance growth.⁷³ This would greatly contribute to alleviation of abject poverty in the continent.

4.3 Curbing Corruption: Need for Enhanced Accountability and Transparency in Resource Management and Governance

Despite its launch in 2009, the *Africa Mining Vision* which seeks to promote transparent, equitable and optimal exploitation of mineral resources is yet to have an impact on resource extraction activities in many other African countries as there are still rampant cases of illicit financial flows, lack of mineral value addition and poverty among communities living in mining areas.⁷⁴

One of the major reasons why the general public in many African countries do not benefit from the wealth of their countries is that they are not even aware of what is available in those countries. They entrust leaders with all the decision-making powers or even denied such rights in decision making and the leaders gladly engage in corrupt dealings with local and foreign investors thus benefitting only a few.

Some authors have convincingly argued that where there are adequate funds accruing from natural wealth, governments are likely to become immune to the citizenry's concerns and complaints and even become authoritarian. This is not new in Africa as some of the countries such as Democratic

⁶⁹ 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.

⁷⁰ Ibid.

⁷¹ See generally, Musawenkosi, N., "Does mining alleviate or exacerbate poverty: Are local community grievances really 'Much Ado about Nothing'?" PhD diss., University of Cape Town, 2017. Available at https://open.uct.ac.za/bitstream/handle/11427/24930/thesis_com_2017_nxele_musawenkosi.pdf?sequence=1&isAllowed=y [Accessed on 26/5/2020]; Pegg, S., "Mining and poverty reduction: Transforming rhetoric into reality," *Journal of cleaner production*, Vol.14, no. 3-4 (2006): 376-387.

⁷² Ranis, G., "Human development and economic growth." Yale University Economic Growth Center Discussion Paper 887 (2004), p. 2.

⁷³ Ibid, p. 10.

⁷⁴ 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 26/5/2020].

Republic of Congo with immense natural wealth have also had some of the worst internal conflicts. This has been explained in terms of taxation in that, in general, governments are more responsive to their citizens and are more likely to transition to democracy when government spending is reliant on citizen taxation.⁷⁵ However, when countries collect large revenues from natural resources, they are less dependent on levying taxes on citizens, and thus citizens feel less invested in the national budget.⁷⁶ In addition, politicians and government officials are also less directly tied to citizen requests or demands. Further, when resource revenues are secret, citizens do not have a clear sense of whether the resource revenues are being spent well or not.⁷⁷ The proponents of this theory thus suggest that the tendency toward authoritarianism can be mitigated by increasing transparency of revenues and strengthening the links between government and citizens through citizen participation in budgeting or direct distribution of wealth (e.g., cash transfers).⁷⁸

It is thus important that the governance structures meant to enhance democratic space, accountability and transparency are strictly enforced. Courts have a great role in achieving such accountability and transparency in mining activities and other resource extraction deals in the country as a means of avoiding resource curse. Courts should also be strengthened in order to uphold the rule of law and promote openness, transparency and accountability. They should not shy away from cancelling licensing deals that go against the national laws.⁷⁹ The licensing processes should be beyond reproach and non-partisan. These decisions should not be left to one body. Anti-corruption bodies should also be well monitored and strengthened to ensure that they are independent enough to curb and prevent such practices.

4.4 Diversifying the Economy: Putting the Natural Resources income to proper Use

Natural resources can be used to jump-start economies and invest in the infrastructure, institutions, and quality public services needed to translate growth into human development, if managed in transparent, inclusive, and sustainable ways.⁸⁰ However, natural resources are often finite resources that must be utilised well when available to build a strong and diversified economy. However, this is not often the case since most resource-rich governments often get trapped in boom-bust cycles where they spend on legacy projects, over-spending on government salaries, inefficient fuel subsidies and large monuments and to underspend on health, education and other social services.⁸¹ In addition, governments often over-borrow because they have improved credit-

⁷⁵ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," NRG Reader, March, 2015, p. 2.

⁷⁶ Ibid, p. 2.

⁷⁷ Ibid, p. 2.

⁷⁸ Ibid, p. 2.

⁷⁹ See *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR; cf. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

⁸⁰ Grynspan, R., "The role of natural resources in promoting sustainable development," Remarks for Rebeca Grynspan, Associate Administrator of UNDP on the occasion of the Opening of the 67th UN General Assembly side event on "The Role of Natural Resources in Promoting Sustainable Development" UN New York, 28 September, 2012, available at <http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/09/28/rebeca-grynspan-the-role-of-natural-resources-in-promoting-sustainable-development/> [Accessed on 27/5/2020].

⁸¹ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," NRG Reader, March, 2015, pp. 2-3; Badeeb, R.A., Lean, H.H. and Clark, J.,

worthiness when revenues are high, a behaviour that was attributed to debt crises when revenues declined in Mexico, Nigeria and Venezuela in the 1980s.⁸²

Botswana is a good example of how to avoid resource curse by properly managing the available mineral resources as well as diversifying the economy and avoiding over-reliance on extractives as a shock insulator against uncertainties in minerals, oil and gas prices in the international markets. There is need for the African countries to use their resources to benefit their people through two pillars of production; accelerated economic growth, job creation and poverty alleviation, and sustainability; combatting climate change and controlling pollution and environmental degradation.⁸³ They should forge mutually beneficial alliances as well as meaningful inclusion of all the stakeholders, including communities as a way of ensuring that their citizenry is empowered in order to fight poverty.

African governments currently enjoying huge natural resources wealth in their countries can avoid the 'Dutch disease' by transforming resource revenue inflows into tangible investments, such as roads and electricity; using resource revenues to make investments in the economy that generate non-resource sector growth; or the government placing a portion of its resource revenues in foreign assets.⁸⁴ A diversified economy is more likely to withstand both internal and external shocks such as global commodity price deterioration and economic meltdown like the one currently occasioned by the Coronavirus (COVID-19) disease⁸⁵.

4.5 Managing Public Spending and Debt

It is not uncommon for African countries to become slaves of foreign countries through aid and takeover of the exploitation of their resources in order to repay huge debts that often accumulate through inefficient spending and borrowing to finance development projects and their governments' recurrent expenditure. Recently, China has been on the limelight for lending African countries such huge infrastructural loans that they become unable to repay prompting takeover of the extraction of some their natural resources as collateral. Indeed, this idea is not farfetched as

"The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134.

⁸² Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," NRG Reader, March, 2015, p. 3.

⁸³ Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya, p.3:

These were held in the context of the Leaders Commitment Segment, nine Signature Thematic Sessions, Business and Private Sector Forum, Governors and Mayors Convention, Science and Research Symposium, Civil Society Forum, Side Events and the Leaders Circle and Closing segments. Partnerships for financing, access to new technologies and innovations; capacity building, integrating women, youth and people in vulnerable situations and opportunities, priorities and challenges in the blue economy sectors were discussed as cross cutting issues (p.3.).

⁸⁴ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," NRG Reader, March, 2015, p. 3.

⁸⁵ Fernandes, N., "Economic effects of coronavirus outbreak (COVID-19) on the world economy." Available at SSRN 3557504 (2020); 'Complacency to Chaos: How Covid-19 Sent the World's Markets into Freefall | Business | The Guardian' <<https://www.theguardian.com/business/2020/mar/28/how-coronavirus-sent-global-markets-into-freefall>> [Accessed on 27/5/2020].; <https://www.the-star.co.ke/authors/alex-awiti>, 'Covid-19 Triggers Unprecedented Global Economic Turmoil' (The Star) <<https://www.the-star.co.ke/opinion/columnists/2020-03-24-covid-19-triggers-unprecedented-global-economic-turmoil/>> [Accessed on 27/5/2020].

China is already reported as having taken land in Tajikistan and a port in Sri Lanka in exchange for the waiving of outstanding debt.⁸⁶

It is estimated that in the five years from 2012 to 2017, Chinese lending to sub Saharan African countries jumped to more than \$10 billion a year, up from less than \$1 billion in 2001.⁸⁷ During that period, China pledged billions of dollars to countries in loans, grants, and development financing as a way of extending their “win-win” economic policy by investing in railway, highway and port projects besides industrialization.⁸⁸ The result has been a borrowing spree by African countries meant to allegedly boost their infrastructure, economic growth, and global competitiveness, a practice which has come under scrutiny in recent years, with critics noting they could encourage dependency, entrap nations in debt, and push debt limits to unsustainable levels.⁸⁹ Countries such as Kenya, Zambia, Djibouti and Angola have reached critical levels of debt where it has been reported that Angola, for instance, services its debt to China by shipping specific quantities of oil.⁹⁰

While these loans were meant to put up infrastructure that would generate enough income to repay the loan and boost the national coffers, there have been reported cases of corruption in management of these funds as well as economic non-viability of some of the projects. A good example is Kenya’s Standard Gauge Railway (SGR) which has been reporting losses since it was operationalized or marginal profits, hardly enough to be self-sufficient in repaying the loans.⁹¹ There is a need for African countries to review their priorities in public expenditure and borrowing to minimise the risk of exposure. This will not only ensure economic stability but will also ensure that the available resources are utilised to improve the lives of its people instead of repaying foreign debts. It will also reduce the risk of foreign capture of national resources as collateral.

⁸⁶ ‘Tajik Land Deal Extends China’s Reach in Central Asia - Reuters’ <<https://www.reuters.com/article/us-tajikistan-china-land/tajik-land-deal-extends-chinas-reach-in-central-asia-idUSTRE72O1RP20110325>> [Accessed on 27/5/2020]; Tripti Lahiri, ‘The Specter of Sri Lanka’s Debt Is Hovering over a Gathering of African Leaders in China’ (Quartz) <<https://qz.com/1377321/the-specter-of-sri-lankas-chinese-debt-is-hovering-over-a-gathering-of-african-leaders-in-china/>> [Accessed on 27/5/2020].

⁸⁷ Abdi Latif Dahir, ‘Chinese Lending to African Countries Jumped Tenfold in the Last Five Years’ (Quartz Africa) <<https://qz.com/africa/1463948/chinese-lending-to-african-countries-jumped-tenfold-in-the-last-five-years/>> [Accessed on 27/5/2020].

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ ‘SGR Makes Sh10 Billion Loss in First Year: The Standard’ <<https://www.standardmedia.co.ke/article/2001288487/sgr-makes-sh10-billion-loss-in-first-year>> [Accessed on 27/5/2020]; ‘The Hits, Misses and Hopes of SGR Dream’ (Daily Nation) <<https://www.nation.co.ke/business/The-big-SGR-dream-begins-to-fizzle-out/996-5138766-97cb5gz/index.html>> [Accessed on 27/5/2020]; ‘CS Macharia Defends Loss Making SGR on Sentimental Value’ (Citizentv.co.ke) <<https://citizentv.co.ke/business/cs-macharia-defends-loss-making-sgr-sentimental-value-250788/>> [Accessed on 28/5/2020]; ‘SGR Raked in Sh10bn Revenue in First Year’ (Business Daily) <<https://www.businessdailyafrica.com/economy/SGR-raked-in-Sh10bn-revenue-in-first-year/3946234-5020294-13c0x1lz/index.html>> [Accessed on 28/5/2020]; Julie Owino, ‘SGR Profits Rise to Sh8.8 Billion from Sh3.7 Billion in 2019’ (Capital Business, 17 January 2020) <<https://www.capitalfm.co.ke/business/2020/01/sgr-profits-rise-to-sh8-8-billion-from-sh3-7-billion-in-2019/>> [Accessed on 28/5/2020].

4.6 Investing in Science, Technology and Innovation

The ability to generate scientific and technological knowledge and translate it into new products or processes is a key instrument of economic growth and development.⁹² For the longest period, Africa has been a consumer of scientific knowledge, which underpins much of the technological capacities that fuel the knowledge economy: production and services based on knowledge-intensive activities that contribute to an accelerated pace of technological and scientific advance⁹³, rather than a contributor at the global level. This has often reduced it to a consumer of resultant goods and services from the rest of the world as opposed to a producer. Indeed, it is estimated that Africa produces a paltry 1% of the global scientific knowledge.⁹⁴ If Africa is to realise its development agenda and transact business with other continents as able partners, this trend must be addressed.

There is a need for Africa to invest heavily in science, technology and innovation for not only insulating their economies but also for development of strong value addition industries and information technology, among others. Science forms a strong basis for improvements in human welfare, through technologies which it develops for health, food production, engineering and communication.⁹⁵ In addition, science is also important in solving problems created by human activity, such as environmental degradation and climate change.⁹⁶ Science, technology and innovation is considered key for future development strategies relating to innovation in products, services, business and social processes as well as models.⁹⁷

Thus, science and technology are key to economic and social development, and African countries should pay more attention to development cooperation, building or developing research capacity. They should focus on developing scientists' technical competencies through training, with parallel investments to develop and sustain the socioeconomic and political structures that facilitate knowledge creation.⁹⁸

⁹² Mormina, M., "Science, technology and innovation as social goods for development: rethinking research capacity building from sen's capabilities approach." *Science and engineering ethics* 25, no. 3 (2019): 671-692, at p. 671.

⁹³ *Ibid.*, at p. 674.

⁹⁴ Tom Kariuki, 'Africa Produces Just 1.1% of Global Scientific Knowledge - but Change Is Coming' *The Guardian* (26 October 2015) <<https://www.theguardian.com/global-development-professionals-network/2015/oct/26/africa-produces-just-11-of-global-scientific-knowledge>> [Accessed on 28/5/2020]; Elsevier, 'Africa Generates Less than 1% of the World's Research; Data Analytics Can Change That' (Elsevier Connect) <<https://www.elsevier.com/connect/africa-generates-less-than-1-of-the-worlds-research-data-analytics-can-change-that>> [Accessed on 28/5/2020].

⁹⁵ 'Why the World Needs to Embrace Science | World Economic Forum' <<https://www.weforum.org/agenda/2015/12/why-the-world-needs-to-embrace-science/>> [Accessed on 28/5/2020].

⁹⁶ *Ibid.*

⁹⁷ Schaaper, M., "The Importance of Science, Technology and Innovation Indicators for Policy," UNESCO Institute for Statistics UNESCO Workshop on Surveys on Science, Technology and Innovation (STI) Policy Instruments, Governing Bodies, Policies and Indicators, Harare, Zimbabwe 7-8 November 2012. Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/UIS-Schaaper_Harare.pdf [Accessed on 28/5/2020].

⁹⁸ Mormina, Maru. "Science, technology and innovation as social goods for development: rethinking research capacity building from sen's capabilities approach." *Science and engineering ethics* 25, no. 3 (2019): 671-692.

4.7 Reviewing Resource Extraction Agreements

The extractive or mining industries generally have long been touted as key to anchor ‘development’ or ‘economic growth’ to alleviate poverty in developing countries.⁹⁹ Despite this, many African countries have largely exhibited low levels of development and poor standards of living.¹⁰⁰ This has been attributed to various factors including exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements, with the result that the Continent has received inadequate returns for its mineral wealth.¹⁰¹

Some governments often enter into exploitative agreements that result in minimal, if any, benefits accruing to their people or even the national coffers. The lopsided agreements lead to most of the income from the resources leaving the country, where most of the accruing profits from the extraction of the resources end up in the investors’ home countries. The governments are unable to even benefit or even compensate the state and communities for depleting their resources and related environmental damage or loss of livelihood.¹⁰² This often attributed to instances where countries are so eager to encourage resource extraction that they lower the rates for taxes and royalties without understanding the true value of their resources.¹⁰³ It is also noted that in capital-intensive (rather than labour-intensive) extractive industries, few non-tax benefits, such as jobs, accrue to locals. While expectations for local content, that is employment, local business development and improved workforce skills, are often very high, the actual number of opportunities may be few. The industry has a very low employment rate relative to the size of investments and those jobs, and the machinery required to implement them, mostly imported from abroad, tends to be extremely specialized.¹⁰⁴

While countries such as Kenya often have regulations requiring promotion of 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,¹⁰⁵ there is little evidence that this is often achieved.

There is a need for the African countries to consider renegotiating these agreements in order to safeguard the national interests as far as benefit sharing and economic growth is concerned. Some

⁹⁹ Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.*, 9 (2013): 31, at p.33.

¹⁰⁰ African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, p. 2. Available at <https://repository.uneca.org/bitstream/handle/10855/23538/b11580379.pdf?sequence=1> [Accessed on 28/5/2020].

¹⁰¹ *Ibid.*, p.2; Ezekwe sili, O.K., "Harnessing Africa's natural resources to fight poverty," *Daily Nation*, Wednesday April 15 2009. Available at <https://www.nation.co.ke/oped/opinion/440808-560566-gnl8o6z/index.html> [Accessed on 28/5/2020].

¹⁰² Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 4.

¹⁰³ *Ibid.*

¹⁰⁴ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 4.

¹⁰⁵ Mining (Employment and Training) Regulations, 2017, Regulation 3.

countries such as Tanzania have sought to renegotiate their extractives exploitation contracts where it was deemed necessary. The Tanzanian government enacted laws that introduced changes in the exploitation of natural resources in the country's mining sector to ensure that Tanzania's natural resources are exploited to benefit the citizens.¹⁰⁶ Some of the laws such as the Natural Wealth and Resources Contracts (*Review and Re-negotiation of Unconscionable Terms*) Act, 2017¹⁰⁷ are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.¹⁰⁸ The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 is meant to give powers to parliament to direct the Government to re-negotiate and rectify any term that seem to bear questionable circumstances in the contracts.

Renegotiation of existing mining agreements may be justified:- when rigid contractual terms provide for an excessive duration, secured against any legislative change; when the agreement reflects the one-sided distribution of bargaining power and ability in favour of the transnational corporations; when circumstances have changed considerably so that the agreement needs adjustment to existing usages; and, when the agreement hampers severely the host country's freedom to employ its natural resources as a lever for effective economic development.¹⁰⁹

Other African countries should consider following Tanzania's path in order to reclaim their rights to exploit and use their natural resources to develop their economies and fight poverty among its citizens.

5. Conclusion

It is a blessing that the African Continent is rich in diverse natural resources that can be exploited. However, as discussed above, it is not enough that a country has a wealth of natural resources; effective management of these resources and equitable benefit sharing are essential. The natural resources are meant to promote national development and assist the African countries to achieve national development as envisaged in the United Nations sustainable development goals.¹¹⁰ Time has come for the African leaders to go back to the drawing board and figure out where they go wrong. Some Asian countries have been able to put into use their most important resource (mainly oil) to pull their people out of poverty while their African counterparts have only experienced poverty, conflicts and environmental degradation from the mining and extraction of their oil and other mineral resources.

¹⁰⁶ "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 28/5/2020].

¹⁰⁷ Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No.6 of 2017, Laws of Tanzania. Available at <https://tanzlii.org/tz/legislation/act/2017/6-0> [Accessed on 28/5/2020].

¹⁰⁸ "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 28/5/2020].

¹⁰⁹ Walde, T.W., "Revision of Transnational Investment Agreements in the Natural Resource Industries," *University of Miami Inter-American Law Review*, Vol.10, no. 2 (1978): 265, at p. 267; Kuruk, Paul. "Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," *Michigan Journal of International Law* 13, no. 1 (1991): 43-82.

¹¹⁰ 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.

Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa

There is need for the leaders to put in place measures and enforce them on how best to manage natural resources and the extractive industry wealth in order to curb the resource curse and alleviate poverty and promote development. A strong legal framework for benefit sharing ought to be put in place covering the expectations, rights and obligations of all parties concerned. As long as leaders remain complacent, the African continent will remain poor and be associated with conflicts, despite its natural resource wealth, while the developed countries take advantage of this to accrue raw materials to develop their own economies.

Africa can no longer remain exploited, poor and dehumanised. The resource curse can and should be overcome.

Managing Governance Conflicts Through Alternative Dispute Resolution in Kenya

Abstract

The paper critically analyses the suitability of Alternative Dispute Resolution (ADR) mechanisms in managing governance conflicts. It begins by giving an overview of governance and the importance of good corporate governance as a conflict avoidance strategy. The paper then discusses the nature, causes and underlying issues in governance conflicts to set the tone for the discussion that follows on ADR and governance conflicts. It gives a succinct overview of ADR mechanisms; their advantages and the difference between settlement and resolution in ADR. The paper then delves into the applicability of ADR in managing governance conflicts and highlights the shortcomings of ADR towards this course. Finally, the paper proposes recommendations aimed at ensuring good corporate governance through the use of ADR as a tool for managing governance conflicts.

1. Introduction

Governance, in the corporate context, refers to the system through which a corporation is directed and controlled in order to protect the interests of all stakeholders and ensure reasonable return on investments.¹ Corporate governance has also been defined as the system through which a corporation is directed and controlled and which specifies distribution of rights and responsibilities among various players in a corporation being the board of directors, shareholders and other stakeholders and further sets out the rules and procedures for corporate decision making.² The Global Corporate Governance Forum in advocating the need for good corporate governance notes that:

“Corporate Governance has become an issue of worldwide importance. The Corporation has a vital role to play in promoting economic development and social progress. It is the engine of growth internationally, and increasingly responsible for providing employment, public and private services, goods and infrastructure. The efficiency and accountability of the corporation is now a matter of both private and public interest, and governance has, thereby, come to the head of the international agenda.”³

Good corporate governance is important in attracting investors, creating competitive and efficient corporations, enhancing accountability and performance in an organization and promoting

¹ Cadbury, A. (2002). *Corporate Governance and Chairmanship: A Personal View*. New York: Oxford University Press.

² Organisation for Economic Co-Operation and Development (OECD), *Principles of Corporate Governance*, available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> (accessed on 06/07/2020)

³ Global Corporate Governance Forum, ‘Corporate Governance’ available at <https://www.ifc.org/wps/wcm/connect/0ca17952-3244-4801-a6c2-ee8b1896dc32/User%2BGuide.pdf?MOD=AJPERES&CVID=jtCxBar> (accessed on 23/07/2020)

effective and efficient use of resources in an organization.⁴ On this basis, it is argued that good corporate governance is a prerequisite for national economic development.⁵

In order to give effect to the ideal of good corporate governance, several principles have been generally accepted as pillars of ideal corporate governance. The Constitution of Kenya enshrines national values and principles of governance which bind all persons. These include *inclusiveness, equality, non-discrimination, good governance, integrity, transparency, accountability and sustainable development* (emphasis added).⁶ The Organisation for Economic Co-operation and Development (OECD) identifies the principles of corporate governance to include: *equitable treatment of shareholders; disclosure and transparency; role of stakeholders in corporate governance and responsibilities of the board* (emphasis added).⁷

Good corporate governance cannot thrive in an environment of conflicts. Governance conflicts are bound to occur in an organization due to the different players involved and the difference in ideas, principles and plans that such players may hold.⁸ The parties in an organization may have a conflict about the distribution of resources, or they may have a more fundamental conflict about the very structure of their organization and the basic nature of their interaction.⁹ A corporation entails multiple personnel including the directors, the Chief Executive Officer, shareholders and employees. In their day to day interactions, these personalities are likely to differ leading to conflicts. If such conflicts are not addressed effectively and in a timely manner, they may pose a threat to the business affairs of a corporation and defeat the core purpose of good corporate governance. The paper critically analyses governance conflicts and explores the use of Alternative Dispute Resolution in managing such conflicts. It addresses some of the causes of governance conflicts and the need to have such conflicts managed in an efficient, effective and timely manner. It highlights the benefits of using ADR in managing governance conflicts and proposes reforms aimed at enhancing good corporate governance through effective, efficient and timely conflict management.

2. Alternative Dispute Resolution (ADR) And Conflict Management

Conflict has been described as a situation whereby two or more parties perceive that they possess mutually incompatible goals.¹⁰ A conflict relates to the needs and values shared by the parties

⁴ Private Sector Initiative for Corporate Governance, 'Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance' available at https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Principles_of_good_corporate_Governance_Private_Sector_-_CS_Gabriel_Kimani_110.pdf (accessed on 07/07/2020)

⁵ Ibid

⁶ Constitution of Kenya, 2010, Article 10, Government Printer, Nairobi

⁷ Organisation for Economic Co-Operation and Development (OECD), Principles of Corporate Governance, Op Cit

⁸ Bercovitch. J., Conflict and Conflict Management in Organizations: A Framework for Analysis, available at <https://legacy.earlham.edu/~chriss/ConflictRes/pdf%20files/Conflict.Conflict%20Management%20in%20Organizations.pdf> (accessed on 16/07/2020)

⁹ Ibid

¹⁰ Demmers J., Theories of Violent Conflict: An Introduction, (Routledge, New York, 2012)

whereas a dispute concerns interests or issues.¹¹ Conflict management involves the processes required for stopping or preventing overt conflicts and aiding the parties involved to arrive at durable peaceful settlement of their differences.¹²

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilised to manage conflicts without resort to the often costly adversarial litigation.¹³ The *Constitution of Kenya* advocates for promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* (emphasis added).¹⁴ Internationally, the *Charter of the United Nations* outlines various conflict management mechanisms and provides that the parties to any dispute shall, 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).¹⁵ ADR mechanisms have been hailed for their advantages which include *inter alia* cost effectiveness, flexibility, expeditiousness, promoting party autonomy and preserving relationships among parties.¹⁶ These advantages make ADR a preferable mode of conflict management to the adversarial litigation.

Conflict management can result in settlement or resolution. Most of the ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement.¹⁷ Settlement mechanisms focus on interests of parties at the expense of human needs such as relationships, emotions, perceptions and attitudes.¹⁸ Consequently, the causes of the conflict in settlement mechanisms remain unaddressed leaving the possibility of conflicts reemerging in future.¹⁹ Settlement mechanisms include litigation and arbitration.

Resolution mechanisms on the other hand focus on outcomes based on mutual problem-sharing whereby parties to a conflict cooperate in order to redefine their conflict and their relationship.²⁰ This results in outcomes that are enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.²¹ Resolution mechanisms address the root causes of conflicts and are preferred to settlement mechanisms for their effectiveness in conflict

¹¹ Muigua. K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited (2015)

¹² Leeds, C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners,' *International Journal of Peace Studies*, Vol. 2, No. 2, 1997.

¹³ *Ibid*

¹⁴ *Constitution of Kenya*, 2010, Article 159 (2) (c)

¹⁵ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 33

¹⁶ Muigua. K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015

¹⁷ Muigua. K., *Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER.pdf> (accessed on 07/07/2020)

¹⁸ *Ibid*

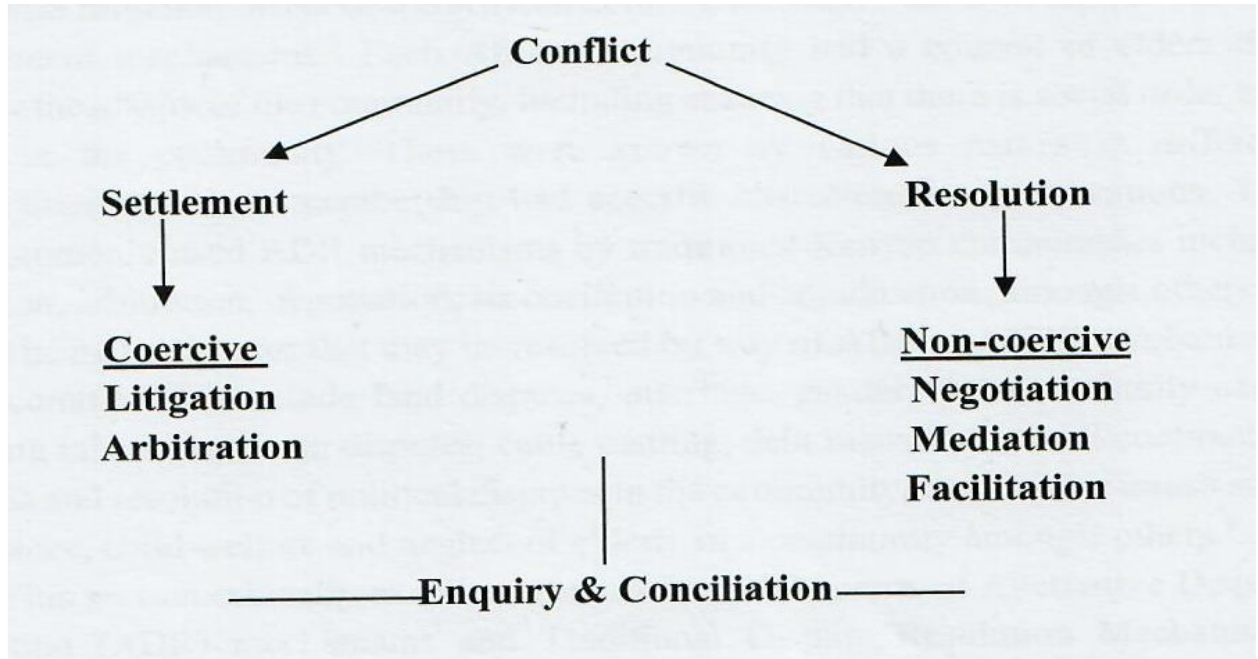
¹⁹ Muigua. K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishers, 2017

²⁰ *Ibid*

²¹ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> (accessed on 07/07/2020)

management. These mechanisms minimise the likelihood of the same conflicts reemerging in future.²²

Figure 1: Methods of Conflict Management



***Source: The authors**

Figure 1 shows that there are certain methods of conflict management that can only result in settlement. These are categorised as coercive methods where parties have little or no autonomy over the process. The coercive methods are litigation and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods, parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

3. Governance Conflicts

It has been argued that most corporate governance conflicts arise because of how board members interact with each other in discharge of their duties.²³ Such conflicts could take the form of disagreements between directors and top management over corporate strategy or financial policy.²⁴ Boardroom conflicts are inevitable. Decision making within the boardroom results from a process in which directors consider all the information reasonably available to them and engage in a vigorous debate on issues such as company strategy, company control and financial policy.²⁵ This

²² Ibid

²³ Agrawal. A., & Chen. M., Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors, Quarterly Journal of Finance, Vol. 7, No. 3

²⁴ Ibid

²⁵ Jon Masters and Alan Rudnick, Improving Board Effectiveness: Bringing the Best of ADR into the Corporate Boardroom (Washington, D.C.: American Bar Association, 2005).

increases the likelihood of disagreements within the board. Indeed, it has been argued that a board that never argues or disagrees is most likely to be an inactive or passive board.²⁶

Governance issues, requirements and standards have been attributed as a fertile source of misunderstandings and disputes within an organization.²⁷ These can include; the relationship between directors and the Chief Executive Officer; the interplay between oversight and management; and the balancing of an organization's short and long term interests. Further, governance disputes can also arise as a result of poor corporate performance or disputes involving stakeholders.

When a disagreement or dispute arises within an organization, it is in the best interest of the organization to have them managed effectively, expeditiously and efficiently. How such disagreements are managed determines whether the underlying issues can be resolved or whether the disagreement can ripen into a dispute that can have detrimental effects on the affairs of an organization including its financial performance and public image.²⁸ It is thus essential for an organization to develop and adopt efficient dispute management mechanisms. Efficient dispute management within an organization is part of good risk management since it enables an organization to cushion itself against the adverse effects of disputes whenever they occur.²⁹

4. Applicability of ADR Mechanisms in Managing Governance Conflicts

Well governed corporations are less likely to have conflicts.³⁰ However, where conflicts arise, there is need to have in place a suitable process and venue to manage the conflict in a timely and cost-effective manner.³¹ A good corporate governance framework ensures availability of a reliable mechanism for managing emerging and existing disputes.

In managing governance disputes, there are several underlying issues that need to be addressed. It has been rightly pointed out that corporations hate to go public with their governance disputes.³² Such disputes if brought to limelight could affect public perception of an organization and ultimately its overall performance.³³ Further, if governance disputes are not managed expeditiously, much of the Board's resources and time will be diverted at the expense of the success of the organization. Litigation therefore cannot effectively deal with the underlying issues in governance conflicts. It has been pointed out that the court's role is dependent on the limitations

²⁶ Runesson. E., & Guy. M., *Mediating Corporate Governance Conflicts and Disputes*, available at <http://documents1.worldbank.org/curated/en/969191468314989975/pdf/418270NWP0Foculion0321443B01PUBLIC1.pdf> (accessed on 01/07/2020)

²⁷ Omisore, B.O & Abiodun, A.R., 'Organizational Conflicts: Causes, Effects and Remedies' *International Journal of Academic Research in Economics and Management Sciences*, Nov2014, Vol. 3, No. 6

²⁸ Ibid

²⁹ International Finance Corporation, *Resolving Corporate Governance Disputes*, available at https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/topics/resolving+corporate+governance+disputes (accessed on 01/07/2020)

³⁰ Pondy, L., *Reflections on Organizational Conflict*, *Journal of organizational Behaviour*, Vol 13 (2) pp257-261

³¹ Ibid

³² International Finance Corporation, *Resolving Corporate Governance Disputes*, Op Cit

³³ Ibid

of civil procedure, and on the litigious courses taken by the parties themselves.³⁴ Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations.³⁵ Litigation is often slow and expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.³⁶

The shortcomings of litigation make it a less viable mechanism of managing governance conflicts due to the need for expeditious results and continued working relations. These challenges can be effectively addresses through the suitable use of ADR solutions which can be tailored by the parties to deal with ongoing situations in a manner that allows the parties to continue working together.³⁷ Indeed, most global and national corporate governance statutes, principles and codes advocate the use of ADR in managing governance conflicts.

The *OECD Principles of Corporate Governance* encourage equitable treatment of shareholders and the need to provide a framework through which shareholders can enforce their rights and initiate legal and administrative proceedings against management and board members.³⁸ Towards this end, OECD notes that “a balance must be struck between allowing investors to seek remedies for infringement of ownership rights and avoiding excessive litigation. Many countries have found that alternative adjudication procedures, such as *administrative hearings or arbitration procedures* organised by the securities regulators or other regulatory bodies, *are an efficient method for dispute settlement*, at least at the first instance level (emphasis added).”³⁹

*The King III Report on Corporate Governance for South Africa*⁴⁰ advocates the use of ADR as a tool of good corporate governance. It encourages directors to preserve business relationships. Consequently, when a dispute arises, in exercising their duty of care, directors should endeavour to *resolve it expeditiously, efficiently and effectively* (emphasis added).⁴¹ Further, in advocating the use of mediation, the Report notes that it enables novel solutions which may not be attained in litigation which is constrained to enforce legal rights and obligations.⁴² The Report correctly states that in mediation, the *parties’ needs are considered, rather than their rights and obligations*.

³⁴ 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: 29

³⁵ Muigua. K., Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Utilising-Alternative-Dispute-Resolution-Mechanisms-to-Manage-Commercial-Disputes-Kariuki-Muigua-7th-September-2018.pdf> (accessed on 13/07/2020)

³⁶ Ibid

³⁷ International Finance Corporation, ‘Resolving Corporate Governance Disputes, available at https://www.ifc.org/wps/wcm/connect/cdd4b694-32b2-4609-8adc-fdf9334cb90b/ADR_Toolkit_volume1.pdf?MOD=AJPERES&CVID=jtCvQIC (accessed on 14/07/2020)

³⁸ (OECD), Principles of Corporate Governance, Op Cit

³⁹ Ibid

⁴⁰ King Report on Governance for South Africa, available at https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf (accessed on 13/07/2020)

⁴¹ Ibid, Chapter 8 (Principles 8.6)

⁴² Ibid

In Kenya, The *Code of Corporate Governance Practices for Issuers of Securities to the Public*⁴³ while providing the guidelines for managing internal and external disputes involving companies states that “Disputes involving companies are an inevitable part of doing business. Companies shall establish mechanisms for *resolving the disputes in a cost effective and timely manner. Mechanisms to avoid their recurrence shall also be established and implemented.* It is incumbent upon directors and executives, in carrying out their duty of care to a company *to ensure that disputes are resolved effectively, expeditiously and efficiently.* Further, *dispute resolution shall be cost effective and not a drain on the finances and resources of the company* (emphasis added).”⁴⁴

Further, The *Code of Governance for State Corporations in Kenya* advises the Board to ensure that disputes with and among stakeholders are resolved effectively, efficiently and expeditiously.⁴⁵ Under the Code, the Board is encouraged *to take reasonable steps towards managing disputes involving stakeholders through the use of Alternative Dispute Resolution Mechanisms* (emphasis added).⁴⁶ Board members are expected to *resolve issues in a fair and respectful manner which considers informal processes such as dialogue or mediation* (emphasis added).⁴⁷

ADR mechanisms especially mediation is viable in managing governance disputes. The King Report in while advocating the use of mediation in managing governance conflicts notes that “mediation is often more appropriate where interests of the disputing parties *need to be addressed and where commercial relationships need to be preserved and even enhanced* (emphasis added).”⁴⁸ It has been noted that governance conflicts have at least three dimensions; emotional, legal and commercial.⁴⁹ Mediation is able to effectively manage such disputes since it considers all the three dimensions unlike litigation which only considers the legal dimension of a case. In *K.M. Patel and another v. United Assurance Company Ltd*⁵⁰, mediation was successfully used in managing a governance conflict. In the case, two shareholders filed a petition against the Respondent company on allegations that their 40-percent shares in the company had been wrongfully and illegally diluted during the company’s restructuring and sale without prior notice. With the consent of both parties, the Commercial Court offered to mediate the case. In encouraging the parties to engage in the mediation process, the mediator stated that “Both parties should sit down as business partners and come to an amicable understanding because at the end of the day, you may find that no one has benefited if the company has wound up.” Consequently, the mediation was successful and led to a consent judgement in which the company bought out the two shareholders and amicably resolved the dispute.

⁴³ Capital Markets Authority, Gazette Notice No. 1420, The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, available at https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=92&Itemid=285 (accessed on 13/07/2020)

⁴⁴ Ibid, Chapter 4.3

⁴⁵ Mwangozo, The Code of Governance for State Corporations, 2015‘Chapter 6, Stakeholder Relationships’

⁴⁶ Ibid

⁴⁷ Code of Conduct and Ethics for State Corporations, 5

⁴⁸ King Report on Governance for South Africa, Op Cit

⁴⁹ Runesson. E., & Guy. M., Mediating Corporate Governance Conflicts and Disputes, Op Cit

⁵⁰ Company Cause No 5 of 2005 (Commercial Court, Uganda)

Arbitration is also a preferable mechanism of conflict management especially in conflicts between an organization and third parties. In Kenya, most organizations are using arbitration to manage conflicts with suppliers, dealers and other third parties.⁵¹ Most contracts governing business engagements usually contain arbitration clauses which provide for referral of any dispute arising under the contract to arbitration.⁵² Further, employment agreements between some corporations and senior executives call for the use of arbitration in case of any employment related dispute. Even though closely related to litigation, there are certain salient features of arbitration which make it an important and attractive alternative to litigation in managing governance disputes. In arbitration the parties have autonomy over the choice of the arbitrator, place and time of hearing, and as far as they can agree, autonomy over the arbitration process which may be varied to suit the nature and complexity of the conflict.⁵³

Negotiation is also one of the most fundamental ADR mechanisms that can be effectively utilised in managing governance conflicts. It refers to the process where parties attempt to find mutually acceptable solutions to the issues at hand without the assistance of a third party.⁵⁴ Negotiation focuses on the common interests of parties over their relative power and positions.⁵⁵ This mechanism can be effectively applied in governance conflicts such as conflicts between board members or board members and shareholders. This is due to the underlying common interest at hand which is to promote success of the organization.⁵⁶ Parties will be more than willing to give up their individual positions and adopt a common position that is mutually acceptable and in the interest of the organization. Negotiation leads to mediation where parties have reached a deadlock.⁵⁷ An organization should thus endeavour to use negotiation in managing governance conflicts before resorting to mediation or other ADR mechanisms such as arbitration where the negotiation fails.

5. Shortcomings of ADR as A Tool for Managing Governance Conflicts

Despite their inherent advantages, ADR mechanisms face certain challenges that could potentially hinder their suitability in managing governance conflicts. One of the cardinal principles of ADR is party autonomy. However, in the case of an organization, it may not be possible to get a common position due to the different players at stake. Most organizations have formal procedures for identifying the persons who are authorized to speak for them but such procedures are imperfect and merely designed to facilitate transactions between the organization and outsiders, rather than to insure that the members of the organization in fact agree with a particular decision.⁵⁸

⁵¹ Muigua. K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> (accessed on 21/07/2020)

⁵² Ibid

⁵³ Building Disputes Tribunal, New Zealand, available at <http://www.buildingdisputestribunal.co.nz/.html>, accessed on 21/07/2019

⁵⁴ Fischer, R. & Ury, W., *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981), p. 4

⁵⁵ Ibid

⁵⁶ Nisanasala, MBS, *Win-Win Settlement: Applicability of Negotiation Principles for Dispute Negotiations in Construction Projects*, available at <http://dl.lib.uom.lk/handle/123/13841> (accessed on 23/07/2020)

⁵⁷ Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p 115.

⁵⁸ Fiss. O, 'Against Settlement' *The Yale Law Journal*, Vol. 93: 1073, 1984

Consequently the management of a corporation may settle a suit through ADR mechanisms to prevent embarrassing disclosures about its managerial policies when such disclosures might well be in the interest of the shareholders of the organization.⁵⁹

Unlike litigation, there is a lack of foundation for continuing judicial involvement in most of the ADR mechanisms such as mediation.⁶⁰ In litigation, judgment does not bring an end to a lawsuit and many other processes may follow. Parties may seek several remedies from the court which issued the judgment such as rectification of an order and review.⁶¹ A dissatisfied party can also appeal to a higher court to challenge a lower court's decision. These remedies are not available in some of the ADR mechanisms where the principle of finality is emphasised. Where parties have recorded a consent decree as in the case of mediation, there no basis through which a party can seek to modify or vary the decree.⁶²

ADR Mechanisms also impede vigorous enforcement measures.⁶³ In litigation, measures such as contempt powers and execution of decrees and orders are available in enforcing decisions. However, decisions in ADR mechanisms such as negotiation and mediation are non-binding and their enforcement depends on the goodwill of the parties.⁶⁴ This could be problematic for an organization especially in dealing with outside parties such as debtors who may refuse to comply with negotiated or mediated agreements.⁶⁵ The organization may thus be forced to seek the judicial process due to its ability to guarantee enforcement of decisions.

6. Recommendations

6.1 Conflict Avoidance

The best conflict management strategy is conflict avoidance. It has been argued that in conflict management, individuals prefer avoidance to confrontation even at the risk of a financial loss, in the belief that confrontation might disrupt interpersonal harmony between the parties involved.⁶⁶ Organizations can endeavour towards conflict avoidance through simple techniques involving their day to day operations such as facilitating harmonious working relationships, Corporate Social Responsibility and adhering to principles of good corporate governance.

6.2 Adopting an Effective Conflict Management Strategy

The aim of conflict management is to help parties possessing incompatible goals to find some solution to their conflict.⁶⁷ To achieve this aim, it is necessary to identify the source of the conflict,

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Civil Procedure Rules, 2010, Orders 43 and 45, Government Printer (Nairobi)

⁶² Fiss. O, 'Against Settlement' The Yale Law Journal, Op Cit

⁶³ Ibid

⁶⁴ Reza, S., The Shortcomings of Family Mediation and Restorative Justice Proceedings, 4 SOAS L.J. 73 (2017)

⁶⁵ Runesson. E., & Guy. M., Mediating Corporate Governance Conflicts and Disputes, Op Cit

⁶⁶ Zhang. Z & Wei. X., 'Superficial Harmony and Conflict Avoidance Resulting from Negative Anticipation in the Workplace' Management and Organization Review 13:4, December 2017, 795–820

⁶⁷ Bercovitch. J., Conflict and Conflict Management in Organizations: A Framework for Analysis, available at

the participants and the most appropriate conflict management mechanism for the particular situation.⁶⁸ It has been argued that there are three sources of organizational conflict; *structural conflict* arising out of the need to manage the inter-dependence between different organizational sub-units); *role conflict* arising from sets of prescribed behaviour and *resources conflict* stemming from interest groups competing for the resources of an organization.⁶⁹ Understanding the source of a conflict within an organization improves the probability of effective conflict management. An organization should thus adopt an effective conflict management strategy that is able to detect the source of the conflict and recommend a suitable mechanism in handling such conflict. In large organizations, it is possible to find a committee or group tasked with conflict management. For small organizations, it is important to ensure availability of an individual skilled in conflict management. Organizations can also facilitate conflict management training skills such as negotiation and mediation to the management and board members.

6.3 Incorporating the use of ADR in an Organization's Policy Framework

The foregoing discussion has demonstrated that ADR mechanisms especially mediation and negotiation are effective in managing governance conflicts. Organizations should encourage their use by incorporating them in their policy framework. Further when entering into contracts with third parties such as creditors, clients and suppliers, it should be ensured that such contracts contain dispute resolution clauses which clearly stipulate the mechanism of conflict management. This prevents the uncertainties that might ensue in case a conflict arises and the possibility of such a conflict ending up in court due to absence of an ADR clause.

7. Conclusion

Governance conflicts are inevitable. However, what sets a good organization apart is the ability to manage governance conflicts in an effective, efficient and expeditious manner without prejudicing its core business. ADR mechanisms especially mediation and negotiation offer a channel through which this goal can be attained. Managing governance conflicts through ADR is an ideal that can be achieved to promote sound corporate governance.

<https://legacy.earlham.edu/~chriss/ConflictRes/pdf%20files/Conflict.Conflict%20Management%20in%20Organizations.pdf> (accessed on 16/07/2020)

⁶⁸ Ibid

⁶⁹ Robbins. S. P, *Managing Organizational Conflict: A Non-Traditional Approach* (EnglewoodCliffs, N.J.: Prentice-Hall, 1974).

The Place of Animal Rights in Kenyan Law: Prospects and Challenges

Abstract

Over the last several years, animal rights and welfare movement has gained momentum the world over, with many countries coming up with laws to protect the welfare of animals. While some advocates for the same call for absolute protection of the rights of animals, effectively banning the use and exploitation of animal resources by human beings, others call for the enhanced welfare of the animals where they should be treated in a humane manner even as they get used and exploited. This paper examines the position that Kenya has taken as far as the subject is concerned.

1. Introduction

The rights and legal status of animals have been the subject of various and diverse discussions globally, with some arguing for absolute protection of animals while others advocate for fair treatment of animals while allowing human beings to benefit from these animals.¹

This paper critically discusses the place of animal rights within the Kenyan legal framework on whether the country has adopted the animal 'rights' approach or the 'welfare' one. The paper first looks at the international discussions surrounding animal rights and the various commentaries that offer pros and cons of recognising and upholding animal rights. The author also looks at the proposed legislation on animal welfare and protection and its merits and demerits as far as protection of animal rights in Kenya is concerned.

2. Ethical and Moral Arguments for and Against Protection of Animal Rights

Some authors have used the utilitarianism moral theory to discuss the protection of animal rights or welfare. According to its proponents, 'a morally good action is one which promotes or produces the greatest amount of pleasure, happiness, or satisfaction of desires, and such promotion, requires abandoning such practices as animal husbandry, and experimentation upon animals for scientific or commercial purposes'.² According to the utilitarian view, one needs to consider the interests of all affected sentient beings, and seek to produce the greatest total fulfilment of interests, thus including the welfare of the affected animals. On this view it is acceptable, for example, to raise animals for slaughter as long as their welfare is protected, which will typically mean an end to the most intensive production methods.³

Others, however, have rejected the utilitarianism approach and argued for the inherent value of animals which is enough to guarantee their protection. To them, many sorts of non-human animals

¹ Jean-Marc Neumann, 'The Universal Declaration of Animal Rights or the Creation of a New Equilibrium between Species' (2012) 19 *Animal L.* 91; See also Henry Stephens Salt, *Animals' Rights Considered in Relation to Social Progress: With a Bibliographical Appendix* (Macmillan 1894); 'BBC - Ethics - Animal Ethics: Animal Rights' <http://www.bbc.co.uk/ethics/animals/rights/rights_1.shtml> accessed 20 July 2020.

² Mark Rowlands, 'Animal Rights and Moral Theories' in Mark Rowlands (ed), *Animal Rights: Moral Theory and Practice* (Palgrave Macmillan UK 2009) <https://doi.org/10.1057/9780230245112_1> accessed 20 July 2020.

³ Thomas B Lund and others, 'Animal Ethics Profiling of Vegetarians, Vegans and Meat-Eaters' (2016) 29 *Anthrozoös* 89.

possess moral rights because they possess ‘inherent value’.⁴ Accordingly, we are morally obligated to treat them in ways that respect this value, and this requires us to abandon such practices as animal husbandry, vivisection, and so on. Inherent value for these proponents is an objective property, and whether or not an individual possesses it does not in any way depend on whether he, she, or it is valued by others. Whether or not a person possesses inherent value depends only on their nature as the type of thing they are.⁵

The moral theory of contractarianism, which claims that moral norms derive their normative force from the idea of contract or mutual agreement,⁶ is also used as a basis for determining the place of animal rights. The contractarian view considers only human self-interest: what is in it for oneself (and for those fellow humans on whose collaboration one depends). This view has no objections against the use of animals for anything, in principle.⁷

According to this group of scholars, animals lack a moral standing to claim any rights and how we treat them matters, not because of their own intrinsic rights to being treated well, but because treating animals cruelly reveals the character of the person doing it and which might be projected to other human beings who of course have rights not to be treated as such.⁸

2.1 Animal Rights versus Animal Welfare

Notably, those who fight for animal rights are divided between those who advocate for animal rights while others fight for welfare of the animals. Some of the advocates for animal rights aim to achieve a number of goals, including: the total abolition of the use of animals in science; the total dissolution of commercial animal agriculture; the total elimination of commercial and sport hunting and trapping.⁹ Those who take this approach argue that the fundamental wrong with how animals are treated by human beings is the system that allows us to view animals as our resources, here for us — to be eaten, or surgically manipulated, or exploited for sport or money.¹⁰ To them, once we accept this view of animals - as our resources - the rest is as predictable as it is regrettable.¹¹

Considering that in recent times most countries have chosen to extend some kind of protection to animals, the debates are therefore usually about the two approaches.

⁴ Ibid.

⁵ Mark Rowlands, ‘Animal Rights and Moral Theories’ in Mark Rowlands (ed), *Animal Rights: Moral Theory and Practice* (Palgrave Macmillan UK 2009) <https://doi.org/10.1057/9780230245112_1> accessed 20 July 2020.

⁶ Ann Cudd and Seena Eftekhari, ‘Contractarianism’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2018, Metaphysics Research Lab, Stanford University 2018) <<https://plato.stanford.edu/archives/sum2018/entries/contractarianism/>> accessed 20 July 2020.

⁷ Thomas B Lund and others, ‘Animal Ethics Profiling of Vegetarians, Vegans and Meat-Eaters’ (2016) 29 *Anthrozoös* 89.

⁸ Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge University Press 1992); See also Raymond Gillespie Frey, ‘Interests and Rights: The Case against Animals’; RG Frey, ‘Rights, Interests, Desires and Beliefs’ (1979) 16 *American Philosophical Quarterly* 233.

⁹ Tom Regan, ‘The Case for Animal Rights’, *Advances in animal welfare science* 1986/87 (Springer 1987).

¹⁰ Ibid.

¹¹ Ibid.

3. The Place of Animal Rights in International Law

Jeremy Bentham was among the very first scholars to argue for the recognition of animal rights as ‘sensitive beings’ where he argued that “other animals, which on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of things . . . The day may come, when the rest of the animal creation may acquire those rights . . .”¹² It is safe to say that the day is here and this section looks at the existing international legal instruments meant to guarantee animal welfare and protection.

3.1 Universal Declaration on Animal Welfare

The *Universal Declaration on Animal Welfare*¹³ calls on countries to acknowledge the importance of animal welfare and, at the same time, recognises the World Organisation for Animal Health (OIE) as the established international animal welfare standard-setting body.

3.2 International Convention for the Protection of Animals

The *International Convention for the Protection of Animals*¹⁴ was formulated against a background of Contracting Parties’: realisation of the need to establish effective and comprehensive international standards for the treatment of animals; recognition that humans derive many diverse benefits from their associations with animals and their utilization of them; recognition that the misuse and wastage of animals impairs the conservation of the environment as well as cultural and economic development; recognition of the widespread international concern over the many and varied abuses of animals which constitute cruelty; recognition that heretofore there existed no comprehensive international agreement which effectively confronted these abuses so as to eliminate or to mitigate their severity; seeking to institute a practical mechanism which resolves the differences arising from the character and implementation of animal protective legislation of the various States; and the conviction that meaningful and effective improvements in the treatment of animals and fulfillment of mankind's obligations toward animals and natural systems can be assured through cooperative action by all States.¹⁵

The implementation of the Convention is to be guided by the following fundamental principles: humans and animals co-exist within an interdependent ecosystem. Humans and animals share an evolutionary heritage. Humans, as moral beings, have an obligation to act responsibly toward animals; life has intrinsic value. No animal should be killed unnecessarily or be subjected to cruel acts or to unnecessary suffering; and when humans have control over specific animals they have a positive obligation to provide these animals with an environment and care appropriate for the species.¹⁶ The convention covers, all types of animals including both domestic and wildlife animals and offers guidelines on how they should be dealt with in order to prevent the subjection of animals to cruelty and unnecessary suffering and to conserve the natural habitat of wildlife.¹⁷

¹² Jeremy Bentham, ‘Theory of Legislation, Vol. II: Principles of the Penal Code’ [1841] Trans. R. Hildreth. Boston: Weeks, Jordan, and Company (As quoted in Jean-Marc Neumann, ‘The Universal Declaration of Animal Rights or the Creation of a New Equilibrium between Species’ (2012) 19 Animal L. 91).

¹³ Universal Declaration on Animal Welfare, Adopted by the International Committee of the OIE on 24 May 2007, 75 GS/FR – PARIS, May 2007.

¹⁴ International Convention for the Protection of Animals, Proposed by the Committee for the Convention for the Protection of Animals, April 4, 1988.

¹⁵ Preamble, International Convention for the Protection of Animals.

¹⁶ Article 1.

¹⁷ Article 10.

3.3 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹⁸ was formulated to protect the endangered species of animals and plants based on the recognition that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come; the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view; that peoples and States are and should be the best protectors of their own wild fauna and flora; that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.¹⁹

4. National Law on Safeguarding the Rights of Animals in Kenya: Prospects and Challenges

4.1 The Constitution of Kenya 2010

The Constitution of Kenya 2010 has some general provisions which cover animal rights, both domestic and wild animals. Under Chapter five, part 2, on environment and natural resources, the Constitution obligates the state to protect genetic resources and biological diversity.²⁰ The Fourth Schedule also outlines the roles of the two levels of government in promoting animal welfare; the national government is responsible for protection of wild animals in conservation areas while the county governments are mandated to seeing the control and welfare of domestic animals.²¹ The Constitution thus lays a basis for other statutory legislation on the welfare of animals in Kenya.

4.2 Prevention of Cruelty to Animals Act

The *Prevention of Cruelty to Animals Act*²² was enacted in 1962 to make better provision for the prevention of cruelty to animals; to control experiments on animals; and for matters incidental thereto and connected therewith. The Act defines acts and omissions which amount to cruelty and penalties therefor as follows: a person shall be guilty of an offence of cruelty if he—cruelly beats, kicks, ill-treats, over-rides, over-drives, over-loads, tortures, infuriates or terrifies any animal; or uses an animal which is so diseased, injured or in such physical condition that it is unfit to be so used; or conveys, carries, confines or impounds an animal in a manner or position as to cause that animal unnecessary suffering; or without sufficient cause, starves, underfeeds or denies water to an animal; or being the owner of an animal, without reasonable cause or excuse, abandons it, whether permanently or not, in circumstances likely to cause the animal unnecessary suffering; or being the owner of an animal, keeps it in a grossly dirty or verminous condition or, without reasonable cause or excuse, fails to procure or administer veterinary treatment or attention for the

¹⁸ Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Signed at Washington, D.C., on 3 March 1973; Amended at Bonn, on 22 June 1979; Amended at Gaborone, on 30 April 1983.

¹⁹ Ibid, Preamble.

²⁰ Constitution of Kenya 2010, Article 69 (1)(e).

²¹ Constitution of Kenya, 2010, Fourth Schedule [Articles 185(2), 186(1) and 187(2).]; see also KSPCA, 'Kenya's Constitution on Animal Rights and Prevention of Cruelty to Animals – KSPCA Kenya' <<https://kspca-kenya.org/kenyas-constitution-on-animal-rights-and-prevention-of-cruelty-to-animals/>> accessed 20 July 2020.

²² Prevention of Cruelty to Animals Act, Cap 360, Laws of Kenya, Revised Edition 2012 [1983].

animal in case of disease, injury or delivery of young; or wilfully, without reasonable cause or excuse, administers any poisonous or injurious drug or substance to an animal or causes any such substance to be taken by an animal; subjects an animal to veterinary surgery in contravention of the Veterinary Surgeons Act (Cap. 366); or subjects an animal to any operation, surgical interference or other treatment which is performed without due care and humanity; or being the owner of any animal, fails to have it destroyed where the animal is so seriously injured or diseased that to prolong its life would cause it unnecessary suffering; or hunts, kills or destroys any animal in such a manner as to cause that animal more suffering than is necessary; or being the owner of any animal, without reasonable cause or excuse, does or omits to do an act which causes unnecessary suffering to the animal.²³ However, the Act provides for exception to the foregoing by providing for: the hunting and killing or destruction of any animal under the provisions of the Wild Life (Conservation and Management) Act (Cap.376)²⁴, the Rabies Act (Cap.365) or any other written law for the time being in force; or subject to the provisions of section 7²⁵ of this Act, the coursing and hunting of captive animals; subject to the provisions of section 8²⁶ of this Act, the slaughtering of any animal; or subject to the provisions of section 9²⁷ of this Act, the training of

²³ Ibid, sec. 3(1).

²⁴ Repealed by the Wildlife Conservation and Management Act, No 47 of 2013, Laws of Kenya.

²⁵ 7. Hunting of injured captive animal an offence

- (1) Any person who, for the purpose of coursing or hunting, liberates any captive animal—
- (a) in an exhausted, injured or mutilated condition; or
 - (b) in such manner or place as to expose it to immediate attack, or danger of attack, by other animals; or
 - (c) in an enclosed space from which it has no reasonable chance of escape,

shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to a term of imprisonment not exceeding three months, or to both.

(2) For the purposes of this section, a captive animal shall not be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or if it is under control.

²⁶ 8. Cruel slaughtering of animals an offence

- (1) Any person who, whether in any slaughterhouse or abattoir or in any place than a slaughterhouse or abattoir, and whether for human consumption or not, slaughters an animal—
- (a) in such a manner as to cause it more suffering than is necessary; or
 - (b) in the sight of any another animal awaiting slaughter,
- shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to a term of imprisonment not exceeding three months or to both.

(2) It shall be a defence to proceedings under paragraph (a) of subsection (1) of this section, for the defendant to prove—

- (a) that at the time of the alleged offence he was of a religious persuasion that prescribed the slaughter of an animal in the manner in which it was slaughtered; and
- (b) that the animal was slaughtered in a place other than a slaughterhouse or abattoir; and
- (c) that the animal was slaughtered for private consumption and that the meat of such animal was not the subject of sale, barter or exchange.

²⁷ 9. Training of animals in cruel manner an offence

(1) A person who, whether for the purposes of the exhibition or not, trains any animal by the cruel infliction of pain or terror, or by the excessive use of a whip, goad or other instrument, or by the application of heat, electrical shock, or other similar appliance or agency, shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to a term of imprisonment not exceeding three months, or to both such fine and imprisonment.

(2) Where any person is convicted of an offence under this section, the court may, in addition to any penalty that may be imposed, order any whip, goad or other instrument, or appliance used by such person for the training of any animal to be forfeited.

(3) Where it is proved to the satisfaction of a subordinate court on a complaint made by an authorized officer or police officer that the training or exhibition of any animal has been accompanied by cruelty and should

any animal; or the performance of an operation on an animal under the provisions of the Veterinary Surgeons Act (Cap.366); or subject to the provisions of Part III of this Act, the performance of any experiment on an animal, where the compliance with any provisions of that subsection would necessarily frustrate the object or purpose of the hunting and killing or destruction, coursing and hunting, slaughtering, training, or the performance of the operation or experiment.²⁸

In addition to the foregoing, the Act provides that a person who—causes, promotes or assists at the fighting or baiting of an animal; or keeps, uses, manages, or acts or assists in the management of, premises for the purpose, or partly for the purpose of fighting or baiting any animal, or permits any premises or place to be so kept, managed or used; or receives, or causes or procures any person to receive any money for the admission of any person to any premises kept or used for the purpose, or partly for the purpose of fighting or baiting any animal, shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to a term of imprisonment not exceeding six months, or to both.²⁹

In relation to poisoned grain and flesh, the Act provides that a person who—sells, or offers or exposes for sale, or gives away, or causes or procures any person to sell or offer or expose for sale or give away, or knowingly is a party to the sale or offering or exposing for sale or giving away of any grain or seed which has been rendered poisonous except for bona fide use in agriculture; or knowingly puts or places, or causes or procures any person to put or place, or knowingly is a party to the putting or placing in or upon any land or building any poison, or any fluid or edible matter (not being sown seed or grain) which has been rendered poisonous, shall be guilty of an offence and shall be liable to a fine not exceeding two hundred shillings.³⁰

However, it shall be a defence to proceedings under paragraph (b) of subsection (1) that the poison was placed for the purpose of destroying insects and other invertebrates, rats, mice and small ground vermin or any other animals where such is found to be necessary in the interests of public health, agriculture, or the preservation of other animals, or for the purpose of manuring the land, and that all reasonable precautions to prevent injury to other animals were taken.³¹

be prohibited or allowed subject only to conditions, the court may make an order against the person in respect of whom the complaint is made prohibiting the training or exhibition or imposing such conditions thereon as may be specified by the order.

(4) If any person is aggrieved by the making of an order, or by the refusal to make such an order, he may appeal to the Supreme Court whose decision shall be final.

An order made under this subsection shall not come into force until seven days after it is made, or, if an appeal has been entered within that period, until the determination of the appeal.

(6) For the purpose of this section, “exhibition” means an exhibition and any entertainment to which the public are admitted whether on payment of money or otherwise.

(7) This section shall not apply to the training of any animal for bona fide military or police purposes nor to the exhibition of an animal so trained.

²⁸ Prevention of Cruelty to Animals Act, sec. 3 (4).

²⁹ *Ibid*, sec. 4.

³⁰ *Ibid*, sec. 5(1).

³¹ *Ibid*, sec. 5(2).

The Act also prohibits the use of traps and other devices for the purpose of capturing or killing an animal.³²

Hunting of an injured captive animal is also an offence under the Act.³³

Experiments with animals are only to be performed by licensed persons.³⁴

A person who, being the owner of an animal, permits the commission of an offence under this Act or against any regulation made thereunder in relation to that animal shall be guilty of that offence and liable to the penalties prescribed therefor.³⁵ Notably, an owner shall be deemed to have permitted the commission of an offence if he fails to exercise reasonable care and supervision in respect of the protection of the animal therefrom provided that, where an owner is convicted of permitting the commission of an offence by reason only of his having failed to exercise reasonable care and supervision, he shall not be liable to imprisonment without the option of a fine.³⁶

The Act grants the court power to deprive a person convicted of offence ownership of animal. If any person is convicted of an offence under this Act or any regulation made thereunder in relation to any animal, the court may, if it thinks fit, in addition to any other punishment, make an order—depriving such person of the ownership of the animal; disqualifying such person from owning, possessing or controlling any similar kind, type or class of animal for such period as it thinks fit under the circumstances.³⁷

4.3 Prevention of Cruelty to Animals (Transport of Animals) Regulations

The *Prevention of Cruelty to Animals (Transport of Animals) Regulations*, 1984³⁸ provide guidelines on how animals should be transported whether by sea, air, road or rail. The Regulations require that during loading, any person who loads an animal into or unloads an animal out of a vessel, aircraft or vehicle, or who causes or permits an animal to be so loaded or unloaded, must do so in a way not likely to cause injury or unnecessary suffering to the animal.³⁹ In addition, any person who transports an animal by sea, air, road or rail, or who causes or permits an animal to be so transported, must ensure that the same is done in a way not likely to cause injury or unnecessary suffering to that animal.⁴⁰ A person would be guilty of an offence where an animal is likely to be caused injury or unnecessary suffering—by reason of inadequately constructed or insecure fittings in that part of the vessel, aircraft or vehicle, or in the receptacle in which the animal is transported; by coming into contact with a fitting or other part of the vessel, aircraft or vehicle which has not been adequately padded or fenced-off, or with another obstruction; from unnecessary exposure to the action of the weather or the sea; from an inadequate supply of fresh air, whether the vessel, aircraft or vehicle is stationary or in motion; or from exposure to unnecessary fluctuations in or

³² Ibid, sec. 6(1).

³³ Ibid, sec. 7.

³⁴ Prevention of Cruelty to Animals Act, sec. 13.

³⁵ Ibid, sec. 24(1).

³⁶ Ibid, sec. 24(2).

³⁷ Ibid, sec. 28(1).

³⁸ Prevention of Cruelty to Animals (Transport of Animals) Regulations, 1984, Legal Notice No. 119 of 1984.

³⁹ Ibid, Regulation 3 (1).

⁴⁰ Ibid, Regulation 4(1).

sustained high or low levels of temperature, humidity or air pressure, from unnecessary exposure to noise or vibration.⁴¹

In addition, an animal under transport must be taken care of by the owner or charterer of a vessel or the operator of an aircraft in which an animal is transported by sea or air, and the transported or other person in charge of an animal transported by road or rail, ensuring ensure that—the animal is adequately fed and watered at suitable intervals during transport, including during a period in which the animal is waiting to be loaded or unloaded; where necessary, an adequate supply of food and water appropriate to the species of that animal is available in the vessel, aircraft or vehicle; an attendant who is responsible for feeding and watering of the animal as provided under subparagraph (a) and for the general care of the animal is available during transport; and where necessary, suitable access is available to the animal for the purpose of feeding and watering and for otherwise attending to the needs of the animal.⁴² As for the transportation of unfit animals, a person who loads or transports an animal that is unfit or likely to give birth during transport, or who causes or permits the loading or transportation of such animal shall be guilty of an offence unless a veterinary surgeon or an authorized officer has given prior written authority for the loading or transport of that animal.⁴³

4.4 Wildlife Conservation and Management Act, 2013

The Wildlife Conservation and Management Act, 2013⁴⁴ is to apply to all wildlife resources on public, community and private land, and Kenya territorial waters.⁴⁵ The Act makes it an offence for anyone to pollute areas designated as wildlife habitats and states that any person who—discharges any hazardous substances or waste or oil into a designated wildlife area contrary to the provisions of this Act and any other written law; pollutes wildlife habitats and ecosystems; discharges any pollutant detrimental to wildlife into a designated wildlife conservation area contrary to the provisions of this Act or any other written law, commits an offence and shall be liable upon conviction to a fine of not less than two million shillings or to imprisonment of not less than five years or to both such fine and imprisonment.⁴⁶ In addition to such a sentence, the court may direct that person to—pay the full cost of cleaning up the polluted wildlife habitat and ecosystem and of removing the pollution; and clean up the polluted habitats and ecosystems and remove the effects of pollution to the satisfaction of the Service.⁴⁷

The Act also outlines offences relating to endangered and threatened species. It prohibits any person from: killing or injuring, torturing or molesting, or attempting to kill or injure, a critically endangered, or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I; dealing in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, without a permit or exemption issued under this Act; dealing in a live wildlife species of any of critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, without

⁴¹ Regulation 4(2), Prevention of Cruelty to Animals (Transport of Animals) Regulations, 1984.

⁴² *Ibid*, Regulation 5(1).

⁴³ *Ibid*, Regulation 6.

⁴⁴ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

⁴⁵ *Ibid*, sec. 2.

⁴⁶ *Ibid*, sec. 89(1).

⁴⁷ *Ibid*, sec. 89(2).

permit or exemption issued under this Act; possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, without permit or exemption issued under this Act; or manufacturing an item from a trophy of a critically endangered or endangered species specified under the Sixth Schedule or listed under CITES Appendix I without a permit or exemption issued under this Act.⁴⁸

It also prohibits any person from—knowingly introducing an invasive species into a wildlife conservation area ; or failing to comply with the measures prescribed by the Cabinet Secretary set out under this Act.⁴⁹ The Act also prohibits any person from knowingly or recklessly using any substance whose effect is to poison any wildlife species.⁵⁰ The Act also prohibits any person from engaging in sport hunting or any other recreational hunting.⁵¹

Notably, the Act also prohibits any person from engaging in hunting of a species other than a critically endangered or endangered species listed under Schedule 6 or CITES Appendix I for the purposes of subsistence commits.⁵² The Act also prohibits any person, without permit or exemption issued under this Act, to deal in the carcass or meat of any wildlife species. In addition, it also prohibits any person from purchasing from another person any meat or eggs of any wildlife species.⁵³

Trade in, import, export, re-export or introduce any specimen or product of a wildlife species into or from Kenya without a permit issued by the Service under this Act is also prohibited.⁵⁴

Regarding international instruments, conventions and agreements ratified by Kenya, for which the Cabinet Secretary has been given implementing authority, the Act empowers the Cabinet Secretary to make regulations and give directions to ensure compliance with the obligations thereunder.⁵⁵

4.5 Fisheries Management and Development Act, 2016

The Fisheries Management and Development Act, 2016⁵⁶ 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.⁵⁷ 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.⁵⁸

The implementation of the Act is to be guided by the following principles: long-term sustainable use, conservation and management of fisheries resources and habitat, and adoption and

⁴⁸ Wildlife Conservation and Management Act, 2013, sec. 92; See also sec. 95.

⁴⁹ Ibid, sec. 93.

⁵⁰ Ibid, sec. 95A.

⁵¹ Ibid, sec. 96.

⁵² Ibid, sec. 97.

⁵³ Ibid, sec. 98.

⁵⁴ Ibid, sec. 99.

⁵⁵ Ibid, sec. 109.

⁵⁶ Fisheries Management and Development Act, No. 35 of 2016, Laws of Kenya.

⁵⁷ Ibid, Preamble.

⁵⁸ Ibid, sec. 5(1).

implementation of management measures in such a manner as to ensure that the fisheries resources and habitat are not overexploited, threatened or endangered; allocation and access to the fisheries resources in a manner that achieves optimum utilization, equitable distribution and long-term sustainable development of fisheries resources to achieve economic growth, human resource development, employment creation, a sound ecological balance and generational equity; conservation and protection of fisheries habitats; ensuring the effective application of the ecosystem approach to fisheries management; ensuring that biodiversity and genetic diversity in the marine environment is maintained and enhanced; fostering recreational and ornamental fishing, aquaculture and commercial fishing activities for the benefit of the country; encouraging the participation of users of the fisheries resources, and the general community, in the management of fisheries; ensuring that management measures are based on the best scientific evidence available and are designed to maintain or restore stocks capable of producing sustainable yield, as qualified by relevant environmental and economic factors including fishing patterns, the interdependence of stocks and generally recommended international standards; application of the precautionary approach to the management and development of the fisheries at no less standard than is set out in any international agreement; managing fisheries resources in an efficient and cost-effective manner, including setting targets for the recovery of management costs; collection and, as appropriate sharing, in a timely manner complete and accurate data and information concerning fishing activities and fisheries; implementation and enforcement of conservation and management measures through effective monitoring, control and surveillance; promotion of sustainable aquaculture in appropriate zones as a viable option to contribute to food security; replenishing natural habitats through diversification from capture fisheries and wealth generation; minimization of wastage, bycatch, discards, catch by lost or abandoned gear, pollution and the promotion of development and use of selective, environmentally safe and cost-effective fishing gear and techniques; prevention or elimination of over-fishing and excess capacity and managing levels of fishing efforts so they do not exceed levels commensurate with sustainable use of fishery resources; effective implementation of international agreements and relevant international laws in conformity with the Treaty Making and Ratification Act, 2013⁵⁹; ensuring effective cooperation with coastal States, fishing States and entities and competent organisations; and ensuring that the livelihood of fishers is enhanced.⁶⁰

The Act thus expressly acknowledges that it is not just concerned with the protection and conservation of fisheries resources but also with how these resources may be used to benefit the communities that rely on them as their source of livelihood.

4.6 Penal Code, Cap 63

The Penal Code⁶¹ establishes the country's code of criminal law.⁶² The Code has several provisions that seek to safeguard the welfare of animals. The Code makes it a felony for any person to have carnal knowledge of an animal.⁶³ Notably, the Code classifies animals under property capable of being stolen as follows: every tame animal, whether tame by nature or wild by nature and subsequently tamed, which is the property of any person is capable of being stolen; animals wild

⁵⁹ Treaty Making and Ratification Act, No 45 of 2012, Laws of Kenya.

⁶⁰ *Ibid*, sec. 5(2).

⁶¹ Penal Code, Cap 63, Laws of Kenya.

⁶² *Ibid*, Preamble.

⁶³ *Ibid*, sec. 162 (b).

by nature, of a kind which is not ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, and which are usually kept in a state of confinement, are capable of being stolen, whether they are actually in confinement or have escaped from confinement; animals wild by nature, of a kind which is ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, are capable of being stolen while they are in confinement, and while they are being actually pursued after escaping from confinement, but not at any other time; an animal wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank or other small enclosure, or is otherwise so placed that it cannot escape and that its owner can take possession of it at pleasure; wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen; and everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen.⁶⁴

In addition to the provisions of section 267, the Code provides that if the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.⁶⁵

The Code prohibits killing animals with intent to kill by providing that: any person, who kills any animal capable of being stolen with intent to steal the skin or carcass, or any part of the skin or carcass, is guilty of an offence and is liable to the same punishment as if he had stolen the animal.⁶⁶ The Code also provides that any person, who, being the mortgagor of mortgaged goods, removes or disposes of the goods without the consent of the mortgagee, and with intent to defraud, is guilty of a misdemeanour.⁶⁷ Notably, for purposes of this section, the Code defines “mortgaged goods” to include any goods and chattels of any kind, and *any animals*, and *any progeny of any animals*, and any crops or produce of the soil, whether growing or severed, which are subject for the time being, by virtue of any instrument or any written law, to a valid charge or lien by way of security for any debt or obligation (emphasis added).⁶⁸

Regarding injuring animals, the Code provides that any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years.⁶⁹

The Code also prohibits any person from communicating infectious diseases to animals. It provides that any person who wilfully and unlawfully causes, or is concerned in causing or attempts to cause, any infectious disease to be communicated to or among any animal or animals capable of being stolen, is guilty of a felony and is liable to imprisonment for seven years.⁷⁰

⁶⁴ Ibid, sec. 267 (3) (4) (5) (6) (7) (8).

⁶⁵ Penal Code, sec. 278.

⁶⁶ Ibid, sec. 289.

⁶⁷ Ibid, sec. 291(1).

⁶⁸ Ibid, sec. 291(2).

⁶⁹ Ibid, sec. 338.

⁷⁰ Ibid, sec. 341.

4.7 Environmental Management and Co-ordination Act, 1999

The *Environmental Management and Co-ordination Act, 1999*⁷¹ (EMCA) provides for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.⁷² It is the framework law on environmental matters in Kenya. 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 (emphasis added).⁷³

EMCA seeks to, inter alia, protect and conserve the ‘ecosystem’ which is defined under the Act to mean a dynamic complex of plant, *animal*, micro-organism communities and their non-living environment interacting as a functional unit (emphasis added).⁷⁴ It also seeks tackle “pollution” which is defined to mean any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to *animals, birds, wildlife, fish or aquatic life*, or to plants or to cause contravention of any condition, limitation, or restriction which is subject to a licence under this Act.⁷⁵

For purposes of protection of rivers, lakes, seas and wet lands, EMCA prohibits any person, 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, from, inter alia—introducing any *animal*, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland.⁷⁶

For purposes of conservation of biological resources ex-situ, EMCA obligates the Cabinet Secretary to, on the recommendation of the Authority—prescribe measures for the conservation of biological resources ex-situ especially for those species threatened with extinction; issue guidelines for the management of—zoos or aquaria; animal orphanages; and, ensure that species threatened with extinction which are conserved ex-situ are re-introduced into their native habitats and ecosystems where—the threat to the species has been terminated; or a viable population of the threatened species has been achieved.⁷⁷

EMCA also requires that widespread introduction of new crops and animals in agriculture, is one of the projects requiring submission of an environmental impact assessment study report under the Second Schedule to the Act.⁷⁸ EMCA thus treats animals as part of the environment which must be protected from adverse effects such as pollution and other environmental degrading elements and activities.

⁷¹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

⁷² Ibid, Preamble.

⁷³ Environmental Management and Co-ordination Act, sec.2.

⁷⁴ Ibid, sec. 2.

⁷⁵ Ibid, sec. 2.

⁷⁶ Ibid, sec. 42 (1) (c).

⁷⁷ Ibid, sec. 52.

⁷⁸ Ibid, Second Schedule [Section 58, Act No. 5 of 2015, s. 80.]

4.8 Veterinary Surgeons and Veterinary Para-professionals Act, 2011

The *Veterinary Surgeons and Veterinary Para-professionals Act, 2011*⁷⁹ was enacted to make provision for the training, registration and licensing of veterinary surgeons and veterinary para-professionals; to provide for matters relating to animal health services and welfare, and for connected purposes.⁸⁰

The Act is applicable to a wide range of animals as it defines “animal” to include cattle, camel, buffalo, sheep, goats, pigs, fish, horse, mule, ass, dog and any other wild or domestic animal kept in captivity or otherwise.⁸¹ Notably, while the Act deals with animal health services and welfare, it also applies to “animal resource industry” which means a sector responsible for animal production, quality assurance, marketing, animal food security and sanitary factors in livestock, companion and other non-human animal resources development.⁸²

The veterinary medicine envisaged under the Act is meant to: diagnose, treat, mitigate or prevent disease or abnormal physical or mental state or the symptoms thereof in an animal; restore, correct or modify any physical, mental or organic function in an animal; or control internal or external pests and parasites and includes insecticides, vaccines, hormones, alternative medicines, antiseptics, disinfectants, surgical, nutrients and biological products.⁸³ Considering that the Act also envisages the use of animal products for human consumption and other needs, the Act notably omits the use of animal rights but instead addresses itself to safeguarding animal welfare.⁸⁴

4.9 Branding of Stock Act

The *Branding of Stock Act*⁸⁵ makes provision for the registration of brands of stock.⁸⁶ The Act applies to “stock” which is defined to mean horses, cattle, camels, sheep and goats.⁸⁷ In addition, it provides that all brands shall be imprinted on stock as follows—the first brand shall be imprinted on the near hind leg below the stifle joint of the animal, and every second or subsequent brand shall, when there is space sufficient for the purpose, be imprinted on the same part of such animal and at a distance of not less than one and a half inches from and directly below the last brand imprinted.⁸⁸ Where there is not sufficient space for the purpose, the second or subsequent brand shall be imprinted on one of the following parts of such animal— off hind leg below the stifle joint; near side of neck; off side of neck; near cheek; off cheek.⁸⁹

The Branding of Stock Rules, made under section 28 of the Branding of Stock Act provides that Branding-irons and branding instruments shall only be procurable through the Registrar of Brands, care of the Veterinary Department, to whom all applications shall be addressed.⁹⁰ The Rules also

⁷⁹ Veterinary Surgeons and Veterinary Para-professionals Act, No. 29 of 2011, Laws of Kenya.

⁸⁰ Ibid, Preamble.

⁸¹ Ibid, sec. 2(1).

⁸² Ibid, sec. 2(1).

⁸³ Ibid, sec. 2(1).

⁸⁴ Ibid, sec. 45 (2)(1).

⁸⁵ Branding of Stock Act, Cap 357, Laws of Kenya.

⁸⁶ Ibid, Preamble.

⁸⁷ Ibid, sec. 2.

⁸⁸ Ibid, sec. 9(a).

⁸⁹ Ibid, sec. 9(b).

⁹⁰ Branding of Stock Rules, Rule 2.

specifies that the persons named in the Schedule to the Rules are authorised to manufacture branding-irons and branding instruments for sale at the respective prices specified in the said Schedule.⁹¹

Notably, both the Act and the Rules thereof are quiet on any principles that must be observed in carrying out such branding. It is quiet on such issues as ensuring that the process is carried out in a manner that respects the rights or welfare of the animals, as envisaged in the international debate. Some authors within the international debate on animal rights and welfare may take issue with the Kenyan legislation as it only specifies where such marks may be put without offering any guiding principles. Indeed, some advocates for animal rights may take issue with the whole branding process as they believe that animals should not be branded as the process may inflict pain on the animals especially the piercings and hot iron branding.⁹² Some commentators have argued that branding is used as a property stamp identifying the stockbreeder as the owner of the animal. According to them, by branding the animals, ranch owners are expressing the animals' legal condition as mere things, or as slaves.⁹³ Hot-iron branding has even been banned in some countries.⁹⁴

4.10 Animal Welfare and Protection Bill, 2019

There is a pending National Assembly legislation, *Animal Welfare and Protection Bill, 2019*, which seeks to provide for the welfare and protection of animals and prevention of ill treatment of animals; to provide for the monitoring of and mitigation of animal abuse and for connected purposes.⁹⁵ The proposed law defines "animal" to mean any member of the animal kingdom except human, whether alive or dead, including mammals, birds, reptiles and aquatic animals.⁹⁶ "Farm animal" is defined to mean any animal including fish, reptiles, rabbits, cattle, sheep, goats, camels, donkeys or amphibians bred or kept for the production of food, wool, skin or fur or for other farming purposes or any other animal kept for these purposes.⁹⁷ "Working animal" is defined to mean any animal that is used to provide any service with the exception of purposes for food or companionship and includes but is not limited to oxen, equids, camels and guard dogs.⁹⁸

It defines "animal protection" to include behaviours and actions aimed at keeping an animal healthy, comfortable, well nourished, safe, able to express innate behaviour and avoidance of any form of suffering.⁹⁹ "Animal welfare" is defined to mean the state of the animal and how it is coping with the conditions in which it lives including good health, comfort, good nourishment, safety, ability to express innate behavior and freedom from suffering from unpleasant states such as pain, fear or distress.¹⁰⁰

⁹¹ Ibid, Rule 3.

⁹² Greg Rushford and TR Goldman, 'Urging an End To Face Branding Of Cattle';

⁹³ Animal Ethics, 'Animal Branding' (Animal Ethics, 29 March 2016) <<https://www.animal-ethics.org/animal-branding/>> accessed 21 July 2020.

⁹⁴ Sarah JJ Adcock and others, 'Branding Practices on Four Dairies in Kantale, Sri Lanka' (2018) 8 *Animals* 137.

⁹⁵ Animal Welfare and Protection Bill, 2019, Preamble.

⁹⁶ Ibid, 2019, Clause 2.

⁹⁷ Ibid, 2019, Clause 2.

⁹⁸ Animal Welfare and Protection Bill, 2019, Clause 2.

⁹⁹ Ibid, Clause 2.

¹⁰⁰ Ibid, 2019, Clause 2.

The object and purpose of the proposed law shall be to promote the responsible care and use of animals leading to the achievement of a reasonable balance between the welfare of animals and the interests of persons whose livelihoods depend on animals.¹⁰¹ The purposes of the proposed legislation are to: - ensure that owners of animals and persons in charge of animals take responsibility for and attend to the protection and welfare of the animals; ensure animal disease prevention and provision of veterinary care; specify and regulate conduct that may be permissible in regard to any animal or class of animals; ensure appropriate shelter, management, nutrition, humane handling and humane slaughter or killing of animals; provide for guidance on animal care and animal husbandry; and provide for the process of approving the use of animals in research, investigations and teaching.¹⁰²

The proposed legislation is to apply: - to all persons in the animal resource industry including those who own, handle, transport or in any way deal with animals and include persons under whose custody an animal may be on a temporary basis or for an extended period of time; and alongside other written laws pertaining to wildlife species or aquatic animals in Kenya.¹⁰³

The proposed law outlines the basic values and principles which shall guide the provision of animal protection including but not limited to: - an acknowledgement and the cognizance that animals are sentient and are capable of experiencing negative and positive complex emotions including grief, empathy, pain and suffering; humane use of animals for companionship, food, fibre, recreation, work, education, exhibition, and research conducted for the benefit of both humans and animals; application of a multi-dimensional approach when considering and making decisions regarding animal care, use and welfare; continuous evaluation of procedures related to animal housing, management, care and use and where necessary, refine or replace them with methods that enhance the welfare of animals; conservation and management of animal populations conducted in a humane, compassionate, socially responsible and scientifically prudent manner; a veterinary profession continuously striving to improve animal health and welfare through scientific research, education, collaboration, advocacy and legislation; and provision of a humane death to an animal where an animal is to be slaughtered for food or killed for any other lawful reason.¹⁰⁴

If enacted, the law will empower the Cabinet Secretary responsible to, in the regulations, prescribe: - mechanisms to ensure facilitation of the well-being of all animals in Kenya; and means by which all animals gazetted as wild species have their welfare guaranteed in accordance with the Act.¹⁰⁵

The proposed law seeks to establish an Advisory Committee to be known as the National Animal Welfare Advisory Committee,¹⁰⁶ whose functions shall be to carry out such mandates as may be necessary to give effect to the objects of this Act and to advise the national and county governments in relation to all aspects thereof.¹⁰⁷ In carrying out its functions, the Committee shall: monitor and report on animal welfare matters; promote co-operation among public departments, County

¹⁰¹ Ibid, 2019, Clause 3(1).

¹⁰² Ibid, Clause 3(2).

¹⁰³ Ibid, Clause 4.

¹⁰⁴ Animal Welfare and Protection Bill, 2019, Clause 5(1).

¹⁰⁵ Ibid, Clause 5(2).

¹⁰⁶ Ibid, 2019, Clause 6.

¹⁰⁷ Ibid, Clause 7(1).

Animal Welfare Committees, the private sector, Non-Governmental Organisations and such other organizations engaged in safeguarding of animal welfare; develop humane education programmes for animals; incorporate animal welfare in school curricula; promote awareness on animal welfare matters; ensure capacity building of County Animal Welfare Committees and other relevant government departments; and prepare annual reports on the state of animal welfare in the country.¹⁰⁸

Each county government shall establish a County Animal Welfare Committee,¹⁰⁹ whose functions shall include:- be responsible for monitoring implementation of the proposed Act; be the advisory body on matters related to the protection and welfare of animals in the county; promote the safeguarding of animal welfare by all actors in the animal resource industry in the county; be involved in the development of animal welfare information and education programmes for the public; recommend incorporation of animal welfare in school curricula; and perform such other functions as may be necessary under the Act.¹¹⁰

The proposed law also provides that a person who owns, is responsible for or is a custodian of any animal shall: - treat or cause the animal to be treated with respect and dignity; provide the animal with adequate water, feed, health-care and space; not subject the animal to, and ensure that the animal is not subjected to fear, pain, stress or any form of suffering; provide the animal with an environment appropriate to its care and use, with thoughtful consideration for the species-typical biological behaviour; while transporting or transiting the animal, maintain the animal in a manner that minimizes the possibility of injury, pain and anxiety; be accountable for anything done to, or by the animal; and where the person is a veterinary surgeon or veterinary para-professional, provide the necessary veterinary care for the animal.¹¹¹

Transportation of animals must only be done in accordance with the provisions of the proposed law.¹¹² A working animal shall not be used for work, sport, transport or any cultural event except as provided for under this Act or any other written law.¹¹³ In addition, any person who uses a working animal for sports, transport, security or any other purpose shall handle and care for the animal in a manner that does not compromise the welfare of the animal or cause the animal to suffer pain, injury, distress, anxiety, discomfort or exhaustion.¹¹⁴ Any person who uses any animal for purposes of entertainment in public or in an exhibition or show shall handle and care for the animal in a manner that does not cause pain, injury, anxiety or distress to the animal.¹¹⁵

Any person who keeps an animal under custody or confinement is required to: - provide the animal with adequate feed, water, space, area to access sunshine, fresh air and shelter; and ensure that the welfare of the animal is maintained or where necessary, improved and the animal is able to express natural behaviour.¹¹⁶

¹⁰⁸ Ibid, Clause 7(2).

¹⁰⁹ Ibid, Clause 10(1).

¹¹⁰ Ibid, Clause 11.

¹¹¹ Animal Welfare and Protection Bill, 2019, Clause 23 (1).

¹¹² Ibid, Clause 24 (1).

¹¹³ Ibid, Clause 25 (1).

¹¹⁴ Ibid, Clause 25 (2).

¹¹⁵ Ibid, Clause 25 (3).

¹¹⁶ Ibid, Clause 26 (2).

Any person keeping or in custody of a companion animal is required to ensure that its specific welfare and species needs are met.¹¹⁷ Any person who owns or operates a farm in which animals are kept is required to take all reasonable steps to ensure: - the welfare of animals under his care; and that those animals are not caused any suffering, injury or pain.¹¹⁸ All animals kept for purposes of food for human consumption must also be cared for in a manner that guarantees their welfare as stipulated under the proposed law.¹¹⁹

Regarding slaughtering of an animal for human consumption, the proposed law provides that a person should, when slaughtering an animal for human consumption, slaughter the animal in a manner that does not cause the animal pain, distress or suffering before and during slaughter.¹²⁰ A person trading in animals should handle the animal: in a responsible and humane manner; and in a manner that does not compromise the welfare of the animal or cause the animal to suffer pain, injury, distress or exhaustion.¹²¹

Any person who is responsible for or is in charge of an animal that lives in water should ensure that: - the animal is kept or handled in a manner that does not cause it any form of anxiety or distress; sufficiently oxygenated water and adequate feed supply is provided to the animal; and adequate space is provided for free movement of the animal.¹²² The Proposed law provides that No person should: - cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate or terrify an animal; use an animal that is diseased, injured or in such physical condition that it is unfit to be used; convey, carry, confine or impound an animal in a manner or position as to cause that animal suffering; without sufficient cause, underfeed or deny water to an animal; or being the owner of an animal, or tasked to care for an animal, without reasonable cause or excuse, abandon the animal, whether permanently or not, in circumstances likely to cause the animal suffering; being the owner of an animal, or tasked to care for an animal, keep the animal in a grossly dirty or verminous condition or, without reasonable cause or excuse, fail to procure or administer required veterinary care or attention for the animal in case of disease, injury or parturition; or wilfully, without reasonable cause or excuse, administer any poisonous, stimulant or injurious drug or substance to an animal or cause such substance to be taken by an animal; subject an animal to veterinary surgery in contravention of the Veterinary Surgeons and Veterinary Paraprofessional Act; or subject an animal to any operation, surgical interference or other treatment which is performed without due care and humanity; or being the owner of any animal, fail to have the animal humanely euthanized where the animal is so seriously injured or diseased that to prolong the animal's life would cause the animal unnecessary suffering; or hunt, kill or destroy any animal in such a manner as to cause that animal suffering; or being the owner of any animal, without reasonable cause or excuse, do or omit to do an act which causes suffering to the animal; or de-beak a bird, cut ears of a donkey or cut any other animal without direct authorization and supervision of a qualified and registered veterinarian.¹²³

¹¹⁷ Ibid, Clause 27 (2).

¹¹⁸ Ibid, Clause 28(1).

¹¹⁹ Ibid, Clause 31.

¹²⁰ Ibid, Clause 32(1).

¹²¹ Animal Welfare and Protection Bill, 2019, Clause 33.

¹²² Ibid, Clause 34.

¹²³ Ibid, Clause 35(1).

The proposed law notably outlaws fighting and baiting of animals by providing that no person shall: - cause, promote or assist the fighting or baiting of an animal; keep, use, manage, act or assist in the management of, premises for the purpose, or partly for the purpose of fighting or baiting any animal, or permit any premises or place to be so kept, managed or used; receive, or cause or procure any person to receive any money for the admission of any person to any premises kept or used for the purpose, or partly used for the purpose of fighting or baiting any animal.¹²⁴ It also prohibits use of traps to capture animals or the purpose of capturing or killing any animal except a vermin or fish.¹²⁵

Notably, the proposed law also borrows from the Penal Code to prohibit an unnatural act or bestiality with an animal of any kind.¹²⁶ The proposed law, if enacted will repeal the Prevention of Cruelty to Animals Act, Cap. 360.¹²⁷ In summary, the proposed law seeks to retain most of the offences against animals as contained in Capp 360. However, there are a few additions. The proposed law acknowledges “sentience”, that is, the capacity of an animal to experience suffering and pleasure including pain and positive emotions with a level of conscious awareness, an acknowledgement that is missing in the current Cap 360. Some countries around the world such as France, New Zealand and the Canadian province of Quebec all explicitly recognized animal sentience in their laws in 2015. Sweden and the Belgian capital of Brussels both joined the club in 2018.¹²⁸ If the 2019 proposed law on the welfare and protection of animals is enacted, Kenya would theoretically join these countries.

In addition, while Cap 360 allowed persons to abuse animals in the name of culture, the proposed law provides that cultural beliefs and cultural set-ups shall not be a defence for contravening the provisions on acts and omissions amounting to cruelty to animals.¹²⁹ The proposed law also is more detailed on animal protection and welfare and spells out more punitive measures for violation of any of the provisions therein.

However, it is worth mentioning that while the proposed law acknowledges the need to protect and take care of the welfare of the animals, it still makes room for animal resource industry and merely seeks to promote the responsible care and use of animals leading to the achievement of a reasonable balance between the welfare of animals and the interests of persons whose livelihoods depend on animals.¹³⁰ It does not therefore seek to impose a total ban on hurting animals; it merely seeks to reduce pain and suffering of animals. Notably, it also seems to retain the notion, though covertly, that, animals can be treated as property capable of ownership and owners can inflict some pain and suffering so long as they do so in accordance with the proposed law. Again, this may not sit very well with the fiercest critics of violation of animal rights in any way. It is also notable that it avoids the use of the term ‘animal rights’ and opts for the broader term ‘animal welfare’. It therefore seeks to adopt a middle ground for those who call for a total ban of any adverse dealings with animals and those who do not consider it offensive to use of animals to fulfil some of the human needs and

¹²⁴ Ibid, Clause 36(1).

¹²⁵ Animal Welfare and Protection Bill, 2019, Clause 38(1).

¹²⁶ Ibid, Clause 44.

¹²⁷ Ibid, Clause 63.

¹²⁸ Jennifer Fiala, ‘News’ [2008] VIN.com <<https://www.vin.com/doc/?id=4235063>>.

¹²⁹ Animal Welfare and Protection Bill, 2019, Clause 35 (3).

¹³⁰ Ibid, Clause 3.

rights. It is therefore understandable why the drafters settled on the more politically tolerable term ‘animal welfare’.

The proposed law also seeks to rope in county governments in recognition of the post 2010 constitutional dispensation. It also seeks to ensure that, as way of creating a culture of respect for animal rights and welfare in Kenya, the National Animal Welfare Advisory Committee develop humane education programmes for animals; incorporate animal welfare in school curricula; promote awareness on animal welfare matters.¹³¹ While some of the provisions envisaged in the proposed law may take time to enforce and implement, especially against the background of many communities’ cultural practices (for instance, fighting and baiting of animals among the Luhya community (bullfighting)), the proposed law has made great efforts at protecting the welfare of animals in Kenya.

The piece of legislation, if passed into law, would not sit well with some of the animal rights movement. This is because a number of them seek to ensure that there is: total abolition of the use of animals in science; total dissolution of commercial animal agriculture; and total elimination of commercial and sport hunting and trapping.¹³² It is thus arguable that the extent to which animal rights and welfare succeeds is highly dependent on the society in question. It is also unlikely that the African Continent and especially in Kenya will be willing to pass laws that completely outlaw the use of animals especially for food and commercial animal agriculture.

5. Animal Rights and Welfare in Kenya: The Practice

This section looks at how animal rights have been treated under the Kenyan laws. To elaborate on this, we focus on some case law as decided by the Kenyan courts. In *Hussein Khalid and 16 others v Attorney General & 2 others [2014] eKLR*¹³³, the petitioners were charged with, inter alia, cruelty to animals contrary to Section 3(1)(c) as read with Section 3(3) of the Prevention of Cruelty to Animals Act Cap 360 Laws of Kenya. The petitioners were accused of cruel treatment of pigs in their demonstration against the Members of Parliament. In this particular constitutional petition, the petitioners sought orders to quash the decision to charge them under criminal law for the alleged cruelty against animals under *Criminal Case No.685 of 2013 (R V William Omondi and 16 Others)*. The Court however declined to do so.¹³⁴

In *May v Republic [1979] eKLR*¹³⁵, the Appellant was convicted in a Resident Magistrate’s court at Nairobi on four counts charging offences under the Prevention of Cruelty to Animals Act (Cap 360). She appealed unsuccessfully to the High Court and then brought a second appeal to the Court of Appeal for East Africa. The appellant ran a business known as “Amber May Safaris”, and in connection with that business she owned some fifty horses, twelve mules and six zebroids which she kept on land owned or occupied by her at Nanyuki. She also kept four dogs there. Apparently the appellant left Kenya early in July, 1978, for a holiday in Europe, and returned later in the year.

¹³¹ Animal Welfare and Protection Bill, 2019, Clause 7.

¹³² Tom Regan, ‘The Case for Animal Rights’ < <https://www.tier-im-fokus.ch/wp-content/uploads/2009/09/regan85.pdf> > 23 July 2020.

¹³³ Hussein Khalid and 16 others v Attorney General & 2 others [2014] eKLR, Petition 324 of 2013.

¹³⁴ Notably, the matter was appealed all the way to the Supreme Court of Kenya vide Hussein Khalid And 16 others v Attorney General & 2 others [2019] eKLR, Petition 21 of 2017, but the same was disallowed.

¹³⁵ May v Republic [1979] eKLR, Criminal Appeal 24 of 1979.

During her absence, these animals were neglected and suffered greatly and the matter was reported to the Kenya Society for the Protection and Care of Animals, who caused the animals to be inspected by their Nanyuki representative and by the District Veterinary Officer for Laikipia. As a result of what they reported, the Society obtained a custody order under Section 26 of the Act and in pursuance of the custody order, all the equine animals were removed to the Nanyuki Sports Centre, where there was some grazing, except for five horses and one mule which were in such an under-nourished and generally poor condition that they had to be destroyed on the spot. Two of these animals appeared to have been slashed with pangas. Of the remaining horses, twenty were in a very poor condition due to underfeeding. The dogs were also in a deplorable condition. Two were taken to Nairobi for veterinary treatment.

The offences with which the appellant was charged were as follows: doing an act which amounts to cruelty contrary to Section 3(1) of the Act, in that being the owner of twenty horses, without sufficient cause she underfed the said horses; abandoning animals contrary to Section 3(1) (e) of the Act, in that being the owner of the animals already referred to, without reasonable cause or excuse, she abandoned the said animals in circumstances likely to cause them unnecessary suffering; failing to procure veterinary treatment, contrary to Section 3(1) (f) of the Act, without reasonable cause or excuse; and, keeping animals in a verminous condition, contrary to Section 3(1) (f) of the Act, without reasonable cause or excuse. Her appeal was however dismissed.

In *Joseph Wanjogu Kungu v Republic [2005] eKLR*¹³⁶, the appellant, Joseph Wanjogu Kungu, was charged with the offence of being cruel to an animal contrary to Section 3(1)(K) of the Prevention of Cruelty to Animals Act (Cap 360 of the Laws of Kenya). The particulars of the offence were that on 18th of January 2000 at Nyandarua Farm, Nakuru the appellant was found being cruel to an animal, namely a dog by killing it, the property of Christopher Njoroge Kimani. At the lower court trial, the appellant had been found guilty as charged and was sentenced to pay a fine of Kshs 300/= or in default he was to serve one month's imprisonment. The Court of Appeal found that the appeal filed by the appellant had merit and the same was allowed. The conviction of the appellant was quashed, the sentence imposed set aside and the fine paid by the appellant was ordered to be refunded.

Despite the laws outlined in the previous section, Kenyans continue with the outlawed dealings in animals unperturbed. For instance, the Luhya community takes great pride in bull fighting, a practice that is expressly outlawed in not only Cap 360, but also in the proposed bill. This therefore poses the risk of a direct confrontation between authorities' efforts on welfare and animal protection and culture.

There are hardly tangible reported cases of successful prosecution of cases involving violation of animal rights in Kenya for one to draw a conclusion on the country's jurisprudence on the rights and welfare of animals. It is however clear based on the laws in force and even the proposed legislation that Kenya opts for animal welfare rather than rights, which approach allows one to use animals to meet their needs while minimising the suffering and pain caused to these animals while fulfilling such needs.

¹³⁶ *Joseph Wanjogu Kungu v Republic [2005] eKLR*, Criminal Appeal 160 of 2000.

6. Animal Rights versus Animal Welfare: Which way to go

Animal rights supporters believe that it is morally wrong to use or exploit animals in any way and that human beings should not do so.¹³⁷ On the other hand, animal welfare supporters believe that it can be morally acceptable for human beings to use or exploit animals, as long as: the suffering of the animals is either eliminated or reduced to the minimum and there is no practicable way of achieving the same end without using animals.¹³⁸ The debate, therefore, is whether animals should be used or exploited at all on the one hand, or how the animals should be used and exploited while reducing pain and suffering, on the other hand. It thus follows that any country's laws fall under either of the two approaches.

Kenya's laws on the protection of animals seem to lean more towards animal welfare, that is, the state of the animal and how it is coping with the conditions in which it lives including good health, comfort, good nourishment, safety, ability to express innate behavior and freedom from suffering from unpleasant states such as pain, fear or distress.

The various laws highlighted above almost all seem to leave some room for subjecting animals to the unpleasant states such as pain, fear and distress. The proposed law seems to qualify every allowable scenario in hurting animals to carrying out everything according to the law.

It is arguable that while the international community and some of the hardliners in animal rights debate seem to advocate for total ban of animal resource industry and all other forms of cruelty to animals, Kenya may not yet get there. This is because Kenyan communities are still highly dependent on animal resources for their livelihoods. Banning the use of animal products may therefore not work. It is also worth mentioning that the animal resource industry is also a huge source of income for the Government of Kenya and this may therefore create a disincentive to criminalize the use of animal resources, with certain exceptions such as the wildlife, which, again, is a source of income for the Government.

The biodiversity and the ecosystem which include the relationship between the animals and their environment, as envisaged under EMCA, are also important for the survival of humankind. It is therefore in the best interests of the humankind that these resources are protected and their welfare guaranteed. The debate at which animals should have rights or even have their welfare taken care of is also relevant.¹³⁹ However, all animals regardless of their size should have their welfare protected. It should not only be the domesticated animals or the bigger wild animals. Even the smaller animals form part of the biodiversity and are relevant to the health of the ecosystem.¹⁴⁰ The Smaller animals especially those that act as pollinators have an important role to play in crop and food production as well as realisation of the sustainable development agenda.¹⁴¹ It is therefore imperative that whichever approach is adopted, whether towards absolute protection of animal

¹³⁷ 'BBC - Ethics - Animal Ethics: Introduction to Animal Rights'

<<http://www.bbc.co.uk/ethics/animals/rights/introduction.shtml>> accessed 25 July 2020.

¹³⁸ Ibid.

¹³⁹ 'BBC - Ethics - Animal Ethics: Introduction to Animal Rights'

<<http://www.bbc.co.uk/ethics/animals/rights/introduction.shtml>> accessed 25 July 2020.

¹⁴⁰ Muigua K. "The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya." *Journal of cmsd*. 2017;1(2):72-96.

¹⁴¹ Ibid, p. 92.

rights or the more flexible animal welfare approach, all animals should be included, whether large or small since they all indirectly contribute to the wellbeing of the ecosystem or the wellbeing of human beings. This approach would entail incorporating both ecocentric and anthropocentric approaches. The anthropocentric approach would entail enlightened self-interest where the main goal is to preserve a healthy natural world for the purpose of commerce, aesthetics, and human health, while the ecocentric one places moral value at the level of whole systems and ecosystems.¹⁴²

7. Conclusion

The debate on animal rights is not about to come to an end. There are two contradictory movements, those for absolute protection of animals and their rights and the consequent banning of all uses and exploitation of animals for human self-interests, and those who advocate for the welfare of animals which would allow the use and exploitation of animals as long as the animals are treated in a humane way while doing so. This paper has analysed the Kenyan law on animal welfare and rights and concluded that the same adopts a welfare approach as opposed to the strict animal rights protection one.

¹⁴² David A Fennell and Valerie Sheppard, 'Tourism, Animals and the Scales of Justice' [2020] *Journal of Sustainable Tourism* 1.

Revisiting the Place of Indigenous Knowledge in the Sustainable Development Agenda

Abstract

For centuries, the African communities and especially in Kenya have always upheld and utilised their cultural knowledge on management and conservation of the environmental and natural resources. However, colonialism marked an era of western knowledge subjugating the indigenous knowledge, a practice that has continued to date. This has been made worse by the top-down or what is commonly referred to as command and control approach where the state organs have often taken the lead role in not only management of the environment and natural resources but also in utilising western and scientific knowledge at the expense of the indigenous knowledge. This paper explores the place of indigenous knowledge, in not only the management of environmental and natural resources but also in realisation of the sustainable development agenda. This is based on the need to ensure active and meaningful participation of communities through enhanced access to information and public participation.

1. Introduction

The term "indigenous knowledge" may generally refer to how members of a community perceive and understand their environment and resources, particularly the way they convert those resources through labour.¹ Indigenous groups offer alternative knowledge and perspectives based on their own locally developed practices of resource use.² In general, all traditional knowledge and resources are considered to be collective heritage of a community or ethnic group, even if the accumulation of knowledge is individual, because they are ancestral heritage, and are believed to come from God.³ Thus, Indigenous knowledge is the local knowledge that is unique to a culture or society.⁴ Indigenous knowledge is 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.⁵

The Sustainable Development Goals (SDGs)⁶ has several goals that seek to incorporate the knowledge vested in indigenous people in order to achieve its main agenda.

¹ 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).

Available at <http://www.fao.org/docrep/005/ac696e/ac696e09.htm> [Accessed on 14/7/2020].

² 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.

³ Swiderska, K., et. al., 'Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices,' Interim Report (2005-2006), November 2006, p. 13. Available at <http://pubs.iied.org/pdfs/G01253.pdf> [Accessed on 14/7/2020].

⁴ 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.

⁵ Ibid.

⁶ 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)].

This paper offers some insights on debate relating to the place of indigenous knowledge in the sustainable development agenda as a means of promoting growth and development in Kenya.

2. Indigenous Knowledge as a Tool for Promoting Inclusive Growth and Development

Kenya has had a history of environmental injustice, where the colonialists used the law to appropriate all land and land-based resources from Africans and to vest them in the colonial masters.⁷ In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers.⁸ 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.⁹

The loss of control rights over natural resources also affected other resources including forests and water.¹⁰ 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.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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, was the Water Ordinance of 1929, vesting water resources on the Crown. 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

⁷ Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), p.54.

⁸ See generally the case of *Isaka Wainaina and Anor v Murito wa Indagara and others*, [1922-23] 9 E.A.L.R. 102.

⁹ See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

¹⁰ 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.

¹¹ 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.

¹² *Ibid*.

¹³ 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.

¹⁴ Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' *Evaluating Eden Series*, Discussion Paper No.4, p. 6.

Kenya has in fact continued into independent Kenya and often with ugly results, as has been documented in various Government reports.¹⁵

Environmental injustice continues to manifest itself in modern times. The recent conflicts such as those in Lamu County and in the pastoral counties are largely attributable to environmental injustices inflicted over the years.¹⁶ 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 forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.¹⁷

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.¹⁸ The Africa Forest Law Enforcement and Governance (AFLEG) Ministerial Declaration of 2003¹⁹ recognized the role of forests in its preamble noting that Africa's forest ecosystems are essential for the livelihoods of the African people; especially the poor and that forests play important social, economic and environmental functions.²⁰

Notably, while the laws acknowledge the existence of indigenous forests, the command and control approach to natural resource management and the associated sustainability and conservation measures do not differentiate indigenous forests from other types of forests in reality. 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.²¹ As a result, the law requires the Kenya Forest Service to consult with the forest conservation committee for the area where the

¹⁵ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, July 31, 1999 (Akiwumi Report, p. 59). 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 Krieglner and Waki Reports on 2007 Elections, 2009, (Government Printer, Nairobi). The Krieglner 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.

¹⁶ "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 17 July 2020; 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.

¹⁷ 'FAO Working Paper 1' <<http://www.fao.org/3/X2102E/X2102E01.htm>> accessed 17 July 2020; Urmilla Bob and Salomé Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2010) 10 *African Journal on Conflict Resolution*.

¹⁸ UNFF Memorandum, available at www.iucnael.org/en/.../doc.../849-unit-3-forest-game-background.html. > accessed 16 July 2020; See also UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), pp.145-154.

¹⁹ Africa Forest Law Enforcement and Governance (AFLEG), Ministerial Conference 13-16 October, 2003; Ministerial Declaration, Yaoundé, Cameroon, October 16, 2003.

²⁰ Sec. 2, Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

²¹ Sec. 42 (1), Forest Conservation and Management Act, No. 34 of 2016.

indigenous forest is situated in preparing a forest management plan.²² Further, the Forests Board may 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.²³ While such arrangements 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, they have been suffering eviction from the indigenous forests.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ Notably, the generation, adaptation and use of indigenous knowledge are greatly influenced by the culture.²⁸ 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.²⁹ Indeed, their diverse forms of

²² Ibid, S. 42(2).

²³ Ibid, S. 44(3).

²⁴ '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 16 July 2020; '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 16 July 2020; '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 16 July 2020; '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 16 July 2020; '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 16 July 2020; '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 16 July 2020; 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 16 July 2020.

²⁵ 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 17/7/2020].

²⁶ Ibid, p.14.

²⁷ Ibid, p. 21.

²⁸ SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka.

²⁹ 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 17 July 2020.

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.³⁰ It is therefore worth including indigenous knowledge and culture in any plans, programmes and policies aimed at realisation of sustainable development agenda.

3. Place of Indigenous Knowledge in International and National Laws: The Framework

3.1 The International Law Framework

The *United Nations Declaration on the Rights of Indigenous Peoples*³¹ was adopted against a background of indigenous peoples having suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.³² It therefore came in to, *inter alia*, correct such situations through guaranteeing their right to self-determination.³³ In addition, it reaffirms the indigenous peoples' right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; and States should give legal recognition and protection to these lands, territories and resources.³⁴ Such right includes their right to use their customs, traditions and land tenure systems of the indigenous peoples concerned especially in relation to their right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.³⁵ States are therefore obligated to establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.³⁶

The *Convention on Biological Diversity*³⁷ recognises the role of indigenous knowledge in in-situ conservation of biological diversity and requires contracting states to 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*.³⁸ The Convention further advocates for promotion of wider application of indigenous knowledge with the approval and involvement of the holders of such knowledge who should equitably share in the

³⁰ 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.

³¹ 61/295, United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on Thursday, 13 September 2007.

³² Ibid, Preamble.

³³ Ibid, Art. 3.

³⁴ Ibid, Art. 26.

³⁵ Ibid, Art. 29 (1).

³⁶ Ibid.

³⁷ United Nations, Convention on Biological Diversity of 5 June 1992, 1760 U.N.T.S. 69

³⁸ Convention on Biological Diversity, Article 8 (j).

benefits which arise from the use of their knowledge.³⁹ Further, under article 10(c) of the Convention, each Contracting Party shall, as far as possible and as appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with *conservation or sustainable use requirements*.

The Convention is the only international treaty that specifically acknowledges the role of traditional knowledge, innovations, and practices in biodiversity conservation and sustainable development and the need to guarantee their protection, whether through intellectual property rights or other means.⁴⁰ In order to achieve the vision of the Convention and optimise the role of indigenous knowledge in sustainable development, there is need to ensure clarity with regards to ownership of traditional knowledge and traditionally used biological resources; a process and set of requirements governing free prior and informed consent and equitable sharing of benefits with respect to traditional knowledge and associated genetic resources.⁴¹

Principle 22 of the *1992 Rio Declaration on Environment and Development* acknowledges 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. 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.’⁴²

African States and other stakeholders, in the *Ngorongoro Declaration*⁴³ 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.⁴⁴ 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 globalized 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.⁴⁵

³⁹ Ibid

⁴⁰ 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.

⁴¹ Convention on Biological Diversity, ‘Presentation by Hamdallah Zedan Executive Secretary Convention on Biological Diversity to the WIPO Seminar on Intellectual Property and Development’ Geneva, Switzerland, 2-3 May 2005, available at http://www.world-intellectual-property-organization.com/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103974.pdf (accessed on 10/09/2020)

⁴² United Nations Educational, Scientific and Cultural Organization (UNESCO), ‘Culture for Sustainable Development,’ available at <http://en.unesco.org/themes/culture-sustainable-development> [Accessed on 17/7/2020]

⁴³ The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016.

⁴⁴ Ibid, p.2.

⁴⁵ Ibid, p. 3.

3.2 The National Policy and Legal Framework on Indigenous Knowledge

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁴⁶ 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.

The Constitution provides that the State shall protect and enhance indigenous knowledge of biodiversity of the communities.⁴⁷ The State is also obliged to encourage public participation in the management, protection and conservation of the environment.⁴⁸ In doing so, the State is also obligated to supply the relevant environmental information. Article 35(1) of the Constitution 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. *Access to Information Act, 2015*⁴⁹, 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. Such environmental information is necessary to enable communities make informed decisions.⁵⁰ Thus decision-making processes should focus on the supply of the right information, incentives, resources and skills to citizens so that they can increase their resilience and adapt to climate change and other environmental changes.⁵¹

Notably, sustainable development involves adoption of sustainable methods of managing conflicts and disputes.⁵² In settling land disputes, communities are encouraged to apply recognized local community initiatives consistent with the Constitution.⁵³ This will enhance community involvement in natural resource management thus enhancing their participation in achieving peace for sustainable livelihoods.⁵⁴

All these provisions encourage in one way or the other the participation of local communities in the management, use or ownership of natural resources and most importantly, using their indigenous knowledge as a knowledge reference point.

⁴⁶ Art. 11 (1), Constitution of Kenya, 2010.

⁴⁷ Ibid, Art. 69(1) (c).

⁴⁸ Ibid, Art. 69 (1) (d).

⁴⁹ Access to Information Act, No. 31 of 2016, Laws of Kenya.

⁵⁰ Carolina Zambrano-Barragán, 'Decision Making and Climate Change Uncertainty: Setting the Foundations for Informed and Consistent Strategic Decisions' (World Resources Institute, 27 June 2013) <<https://www.wri.org/our-work/project/world-resources-report/decision-making-and-climate-change-uncertainty-setting>> accessed 17 July 2020.

⁵¹ Ibid.

⁵² See Kariuki Muigua, *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya* (2016) < <http://kmco.co.ke/wp-content/uploads/2018/08/TRADITIONAL-KNOWLEDGE-AND-CONFLICT-MANAGEMENT-29-SEPTEMBER-2016.pdf>> accessed 17 July 2020.

⁵³ Constitution of Kenya, 2010, Art.60 (1) (g) and Art.67 (2) (f).

⁵⁴ See Kariuki Muigua, 'Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development', 2020 *Journal of cmsd* Volume 4(1) < <http://journalofcmsd.net/wp-content/uploads/2020/03/Mainstreaming-Traditional-Ecological-Knowledge-in-Kenya-for-Sustainable-Development-Kariuki-Muigua-23rd-August-2019.pdf>> Accessed on 17 July 2020.

The *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016*,⁵⁵ which seeks to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; and to give effect to Articles 11, 40(5) and 69 of the Constitution, recognises the intrinsic value of traditional cultures and traditional cultural expressions, including their social, cultural, economic, intellectual, commercial and educational value.⁵⁶ While the Act does not expressly mention the words ‘sustainable development’, it provides that equitable benefit sharing rights of the owners and holders of traditional knowledge or cultural expressions shall include the right to fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, which right might extend to non-monetary benefits, such as *contributions to community development, depending on the material needs and cultural preferences expressed by the communities themselves* (emphasis added).⁵⁷ Notably, *2030 Agenda on Sustainable Development Goals* (SDGs) under 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, calls for states to ensure responsive, inclusive, participatory and representative decision-making at all levels.⁵⁸ The SDGs also pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility. They also acknowledge the natural and cultural diversity of the world and recognise that all cultures and civilizations can contribute to and are enablers of, sustainable development.⁵⁹ The provisions in the *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016* thus 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.

The *Environmental Management and Conservation Act* (EMCA)⁶⁰ is the overarching law on environmental matters in Kenya. It is a framework environmental law establishing legal and institutional mechanisms for the management of the environment. It provides for improved legal and administrative co-ordination of the diverse sectoral initiatives in order to improve the national capacity for the management of the environment. Section 44 of the Act, mandates the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of hill sides, hill tops, mountain areas and forests. It also requires the formulation of regulations, guidelines, procedures and measures aimed at controlling the harvesting of forests and any natural resources located in or on a hill side, hill top or mountain areas so as to protect water catchment areas, prevent soil erosion and regulate human settlement. Section 46(1) requires every County Environment Committee to specify the areas identified in accordance with section 45(1) as targets for afforestation or reforestation. A County Environment Committee is to take measures,

⁵⁵ Protection of Traditional Knowledge and Traditional Cultural Expressions Act, No. 33 of 2016, Laws of Kenya.

⁵⁶ Ibid, s. 2(d).

⁵⁷ Ibid, s. 24 (1)(2).

⁵⁸ 2030 Agenda on Sustainable Development Goals, Goal 16.7.

⁵⁹ Ibid, Vision, Para. 36.

⁶⁰ No. 8 of 1999, Laws of Kenya.

through encouraging voluntary self-help activities in their respective local community, to plant trees or other vegetation in any areas specified under subsection (1) which are within the limits of its jurisdiction.⁶¹

It is noteworthy that such afforestation may be ordered to be carried out even in private land. Paragraph (3) thereof is to the effect that where the areas specified under subsection (1) are subject to leasehold or any other interest in land, including customary tenure, the holder of that interest shall implement measures required to be implemented by the District Environment Committee, including measures to plant trees and other vegetation in those areas.

Under section 48, the Director-General with the approval of the Director of Forestry, may enter into any contractual arrangement with a private owner of any land on such terms and conditions as may be mutually agreed for the purposes of registering such land as forest land. The powers of the Authority include the issuance of guidelines and prescribing measures for the sustainable use of hill tops, hill slides and mountainous areas.⁶² To promote environmental justice and community participation in environmental matters, section 48 (2) prohibits the Director-General from taking any action, in respect of any forest or mountain area, which is prejudicial to the traditional interests of the indigenous communities customarily resident within or around such forest or mountain area. The general objectives of the *Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009*⁶³ (dealing with wetlands management) include, *inter alia*: 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 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.

Regulation 5(1) thereof provides for the general principles that shall be observed in the management of all wetlands in Kenya including: Wetland resources to be utilized in a sustainable manner compatible with the continued presence of wetlands and their hydrological, ecological, social and economic functions and services; Environmental impact assessment and environmental audits as required under the Act to be mandatory for all activities likely to have an adverse impact on the wetland; Special measures to promote respect for, 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; Sustainable use of wetlands to be integrated into the national and local land use plans to ensure sustainable use and management of the resources; principle of public participation in the management of wetlands; principle of international co-operation in the

⁶¹ S. 46(2), No. 8 of 1999.

⁶² S. 47(1), No. 8 of 1999.

⁶³ Legal Notice No. 19, Act No. 8 of 1999.

management of environmental resources shared by two or more states; the polluter-pays principle; the pre-cautionary principle; and public and private good.

These are some of the initiatives that highlight the existing relationship between community indigenous and cultural knowledge 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.

4. Tapping into Indigenous Knowledge as a Means to an end: Place of Indigenous Knowledge in the Sustainable Development Agenda

The 2030 Agenda for Sustainable Development Goals 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.⁶⁴

4.1 Environmental Justice and Access to Information

As already pointed out, in order to contribute to the protection of the right of every person 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.⁶⁵ 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.⁶⁶ It also obligates the State to publish and publicise any important information affecting the nation.⁶⁷ Guaranteeing access to relevant information, is imperative in facilitating access to environmental justice and enabling the communities to give prior, informed consent 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.⁶⁸ 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.⁶⁹ 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*,⁷⁰

⁶⁴ 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.

⁶⁵ Art.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.

⁶⁶ Art. 35(1).

⁶⁷ Art. 35(2).

⁶⁸ 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.

⁶⁹ Ibid.

⁷⁰ ELC Suit No 825 of 2012.

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 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. 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.

4.2 Environmental Justice and Public Participation

Meaningful involvement of people in environmental matters requires effective access to decision making processes for all, and the ability in all communities to make informed decisions and take positive actions to produce environmental justice for themselves.⁷¹ The *Vienna Declaration and Programme of Action*⁷² states that all peoples have the right of self-determination.⁷³ 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.⁷⁴ 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.⁷⁵ 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.⁷⁶

⁷¹ 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 12/7/2020].

⁷² UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

⁷³ Proclamation 1.2.

⁷⁴ 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.

⁷⁵ Ibid.

⁷⁶ Ibid, p. 4.

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.⁷⁷

The Constitution provides for participation of persons with disabilities,⁷⁸ youth,⁷⁹ minorities and marginalized groups,⁸⁰ and older members of society,⁸¹ in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments Act*,⁸² 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.⁸³

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 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 and ultimately has an adverse effect on the sustainable development agenda.

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

⁷⁷ Art. 174, Constitution of Kenya 2010.

⁷⁸ Art. 54.

⁷⁹ Art. 55.

⁸⁰ Art. 56.

⁸¹ Art. 57.

⁸² No. 17 of 2012, Laws of Kenya.

⁸³ *Ibid*, S. 87.

and involvement in the legislative and other business of Parliament and its committees.⁸⁴ The proposed law, *The Natural Resources (Benefit Sharing) Bill, 2018*, 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.⁸⁵ Every affected local community is also to enter into a local community benefit sharing agreement with the respective county benefit sharing committee.⁸⁶ 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.⁸⁷

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 exploitation of the natural resources, their appreciation of such impact is the ultimate key to winning social acceptance of these projects.⁸⁸ Indeed, 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.⁸⁹ 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.⁹⁰

Indeed, 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; and that in a democracy it is the people, not the government, that are ultimately responsible for fair use of the environment.⁹¹ Active and meaningful public participation, therefore, through such means as suggested in the indicators of procedural justice are important in enhancing community participation in realisation of the sustainable development agenda.

4.3 Benefit Sharing Arrangements

Benefit-sharing is a way of integrating the economic, social and environmental considerations in the management of natural resources.⁹² In order to protect community and individual interests over land-based resources, and facilitate benefit sharing, the *National Land Policy, 2009*, recommends

⁸⁴ Art. 118(1) (a).

⁸⁵ Clause 31 (1).

⁸⁶ Clause 32 (1).

⁸⁷ Clause 32(2).

⁸⁸ 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.

⁸⁹ Amerasinghe, M., et al, 'Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology, 2008, p.3.

Available at <http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf> [Accessed on > accessed 17 July 2020].

⁹⁰ Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, *Environmental Values*, 14(4), 483-501.

⁹¹ Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy,' OUP USA, 2005. Available at <http://philpapers.org/rec/SHREJC> Accessed on > accessed 17 July 2020.

⁹² Government of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy, p. 23, (Government Printer, Nairobi).

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.⁹³

The proposed law, *Natural Resources (Benefit Sharing) Bill*, 2018⁹⁴ 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 law, is to apply with respect to the exploitation of petroleum, natural gas, minerals, forest resources, water resources, wildlife resources and fishery resources.⁹⁵ Notably, the Bill provides for the guiding principles in 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.⁹⁶

The proposed law also proposes the establishment of a Benefit Sharing Authority,⁹⁷ with the mandate to, *inter alia*, coordinate the preparation of benefit sharing agreements between local communities and affected organizations; review, and, determine the royalties payable; identify counties that require to enter into 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 resources 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 agreements; and advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation.⁹⁸

The Bill also seeks to establish in each county with natural resources, a County Benefit Sharing Committee.⁹⁹ Benefit sharing could effectively be used to promote environmental justice among

⁹³ Ibid, p. 23.

⁹⁴ Kenya Gazette Supplement No.130 (Senate Bills No.31).

⁹⁵ Clause3.

⁹⁶ Clause4.

⁹⁷ Clause5.

⁹⁸ Clause6 (1).

⁹⁹ Clause28. The functions of the said Committees will include to: 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

communities and enhance the relationship between the government and communities, as well as among communities which in turn enhances peace in the country. A satisfied people are likely to support and even contribute in efforts towards the sustainable development agenda and are also more likely to adopt sustainable methods of production.

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 (long-term) economic benefits of sustainable utilisation, and they are willing to invest time and resources in natural resource management.¹⁰⁰

4.4 Payment for ecosystem services

One aspect of biodiversity conservation that has not been tapped by Kenyans is payment for ecosystem services. Ecosystem services refer to the value people get from ecosystems. Examples are the value of ecosystems in freshwater purification, pollination, clean air, flood control, soil stability, water conservation and climate regulation.¹⁰¹ The value of ecosystem services is estimated at more than one third of the total value of the world’s economy.¹⁰² The primary reason that ecosystem services are taken for granted is that they are deemed to be free.¹⁰³ An example of payment for ecosystem services includes the residents of Nairobi paying a certain amount of money to the communities surrounding Aberdare National Park because most of the water used in Nairobi comes from the Aberdares. This will encourage the Aberdare community to continue conserving the resources as such conservation benefits them. However, in Kenya, the value of ecosystem services rarely enters policy debates or public discussions.¹⁰⁴

4.5 Use of Community-Based Natural Resource Management (CNRM)

This is the involvement of community members and local institutions in the management of natural resources for their economic growth and development. It involves devolution of power and authority from the State to local levels. This legitimises indigenous resource uses and rights and

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.(Clause 29).

¹⁰⁰ 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 17 July 2020.

¹⁰¹ Hunter, David, James Salzman, and Durwood Zaelke. *International environmental law and policy*. Vol. 516. New York: Foundation Press, 2007, p. 916.

¹⁰² *Ibid*; Losey, J.E. & Vaughan, M., ‘The Economic Value of Ecological Services Provided by Insects,’ *BioScience*, Vol. 56, No. 4, April 2006, pp. 311-323; Costanza, R., ‘The value of the world’s ecosystem services and natural capital,’ *Nature*, Vol. 387, 15 May 1997, pp. 253-260.

¹⁰³ Hunter, David, James Salzman, and Durwood Zaelke. *International environmental law and policy*. Vol. 516. New York: Foundation Press, 2007, p. 916; Salzman, J., ‘Valuing Ecosystem Services,’ *Ecology Law Quarterly*, Vol. 24, Iss. 4, September 1997, pp.887-904.

¹⁰⁴ *Ibid*.

includes traditional values and ecological knowledge in modern resource management.¹⁰⁵ The Constitution provides that the state shall protect and enhance indigenous knowledge of biodiversity of the communities.¹⁰⁶ The use of indigenous knowledge in biodiversity conservation encourages community participation and benefits from conservation and ultimately leads to reduction in human-wildlife conflict.¹⁰⁷ The Wildlife Conservation and Management Act, 2013¹⁰⁸ (WCMA) provides for CBNRM through the recognition of community conservancies and sanctuaries.¹⁰⁹

Another opportunity under CBNRM approach is the use of incentives to encourage participation in wildlife management. Command and control approaches to wildlife management have failed to curb loss of wildlife. 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 it in the same manner they protect their private property. The WCMA now provides for incentives for wildlife management.¹¹⁰ Economic incentives such as tax exemptions and waiver of stamp duties on land relating to wildlife would go a long way in encouraging Kenyans to conserve wildlife as an alternative land use method. These incentives may also be used in management of other resources such as forests, using indigenous community knowledge especially for those communities who have traditionally relied on such forests for their livelihoods.

4.6 Dissemination of Information and Environmental Education to Communities

Agenda 21 provides 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.¹¹¹ 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. Management and development, as well as environmental protection concerns and local planning issues, should be incorporated in educational curricula and public awareness campaigns, with due regard to traditional ecological knowledge and socio-cultural values.¹¹² This is useful in promoting sustainable and inclusive sustainable resources management through empowering the local people to participate meaningfully in the same.

It is worth pointing out that while indigenous knowledge is relevant to the sustainable development agenda, information dissemination and environmental education for the communities will make them appreciate how their knowledge and experiences can fit into the sustainable development agenda for not only environmental conservation but also for betterment of their lives.

¹⁰⁵ Kellert, S.R., et al, 'Community Natural Resource Management: Promise, Rhetoric and Reality,' *Society and Natural Resources: An International Journal*, Vol.13, No.8, 2000, p.706.

¹⁰⁶ Art. 69(1) (c).

¹⁰⁷ Warren, M., 'Indigenous Knowledge, Biodiversity Conservation and Development' in Bennunet, L.A., al., (eds), *Conservation of Biodiversity in Africa: Local Initiatives and Institutional Roles* (Centre for Biodiversity, National Museums of Kenya, 1995) 93, p.96.

¹⁰⁸ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

¹⁰⁹ *Ibid*, sec. 39 & 40.

¹¹⁰ S. 70.

¹¹¹ Clause 13.22.

¹¹² Clause 17.15.

4.7 Community Participation in Climate Change Mitigation

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 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.¹¹³

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

¹¹³ Though non-binding, the Bali Principles give some recommendations that can boost efforts to achieve sustainable development. These include, inter alia: the need to reduce with an aim to eliminate the production of greenhouse gases and associated local pollutants; the rights of indigenous peoples and affected communities to represent and speak for themselves; Governments' responsibility for addressing climate change in a manner that is both democratically accountable to their people and in accordance with the principle of common but differentiated responsibilities; fossil fuel and extractive industries be held strictly liable for all past and current life-cycle impacts relating to the production of greenhouse gases and associated local pollutants; clean, renewable, locally controlled and low-impact energy resources in the interest of a sustainable planet for all living things; the right of all people, including the poor, women, rural and indigenous peoples, to have access to affordable and sustainable energy; the need for solutions to climate change that do not externalize costs to the environment and communities, and are in line with the principles of a just transition; the need for socio-economic models that safeguard the fundamental rights to clean air, land, water, food and healthy ecosystems; the rights of communities dependent on natural resources for their livelihood and cultures to own and manage the same in a sustainable manner, and avoiding the commodification of nature and its resources; recognition of the right to self-determination of Indigenous Peoples, and their right to control their lands, including sub-surface land, territories and resources and the right to the protection against any action or conduct that may result in the destruction or degradation of their territories and cultural way of life; the right of indigenous peoples and local communities to participate effectively at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation, the strict enforcement of principles of prior informed consent, and the right to say "No"; the need for solutions that address women's rights; the right of youth as equal partners in the movement to address climate change and its associated impacts; education of present and future generations, emphasising on climate, energy, social and environmental issues, while basing itself on real life experiences and an appreciation of diverse cultural perspectives; the need for we, as individuals and communities, to make personal and consumer choices to consume as little of Mother Earth's resources, conserve our need for energy; and make the conscious decision to challenge and reprioritize our lifestyles, re-thinking our ethics with relation to the environment and the Mother Earth; while utilizing clean, renewable, low impact energy; and ensuring the health of the natural world for present and future generations; and the rights of unborn generations to natural resources, a stable climate and a healthy planet.

restoration strategies are considered, from managed natural regeneration to tree planting; and continuous monitoring, learning, and adaptation are central.¹¹⁴

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.¹¹⁵ Communities can and should therefore be encouraged to utilise their indigenous knowledge and technologies in combating climate change. It has been suggested that inclusive innovations enhance the social and economic well-being of disenfranchised society members and the participatory element in innovative systems development.¹¹⁶ This is because the redistribution of resources is combined by the active participation of the marginalized poor applying participatory processes in relation to problem, conflict solution and related strategies.¹¹⁷ Communities should therefore not be left out in climate change mitigation measures as they may have some contribution to make.

4.8 Incorporation of Indigenous Knowledge in Food Production Methods

SDG Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture.¹¹⁸ In order to achieve this, the SDGs Agenda aims at ensuring that by 2030, state parties will 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.¹¹⁹

Food security depends, *inter alia*, on sustainable management of fish, forests, and wildlife since in many indigenous communities; these resources are the principal sources of protein in the diet.¹²⁰ It also highlights the fact that the traditional knowledge within indigenous communities also plays an important role in the achievement of food security for these communities and others.¹²¹

It has been argued that the interaction and cooperation between different actors facilitate learning and knowledge creation in specific socioeconomic contexts in which innovation and development processes are embedded.¹²² In addition, the impact of the context is reciprocal: it influences the capacity of individuals, institutions, sectors, regions, and countries to develop, apply, and diffuse innovations while these innovations change the context.¹²³

¹¹⁴ 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 17 July 2020.

¹¹⁵ Ibid.

¹¹⁶ Jussi S Jauhiainen and Lauri Hooli, 'Indigenous Knowledge and Developing Countries' Innovation Systems: The Case of Namibia' (2017) 1 International Journal of Innovation Studies 89.

¹¹⁷ Ibid.

¹¹⁸ 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)], Goal 2.

¹¹⁹ Ibid, SDG Goal 2.3.

¹²⁰ The Rome World Food Summit Commitment No. 3.

¹²¹ Ibid.

¹²² Jussi S Jauhiainen and Lauri Hooli, 'Indigenous Knowledge and Developing Countries' Innovation Systems: The Case of Namibia' (2017) 1 International Journal of Innovation Studies 89.

¹²³ Ibid.

As already pointed, the Constitution also obligates the State to recognise the role of science and indigenous technologies in the development of the nation.¹²⁴ 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.

It has been observed that indigenous knowledge may get lost due to the intrusion of foreign technologies and development concepts aimed at short-term gains or solutions to problems without being capable of sustaining them.¹²⁵ Thus, even as the stakeholders in the ministry of agriculture gear towards adoption of improved methods of crop and animal production such as Genetically Modified technologies, there is a need to involve communities in coming up with adoptive methods, which may include indigenous knowledge and technologies available and utilised by certain communities in certain regions.

5. Conclusion

The Constitution further creates obligations on 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; 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 utilize the environment and natural resources for the benefit of the people of Kenya.¹²⁶ Indigenous knowledge offers a viable platform for exchange of ideas between the state organs and communities in their efforts towards realisation of the sustainable development agenda.

¹²⁴ Art. 11(2) (b).

¹²⁵ SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka.

¹²⁶ Constitution of Kenya 2010, Art. 69(1).

Balancing Trade Environment and Development for Sustainability

Abstract

This paper discusses the connection between trade and environment in light of the sustainable development agenda. The author argues that the countries' efforts towards achieving sustainable development require the concerted efforts of all stakeholders including commerce and trade community. This is because the long term sustainable growth requires far-reaching changes to produce trade, capital, and technology flows that are more equitable and better synchronized to environmental imperatives. The paper thus affirms the central role that trade polices play in the quest for achieving the sustainable development agenda.

1. Introduction

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.¹ 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.² 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.³

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.⁴ 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.⁵ This is due to the fact that environmental protection is inherent in the concept of sustainable development, as is a focus on the sources of environmental problems rather than the symptoms.⁶

¹ 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 19/08/2018].

² 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 19/08/2018].

³ Ibid.

⁴ World Commission on Environment and Development, *Our Common Future*, United Nations 1987, "Report of the World Commission on Environment and Development," General Assembly Resolution 42/187, 11 December 1987, A/42/427, para. 50.

⁵ Ibid, para. 50.

⁶ Ibid, para. 50.

Trade is considered as one of the driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.⁷ 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.⁸ 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.⁹

Recalling that some of the significant goals of sustainable development are eradication of poverty and economic growth, and that it is now a recognised precondition for ensuring a long-term perspective for the economy, these two concepts, trade and sustainable development, are arguably inextricable.¹⁰ The Report of the World Commission on Environment and Development, *Our Common Future*, rightly points out that previously, responsibility for environmental matters had been placed in environmental ministries and institutions that often had little or no control over destruction caused by agricultural, industrial, urban development, forestry, and transportation policies and practices.¹¹ As such, society failed to give the responsibility for preventing environmental damage to the 'sectoral' ministries and agencies whose policies cause it. Accordingly, environmental management practices focused largely upon after-the-fact repair of damage: reforestation, reclaiming desert lands, rebuilding urban environments, restoring natural habitats, and rehabilitating wild lands.

To correct this, the World Commission on Environment and Development, therefore, suggested that the ability to anticipate and prevent environmental damage would require that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, and other dimensions.¹² Thus, long term sustainable growth would require far-reaching changes to produce trade, capital, and technology flows that are more equitable and better synchronized to environmental imperatives.¹³

The recommendation by the World Commission on Environment and Development has since seen a paradigm shift in the global approach to the relationship between trade and environment. Indeed, this shift has been reflected in many trade and economic policies, which have incorporated such

⁷ '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.

⁸ International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook*, op cit, pp. 3-4.

⁹ *Ibid*, pp. 3-4.

¹⁰ Glover, F., et al, 'Reinforcing the Links between Trade, Sustainable Development and Gender: an Overview of the Papers of the Expert Workshop,' United Nations Conference on Trade and Development. Papers prepared in support of the themes discussed at the Pre-UNCTAD X Expert Workshop on Trade, Sustainable Development and Gender (Geneva, 12-13 July 1999).

¹¹ Report of the World Commission on Environment and Development, *Our Common Future*, op cit., para. 46.

¹² *Ibid*, para. 46.

¹³ *Ibid*. para. 52.

issues as the concept of internalisation of environmental costs as an incentive for the states and multinationals to be conscious of environmental matters in their business transitions. The concept of internalisation of environmental costs implies that market prices should reflect the environmental costs of the production and use of a product in terms of natural resource utilisation, pollution, waste generation, consumption, disposal and other factors.¹⁴ This is believed to be a focal point of environmental economics.¹⁵

This paper generally discusses the connection between trade and environment in light of the sustainable development agenda. While it is beyond the scope of this paper to discuss in detail the particular trade measures that countries should or have been applying, the same have been highlighted with the recognition that they are so deep and complicated that they can form the basis for further research.

2. International Trade as a Tool for Sustainable Development

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.¹⁶ 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.¹⁷ 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 2020.¹⁸ 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.¹⁹ As such, it seeks to continue to promote a universal, rules-based, open,

¹⁴ OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., para. 33.

¹⁵ Ibid.

¹⁶ 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).

¹⁷ Ibid, para. 40.

¹⁸ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, op cit., para. 17.11.

¹⁹ 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 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.

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.²⁰

The international community came together in July 2015 for the Third International Conference on Financing for Development, held in Addis Ababa, Ethiopia, and agreed on a set of concrete policies and actions for enhancing the effectiveness of trade as a means of implementation of sustainable development. The Addis Ababa Action Agenda, the resultant document, states²¹: “With appropriate supporting policies, infrastructure and an educated work force, trade can also help to promote productive employment and decent work, women’s empowerment and food security, as well as a reduction in inequality, and contribute to achieving the sustainable development goals.”²²

It also stated that the Heads of State would continue to promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organisation (WTO), as well as meaningful trade liberalisation.²³

It has been suggested that equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer²⁴, 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.²⁵ 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.²⁶

International trade comprises so many issues that the international community has to address the same in various forums, sometimes only handling only one of them. For instance, the participants of the *United Nations Conference on Sustainable Development - or Rio+20*, which took place in Rio de Janeiro, Brazil on 20-22 June 2012,²⁷ emphasised that well-designed and managed tourism

²⁰ Ibid, para. 68.

²¹ ‘Trade Policymaking and the Sustainable Development’ Trading into Sustainable Development: Trade, Market Access, and the Sustainable Development Goals, Chapter I (United Nations, 2016).

²² Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) (A/RES/69/313), Resolution adopted by the General Assembly on 27 July 2015, para. 79.

²³ Ibid.

²⁴ 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.”

²⁵ 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 19/08/2018].

²⁶ Ibid, p.10.

²⁷ The Rio+20 Conference had two themes: a green economy in the context of sustainable development and poverty eradication; and the institutional framework for sustainable development (World Trade Organisation, ‘Harnessing Trade for Sustainable Development and a Green Economy,’ p. 2.

can make a significant contribution to the three dimensions of sustainable development, has close linkages to other sectors and can create decent jobs and generate trade opportunities.²⁸ Further, they recognised the need to support sustainable tourism activities and relevant capacity building that promote environmental awareness, conserve and protect the environment, respect wildlife, flora, biodiversity, ecosystems and cultural diversity, and improve the welfare and livelihoods of local communities by supporting their local economies and the human and natural environment as a whole.²⁹ As a result, participants called for enhanced support for sustainable tourism activities and relevant capacity-building in developing countries in order to contribute to the achievement of sustainable development.³⁰

Further, in order to promote trade in legally harvested forest products, the Rio +20 conference participants called for increased efforts to strengthen forest governance frameworks and means of implementation, in accordance with the non-legally binding instrument on all types of forests, in order to achieve sustainable forest management. To this end, they committed to improve the livelihoods of people and communities by creating the conditions needed for them to sustainably manage forests, including by strengthening cooperation arrangements in the areas of finance, trade, transfer of environmentally sound technologies, capacity-building and governance, as well as by promoting secure land tenure, particularly with regard to decision-making and benefit-sharing, in accordance with national legislation and priorities.³¹

Based on the foregoing, it is arguable that participating in international trade can widen the economic space needed to create new job opportunities, promote efficient use of resources, increase access to food, energy and basic services, and improve productive, managerial and entrepreneurial capacity required for economic diversification, growth and development.³²

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.³³

Available at https://www.wto.org/english/res_e/publications_e/rio20_e.htm [Accessed on 19/08/2018].

²⁸ United Nations, *The Future We Want*, A/RES/66/288, Sixty-sixth session Agenda item 19, Resolution adopted by the General Assembly on 27 July 2012, para. 130.

²⁹ *Ibid.*

³⁰ *Ibid.* As one of the means of promoting sustainable tourism, RIO +20 participants further encouraged the promotion of investment in sustainable tourism, including ecotourism and cultural tourism, which may include creating small and medium sized enterprises and facilitating access to finance, including through microcredit initiatives for the poor, indigenous peoples and local communities in areas with high ecotourism potential. In this regard, they underlined the importance of establishing, where necessary, appropriate guidelines and regulations, in accordance with national priorities and legislation, for promoting and supporting sustainable tourism (para. 131).

³¹ *Ibid.*, para. 193.

³² *Ibid.*, p. 10.

³³ *Ibid.*, p.10.

3. The World Trade Organization (WTO), Trade and Sustainable Development

It is noteworthy that despite the major impact of trade and investment on economic activities that impact the environment – and responses to related problems like climate change – there is no single institution at the global level tasked with ensuring the mutual supportiveness of the international trade regime with sustainable development.³⁴ Most aspects of trade – from intellectual property rights to agricultural policy – are addressed by different international processes, such as multilateral environmental agreements including the UN Framework Convention on Climate Change (UNFCCC), organizations like the WTO or the International Maritime Organization (IMO), and UN processes and institutions like the UN Environment Programme (UNEP), the UN Development Programme (UNDP) and the UN Food and Agriculture Organization (FAO), with varying degrees of attention to the links with sustainability.³⁵ However, considering that the other bodies deal with a whole range of issues, unlike WTO which is mainly involved in trade matters, this paper does not dwell much on the work of the other institutions as far as international trade and sustainable development matters are concerned but instead singles out WTO.

The World Trade Organization is the international body dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible, with a level playing field for all its members. Sustainable development is one of the objectives of the WTO, as reflected in the Preamble of the Marrakesh Agreement which establishes the WTO, putting it at the intersection of trade and sustainable development.³⁶ Sustainable development and protection and preservation of the environment complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations.³⁷

The WTO notes that while there is no specific agreement dealing with the environment, under WTO rules members can adopt trade-related measures aimed at protecting the environment provided a number of conditions to avoid the misuse of such measures for protectionist ends are fulfilled. The WTO contributes to protection and preservation of the environment through its objective of trade openness, through its rules and enforcement mechanism, through work in different WTO bodies, and through ongoing efforts under the Doha Development Agenda. The Doha Agenda includes specific negotiations on trade and environment and some tasks assigned to the regular WTO Trade and Environment Committee.³⁸ The Doha Round was a round of trade

³⁴ IISD, 'A Brief History of Trade, Finance and Sustainable Development.'

Available at http://www.iisd.ca/process/trade_invest-intro.htm [Accessed on 19/08/2018].

³⁵ Ibid.

³⁶ 'Harnessing Trade for Sustainable Development and a Green Economy' (World Trade Organization, 2012); Marrakesh Agreement Establishing the World Trade Organization" "The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...."

³⁷ World Trade Organization, 'Trade and environment,'

available at https://www.wto.org/english/tratop_e/envir_e/envir_e.htm [Accessed on 19/08/2018].

³⁸ Ibid. The Trade and Environment Committee is the standing forum dedicated to dialogue between governments on the impact of trade policies on the environment, and of environment policies on trade. Created in 1995, the Committee has followed a comprehensive work programme. Under the Doha Development Agenda, the regular committee is also looking at the effects of environmental measures on

negotiations among the WTO membership. Its aim was to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covers about 20 areas of trade. The Round is also known semi-officially as the *Doha Development Agenda* as a fundamental objective is to improve the trading prospects of developing countries.³⁹

Thus, it has been contended WTO aims to make trade policies and environmental policies mutually supportive and to promote their compatibility so as to contribute to sustainable development. The World Trade Organization's description of sustainable development equates the pillar of economic development to trade liberalisation⁴⁰. It has asserted that the goals of sustainable development and trade liberalisation are mutually supportive. Some environmental and social welfare advocates have disputed this mutuality, as in their view, trade liberalisation creates a race to the bottom in terms of standards, by globalizing markets and encouraging more exploitation of resources.⁴¹ However, this position has been challenged on the ground that WTO rules do not prevent countries from adopting environmental policies; instead, they allow complementary trade measures that are conducive to effective implementation of domestic environmental policies, but aim to prevent such measures from creating unnecessary obstacles to trade.⁴² They are seen as the guardian against protectionism and discrimination in international trade.⁴³

market access, the intellectual property agreement and biodiversity, and labeling for environmental purposes. (Available at

https://www.wto.org/english/tratop_e/envir_e/envir_e.htm [Accessed on 19/08/2018].

³⁹ Doha Round of trade negotiations (Doha Development Agenda).

Available at https://www.wto.org/english/tratop_e/dda_e/dda_e.htm [Accessed on 19/08/2018].

In the Doha Round, WTO members are negotiating certain aspects of the link between trade and the environment, particularly the relationship between the WTO's agreements and those of other agencies, and market access for environmental goods and services. These talks take place in "Special Sessions" of the Trade and Environment Committee.

⁴⁰ Lydgate, E.B., 'Sustainable Development in the WTO: From Mutual Supportiveness to Balancing,' *World Trade Review*, Vol. 11, No. 4, 2012, pp. 621-639.

⁴¹ *Ibid.*

⁴² UNCTAD, 'Trade and Environment in the Multilateral Trading System,' Module 2, TradeForTrade 2000, para. 191. Available at

<http://www.oas.org/dsd/Toolkit/Documentos/ModuleIIIIdoc/Trade%20and%20Environment%20in%20the%20Multilateral%20Trading%20System.pdf> [Accessed on 19/08/2018]. For instance, in the case of United States — Import Prohibition of Certain Shrimp and Shrimp Products, the "shrimp-turtle" case, (WTO case Nos. 58 and 61, Ruling adopted on 6 November 1998. Case brought by India, Malaysia, Pakistan and Thailand), the Appellate Body's ruling recognized that under WTO rules governments have every right to protect human, animal or plant life and health and to take measures to conserve exhaustible resources. The WTO does not have to "allow" them this right. Initially, the US lost the case because it applied its import measures in a discriminatory manner; it then revised its measures to introduce flexibilities in favour of developing countries. The Appellate Body subsequently concluded that the US ban was consistent with WTO rules. This was also the position in United States — Standards for Reformulated and Conventional Gasoline, (WTO case Nos. 2 and 4, Ruling adopted on 20 May 1996. Case brought by Venezuela and Brazil.) where it was affirmed that the US had every right to adopt the highest possible standard to protect its air quality so long as it did not discriminate against foreign imports. The US lost the case because it discriminated — its requirement on domestic producers was less stringent than that imposed on imported gasoline (in this case from Venezuela and Brazil). (WTO, 'Environmental disputes in GATT/WTO,' available at https://www.wto.org/english/tratop_e/envir_e/edis00_e.htm [Accessed on 19/08/2018])

⁴³ United Nations Conference on Trade and Development, Towards an enabling multilateral trading system for inclusive and sustainable development, Trade and Development Commission Multi-year Expert Meeting on Enhancing the Enabling Economic Environment at All Levels in Support of Inclusive and Sustainable Development, Second session Geneva, 8–9 December 2014, Item 3 of the provisional agenda, Note by the

The relationship between trade liberalisation and economic development is arguably the most important common area of policy concern for both trade and sustainable development.⁴⁴ Trade liberalisation is one of the key goals of WTO, under the working hypothesis that trade liberalisation removes restrictions in the market, efficiently allocates resources and contributes to their optimal use. This results in increased production and income, promotes economic development, and makes more resources available for economic development, environmental management and improving social conditions, thereby contributing to sustainable development.⁴⁵

Generally, trade liberalisation can have both positive and negative effects on sustainable development.⁴⁶ To maximize the positive contribution from liberalisation, it is necessary to have increased environmental safeguards, as lack of adequate environmental safeguards leads to environmental deterioration, which is likely to be on a massive scale.⁴⁷ Another positive effect is the increased revenues it brings which is essential for sustainable development.

Trade liberalisation has not, however, benefitted all regions of the world or all layers of society in an equal manner.⁴⁸ One of the concerning developmental effects of trade expansion is that international trade may have strong unequalizing tendencies, both between and within nations.⁴⁹ Agenda 21 recommends that for developing countries to benefit from the liberalisation of trading systems, they should implement the following policies, as appropriate: Create a domestic environment supportive of an optimal balance between production for the domestic and export markets and remove biases against exports and discourage inefficient import-substitution; and promote the policy framework and the infrastructure required to improve the efficiency of export and import trade as well as the functioning of domestic markets.⁵⁰ Further, it recommends that the following policies should be adopted by developing countries with respect to commodities consistent with market efficiency: expand processing, distribution and improve marketing practices and the competitiveness of the commodity sector; diversify in order to reduce dependence on commodity exports; and reflect efficient and sustainable use of factors of production in the formation of commodity prices, including the reflection of environmental, social and resources costs.⁵¹

It has been contended that there is an alarming split between industrialized countries who are successful participants of global trade and developing countries, who are largely excluded from

UNCTAD secretariat, TD/B/C.I/MEM.5/5, para. 48. Available at http://unctad.org/meetings/en/SessionalDocuments/cimem5d5_en.pdf [Accessed on 19/08/2018].

⁴⁴ Gary P. Sampson, 'The WTO and Sustainable Development' p. 3.

⁴⁵ Ibid.

⁴⁶ OECD Roundtable on Sustainable Development, Fourth Meeting, Paris 27-28 June 2008, 'Trade Liberalisation and Sustainable Development' Background Paper.

⁴⁷ The World Trade Organization and Sustainable Development: An Independent Assessment. A Report by the International Institute for Sustainable Development, 1996.

⁴⁸ 'The Link between Trade and Development: What Role for the EU Trade Policy?' AIF Conference, Christiansborg, 12 September 2000.

⁴⁹ Joekes, S., 'A Gender-Analytical Perspective on Trades and Sustainable Development' op cit.

⁵⁰ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, para. 2.13.

⁵¹ Ibid, para. 2.14.

it.⁵² There is, thus, a need to take this disparity into account as we consider the steps to be taken by various countries towards sustainable development.

Trade is deemed instrumental for growth and development under appropriate conditions. Trade provides a means to overcome constraints posed by small domestic markets and allows countries to access larger external markets, as well as skills, technology and capital, which in turn enable a better use of productive resources to catalyse structural transformation.⁵³

It has been argued that the links between trade and the environment are multiple, complex and important. Further, trade liberalisation as such is neither good nor bad for the environment. Its effects on the environment depend on the extent to which environment and trade goals can be made complementary and mutually supportive. A positive outcome requires appropriate supporting social, economic and environmental policies at the national and international levels.⁵⁴

It has been observed that there is no “one-size-fits-all” prescription to create the appropriate policy environment. In making the shift to sustainable development considerations, the approach countries will take will depend on their institutions, level of development and resource endowments, and particular environmental challenges they face.⁵⁵ While environmental standards set in developed countries are of keen interest to developing countries, they are hard to know, hard to meet, sometimes unreasonable, but all the same, imperative to export success. They end up frustrating sustainable development in developing countries.⁵⁶

There is a difference in agenda between developed and developing countries. With regard to trade, developed countries’ agenda is to establish or maintain worldwide free trade, while that of developing countries’ is to gain access to new markets and to build capacity for stronger participation in international trade.⁵⁷ With regard to sustainable development, developed countries seek to ensure global environmental stability while developing countries seek to ensure development and avoid further destruction of local environments.⁵⁸

One of the rules of international trade is that countries cannot discriminate against the products of other countries on the basis of how those products were made. Regulating Process and Production Methods (PPMs) gives governments an opportunity to protect their industries unfairly against foreign competition.⁵⁹ PPMs specify how products are to be produced and what kinds of impact

⁵² ‘The Link between Trade and Development: What Role for the EU Trade Policy?’ op cit.

⁵³ 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 19/08/2018].

⁵⁴ International Institute for Sustainable Development & United Nations Environment Programme, Trade and Green Economy: A Handbook op cit., p.3.

⁵⁵ ‘Harnessing Trade for Sustainable Development and a Green Economy’ (World Trade Organization) 2012.

⁵⁶ Cosbey, A., ‘Lessons Learnt on Trade and Sustainable Development: Distilling Six Years of Research from the Trade Knowledge Network,’ International Institute for Sustainable Development, 2005.

⁵⁷ Glover, F., et al, ‘Reinforcing the Links between Trade, Sustainable Development and Gender: an Overview of the Papers of the Expert Workshop,’ op cit.

⁵⁸ Ibid.

⁵⁹ International Institute for Sustainable Development & United Nations Environment Programme, Trade and Green Economy: A Handbook, (International Institute for Sustainable Development, Geneva, 2014).

they may have on the environment. Applied to traded goods, they have been accused of amounting to the importing country regulating activities that take place outside its borders.⁶⁰ From the environmental perspective, how a good is made is of central importance. From a developing country perspective, dictating how a good is produced may be seen as an intrusion on sovereignty.⁶¹

In environmental terms, the essence of sustainable development is to move from the old style of cleaning up environmental problems after they occur to the new style of closed cycle facilities, cleaner production concepts and waste minimisation. Most countries and consumers will want to reward companies who produce according to these new methods.⁶²

This, may however, create the situation where standards imposed might be inappropriate for foreign investors. Another argument against PPMs is that developing countries have different social priorities than developed states, such as a higher concern for clean water than for global warming.⁶³

It is noteworthy that developing countries face many challenges especially as far as regulation of international trade in light of environmental degradation is concerned. Multinational Corporations are arguably important players in the quest for sustainable development in international trade matters. The Report of the World Commission on Environment and Development pointed that transnationals play an important role as owners, as partners in joint ventures, and as suppliers of technology in the mining and manufacturing sectors in many developing countries, especially in such environmentally sensitive areas as petroleum, chemicals, metals, paper, and automobiles. They also dominate world trade in many primary commodities.⁶⁴ There is, thus, a need to hold them accountable in their activities in a bid to achieve the right equilibrium between international trade and sustainable development agenda. Considering that many of the developing countries may not have an effective framework to contain these multinationals, this is where the multilateral trading system comes in to fill in the gaps in the regulatory framework especially with regards to environmental sustainability.

Agenda 21 points out that international cooperation in the environmental field is growing, and in a number of cases trade provisions in multilateral environment agreements have played a role in tackling global environmental challenges. Trade measures have thus been used in certain specific instances, where considered necessary, to enhance the effectiveness of environmental regulations for the protection of the environment.⁶⁵ Such regulations should address the root causes of

⁶⁰ Ibid.

⁶¹ Halle, M., 'WTO and Sustainable Development' (A chapter in "The WTO and East Asian Regional Integration").

⁶² Runnals, D., 'Trade and Sustainable Development- the Emerging Issues' Policy Matters Issue no. 2, Spring 1998.

⁶³ International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook*, op cit.

⁶⁴ Report of the World Commission on Environment and Development, *Our Common Future*, op cit., chapter 3, para. 58.

⁶⁵ For Instance, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249; 993 UNTS 243) is an international agreement which aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival by regulating trade in such animals and plants (e.g. Elephant tusks). Further, in the US—Gasoline case (, the Appellate Body stated as follows (WTO Appellate Body Report, DSR 1996, p. 28): "It is of some importance that the Appellate Body

environmental degradation so as not to result in unjustified restrictions on trade. The challenge is to ensure that trade and environment policies are consistent and reinforce the process of sustainable development. However, account should be taken of the fact that environmental standards valid for developed countries may have unwarranted social and economic costs in developing countries.⁶⁶

During the *United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992*, some of programme areas that led to the adoption of Agenda 21 were promoting sustainable development through trade Basis for action; Making trade and environment mutually supportive Basis for action; and encouraging economic policies conducive to sustainable development, amongst others. Agenda 21 also points out that economic policies of individual countries and international economic relations both have great relevance to sustainable development.⁶⁷ It also recommends that the international community should aim at finding ways and means of achieving a better functioning and enhanced transparency of commodity markets, greater diversification of the commodity sector in developing economies within a macroeconomic framework that takes into consideration a country's economic structure, resource endowments and market opportunities, and better management of natural resources that takes into account the necessities of sustainable development.⁶⁸ Further, governments should strive to meet the following objectives, through relevant multilateral forums, including General Agreement on Tariffs and Trade (GATT)⁶⁹, United Nations Conference on Trade and Development (UNCTAD) and other international organizations: to make international trade and environment policies mutually supportive in favour of sustainable development; to clarify the role of GATT, UNCTAD and other international organizations in dealing with trade and environment -related issues, including, where

point out what this does not mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Art. XX of the General Agreement contains provisions designed to permit important state interests—including the protection of human health, as well as the conservation of exhaustible natural resources—to find expression...’; See also GATT Panel Report, United States – Restrictions on Imports of Tuna, DS29/R, 16 June 1994, unadopted. The Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement. The Panel observed that the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction. The Panel therefore had to resolve whether the contracting parties, by agreeing to give each other in Art. XX the right to take trade measures necessary to protect the health and life of plants, animals and persons or aimed at the conservation of exhaustible natural resources, had agreed to accord each other the right to impose trade embargoes for such purposes. (para. 5.4.2).

⁶⁶ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, para. 2.20.

⁶⁷ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, para. 2.1.

⁶⁸ Ibid, para. 2.11.

⁶⁹ The General Agreement on Tariffs and Trade (GATT) was a multilateral agreement regulating international trade. It was created in 1948 and lasted until 1993 when the World Trade Organization (WTO) was formed as a replacement for GATT in 1995. GATT went out of existence with the formal conclusion of the Uruguay Round on April 15, 1994. Its principles and the many trade agreements reached under its auspices were adopted by the WTO. (<https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade>). It is worth mentioning that the original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994. World Trade Organisation, ‘Uruguay Round Agreement General Agreement On Tariffs And Trade 1994,’ available at https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm [Accessed on 19/08/2018].

relevant, conciliation procedure and dispute settlement; and to encourage international productivity and competitiveness and encourage a constructive role on the part of industry in dealing with environment and development issues.⁷⁰

4. United Nations Conference on Trade and Development

UNCTAD is a permanent intergovernmental body established by the United Nations General Assembly in 1964, with its headquarters located in Geneva, Switzerland, and have offices in New York and Addis Ababa.⁷¹ UNCTAD is part of the UN Secretariat and it reports to the UN General Assembly and the Economic and Social Council but have their own membership (194 members as at 2015), leadership, and budget.⁷²

Working at the national, regional, and global level, UNCTAD's efforts are aimed to help countries to: diversify economies to make them less dependent on commodities; limit their exposure to financial volatility and debt; attract investment and make it more development friendly; increase access to digital technologies; promote entrepreneurship and innovation; help local firms move up value chains; speed up the flow of goods across borders; protect consumers from abuse; curb regulations that stifle competition; and adapt to climate change and use natural resources more effectively.⁷³

UNCTAD's work on harnessing international trade in promoting sustained growth and inclusive development includes as a key aspect, support to developing countries in taking advantages of emerging opportunities for trade associated with the protection, promotion and preservation of the environment and sustainable development objectives generally, while minimizing potential adverse impacts.⁷⁴ It has been engaging in initiatives that are meant to achieve its objectives. For instance, UNCTAD launched the BioTrade Initiative in 1996 and it has been promoting sustainable BioTrade⁷⁵ in support of the objectives of the Convention on Biological Diversity. Since 2003 the BioTrade Initiative has also hosted the BioTrade Facilitation Programme (BTFP) which focuses on enhancing sustainable bio-resources management, product development, value adding processing and marketing. The BTFP complements the UNCTAD BioTrade Initiative activities.⁷⁶ In 2015, UNCTAD launched the third phase of the BioTrade Facilitation Programme, which helps developing countries to strengthen their institutional capacity and policy frameworks.⁷⁷

⁷⁰ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, para. 2.21.

⁷¹ UNCTAD, (ECOSOC res. 917 (XXXIV) OF 1962 & RES 1995 (XIX) (1964) 'About UNCTAD,' available at <http://unctad.org/en/Pages/aboutus.aspx> [Accessed on 19/08/2018].

⁷² Ibid.

⁷³ Ibid.

⁷⁴ UNCTAD, 'Trade, Environment, Climate Change and Sustainable Development,' available at <http://unctad.org/en/Pages/DITC/Trade-and-Environment.aspx> [Accessed on 19/08/2018].

⁷⁵ BioTrade refers to those activities of collection, production, transformation, and commercialization of goods and services derived from native biodiversity under the criteria of environmental, social and economic sustainability. [UNCTAD, 'About BioTrade,' available at <http://unctad.org/en/Pages/DITC/Trade-and-Environment/BioTrade.aspx> [Accessed on 19/08/2018].

⁷⁶ Ibid.

⁷⁷ UNCTAD, 'UNCTAD Annual Report 2015: Delivering On A Sustainable Agenda,' (UNCTAD, Geneva, 2015), p. 29. Available at http://unctad.org/en/PublicationsLibrary/dom2016d1ipub_en.pdf [Accessed on 19/08/2018].

UNCTAD observes that biodiversity is the source of many products and services utilized by society and its sustainable use is thus fundamental for long-term sustainable development. They also highlight the fact that natural resources are located mainly in rural areas, where over 70 per cent of the world's poor live and directly depend on these resources to cover 90 per cent of their needs in terms of food, fuel, medicine, shelter and transportation. As such, the BioTrade Initiative of the United Nations Conference on Trade and Development (UNCTAD) seeks to generate additional economic opportunities and income through the sustainable commercialization of biodiversity-based products and services. BioTrade encompasses activities ranging from the production to the sale of products and services derived from native biodiversity. Its implementation is based on compliance with a set of environmental, economic and social sustainability criteria aimed at generating economic growth and sustainable livelihoods for rural populations while conserving biodiversity.⁷⁸

Another laudable initiative by UNCTAD, in collaboration with the UN Global Compact, the UN Environment Program Finance Initiative (UNEP FI), and the Principles for Responsible Investment (PRI), is the Sustainable Stock Exchanges (SSE) initiative which is a peer-to-peer learning platform for exploring how exchanges, in collaboration with investors, regulators, and companies, can enhance corporate transparency – and ultimately performance – on ESG (environmental, social and corporate governance) issues and encourage sustainable investment.⁷⁹

The participating stock exchanges commit to sustainability in their markets. They make a voluntary public commitment to promote improved ESG disclosure and performance among listed companies.⁸⁰ SSE works with all of its Partner Exchanges through dialogue, capacity building and research to continue the momentum and to promote sustainable and transparent capital markets worldwide.⁸¹

Nairobi Securities Exchange (NSE) is also a member of SSE. Kenyan private sector is already taking advantage of this initiative, with reports that Kenyan bankers are working to develop a Green Bonds (GBs) Market in collaboration with the NSE.⁸² A GB is a debt instrument that is issued to raise capital in support of environmental and climate related projects. This has been commended as one of the ways that can enable Kenya transition to low carbon development and climate resilient growth.⁸³

The highest decision-making body of UNCTAD is the quadrennial conference, at which member States make assessments of current trade and development issues, discuss policy options and formulate global policy responses.⁸⁴ The conference also sets the organization's mandate and work

⁷⁸ UNCTAD, Training Manual on Developing Joint BioTrade and REDD+ Projects, UNCTAD/DITC/TED/2015/1. Available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1558> [Accessed on 19/08/2018].

⁷⁹ Sustainable Stock Exchanges (SSE) Initiative, 'About the Sustainable Stock Exchanges (SSE) initiative,' available at <http://www.sseinitiative.org/about/> [Accessed on 19/08/2018].

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Nyandika P., 'Green Bonds Value in Financial Investments,' The Standard, Tuesday, September 13, 2016, p. 15 (The Standard Group, Nairobi, 2016).

⁸³ Ibid.

⁸⁴ UNCTAD, 'UNCTAD Conferences,' available at

priorities, and it is a subsidiary organ of the United Nations General Assembly. The conferences serve an important political function: they allow intergovernmental consensus building regarding the state of the world economy and development policies, and they play a key role in identifying the role of the United Nations and UNCTAD in addressing economic development problems.⁸⁵

The member States of the United Nations Conference on Trade and Development (UNCTAD), gathered in Nairobi from 17 to 22 July 2016 for the fourteenth session of the Conference (UNCTAD XIV), under the theme “From decision to action: Moving towards an inclusive and equitable global economic environment for trade and development”, resulted in the Nairobi Consensus document, known as *the Maaifikiano*.⁸⁶ The conference resulted in concrete progress including the launch of a new e-trade initiative, the first UN statistical report on the Sustainable Development Goals (SDGs) indicators, the launch of a multi-donor trust fund on trade and productive capacity, and the commitment of more than 90 countries for a roadmap on fisheries subsidies.⁸⁷

This is one of the commendable initiatives of UNCTAD that are meant to promote sustainable development, making this body an important player in promoting fair and environmentally conscious trade practices for sustainable development. These initiatives are commendable especially because they can go a long way in enhancing technology transfer efforts in trade matters, necessary for sustainable development.

5. Conclusion

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.⁸⁸ 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

<http://unctad.org/en/Pages/Meetings/UNCTAD-Conferences.aspx> [Accessed on 19/08/2018].

⁸⁵ Ibid.

⁸⁶ UNCTAD, Nairobi Maaifikiano, ‘From decision to action: Moving towards an inclusive and equitable global economic environment for trade and development,’ Fourteenth session Nairobi, 17–22 July 2016, TD/519/Add.2, 5 September 2016. The Document states, inter alia, ‘in moving from decisions to actions, UNCTAD should undertake the following actions: (a) Give due account to cross-cutting issues such as good governance at all levels, freedom, peace and security, respect for human rights, including the right to development, gender equality and women’s empowerment, youth and an overall commitment to just and democratic societies, which are essential to all countries to attain sustainable and equitable growth and development; (b) Continue its efforts in all its work to mainstream cross-cutting issues of gender equality and the empowerment of women, and the promotion of sustainable development and full and productive employment; (c) Continue and strengthen its engagement with Governments, in particular those of developing countries, and all relevant stakeholders including civil society, academia and the private sector; and (d) Continue its efforts to enhance its efficiency, effectiveness, transparency and accountability, including through effective results-based management and ensuring a member State-driven process through the intergovernmental machinery. (para. 14).

⁸⁷ United Nations Conference on Trade and Development, ‘Negotiators at UNCTAD14 reach consensus, strengthen UNCTAD work programme,’ 22 July 2016. Available at <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1301> [Accessed on 19/08/2018].

⁸⁸ The World Trade Organization and Sustainable Development: An Independent Assessment. A Report by the International Institute for Sustainable Development, 1996.

policy.⁸⁹ The impact of environment policies on trade depends on the amount and frequency of the transaction, conditioned by the degree of trade liberalisation.⁹⁰

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.⁹¹

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.⁹²

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.⁹³ Environment, trade and development are clearly linked. An integrated approach that fully incorporates environmental concerns, fair trade and sustainable development is desirable.

⁸⁹ Timbur, M. & Pralea, S., 'International Trade – Environment' Relationship in the Context of Sustainable Development,' CES Working Papers.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Report of the World Commission on Environment and Development, *Our Common Future*, op cit., chapter 2, para. 79.

⁹³ '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.

Achieving the Right to Food for Sustainable Development in Kenya

Abstract

Food and nutrition security for the poor is an important step towards achieving sustainable development and national development. A poor and hungry people cannot meaningfully participate in national economic development. This also affects human dignity which is considered key for self-determination. This paper discusses the challenges affecting the realisation of the right to food for the Kenyan people and especially the urban poor. It offers practical recommendations on how the country can become food secure through the diverse and concerted efforts of all stakeholders.

1. Introduction

The main aim of this paper is to discuss the place of right to food security in law and the practical ways in which the right to food can be actualized for the Kenyans and especially the urban poor communities in Kenya as one of the ways of achieving the sustainable development agenda. This paper examines the international and national legal framework regarding the right to food, and the potential for the current national policy, legal and institutional framework on food security to achieve the right to food as guaranteed in the Constitution of Kenya 2010. The paper also offers a background on the justiciability of the right to food as a human right and the various elements of this right as envisaged by various writers and the international legal instruments on the right to food.

1.1 Definition and Elements of Food Security

The World Bank defines food security to mean access by all people at all times to adequate food for an active healthy life, and entails both the availability of food and the ability of all members to have access to adequate amount of food.¹ This definition is important to this discussion as it captures not only an element of availability of food but also the continued ability of people to fend for themselves. At the household level, household food security has been defined as a household having assured sets of entitlement from food production, cash, income, reserves of food assets and/or government assistance programmes such as in times of need they will be able to maintain sufficient nutritional intake for physical well-being.²

According to the World Food Programme, people are considered food secure when they have availability and adequate access at all times to sufficient, safe, nutritious food to maintain a healthy and active life.³ Furthermore, the World Food Programme associates food security with the following three main elements: - Food availability: food must be available in sufficient quantities and on a consistent basis. It considers stock and production in a given area and the capacity to bring in food from elsewhere, through trade or aid; Food access: people must be able to regularly acquire adequate quantities of food, through purchase, home production, barter, gifts, borrowing

¹ Reutlinger, S. and Pellekaan, J.V.H., *Poverty and Hunger: Issues and options for food security in developing countries*, (The World Bank, 1986).

² Ngwira, F. and Majawa, F., "Disseminating Agricultural Information Services To Farmers For Attaining Food Security In Zombwe Extension Planning Areas (EPA) Mzuzu Agricultural Development Division (MZADD) Mzimba, Malawi," pp. 597-615, at p. 598.

³ World Food Programme, "What is food security?" available at <https://www.wfp.org/node/359289> [Accessed on 15/07/2018].

or food aid; and Food utilization: consumed food must have a positive nutritional impact on people. It entails cooking, storage and hygiene practices, individuals' health, water and sanitations, feeding and sharing practices within the household.⁴

According to the UN Commission on Economic, Social and Cultural Rights, the concept of *adequacy* is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11 of the Covenant.⁵ The notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations. Thus, the precise meaning of “adequacy” is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while “sustainability” incorporates the notion of long-term availability and accessibility.⁶

The Committee considers that the core content of the right to adequate food implies: the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.⁷

Dietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breastfeeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.⁸

Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.⁹

⁴ Ibid.

⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁶ Para. 7, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁷ Para. 8, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁸ Para. 9, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁹ Para. 10, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

Cultural or consumer acceptability implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.¹⁰

Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.¹¹

Accessibility encompasses both economic and physical accessibility:¹²

Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

The foregoing elaboration by the Commission therefore means that if any of the above elements is missing, then the right to food security cannot be said to have been achieved.

2. The Right to Food as a Human Right

Within the international law legal framework on human rights, the right to food is classified as part of the economic, social and cultural rights, popularly referred to as the second-generation rights, and specifically, they are enshrined in the *International Covenant on Economic, Social and Cultural Rights*¹³. Second-generation rights are also considered as rights which require affirmative government action for their realisation. They are also often styled as group rights or collective rights, in that they pertain to the wellbeing of whole societies.¹⁴ However, it must be pointed out that while it is not within the scope of this paper to discuss all the classifications of the international

¹⁰ Para. 11, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

¹¹ Para. 12, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

¹² Para. 13, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

¹³ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹⁴ Ruppel, O.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), pp.101-120 at p.102.

human rights in detail, these rights are interdependent, as affirmed in the international principles of human rights and are all geared towards ensuring human wellbeing.¹⁵ For instance, the right to self-determination¹⁶ and the right to a healthy environment are both important in realisation of economic, social and cultural rights, and especially the right to food. This interdependence was also affirmed by in the expansive definition given to the right to life by the Supreme Court of Pakistan in its decision in *Zia –v- Wapda PLD*¹⁷, where the Supreme Court of Pakistan stated with respect to the provisions of section 9 of the Pakistan Constitution that ‘no person shall be deprived of life or liberty except in accordance with the law’: “*The Constitution guarantees dignity of man and also right to ‘life’ under Article 9, and if both are read together, the question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment*” (emphasis added).

The argument that the right to life includes the right to livelihood was also affirmed in the definition of the right to life given in *Peter K. Waweru –v- Republic, High Court*¹⁸. Furthermore, the Court in *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*¹⁹, quoted with approval the United Nations Human Rights Committee in its General Comment 6 on the right to life adopted on 27 July 1982 which observed that the right to life as guaranteed in the first paragraph of Article 6 of the International Covenant on Civil and Political Rights has been too often narrowly interpreted. It stated that the expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States take all possible measures to reduce infant mortality and to increase life expectancy, especially in *adopting measures to eliminate malnutrition and epidemics* (Emphasis added).

2.1 International Legal and Institutional Framework on Right to Food

The *Universal Declaration of Human Rights (1948)*, (UDHR) recognises the right to food as a fundamental human right. Article 25 thereof provides that; “*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood circumstances beyond his control*” (Emphasis added).

The *International Covenant on Economic, Social and Cultural Rights (ICESCR)*²⁰ commits each State Party to the Covenant to undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the

¹⁵ Macklem, P., Human Rights in International Law: Three Generations or One? (October 28, 2014). Available at SSRN: <https://ssrn.com/abstract=2573153> or <http://dx.doi.org/10.2139/ssrn.2573153>

¹⁶ See Article 1.1. 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.

¹⁷ *Zia –v- Wapda PLD (1994) SC 693.*

¹⁸ Misc. Civil Application No. 118 of 2004(2006) 1 KLR (E&L) 677 at 691.

¹⁹ ELC Civil Suit No. 821 OF 2012 (OS).

²⁰ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. 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.

present Covenant by all appropriate means, including particularly the adoption of legislative measures.²¹ It also requires the States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.²²

Regarding food security, ICESCR provides that the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. It commits the States Parties to take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.²³ In addition, the States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, should take, individually and through international co-operation, the measures, including specific programmes, which are needed: to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.²⁴

The *Comment No. 12 on the 'The Right to Adequate Food'*²⁵ affirms the fact that the human right to adequate food is of crucial importance for the enjoyment of all rights. The UN Committee on ESCR accumulated significant information pertaining to the right to adequate food through examination of State parties' reports over the years and noted that while reporting guidelines were available relating to the right to adequate food, only a few States parties had provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned with respect to this right and to identify the obstacles to its realization.²⁶ This general comment was therefore prepared with the aim of identifying some of the principal issues which the Committee considered to be important in relation to the right to adequate food. Its preparation was triggered by the request of Member States during the 1996 World Food Summit for a better definition of the rights relating to food in article 11 of the Covenant, and by a special request to the Committee to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant.²⁷

The Committee affirmed that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights.²⁸ It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and

²¹ Article 2.1, International Covenant on Economic, Social and Cultural Rights.

²² Article 3, International Covenant on Economic, Social and Cultural Rights.

²³ Article 11(1), International Covenant on Economic, Social and Cultural Rights.

²⁴ Article 11(2), International Covenant on Economic, Social and Cultural Rights.

²⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

²⁶ *Ibid.*

²⁷ Para. 2, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

²⁸ Para. 4, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.²⁹

The Committee also pointed out that despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate food, a disturbing gap still exists between the standards set in article 11 of the Covenant and the situation prevailing in many parts of the world.³⁰ In addition, the Committee observed that while the problems of hunger and malnutrition are often particularly acute in developing countries, malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries. According to them, fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, *inter alia* because of poverty, by large segments of the world's population.³¹

According to the Committee, the right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement, and should therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.³² Furthermore, the right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.³³

The *African Charter on Human and Peoples' Rights (ACHPR)*³⁴ guarantees that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.³⁵ Notably, however, is the omission to specifically guarantee the right to food, although this can be deduced from the right to economic and social development and also the right to enjoy the best attainable state of physical and mental health. The Charter requires States to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*³⁶ guarantees the right of women to food security and requires States Parties to facilitate women's enjoyment of this right to nutritious and adequate food. The *Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14 on The Right to the Highest Attainable Standard of Health*, recognises that the right to health is closely related to the economic rights and is dependent on the realization of the other rights including the rights to food, housing,

²⁹ *Ibid.*, Para. 4.

³⁰ Para. 5, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

³¹ Para. 5, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

³² Para. 6, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

³³ Para. 6, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

³⁴ 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).

³⁵ Article 22, African Charter on Human and Peoples' Rights ("Banjul Charter").

³⁶ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

water, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information and other freedoms.³⁷

The *Rome Declaration and Plan of Action*³⁸ provides that everyone should have access to adequate and safe food and be free from hunger, and action must be taken to assist the people without food to meet their basic needs. Furthermore, human rights, democracy and freedoms of all people are all crucial to supplying the world with enough food to go around, while poverty, environmental degradation, war, terrorism and corruption also cause insecurity in terms of food for all.³⁹

The *Committee on World Food Security (CFS)* was set up in 1974 as a United Nations intergovernmental body to serve as a forum for review and follow up of food security policies.⁴⁰ It is considered as the foremost inclusive international and intergovernmental platform for all stakeholders to work together to ensure food security and nutrition for all.⁴¹ The Committee reports to the UN General Assembly through the Economic and Social Council (ECOSOC) and to FAO Conference.⁴² Through a multi-stakeholder, inclusive approach, CFS develops and endorses policy recommendations and guidance on a wide range of food security and nutrition topics.⁴³ In addition, these are developed starting from scientific and evidence-based reports produced by the High Level Panel of Experts on Food Security and Nutrition (HLPE) and/or through work supported technically by The Food and Agricultural Organization (FAO), The International Fund for Agricultural Development (IFAD), World Food Programme (WFP) and representatives of the CFS Advisory Group.⁴⁴

The outcome of the works of the committee and other stakeholders are thus important for the countries around the world to enable them fulfil their obligations as far as realisation of the right to food is concerned.

2.2 National Legal and Institutional Framework

The Constitution of Kenya 2010 provides 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.⁴⁵

In addition, some of the national values and principles of governance as envisaged in the Constitution of Kenya include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and sustainable development.⁴⁶ These values and principles are relevant in any efforts geared towards realisation

³⁷ The right to the highest attainable standard of health: . 11/08/2000. E/C.12/2000/4. (General Comments), para. 3. Available at http://apps.who.int/disasters/repo/13849_files/o/UN_human_rights.htm

³⁸ World Food Summit: The Rome Declaration and Plan of Action, Rome, 13-17 November 1996.

³⁹ Ibid.

⁴⁰ "The Committee on World Food Security: A Multi-Stakeholder, Evidence-Based Approach to Policy Making" available at http://www.fao.org/fileadmin/templates/cfs/Docs1516/About/CFS_Multistakeholder_Approach.pdf

⁴¹ Committee on World Food Security, available at <http://www.fao.org/cfs/cfs-home/en/>

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Committee on World Food Security, available at <http://www.fao.org/cfs/cfs-home/en/>

⁴⁵ Article 19(2), Constitution of Kenya 2010.

⁴⁶ Article 10(2), Constitution of Kenya 2010.

of food security in Kenya. While some of these may not be directly related, their realisation includes ensuring that people enjoy food security for them to enjoy any form of governance that purports to reflect these values. However, this seems to be in line with the *UN General Comment No. 12 on the Right to Food* which provides that the formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.⁴⁷

Kenya's *National Food and Nutrition Security Policy 2011*⁴⁸ was formulated to add value, build synergies and assist with the implementation of existing national and sectoral policies and strategies to effectively address issues of food insecurity and malnutrition in Kenya. The Constitution of Kenya 2010 also guarantees that every person has the right—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.⁴⁹ The State is also obligated to provide appropriate social security to persons who are unable to support themselves and their dependants.⁵⁰

Notably, the Constitution has provisions that directly relate to the Covenant on Economic, Social and Cultural Rights. It provides that in applying any right under Article 43 on economic and social rights, 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.⁵¹

In addition to the foregoing, the State is obligated to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.⁵² Also relevant is the provision that 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.⁵³

As far as enforcement of bill of rights is concerned, the Constitution 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.⁵⁴

⁴⁷ Para. 23, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁴⁸ Government Printer, Nairobi.

⁴⁹ Article 43(1), Constitution of Kenya 2010.

⁵⁰ Article 43(3), Constitution of Kenya 2010.

⁵¹ Article 20(5), Constitution of Kenya 2010.

⁵² Article 21(2), Constitution of Kenya 2010.

⁵³ Article 21(3), Constitution of Kenya 2010.

⁵⁴ Article 22(1), Constitution of Kenya 2010.

Indeed, some of these provisions have been canvassed before the Kenyan courts. In the *Advisory Opinion Reference No. 2 of 2013, Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR*, the Supreme Court of Kenya observed that: *the Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, [10] fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities* (Emphasis added).⁵⁵ This means that the responsibility to deliver on these rights is both a national and county governments' responsibility.

In the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi Petition No. 164 of 2011 (Unreported) Mumbi Ngugi J. observed that, "53....*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 I might add be seen to take steps, towards realization of these rights. 78... 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 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.*"⁵⁶

Kenyan Courts have thus affirmed 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.⁵⁷

3. Attaining Food Security in Kenya for Sustainable Development: Challenges and Prospects

The *General Comment No. 12: The Right to Adequate Food* elaborates on the nature of the legal obligations of States parties, where the principal obligation is to take steps to achieve *progressively* the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.⁵⁸

The Committee rightly points out that the right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect*

⁵⁵ Para. 193.

⁵⁶ *Mitu-Bell Welfare Society v Attorney General & 2 others*.

⁵⁷ See the case of *Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR*, Petition 94 of 2012, para. 16.

⁵⁸ Para. 14, *General Comment No. 12: The Right to Adequate Food* (Art. 11 of the Covenant), 12 May 1999.

and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.⁵⁹

Notably, some measures at these different levels of obligations of States parties are of a more immediate nature, while other measures are more of a long-term character, to achieve progressively the full realization of the right to food.⁶⁰ The Committee suggested that the most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State party to another. Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. It should also identify the resources available to meet the objectives and the most cost-effective way of using them.⁶¹

The effects of climate change and associated extreme weather events such as flooding and droughts affect food production, water supply, housing access, livestock production and general livelihoods of the people.⁶² Unsustainable use of land in urban and rural areas, such as unsuitable agricultural land use, poor soil and water management practices, deforestation and overgrazing, amongst others have led to reduced food production, thus pushing up the prices of food and effectively making it inaccessible to the poor in terms of unavailability and inaccessibility due to lack of purchasing power.

Poverty includes lack of access to food, clothing, shelter, education and health care, and it is a cause of hunger; poor people are always chronically hungry.⁶³ Poverty has been a major cause of food insecurity and sustainable progress in poverty eradication is critical to improve access to food through undertaking increased food production, including staple food.⁶⁴ Poverty affects food sustainability, which requires long-term availability and accessibility.

⁵⁹ Para. 15, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁶⁰ Para. 16, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁶¹ Para. 21, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999.

⁶² Environment Protection, Water and Housing Sector Report 2012, p.62 (Government Printer, Nairobi, 2012).

⁶³ Ananda, D., - 2012, Chapter - II, '_Food Security: the Concept and the Issue', p. 8. Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/4066/8/08_chapter%202.pdf

⁶⁴ Ibid.

Addressing these challenges requires the participation of all interested stakeholders. The UN Committee on Food Security has rightly argued that there is increasing recognition by the international community that participation can enhance the quality of decision-making, increase ownership of the decisions, improve accountability and transparency of processes and enrich outcomes through a variety of views and experiences.⁶⁵ However, participation needs to be organized around clear institutional structures and rules of engagement in order to find the right balance between inclusiveness and effectiveness.⁶⁶

This section offers some recommendations on some of the ways that Kenya overcome these challenges to achieve its goal and obligation to guarantee the right to food security for all.

3.1 Economic and Social Empowerment for Poverty Eradication

Empowerment of communities can be achieved through different means such as ensuring that they have access to formal, informal or non-formal education to acquire skills and knowledge necessary to acquire jobs or start businesses or trade, having access to information, and generally improving the economy so as to amplify their possibilities to get or create a job or business, though access to resources such as micro-credit facilities, access to ICT networks amongst other initiatives geared towards poverty eradication. This is especially important amongst the marginalised groups of people.

An empowered people will not only have guaranteed access to adequate and quality food but will also have sustainable ability to fend for themselves. There is need for the government entities responsible for education to work closely with the private institutions to offer tailor made formal, informal or non-formal education for empowering families to not only cater for their nutritional and food security but also ensure that they positively contribute to national development for achievement of the sustainable development agenda and Kenya's Vision 2030.

A survey within the communities can help engage the affected communities and get their ideas and opinions on how best to involve them and empower them. Setting up training centres within their localities as well as extending credit facilities to enable the poor access funds for setting up businesses can go a long way in empowering people to fend for themselves and contribute positively to economic growth.

3.2 Gender Equality and Equity for Food Security

While it is important to empower both men and women, there is a specific need to put in special measures over and above the standard measures to empower women in the poor neighborhoods. It has been argued that many women entrepreneurs in developing countries are facing disproportionate obstacles due to lack of mobility, capacity and technical skills, with some experiencing several discrimination, hardship and exclusion.⁶⁷ Furthermore, when women are

⁶⁵ "The Committee on World Food Security: A Multi-Stakeholder, Evidence-Based Approach to Policy Making," p.1. Available at http://www.fao.org/fileadmin/templates/cfs/Docs1516/About/CFS_Multistakeholder_Approach.pdf

⁶⁶ Ibid., p.1.

⁶⁷ Okechukwu, E.U., Gerald, N. and Eze, J., "Women Empowerment: Panacea for Poverty Reduction and Economic Development in Nigeria," *Journal of Policy and Development Studies*, Vol. 10, No. 2, May 2016, pp. 31-41, at p.31.

employed or have more control over household incomes, they tend to spend more than men do on food, health, clothing and education for their children and this expenditure can generate improvements in household nutrition, health and education.⁶⁸

It is therefore important for the constitutional and statutory measures aimed at achieving gender equality, equity and empowerment of women to be actively implemented through programmes and plans especially for the women in marginalised and disadvantaged groups. The government is also urged to give equal rights to men and women on agricultural education, food production, techniques on marketing and distribution, as well as ensuring that men and women have equal responsibilities in the fight against hunger.⁶⁹ Furthermore, it is also suggested that there could be nutritional education for men in order to bring equality within the family.⁷⁰

3.3. Enhancing Agricultural Production

Agricultural production has continually deteriorated in Kenya due to different factors which include but not limited to climate change effects, changing land use tendencies, poor farming methods and rural urban migration, amongst others. As such, access and availability of food becomes a challenge and this is especially worsened by the ever-growing population and high levels of poverty.

Food security is considered to be a key component of sustainable development agenda and thus a priority area. Notably, improved agricultural production is one of the ways through which food security can be achieved. Indeed, as a way to end hunger, achieve food security and improve nutrition and promote sustainable agriculture, the *Agenda 2030 for Sustainable Development* requires states to ensure that by 2030, they 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, amongst other measures.

Some of the challenges facing agricultural production in Kenya such as climate change effects, changing land use tendencies and poor farming methods can be addressed through dissemination of related agricultural information to farmers.

Scholars have argued that free flow of information is a right of people which enable them to participate effectively in the process of economic, social and political activities in the society and enhance education, knowledge and learning.⁷¹ Accordingly, information and knowledge are considered key components of an improved agricultural sector since farmers require proper

⁶⁸ Petruney, T., Wilson, L.C., Stanback, J. and Cates Jr, W., "Family planning and the post-2015 development agenda," World Health Organization Bulletin of the World Health Organization, Vol. 92, No8, 2014, p.548.

⁶⁹ Birdal, S., Three generations of human rights of women in the 20th century: an analysis of international legal documents (Doctoral dissertation, Bilkent University, 2014), p.67. Available at <http://www.thesis.bilkent.edu.tr/0007056.pdf> [Accessed on 15/07/2018].

⁷⁰ Birdal, S., Three generations of human rights of women in the 20th century: an analysis of international legal documents, op cit., p.68.

⁷¹ Ngwira, F. and Majawa, F., "Disseminating Agricultural Information Services to Farmers for Attaining Food Security in Zombwe Extension Planning Areas (EPA) Mzuzu Agricultural Development Division (MZADD) Mzimba, Malawi," op cit., at p. 598.

information in order to plan for their activities, make choice of the inputs and eventually on when and where to sell their products.⁷² Thus, as a way to improve agricultural production for food security and self-sufficiency and subsequently improve the economy, information needs of farmers ought to be conveniently met and at an affordable cost while ensuring its timely availability.⁷³

The Constitution of Kenya 2010 guarantees the right of every person to access information and this right includes access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom.⁷⁴ This constitutional provision is to be actualized through the *Access to Information Act, 2016*⁷⁵, which guarantees that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.⁷⁶

The Government ought to ensure that farmers get adequate and up to date agricultural production information through such means as seminars, trainings, field extension services and publication of information in accessible language and format, amongst other means. There is thus a need to invest in research and adequate funding to get the relevant information and support to the farmers for improved and increased agricultural productivity.

3.4 Encouraging Family Planning for economic and Social Sustainability

It is believed that population is growing at alarming rate and with potentially devastating effects such as ameliorating environmental risks associated with climate change, water scarcity, biodiversity loss, and food and energy insecurity.⁷⁷ As such, one of the goals of Agenda 2030 for Sustainable Development is to ensure that by 2030, there is universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes.⁷⁸

It has been argued that family planning improves the health and overall well-being of women and families around the world.⁷⁹ Family planning is believed to have an impact on global goals such as poverty reduction, gender equity, and improvements in education, health and environmental conservation, so that with regard to sustainable livelihoods and job growth, family planning programmes can reduce unwanted fertility in resource-poor settings.⁸⁰ This, in turn, allows women greater opportunities to participate in paid employment and to increase their productivity and earnings.⁸¹

⁷² Ibid., p.598.

⁷³ Ibid., p.598.

⁷⁴ Article 35, Constitution of Kenya 2010.

⁷⁵ Act No. 31 of 2016, Laws of Kenya.

⁷⁶ Sec. 4(3), Access to Information Act, 2016.

⁷⁷ Engelman, R., "An End to Population Growth: Why Family Planning Is Key to a Sustainable Future," Solutions, Volume 2, Issue 3, May 2011, pp. 32-41. Available at <https://www.thesolutionsjournal.com/article/an-end-to-population-growth-why-family-planning-is-key-to-a-sustainable-future/>

⁷⁸ Goal 3.7.

⁷⁹ Petruney, T., Wilson, L.C., Stanback, J. and Cates Jr, W., "Family planning and the post-2015 development agenda," op cit., p.548.

⁸⁰ Ibid., p.548.

⁸¹ Ibid., p.548.

Family planning is not only important at the household level but also plays a crucial role as a planning factor in economic and social wellbeing and development of the nations. It therefore follows that encouraging and facilitating safe and reliable family planning especially among the poor can go a long way in enhancing food security in the poor households.

3.5 Inclusive Decision-Making and Policy and Law-Making Processes

Since food security has multiple dimensions, eradicating hunger requires policy action that addresses all four dimensions, that is, availability, access, utilization and stability.⁸² As such, there is a need for multiple actions⁸³ which may involve a variety of stakeholders, who often have diverging views and goals.⁸⁴ It has been suggested that the challenge is to improve stakeholders' coordination to enhance the effectiveness of actions to promote food security and nutrition. Furthermore, such coordination requires an enabling environment that creates incentives for all stakeholders and empowers them to participate in policy formulation and implementation.⁸⁵

Article 118(1)(a) of 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 (b) to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. There is a need to put in place measures that ensure that communities meaningfully participate in decision making processes especially in matters that directly affect them.

4. Conclusion

Realisation of the constitutionally guaranteed socio-economic rights and especially the right to food can be achieved through the concerted efforts of all stakeholders. Notably, food security cannot be achieved through disjointed sectoral approaches. This is because this is a social welfare issue as much as it is an economic and environmental issue. The political goodwill of the legislature and courts is also required to ensure enforcement and compliance with any policy and legal measures geared towards achieving food security for the poor households and the country in general.

⁸² Committee on World Food Security, p.1. Available at [https://sustainabledevelopment.un.org/content/documents/15195Session%2012_Committee%20on%20World%20Food%20Security%20\(CFS%20Brief\)_May_2015.pdf](https://sustainabledevelopment.un.org/content/documents/15195Session%2012_Committee%20on%20World%20Food%20Security%20(CFS%20Brief)_May_2015.pdf)

⁸³ Ibid. These actions have been identified by the United Nations Committee on Food Security as including, depending on the specific context, actions aimed at increasing productivity, promote rural development and incomes, strengthen social protection mechanisms, improve infrastructure and invest in education and health.

⁸⁴ Ibid.

⁸⁵ Ibid.

Attaining Environmental Security in Kenya

Abstract

The importance of the environment cannot be overstated since without the environment, there would be no survival of any human, animal or plant life. A clean and secure environment facilitates the right to life. 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. While a proper environmental security mechanism ensures that access to environmental goods and services is available to all, many Kenyans continue to remain out in the cold with no ability to benefit from the environment at the moment. Many user groups are still finding an inability to ingress environmental goods and services, facing barriers such as poor sanitation, lack of clean water, and an array of pollutants.

In this paper, the author examines the importance of environmental security as an instrument of the realisation and actualization of human and environmental rights. The discourse analyses how a secure environment can promote or guarantee the proper expression of such rights. It is argued that in the absence of environmental security, proper development cannot be sustainably achieved. Therefore, achieving environmental security both as a human right prerogative and an environmental right will ensure that a populace is able to enjoy access to environmental goods and services and in so doing, development can be adequately pursued and responsibly achieved.

1. Introduction

The importance of the environment cannot be overstated since it ensures survival of any kind of life. The enjoyment of the right to life depends on a clean and healthy environment.¹ A secure environment makes possible the exercise of the right to life certain by ensuring that any threats to life are neutralized. In this paper, the author examines the concept of environmental security as an instrument for the realisation and actualization of human and environmental rights. The approach adopted is both anthropocentric and ecocentric. The ecocentric approach to environmental security is given attention considering that it advocates for the conservation of the environment as a matter of right and not merely because of the benefits that accrue to the human beings.² The discourse analyses how a secure environment can promote or guarantee the proper expression of human rights. It is argued that in the absence of environmental security, proper development cannot be sustainably achieved. Therefore, achieving environmental security first, as a human right prerogative will ensure that the Kenyan populace is able to enjoy access to environmental goods and services and in so doing, development can be adequately pursued and responsibly achieved.

¹ See generally, A. Stock, *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).

² See generally, 'Species Extinction Is a Great Moral Wrong' (Elsevier Connect) available at <<https://www.elsevier.com/connect/species-extinction-is-a-great-moral-wrong>> accessed 23 October 2015.

2. Conceptualising Environmental Security

This section provides a brief overview on the concept of environmental security as envisaged in various international legal instruments on environmental rights as well as publications by different authors. This is important considering that environmental rights and the associated elements have for long been contested as to their legitimacy within the international discourse on human rights, and while they have continually gained acceptance, the debate is yet to be settled. This is despite the global acknowledgement of the indispensable role of environment in human survival.

Environmental degradation has become a worrying trend the world over, thus, prompting discussions at all levels on how best to address the same. Indeed, it has been observed that over the last several years, environmental degradation and resource scarcity have come to be perceived as threats not only to human well-being and prosperity but also to international security.³ This has also led to calls for reconceptualisation and re-evaluation of security as traditionally understood. This is due to the growing potential for conflict over scarce or degraded resources, in order to include environmental security as an element of human security.⁴ A secure environment makes it possible to exercise and enjoy the right to life by ensuring that any threats to life, and extension to human beings, are neutralized. It is argued that the notion of "environmental security," should be understood to have two dimensions. On the one hand, in placing emphasis upon the environmental dimension, security means maintaining an ecological balance, at least to the extent necessary to sustain resource supplies and life-support systems. On the other hand, in emphasizing the dimension of security in the traditional sense, the term refers to the prevention and management of conflicts precipitated by environmental decline.⁵

Environmental security 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.⁶ This broader conception of environmental security, it has been argued, is crucial because, at least in the long term, security, even in the traditional sense, can be ensured only if security in the environmental sense is emphasized. Only where ecological balance is maintained, resources are protected, and supplies ensured, will the potential for conflict be significantly reduced. Further, focusing on common environmental interests rather than on competing strategic interests will promote international cooperation and, ultimately, security.⁷ To buttress this, it has been argued that *few threats to peace and survival of the human community are greater than those posed by the prospects of cumulative and irreversible degradation of the biosphere on which human life depends. True security cannot be achieved by*

³ J. Brunnee, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?" *Fordham International Law Journal*, Vol. 18, 1995, pp. 1742-1747 at p. 1742.

⁴ *Ibid*, p. 1742; See also, N. Græger, "Environmental Security?" *Journal of Peace Research*, Vol. 33, No. 1 (Feb., 1996), pp. 109-116, at pp. 109-110; See also A.S. Tolentino, "Asean environmental security concerns," *The Manila Times*, October 3, 2015 10:16 pm, available at <http://www.manilatimes.net/asean-environmental-security-concerns/221970/> [Accessed on 17/10/2015].

⁵ J. Brunnee, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?" *op cit*, p. 1742.

⁶ F. Rita, "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.

⁷ *Ibid*; See also, P. Nijkamp, "Environmental Security and Sustainability in Natural Resource Management: A Decision Support Framework," *Serie Research Memoranda*, 1997, pp. 4-5.

Available at <http://degree.uvu.vu.nl/RePEc/vua/wpaper/pdf/19970063.pdf> [Accessed on 16/10/2015].

*mounting buildup of weapons (defence in a narrow sense), but only by providing basic conditions for solving non-military problems which threaten them. Our survival depends not only on military balance, but on global cooperation to ensure a sustainable environment (emphasis added).*⁸

To assert the importance of environmental security as an aspect of human security, the Brundtland Commission argued that the whole notion of security as traditionally understood in terms of political and military threats to national sovereignty must be expanded to include the growing impacts of environmental stress - locally, nationally, regionally, and globally.⁹ They observed that there are no military solutions to 'environmental insecurity'.¹⁰

There has been a growing linkage between environment and conflict.¹¹ Environmental deficiencies supply conditions which render conflict all the more likely. They can serve to determine the source of conflict, they can act as multipliers that aggravate core causes of conflict, and they can help to shape the nature of conflict. Moreover they can not only contribute to conflict, but also stimulate the growing use of force to repress disaffection among those who suffer the consequences of environmental decline.¹² As a result, it is concluded that national security is no longer about fighting forces and weaponry alone, but it relates increasingly to watersheds, forests, soil cover, croplands, genetic resources, climate and other factors rarely considered by military experts and political leaders, but that taken together deserve to be viewed as equally crucial to a nation's security as military prowess.¹³

Environmental security has been defined in different ways to fit various contexts, and despite the many attempts to define the same, the concept is understood differently by people of various professions in diverse countries.¹⁴ For instance, it has been argued that in developing countries, environmental security has more to do with a household's ability to meet the demand for environmental resources in production and consumption activities.¹⁵ In this regard, it is observed that for many of the four billion inhabitants in the developing countries, security is conceived at

⁸ World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, 1987, A/42/427.

⁹ *Ibid.*, para. 86.

¹⁰ *Ibid.*

¹¹ B. Bromwich, "Environmental degradation and conflict in Darfur: implications for peace and recovery," *Humanitarian Exchange Magazine*, Issue 39, July 2008, available at <http://www.odihpn.org/humanitarian-exchange-magazine/issue-39/environmental-degradation-and-conflict-in-darfur-implications-for-peace-and-recovery> [Accessed on 10/10/2015].

¹² N. Myers, "Environmental Security: What's New and Different?"

Available at <http://www.envirosecurity.org/conference/working/newanddifferent.pdf> [Accessed on 11/10/2015], p.4.

¹³ *Ibid.*, p.4; See also generally, B.R. Allenby, "Environmental Security: Concept and Implementation," *International Political Science Review / Revue internationale de science politique*, Vol. 21, No. 1 (Jan., 2000), pp. 5-21.

¹⁴ O. Skarlato & I. Telesh, *Environmental security and policymaking: concepts and practices in North America and Europe, a Review*, Rostock. *Meeresbiolog. Beitr.*, pp. 169-185, p. 170. Available at http://www.oekologie.uni-rostock.de/fileadmin/Mathnat_Bio_Oekologie/RMB/RMB_19/RMB_19-12.pdf [Accessed on 12/10/2015].

¹⁵ S.S. Shrestha & P.B. Bhandari, "Environmental Security and Labor Migration in Nepal," Paper for presentation at the IUSSP's XXV International Population Conference, Tours, France, July 18-23, 2005, p. 2. Available at http://demoscope.ru/weekly/knigi/tours_2005/papers/iussp2005s52252.pdf [Accessed on 12/10/2015].

the most basic level of the struggle for individual survival.¹⁶ It is estimated that over eight hundred million live in absolute poverty and deprivation, five hundred million are malnourished, and many millions have no access to safe drinking-water and do not have the income necessary to purchase food.¹⁷ They lack protection against the consequences of environmental degradation and natural calamities, such as floods and drought, which, particularly in Africa, have produced famine and suffering of unprecedented proportions.¹⁸

There are scholars who have argued that not all environmental problems lead to conflict, and not all conflicts stem from environmental problems, and that indeed it is rare for linkages to be directly and exclusively causative.¹⁹ It is argued that while environmental phenomena contribute to conflicts, they can rarely be described as sole causes: there are too many other variables mixed in, such as inefficient economies, unjust social systems and repressive governments, any of which can predispose a nation to instability-and thus, in turn, make it specially susceptible to environmental problems.²⁰ While this may be true, it is noteworthy that the link between the two is more pronounced in developing countries, like Kenya, where most people directly derive their livelihoods from the environment.²¹

Competition for scarce resources may lead to a 'survival of the fittest' situation.²² In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.²³ 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).²⁴ 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.²⁵ 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.²⁶

In this paper, environmental security is used to refer to an environmental condition that is able to fully satisfy the needs of the people living around an area, those who rely on it for their survival. Human security as an element of poverty eradication has been defined as: protection of the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human

¹⁶ United Nations, "Concepts of Security," United Nations Publication, A/40/553, 1986, p. 20, para. 86.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ N. Myers, "Environmental Security: What's New and Different?" *op cit*, p.3.

²⁰ Ibid, p.3; See also generally, N.R. Biswas, "Is the Environment a Security Threat? Environmental Security beyond Securitization," *International Affairs Review*, Vol. XX, No. 1, Winter 2011.

²¹ See S. Bocchi, et al, 'Environmental Security: A Geographic Information System Analysis Approach—The Case of Kenya,' *Environmental Management* Vol. 37, No. 2, 2005, pp. 186–199, pp. 191-195.

²² 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].

²³ See K. Bowman, 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].

²⁴ S. Khagram, 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.

²⁵ Ibid.

²⁶ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

security means protecting fundamental freedoms – freedoms that are the essence of life. It involves protecting people from critical (severe) and pervasive (widespread) threats and situations. It includes using processes that build on people's strengths and aspirations, thus creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.²⁷ Environmental conditions, being central to human security and survival, must be addressed as one of the means of eradicating poverty. Human security can be threatened by various factors, including conflicts arising from scarce resources, as well as unhealthy environment.²⁸ This is the approach to environmental security that informs the discussion in this paper. The next section offers a brief overview of the international environmental law basis for promotion of the concept of environmental security for realisation of human rights and the greater sustainable development agenda.

3. Global Efforts towards Environmental Security

Environmental protection and conservation has been at the centre stage in the global economic, social and political discussions. Sustainable development agenda was informed by the need to ensure an environmentally sound world that can satisfy the needs of the current generation without compromising those of future generations. Indeed, it has been asserted that sustainable development has been the overarching goal of the international community since the UN Conference on Environment and Development (UNCED) in 1992, where, amongst numerous commitments, the Conference called upon governments to develop national strategies for sustainable development, incorporating policy measures outlined in the Rio Declaration and Agenda 21.²⁹

It is further observed that despite the efforts of many governments around the world to implement such strategies as well as international cooperation to support national governments, there are continuing concerns over global economic and environmental developments in many countries which have been intensified by recent prolonged global energy, food and financial crises, and underscored by continued warnings from global scientists that society is in danger of transgressing a number of planetary boundaries or ecological limits.³⁰ Environmental security is thus one of the key elements of the sustainable development agenda. This special relationship has been in a number of initiatives and plans of action as reflected in the highlighted instruments under this section.

²⁷ United Nations Human Security Unit, *Human Security in Theory and Practice: An Overview of the Human Security Concept and the United Nations Trust Fund for Human Security*, 2009, p. 5. Available at http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/human_security_in_theory_and_practice_english.pdf [Accessed on 12/10/2015].

²⁸ See generally, Laura J Shepherd, *Critical Approaches to Security: An Introduction to Theories and Methods* (Routledge 2013).

²⁹ United Nations Department of Economic and Social Affairs (UNDESA), *A guidebook to the Green Economy, Issue 1: Green Economy, Green Growth, and Low-Carbon Development - history, definitions and a guide to recent publications*, UN-DESA, August 2012, available at <http://www.uncsd2012.org/index.php?page=view&type=400&nr=528&menu=45> [Accessed on 24/10/2015].

³⁰ Ibid.

3.1 Agenda 21

Agenda 21³¹ is part of the global efforts aimed to address the pressing problems of today and also aims at preparing the world for the challenges of the next century. It reflects a global consensus and political commitment at the highest level on development and environment cooperation.³² Chapter 9 of the Agenda 21 is dedicated to measures aimed at protection of the atmosphere. The options and measures described in the chapter are recommended for consideration and, as appropriate, implementation by Governments and other bodies in their efforts to protect the atmosphere.³³ Specifically, the chapter is dedicated to the following areas: addressing the uncertainties: improving the scientific basis for decision-making; promoting sustainable development: energy development, efficiency and consumption; transportation; industrial development; terrestrial and marine resource development and land use; preventing stratospheric ozone depletion; and transboundary atmospheric pollution.³⁴ As part of the efforts towards ensuring environmentally sound atmosphere, states are to take diverse measures, some of which are suggested in the document, that address the threats that contribute to depreciating atmospheric conditions. The suggestions are cross-cutting and aimed at addressing threats that may emanate from various sectors of the economy.

3.2 1992 United Nations Framework Convention on Climate Change

The 1992 United Nations Framework Convention on Climate Change³⁵ which is an intergovernmental treaty developed to address the problem of climate change, setting out an agreed framework for dealing with the issue, was negotiated from February 1991 to May 1992 and opened for signature at the June 1992 UN Conference on Environment and Development (UNCED) — also known as the Rio Earth Summit.³⁶

By 1995, countries realized that emission reductions provisions in the Convention were inadequate. They launched negotiations to strengthen the global response to climate change, and, two years later, adopted the Kyoto Protocol. The Kyoto Protocol legally binds developed countries to emission reduction targets. The Protocol's first commitment period started in 2008 and ended in 2012. The second commitment period began on 1 January 2013 and was designed to end in 2020.³⁷

Parties to the Convention continue to meet regularly to take stock of progress in implementing their obligations under the treaty, and to consider further actions to address the climate change threat.³⁸

³¹ United Nations, United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

³² Ibid, Preamble.

³³ Ibid, para. 9.1.

³⁴ Ibid, para. 9.5.

³⁵ UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

³⁶ International Institute for Sustainable Development – Reporting Services Division, “Climate and Atmosphere: Introduction to the UNFCCC and Kyoto Protocol,” available at http://www.iisd.ca/process/climate_atm-fccintro.htm [Accessed on 24/10/2015].

³⁷ United Nations Framework Convention on Climate Change, Background on the UNFCCC: The international response to climate change, available at http://unfccc.int/essential_background/items/6031.php [Accessed on 24/10/2015].

³⁸ International Institute for Sustainable Development – Reporting Services Division, “Climate and Atmosphere: Introduction to the UNFCCC and Kyoto Protocol,” op cit.

These provisions are expected to inform the national policy and legal framework for environmental security for the current and future generations especially in the area of climate change mitigation.

3.3 Ramsar Convention (1973)

The Ramsar Convention³⁹ is an intergovernmental treaty whose mission is conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world.⁴⁰ 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 human beings, animals and plants. It therefore, follows that improved health of the wetland resources can go a long way in achieving environmental health and security for both anthropocentric and ecocentric reasons.

3.4 Convention on Biological Diversity

The Convention on Biological Diversity⁴¹ was negotiated with the objective of promoting 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.⁴² Amongst the most relevant provisions of the Convention are Articles 6 and 7.

Article 6 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 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 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

³⁹ Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972).

⁴⁰ 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.

⁴¹ 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

⁴² Art. 1.

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.

3.5 Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997

The Convention on the Non-Navigational Use of Watercourses⁴³ 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.⁴⁴ There is an obligation under the Convention for the Watercourse States to, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.⁴⁵ 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 utilization and adequate protection of an international watercourse.⁴⁶

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.

3.6 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)

The Forest Principles⁴⁷ 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. They also provide that 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.⁴⁸ They also acknowledge that 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.⁴⁹

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

⁴³ 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).

⁴⁴ Art. 1.1.

⁴⁵ Art. 7.1.

⁴⁶ Art. 8.1.

⁴⁷ A/CONF.151/26 (Vol. III).

⁴⁸ Preamble.

⁴⁹ Preamble.

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. They state that 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.⁵⁰

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 recognized.⁵¹

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. 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, those land tenure arrangements which serve as incentives for the sustainable management of forests.⁵²

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.

3.7 Sustainable Development Goals (SDGs)

At the United Nations 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 2030.⁵³ According to the United Nations Development Programme (UNDP), the Sustainable Development Goals, otherwise known as the Global Goals, build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015.⁵⁴ 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.⁵⁵

⁵⁰ Principle 2 (b).

⁵¹ Principle 4.

⁵² Principle 5 (a).

⁵³ 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].

⁵⁴ Ibid.

⁵⁵ Ibid.

In order to end hunger, achieve food security and improved nutrition and promote sustainable agriculture, the SDGs aim to ensure that by 2030, countries 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.⁵⁶

They also 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.⁵⁷ 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 utilization of genetic resources and associated traditional knowledge, as internationally agreed.⁵⁸

In summary, the Sustainable Development Goals seeks to, inter alia, end poverty in all its forms everywhere; end hunger, achieve food security and improved nutrition and promote sustainable agriculture; ensure healthy lives and promote well-being for all at all ages; ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; achieve gender equality and empower all women and girls; ensure availability and sustainable management of water and sanitation for all; ensure access to affordable, reliable, sustainable and modern energy for all; promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; reduce inequality within and among countries; make cities and human settlements inclusive, safe, resilient and sustainable; ensure sustainable consumption and production patterns; take urgent action to combat climate change and its impacts; conserve and sustainably use the oceans, seas and marine resources for sustainable development; protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; and strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

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

⁵⁶ Goal 2.3.

⁵⁷ Goal 2.4.

⁵⁸ Goal 2.5.

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.

The 2030 Agenda for Sustainable Development⁵⁹ 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.⁶⁰ With regard to planet sustainability, the State parties agreed 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.⁶¹ Concerning peace sustainability, the Agenda states that countries are determined to foster peaceful, just and inclusive societies which are free from fear and violence. There can be no sustainable development without peace and no peace without sustainable development.⁶² Going by this assertion, environmental security becomes an indispensable part of sustainable development.

The participants also 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.⁶³

The Agenda also envisages a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. 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 democracy, good governance and the rule of law, as well as an enabling environment at the 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; One in which development and the application of technology are climate-sensitive, respect biodiversity and are resilient and one in which humanity lives in harmony with nature and in which wildlife and other living species are protected.⁶⁴

Through full implementation of the goals and principles set out in the Agenda, it is possible to achieve a clean and healthy environment both for the sake of a secure future for the human beings and the wildlife and other living species. It incorporates both anthropocentric and ecocentric approaches to environmental conservation and protection, since it seeks to protect both the humans and the planet as a whole.

⁵⁹Resolution 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.

⁶⁰ Ibid, Preamble.

⁶¹ Ibid, Preamble.

⁶² Ibid, Preamble.

⁶³ Ibid, Agenda No. 3.

⁶⁴ Ibid, Agenda No. 9.

3.8 United Nations Conference on Sustainable Development, Rio+20

The United Nations Conference on Sustainable Development - or Rio+20 - took place in Rio de Janeiro, Brazil on 20-22 June 2012. It resulted in a focused political outcome document⁶⁵ which contains clear and practical measures for implementing sustainable development.⁶⁶

The document was as a result of recognition of the fact that poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development. The participants also reaffirmed the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting the integrated and sustainable management of natural resources and ecosystems that supports, inter alia, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.⁶⁷

The Conference and the resultant document were for purposes of achieving sustainable development. All that is required now is political goodwill from the state parties to ensure that their national frameworks and efforts towards sustainable development are in line with the spirit of Rio+20 as a way of guaranteeing sustainable production, consumption and conservation of the environmental resources for both the present and future generations. By ensuring that everyone is on board and meaningfully engaged, the hope for a sustainably developed world becomes realizable for all. All the foregoing international efforts are supposed to be adopted by states and to also reflect in their domestic efforts towards environmental conservation and management for realisation of sustainable development agenda. The next section looks at some of Kenya's initiatives and framework on realisation of environmental rights and especially environmental security for the people of Kenya.

4. Efforts towards Environmental Security in Kenya

There have been various efforts by the Kenyan authorities to ensure that the environment is secure both for the current generation and the future generations, as required under the international legal instruments on environment and development. The country has been grappling with such issues as climate change, environmental degradation, pollution and deforestation, amongst others. To address these issues, a number of measures, legal, policy and institutional, have been put in place.

4.1 Constitution of Kenya 2010 and Environmental Security

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.⁶⁸ Also noteworthy is the provision that sustainable development is one of the national values and principles of governance, which must bind all State

⁶⁵ United Nations, Future We Want - Outcome document, Resolution adopted by the General Assembly on 27 July 2012 [without reference to a Main Committee (A/66/L.56)], A/RES/66/288.

⁶⁶ United Nations Department of Economic and Social Affairs, 'United Nations Conference on Sustainable Development, Rio+20,' available at <https://sustainabledevelopment.un.org/rio20> [Accessed on 24/10/2015].

⁶⁷ Clause 4.

⁶⁸ Preamble, Constitution of Kenya, (Government Printer, 2010).

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.⁶⁹ This is especially important in environmental and natural resource management matters.

The Constitution also has a whole chapter dedicated to land and environmental related matters.⁷⁰ The Constitution 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 69⁷¹; and to have obligations relating to the environment fulfilled under Article 70.⁷² In a bid to ensure sustainability and safeguard land-related resources, the Constitution provides that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: 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 the Constitution.⁷³ These principles may be construed as ones meant to ensure that even as communities derive their livelihoods from land and land-related resources, they do so in a sustainable manner. Sustainable rural livelihood has been defined as *a livelihood comprises the capabilities, assets (stores, resources, claims and access) and activities required for a means of living: a livelihood is sustainable which can cope with and recover from stress and shocks, maintain or enhance its capabilities and assets, and provide sustainable livelihood opportunities for the next generation; and which contributes net benefits to other livelihoods at the local and global levels and in the short and long-term* (emphasis added).⁷⁴

⁶⁹ Art. 10.

⁷⁰ Arts. 60-72.

⁷¹ Article 69 (1) provides for State and individual obligations in respect of the environment. It requires 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 per cent of the land area of Kenya; 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; 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.

⁷² Art. 42.

⁷³ Art. 60(1).

⁷⁴ L. Krantz, *The Sustainable Livelihood Approach to Poverty Reduction: An Introduction*, (Swedish International Development Cooperation Agency, February, 2001), p.6, available at http://www.sida.se/contentassets/bd474c210163447c9a7963d77c64148a/the-sustainable-livelihood-approach-to-poverty-reduction_2656.pdf [Accessed on 16/10/2015]; cf, 'Chapter 2: The Theory Behind the Sustainable Livelihood Approach,' in S. Morse & N. McNamara, *Sustainable Livelihood Approach: A Critique of Theory and Practice*, (Springer Science+Business Media Dordrecht, 2013), pp. 15-60. S. Morse and N. McNamara observe that, sustainable livelihood approach evolved within the context of the intentional development approach by which development practitioners were seeking to maximise the effectiveness of their interventions to help the disadvantaged. It is in effect a diagnostic tool which provides a framework for analysis leading to concrete suggestions for intervention. It was typically applied in poorer

With regard to economic and social rights, the Constitution provides 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.⁷⁵

It is noteworthy that the provision of most of the economic and social rights as guaranteed in the Constitution is dependent on the state of the environment.⁷⁶ It has been argued that full environmental security is achieved when the natural resources provide full environmental services to the human beings who depend on this area and when this condition is sustainable.⁷⁷ This demonstrates the close relationship between environmental security and sustainable development. A healthy environment that supports the needs of communities, with natural ability for replenishment means that there is enough for everyone and a similar guarantee for future generations. A satisfied society is able to co-exist peacefully.

To establish the relationship between environmental security and sustainable development, the Food and Agricultural Organisation defines sustainable development by specifying the features of sustainable development thus: *resource use and environmental management are combined with increased and sustained production, secure livelihoods, food security, equity, social stability, and people's participation in the development process* (emphasis added).⁷⁸ As such, it is arguable that for a country to achieve sustainable development, all the foregoing elements, including environmental security concerns, must be addressed. This is due to the fact that any external shock to the environment such as deforestation makes the local people, especially the rural households, environmentally and economically vulnerable in securing their livelihood.⁷⁹ It has been argued that poverty eradication contains four ingredients which include: food and nutritional security; income

countries as part of a planning phase for an intervention via policy, a development project or perhaps as the basis for more in-depth research. In that sense the sustainable livelihood approach is an analysis of peoples' current livelihood and what is needed for an 'enhancement', and useful in avoiding the inappropriate interventions critiqued by the post-developmentalists. They however argue that it should be noted that the latter might not necessarily be the need for people to replace their current livelihood or indeed have more means of livelihood. Instead it might involve making the current means of livelihood less susceptible to environmental, social or economic 'stresses'. The sustainable livelihood approach could also result in recommendations that people themselves may be able to put into practice rather than be dependent upon the actions of outsiders. According to them, therefore, it is thus a 'no holds barred' approach to understanding and improving the sustainability of livelihood, although it clearly has to take into account what is feasible in different circumstances (p. 17-18). The import of this, in the Kenyan context, would be that various regions require different approaches to achieve environmental security and overall development for the people.

⁷⁵ Art. 43(1).

⁷⁶ See generally, A. Boyle, "Human Rights and the Environment: A Reassessment," Boyle UNEP Paper Revised, available at

⁷⁷F. W. T. P., Vries, et al, "Integrated Land and Water Management for Food and Environmental Security," Integrated land and water management for food and environmental security, (Comprehensive Assessment of Water Management in Agriculture Research Report 1, 2003), p. 54. Available at <http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf> [Accessed on 16/10/2015].

<http://www.gwp.org/Global/ToolBox/References/Integrated%20land%20and%20water%20management%20for%20food%20and%20environmental%20security%20%28IWMI,%202003%29.pdf> [Accessed on 12/10/2015].

⁷⁸S.S. Shrestha & P.B. Bhandari, "Environmental Security and Labor Migration in Nepal," op cit, p. 4.

⁷⁹ Ibid, p. 1.

security; social security; and human security.⁸⁰ For poverty to be fully eradicated, these elements must adequately be addressed.

A number of these ingredients are so closely related to environmental security, that an environmentally insecure environment compromises the realisation of a poverty-free society. 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.⁸¹ It has rightly been observed that impoverished people feel driven by their plight to overwork their croplands, to clear forests and to cultivate drylands and mountain slopes for additional croplands, all of which trigger soil erosion and other environmental ills, and result in poverty compounded.⁸² In such an environment, sustainable development becomes a mirage.⁸³ Nevertheless, it has been observed that rapidly increasing population in the dynamic semi-arid agro-ecosystems in sub-Saharan Africa (SSA) highlights the necessity to increase food production, while at the same time safe-guarding other ecological systems that support human development and well-being.⁸⁴

From the foregoing, it is arguable that the full implementation of the Bill of Rights largely depends on the state of the environment, especially in relation to the social and economic rights of the people. A clean and healthy environment that is secure is central for the implementation and enforcement of the right to: the highest attainable standard of health; 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; and to social security.⁸⁵ Environmental degradation negatively affects the ability of a State to feed its people, provide clean and safe drinking water in adequate quantities, and attain right to health and reasonable standards of sanitation, amongst others. Any meaningful implementation of the constitutional Bill of Rights should therefore start with the realisation of an environmentally secure society for all.

While the Constitution makes provisions for the protected rights as well as the guiding principles in realisation of various rights, there have been other efforts by different state entities to actualize the guaranteed rights as well as meeting the state's international obligations. The next subsection offers an overview of some of the relevant measures.

⁸⁰ R. Das, *Poverty and Hunger: Causes and Consequences*, (Sarup & Sons, 2006), p. 8.

⁸¹ K. Muigua, "Food Security and Environmental Sustainability in Kenya," p.4, available at

<http://www.kmco.co.ke/attachments/article/129/FOOD%20SECURITY%20AND%20ENVIRONMENTAL%20SUSTAINABILITY%20IN%20KENYA.pdf>

⁸² N. Myers, "Environmental Security: What's New and Different?" pp. 3-4.

⁸³ Boyce JK, 'Is Inequality Bad for the Environment?' (2007) 15 *Research in Social Problems and Public Policy* 267; See also Hoffman AJ and Sandelands LE, 'Getting Right with Nature' (2005) 18 *Organization & Environment* 141.

⁸⁴ *Smallholder System Innovations in Integrated Watershed Management (SSI), Strategies of Water for Food and Environmental Security in Drought-Prone Tropical and Subtropical Agro-Ecosystems*, p. vii.

⁸⁵ Art. 43.

4.2 Related Legal, Policy and Institutional Measures on Achieving Environmental Security in Kenya

The *REDD+ Concept Note: Dryland Forest Conservation*⁸⁶ records that the Government of Kenya has a REDD+ Coordination Office and National REDD+ Technical Working Group in place, developed a REDD readiness preparation proposal (RPP) and is working toward a national REDD+ strategy.⁸⁷ The REDD+ actions are consistent with the goal of Kenya's constitution that sets a target of 10 percent tree cover, up from the current six percent. These actions are also consistent with *Kenya Vision 2030*, the long-term development blueprint for the country.⁸⁸ The actions are also aimed at restoring dryland forests for sustainable development.⁸⁹ This can go a long way in attaining environmental security in the arid and semi-arid regions in the country. However, there should be taken realizable steps, in collaboration with the locals, to ensure the Government projections are realized for environmental security especially in the arid and semi-arid areas in the country.

As part of an analysis of low-carbon development options in Kenya, which covers the six mitigation sectors set out in Article 4.1 of the United Nations Framework Convention on Climate Change (UNFCCC) (energy, transport, industry, waste, forestry and agriculture), Kenya has made attempts to move away from over-reliance on energy sources that increase greenhouse gas emissions.⁹⁰ The country aims at diversifying energy sources for the growing energy needs in the country, while reducing environmental impact for sustainability.⁹¹ This is a laudable step considering that wood fuel greatly affects reforestation and afforestation efforts. Diversified energy sources can boost the drive towards achieving at least ten percent forest cover in the country.

It has been observed that Kenya is experiencing rapid growth in the generation of solid waste, and appropriate systems for waste collection, management and disposal are a cornerstone for development as they significantly contribute to cleanliness and health in human settlements.⁹² However, while solid waste collection, management and disposal has improved over the past years, it still poses a challenge in Kenya, since according to the Kenya National Environment Management Authority (NEMA), only 40 percent of waste generated in urban centres is collected and disposed of at designated disposal sites.⁹³ Further, the provision of adequate sanitary facilities in urban areas in the face of growing population, especially sewage disposal, poses another challenge.⁹⁴

To address the problem, the Government aims to adopt several Pollution and Solid Waste Management strategies have been identified to deliver on short- and long-term goals which

⁸⁶ D. Murphy & S. McFatridge, *REDD+ Concept Note: Dryland Forest Conservation*, (IISD, 2012).

⁸⁷ *Ibid*, p. 1.

⁸⁸ *Ibid*, p.1.

⁸⁹ *Ibid*, pp. 3-4.

⁹⁰ L. Cameron, et al, *National Climate Change Action Plan: Mitigation*, 'Chapter 5: Electricity Generation,' (Government of Kenya, August 2012), p. 1.

⁹¹ *Ibid*.

⁹² L. Cameron, et al, *National Climate Change Action Plan: Mitigation*, 'Chapter 9: Waste,' (Government of Kenya, August 2012), p. 1.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

include: develop and enforce mechanisms targeting pollution and solid waste management regulations; public-private partnerships for municipal waste; reduce importation of oil with high sulphur content; establish a national air quality monitoring system; and apply market-oriented instruments to regulate the use of plastic bags.⁹⁵

It is important to point out that while pollution is a major contributing factor to environmental degradation, pollution and solid waste management strategies will require to be backed by creating environmental awareness to curb further corruption by the local people. Pollution of water, air and other land-based resources does not come from the urban centres only but also from unsustainable agricultural and production methods among the people. These ought to be dealt with through ensuring a collaborative approach to pollution control and eliminations. For instance, through encouraging the communities to plant more trees and to employ sustainable production methods, atmospheric pollution is greatly reduced through reduced greenhouse gases elimination. Communities are also able to employ precautionary approach in their interaction with the environment. An environmentally-conscious community makes it easier to bring polluters to book. Thus, the foregoing government plans should as much as possible include the people who are most affected so as to make them appreciate the implications of such efforts and consequently give them social approval.

5. Call for Action: Moving Beyond the Law

As far as production and use of renewable natural resources is concerned, 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.⁹⁶ 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 and technology that is friendlier to green economy practices as opposed to the polluting and dangerous chemicals.⁹⁷ It is contended that without an inflexible commitment to the sustainable development of resources and the sustainable disposal of wastes there can be no environmental security.⁹⁸ This is true considering that unsustainable use of resources coupled with unsustainable waste disposal negatively affects the environment and ultimately the quality of life for human beings, plants as well as animals.

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.⁹⁹ This approach is envisaged in the Earth Charter¹⁰⁰ which calls for respect for the Earth and life in all its diversity in recognition of the fact that all beings are interdependent and every form

⁹⁵ *Ibid.*, p. 3.

⁹⁶ A.H. Westing, "Environmental Security and Its Relation to Ethiopia and Sudan," *Ambio*, Vol. 20, No. 5, Environmental Security (Aug., 1991), pp. 168-171, p. 168.

⁹⁷ See Government of Kenya, Kenya Green Economy Strategy and Implementation Plan (GESIP), Maanzoni-1 Draft, May 2015.

⁹⁸ *Ibid.*

⁹⁹ See generally, Oksanen M, 'Should Trees Have Standing? Law, Morality, and the Environment' 174.

¹⁰⁰ UN General Assembly, World Charter for Nature, 28 October 1982, A/RES/37/7.

of life has value regardless of its worth to human beings.¹⁰¹ For instance, without the bees, pollination of plants would be almost impossible, and without plants animal lives would be jeopardized. A sustained and secure environment is also useful for the regeneration of resources. The Charter calls for rights with responsibilities and states that there should be care for the community of life with understanding, compassion, and love. It provides that all must accept that with the right to own, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people.¹⁰² A fundamental purpose of the Earth Charter is to encourage all peoples to identify with the whole Earth community as well as their local communities and to expand their moral concern and caring to include the present and future well-being of the entire human family and the larger living world.¹⁰³

Kenya asserts that it has shown commitment to protect the climate system for the benefit of the present and future generations by supporting the United Nations Framework Convention on Climate Change (UNFCCC) process; ratifying the Kyoto Protocol in 2005; and contributing to continental and regional climate change initiatives.¹⁰⁴ Notably, there is also the pending legislation, *Climate Change Bill, 2014*, which seeks, inter alia, to provide- 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.¹⁰⁵

This, it is argued, is complemented by the fact that the country's Constitution has set out a legal commitment to attain ecologically sustainable development; hence providing a basis to address the challenge of climate change while striving to attain its development goals through the Kenya Vision 2030.¹⁰⁶

There is, however, 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.¹⁰⁷ It is undeniable

¹⁰¹ Principle 1.

¹⁰² Principle 2.

¹⁰³ S.C. Rockefeller, *The Earth Charter*, p. 4, available at <http://users.clas.ufl.edu/bron/pdf--christianity/Rockefeller--Earth%20Charter.pdf> [Accessed on 24/10/2015].

¹⁰⁴ Ministry Of Environment, Water and Natural Resources, *Draft National Climate Change Framework Policy (Version of 22 September, 2014)*, Sessional Paper No. ** of 2014 on National Climate Change Framework Policy, p. 4 (Government Printer, Nairobi, 2014).

¹⁰⁵ *Climate Change Bill, Clause 3(a)* (Government Printer, Nairobi, 2014).

¹⁰⁶ Ministry Of Environment, Water and Natural Resources, *Draft National Climate Change Framework Policy (Version of 22 September, 2014)*.

¹⁰⁷ See generally, Lang W, 'UN-Principles and International Environmental Law' (1999) 163 *Max Planck UNYB* 157.

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 must adhere to the constitutional governance framework and commitment to sustainable development, while addressing the goal of attaining low carbon climate resilient development.

The State entities need 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, the 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.¹⁰⁸

The United Nations Conference on Sustainable Development, Rio+20 conference participants recognized that farmers, including small-scale farmers and fisherfolk, pastoralists and foresters, can make important contributions to sustainable development through production activities that are environmentally sound, enhance food security and the livelihood of the poor and invigorate production and sustained economic growth.¹⁰⁹ Such an approach that integrates the efforts of the locals can go a long way in guaranteeing sustainability since they also act as incentives for the communities to shun unsustainable methods of production and utilisation of resources. It would also play a big and positive role in ensuring that there is equitable sharing of the accruing benefits.¹¹⁰

In promoting sustainable agriculture and rural development, Agenda 21 provides that major adjustments are needed in agricultural, environmental and macroeconomic policy, at both national and international levels, in developed as well as developing countries, to create the conditions for Sustainable Agriculture and Rural Development (SARD). The major objective of SARD is to increase food production in a sustainable way and enhance food security. This will involve education initiatives, utilization of economic incentives and the development of appropriate and new technologies, thus ensuring stable supplies of nutritionally adequate food, access to those supplies by vulnerable groups, and production for markets; employment and income generation to alleviate poverty; and natural resource management and environmental protection.¹¹¹

In areas where communities largely depend on agriculture for livelihood, there is need to create awareness for the diversification of economic activities, and effective agriculture and production methods. Communities, especially those living in ecologically susceptible areas need to be encouraged to engage in economically viable but environmentally friendly activities. Those that rely exclusively on livestock keeping should be supported to come up with efficient but sustainable

¹⁰⁸ 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].

¹⁰⁹ United Nations Conference on Sustainable Development, Rio+20, Clause 52.

¹¹⁰ Benefit Sharing Bill, 2014 contemplates public and community participation in benefits sharing.

¹¹¹ Para. 14.2.

production methods that will ensure higher yields while conserving the environment. They should be engaged in planting and nurturing dryland forests which will not only help in environmental restoration but also ensure there will be enough resources for their use.

The Ministry of Environment and Natural Resources, in collaboration with the Ministry of Water and the County governments, can put in place a sustainable plan for supplying water both from the national water reservoirs and drilled boreholes. This will serve the purpose of supporting economic activities as well as supporting reforestation efforts. Such measures should also be accompanied by soil conservation measures.

The *National Land Reclamation Policy*¹¹² was informed by the fact that over 80% of Kenyan land surface that include the Arid and Semi-Arid Lands (ASALs) is fragile and has a population of about 11 million people, the great majority of who live below the poverty line and suffer effects of widespread aridity, acute food and water shortage, as well as general insecurity.¹¹³ The remaining 20% of Kenya land mass is non-ASALs and is arable land often referred to as high potential or humid areas, in which the most affected areas are located in hilly and mountainous regions experiencing de-vegetation or clear cutting of forests, diminishing soil fertility due to poor soil management or cultivation on steep slopes, among other impacts.¹¹⁴

In efforts to combat land degradation through, inter alia, intensified soil conservation, afforestation and reforestation activities, Agenda 21 requires governments to, inter alia: implement urgent direct preventive measures in drylands that are vulnerable but not yet affected, or only slightly desertified drylands, by introducing (i) improved land-use policies and practices for more sustainable land productivity; (ii) appropriate, environmentally sound and economically feasible agricultural and pastoral technologies; and (iii) improved management of soil and water resources; carry out accelerated afforestation and reforestation programmes, using drought resistant, fast-growing species, in particular native ones, including legumes and other species, combined with community-based agroforestry schemes.

Further, the Governments at the appropriate level, with the support of the relevant international and regional organizations, are expected to, inter alia: develop land-use models based on local practices for the improvement of such practices, with a focus on preventing land degradation. The models should give a better understanding of the variety of natural and human-induced factors that may contribute to desertification. Models should incorporate the interaction of both new and traditional practices to prevent land degradation and reflect the resilience of the whole ecological and social system; develop, test and introduce, with due regard to environmental security considerations, drought resistant, fast-growing and productive plant species appropriate to the environment of the regions concerned.¹¹⁵ Community participation in dealing with land degradation is one of the effective ways and channels through which such traditional knowledge on sustainability can be tapped to enhance environmental health and security. They are also in a

¹¹² The Ministry Of Water and Irrigation, *National Land Reclamation Policy*, February 2013 (Government Printer, Nairobi, 2013).

¹¹³ P. 8.

¹¹⁴ Ibid; See also Republic Of Kenya Ministry Of Environment, Water And Natural Resources, *Draft National Forest Policy*, 2015. (Government Printer, Nairobi, 2015).

¹¹⁵ Para. 12.19.

better position to implement measures directed at eliminating human induced factors that may contribute to environmental degradation.

From the various international environmental instruments, it is important that land degradation problem be addressed urgently, by tackling the contributing factors which include inappropriate anthropogenic activities such as clear-cutting of forest and other vegetation, logging and firewood gathering, bush encroachment, invasion of alien species, charcoal production, mining, human settlement, infrastructural and industrial development, uncontrolled fires, livestock overstocking and overgrazing, among others.¹¹⁶ These problems cannot be addressed through legislation without taking tangible measures, in collaboration with the local communities to tackle them. It is time to go beyond legislation and involve the people who are directly affected in coming up with lasting and effective measures.

A former Cabinet Secretary, Ministry of Water and Irrigation, in the *National Land Reclamation Policy* observed that sensitizing communities to use sustainable agricultural practices and technologies in order to reduce extensive cultivation associated with low input agriculture, is a pragmatic action to discouraging wanton clearance of forest resources.¹¹⁷ She went further to state that while ensuring propagation of farm woodlots, the government will perpetually promote use of improved cooking stoves and green energy like geothermal, wind, solar, and biogas; to stop reliance on wood fuel and charcoal for cooking and heating. These strategies will translate into up-to 10% forest cover and its robust conservation thus increasing carbon storage as well as cutting on greenhouse gases to mitigate effects of climate change such as increased frequency and magnitude of many types of extreme events, including floods, droughts and tropical cyclones.¹¹⁸ One way of achieving this would be innovation and creativity to actualize the use of improved cooking stoves and green energy like geothermal, wind, solar, and biogas, which will in turn facilitate job creation and improved production and consumption methods.

The Ministry can work with various stakeholders to realise such objectives. Indeed, the Ministry of Environment and Natural Resources is well aware of this and what is required is action. The Environment Permanent Secretary is on record urging that there is need to improve adaptive capacities for communities through existing indigenous knowledge in combating the impacts of climate change. He observed that the use of such knowledge is critical in identifying and disseminating innovations which enhance food productivity in the face of climate change.¹¹⁹ 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. In the long term plans, the state should put in place adequate measures to address the chronic poverty in some regions through integrated measures that boost economic status of the people while ensuring environmental sustainability.

Public participation in the management, protection and conservation of the environment, coupled with the protection of genetic resources and biological diversity can be one of the effective ways

¹¹⁶ Ibid, p. 8.

¹¹⁷ Ibid, p. 2.

¹¹⁸ Ibid.

¹¹⁹ The Ministry Of Water and Irrigation, 'Indigenous Knowledge to Tackle Climate Change,' available at <http://www.environment.go.ke/?p=1479> [Accessed on 25/10/2015].

of achieving environmental security for the present and future generations. It is also an effective way of identifying and eliminating processes and activities that are likely to endanger the environment 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).¹²⁰ 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.

With adequate and meaningful participation in decision making and environmental conservation, all factions in the society feel appreciated and have a sense of belonging. They are also able to voice and address their concerns in diplomatic ways that in turn boost security in a country. If the recurrent resource-based conflicts in the Northern parts and North Rift regions of country are to be permanently addressed, then the environmental resource scarcity in the areas must be dealt with to eliminate the environmental scarcity pressure. With all parties having adequate resources for their livelihoods, none of the communities feel any pressure to attack their neighbours as it is the case with scarce resources. Lasting security solution in some of these areas is closely associated with environmental security.

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. This will not only boost efficiency but will only curb corruption and ensure better management of the funds. 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), 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.¹²¹ 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

¹²⁰ See the East African Community Protocol on Environment and Natural Resources Management, 2005. Art. 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.

¹²¹ Environmental protection Agency, 'Strategic Environmental Assessment,' available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> [Accessed on 26/10/2015].

programmes.¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵

These exercises should not be just a matter of formality and paper work.¹²⁶ 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. 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. 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. An ecocentric approach to environmental conservation was witnessed in the Tanzanian case of *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*,¹²⁷ where the Africa Network for Animal Welfare (ANAW), a Kenya non-profit

¹²² Ibid; See also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulations 42, 43 & 47.

¹²³ Environmental Management and Co-Ordination Act, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

¹²⁴ Ibid.

¹²⁵ 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 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. If fully implemented, this is a positive step towards achieving environmental security for all.

¹²⁶ 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 26/10/2015]; 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.

¹²⁷ Reference No. 9 of 2010.

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. This was also the case in *In Peter K. Waweru v Republic*,¹²⁸ where 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.¹²⁹

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 the local bodies to adequately and peaceably address conflict or disputes. For instance, the proposed legislation, *Irrigation Bill 2015*,¹³⁰ provides for dispute resolution mechanisms in context of irrigation water user associations and provides for mechanisms for appeal and review by the Environment and Land court. In such instances, the court can ensure that environmental justice is served. 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 the law. Achieving environmental security requires the concerted efforts of all stakeholders and collaboration between the various interested parties and decision-makers.

5.1 Environmental Security as a means to an end

While a proper environmental security mechanism ensures that access to environmental goods and services is available to all, many Kenyans continue to ravage in poverty with no ability to benefit from the environmental resources capable of being generated from the surrounding environment. Many user groups are still finding it hard to enjoy environmental goods and services, while facing social problems such as, poor sanitation, lack of clean water, and an array of pollutants, amongst others. Although there have been widespread calls for a more secure environment, 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 address the problem.

¹²⁸ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

¹²⁹ p.14.

¹³⁰ This is a National Assembly Bill to amend and consolidate the law relating to sustainable development and management of irrigation for socio-economic development in the country; to align existing irrigation laws to the Constitution of Kenya 2010, to repeal the Irrigation Act, Chapter 347 of Laws of Kenya; and for purposes incidental thereto and connected therewith.

It is generally agreed that conflict over scarce resources, such as minerals, fish, water, and particularly territory, is a traditional source of armed struggle.¹³¹ 'It is also not in question that environmental degradation may be viewed as a contribution to armed conflict in the sense of exacerbating conflicts or adding new dimensions'.¹³² This is well demonstrated in the armed conflicts in parts of Kenya's Tana Delta, Rift Valley Region and Northern parts of the country, where inter-ethnic resource-based conflict has been prevalent.¹³³ However, resource abundance can also lead to conflict over resources as has been witnessed in many African States.¹³⁴ Efforts towards achieving environmental security must therefore tackle problems related to the two instances, where they are likely to occur. Environmental security involves addressing environmental degradation, resource depletion, natural disasters, and pollution, amongst others.¹³⁵

In the recent years, Kenya has experienced various security threats from external sources, namely Al Shabaab,¹³⁶ as well as internal inter-ethnic and inter-clan conflict which are mainly fueled by conflicting interests and competition over resources.¹³⁷ While the State forces, mainly National Police service and Kenya Defence Forces, can deal with the external attacks more effectively, it is arguable that the solution to the internal conflict lies in something deeper than the use of force. Any feasible approach must address the root causes of these internal conflicts. While addressing any ongoing aggression between communities and clans through more reactive means, it is important that measures that pre-empt recurrence of such conflict are adopted. Measures that are

¹³¹ N.P. Gleditsch, "Armed Conflict and the Environment: A Critique of the Literature," *Journal of Peace Research*

Vol. 35, No. 3, Special Issue on Environmental Conflict (May, 1998), pp. 381-400, p. 381.

¹³² *Ibid*, p. 382.

¹³³ See generally, M. Wepundi, et al, "Availability of Small Arms and Perceptions of Security in Kenya: An Assessment," Special Report, June 2012, (Small Arms Survey, Graduate Institute of International and Development Studies, Geneva, 2012). Available at <http://www.smallarmssurvey.org/fileadmin/docs/C-Special-reports/SAS-SR16-Kenya.pdf> [Accessed on 13/10/2015].

¹³⁴ For instance, the following countries have experienced internal natural resources-related conflict that may be attributed to resource abundance: South Sudan, Liberia, Sierra Leone, Democratic Republic of Congo, Congo -Brazzaville, Central African Republic, amongst others; See also generally, G. King & V. Lawrence, Africa, "A Continent in Crisis: The Economic and Social Implications of Civil War and Unrest among African Nations," *EDGE*, Final Spring 2005, June, 2005; see also, M. Jenkins & E. Umoh, Africa in Conflict and Crisis: Critical Perspectives on the Role of Conflict Diamonds and Oil on the Livelihood of Sierra Leone and Nigeria.' Autumn, 2002; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941(2001); Institute for Environmental Security, "What is Environmental Security?" Available at http://www.envirosecurity.org/activities/What_is_Environmental_Security.pdf [Accessed on 13/10/2015].

¹³⁵ M. Wepundi, et al, "Availability of Small Arms and Perceptions of Security in Kenya: An Assessment," *op cit*, p.7.

¹³⁶ Islamist militant group al-Shabaab operates from Somalia, and has been carrying out terrorist attacks against Kenya.

¹³⁷ See generally, A.H. Haji, *Inter-Clan Peace Initiative in Mandera County: A Case of Gurreh and Murulle Communities from 1998 to 2012*, Research Project Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Armed Conflict and Peace Studies, of the University of Nairobi, December 2014. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/76901/Alinur_Inter-clan%20peace%20initiative%20in%20Mandera%20county%3A%20a%20case%20of%20Qurreh%20and%20Murulle%20communities%20from%201998%20to%202012.pdf?sequence=1 [Accessed on 13/10/2015]; See also, Institute for Peace and Security Studies in Collaboration with Friedrich Ebert Stiftung, *Anthology of Peace and Security Research*, (Addis Ababa, Ethiopia, Vol. 3, December, 2012), p. 5. Available at <http://library.fes.de/pdf-files/bueros/aethiopien/09883.pdf> [Accessed on 13/10/2015].

geared towards achievement of environmental security for all would go a long way in addressing such conflict, by ensuring that such factors as environmental degradation, resource depletion, natural disasters, and pollution, amongst others are adequately dealt with to guarantee environmental security for all.

6. Conclusion

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. Further, as it has been argued in this paper, achieving peace in the country is pegged on a number of issues, one of which is ensuring human security through guaranteed enjoyment of environmental goods and services for all. 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.

Streamlining Water Governance in Kenya for Sustainable Development

Abstract

Good governance is not only important for the national government but also for the various sectors in discharging service to the people. One such area is the provision of basic needs such as water which is critical for human survival and securing of livelihoods. Water sector governance is an area that involves various state laws, regulations, and formal and informal players. It involves balancing the conflicting interests and needs of various stakeholders through clearly defined responsibilities, transparency and accountability of formal and informal players. Water resources governance has to consider and balance various interests which range from cultural, economic, social, legal and political contexts. This paper approaches water governance in this perspective and affirms the need to accommodate the various users and their diverse needs as far as water is concerned. To assess the current measures and attempts by the state to achieve the constitutionally guaranteed right of access to clean and safe water in adequate amounts, the paper offers an overview and analysis of the provisions of Water Act 2016 in light of the international best practices in water governance and the sustainable development agenda.

1. Introduction

Good governance frameworks are said to embrace the relationships between governments and societies, including laws, regulations, institutions, and formal and informal interactions which affect the ways in which governance systems function, stressing the importance of involving more voices, responsibilities, transparency and accountability of formal and informal organizations associated in any process.¹ The concept of good governance as used in this paper is informed by the foregoing definition of the term due to the important elements such as stakeholders' voices, responsibilities, transparency and accountability.

Water governance may be defined as the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different levels of society.² It comprises mechanisms, processes, and institutions through which all involved stakeholders, including citizens and interest groups, articulate their priorities, exercise their legal rights, meet their obligations and mediate their differences.³ It is, however, noteworthy that different people and institutions use the concept in different ways, and within varying cultural, economic, social, legal and political contexts.⁴ This paper approaches water governance in this perspective considering that the discussion looks at the various users and their diverse needs as far as water is concerned.

The current law,⁵ was enacted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.⁶ This paper offers

¹ Tortajada, C., 'Water Governance: Some Critical Issues,' *International Journal of Water Resources Development*, Vol. 26, No.2, 2010, pp.297-307, p. 298.

² K'Akumu, O.A., 'Toward effective governance of water services in Kenya,' *Water Policy*, Vol. 9, 2007, pp.529-543 at p. 530.

³ Tortajada, C., 'Water Governance: Some Critical Issues,' *op cit*, p. 299.

⁴ *Ibid*, p. 299.

⁵ No.43 of 2016, *Laws of Kenya*.

⁶ *Ibid*, s. 3.

an overview and analysis of the provisions of this law in light of the international best practices in water governance and the sustainable development agenda.

2. Water Governance in Kenya

Water Resources governance in Kenya has come a long way from the colonial times when, as it has been observed, in many African states, colonial water laws, which have largely been continued by the independent states, emphasised the use of water for commercial agriculture and provision of water services to the settler population and largely ignored the local population's need for water for domestic and productive purposes.⁷ Even in the independent African states, most laws on water governance and management have been adopting a top-down approach to governance, effectively sidelining communities and their water needs.

Over the years, the State has attempted to come up with laws, rules and regulations aimed at addressing issues related to water governance and curbing mismanagement of water resources. However, these objectives may not have been adequately realized and this has often led to a critical situation in many parts of the country with many communities suffering from acute water shortages. Kenya is often classified as a water-scarce country with renewable fresh water per capita standing at 647m³ against the United Nations recommended minimum of 1,000m³.⁸ They have difficulties accessing safe water for drinking and other domestic needs.

The right to water is recognised internationally and this has been captured in many international documents, as well as regional legal instruments on basic human rights. The right to water is the fundamental human right of access to water of a quality and quantity sufficient to satisfy basic human needs: consumption, hygiene and sanitation (e.g. bathing or laundry), cleaning, cooking, and subsistence agriculture.⁹ The *General Comment No. 15 on the Right to Water* provides that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.¹⁰

Principle 4 of the Dublin Conference Water Principles states that "... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price".

⁷ Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' in Hellum A., et al (eds), *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa*, (Weaver Press, Harare, 2015), p. 10.

⁸ Concern Worldwide Kenya, 'Five year ASAL Water Hygiene and Sanitation Strategy for Marsabit County 2013 – 2018,' (Dublin Institute of Technology), p.4. Available at https://www.google.com/url?sa=t&rc=1&q=&esrc=s&source=web&cd=5&ved=0ahUKEwjm5YbYvMXP AhVrBsAKHfN7Cz4QFgg3MAQ&url=http%3A%2F%2Fwww.dit.ie%2Fdct%2Fmedia%2Fditdct%2FCo ncern%25205%2520Year%2520WASH%2520Strategy%252010%2520December%25202012_draft1.doc &usq=AFQjCNHUDMk Jrzy1fsQnCsUm47prfTDSBQ [Accessed on 5/10/2016].

⁹ Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 25.

¹⁰ United Nations, 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), para. 2.

With regard to the user water rights, the Water Act 2016 provides that every person has the right to access water resources, whose administration is the function of the national government as stipulated in the Fourth Schedule to the Constitution.¹¹ 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. This exception to the requirement for an operation permit is essential in ensuring that the right of access to water resources for domestic use is not curtailed. This is especially relevant in light of the Constitutional right to right to clean and safe water in adequate amounts for all.¹²

3. Institutional and Regulatory Arrangements

3.1 Institutional Framework on Water Governance

All water resources in Kenya are vested in the state where the Ministry of Water and Irrigation is responsible for creating institutions to manage water resources and provide water services. 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.¹³

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.¹⁴ The functions of the Authority include, inter alia, to: formulate and enforce standards, procedures and Regulations for the management and use of water resources and flood mitigation; regulate the management and use of water resources; enforce Regulations made under this Act; receive water permit applications for water abstraction, water use and recharge and determine, issue, vary water permits; and enforce the conditions of those permits; collect water permit fees and water use charges; determine and set permit and water use fees; provide information and advice to the Cabinet Secretary for formulation of policy on national water resource management, water storage and flood control strategies; coordinate with other regional, national and international bodies for the better regulation of the management and use of water resources; and advise the Cabinet Secretary generally on the management and use of water resources.¹⁵

Water Act 2016 also establishes the National Water Harvesting and Storage Authority whose functions and powers shall be to- undertake on behalf of the national government, the development of national public water works for water resources storage and flood control; maintain and manage

¹¹ S. 9, No.43 of 2016, Laws of Kenya.

¹² Art. 43, Constitution of Kenya 2010.

¹³ Water Act 2016, s.5.

¹⁴ Ibid, S. 6.

¹⁵Ibid, s.12.

national public water works infrastructure for water resources storage; collect and provide information for the formulation by the Cabinet Secretary of the national water resources storage and flood control strategies; develop a water harvesting policy and enforce water harvesting strategies; undertake on behalf of the national government strategic water emergency interventions during drought; and advise the Cabinet Secretary on any matter concerning national public water works for water storage and flood control.¹⁶

Section 29(1) of the Water Act 2016 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. A Water Resource Users Association should be a community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.¹⁷

Section 25 tasks the Cabinet Secretary to establish a Basin Water Resources Committee for each respective basin area which shall be responsible for the management of the water resources within a respective basin area.

The Cabinet Secretary may, by notice in the Gazette, establish one or more waterworks development agencies and define the geographical area of jurisdiction of each such agency.¹⁸ The powers and functions of the water works development agency shall be to- undertake the development, maintenance and management of the national public water works within its area of jurisdiction; and operate the waterworks and provide water services as a water service provider, until such a time as responsibility for the operation and management of the waterworks are handed over to a county government, joint committee, authority of county governments or water services provider within whose area of jurisdiction or supply the waterworks is located.¹⁹

Section 69(1) of the Act provides that as soon as possible, following the commissioning of the waterworks, the waterworks development agency should enter into an agreement with the county government, the joint committee or authority of the county governments within whose area of jurisdiction the water works is located, jointly with the water service provider within whose area of supply the water works are located for the use by the joint committee, authority or water services provider, as the case may be, of the water works to provide water services.²⁰

Section 70(1) of the Water Act 2016 establishes the Water Services Regulatory Board whose principal object is to protect the interests and rights of consumers in the provision of water services. 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 Strategy. The object of the Water Strategy shall be to provide the

¹⁶ Ibid, S. 30 & 32.

¹⁷ Ibid, S. 29(2).

¹⁸ Ibid, S. 65(1).

¹⁹ Ibid, S. 68.

²⁰ Ibid, S. 69(1).

Government's plans and programs for the progressive realization of the right of every person in Kenya to water.²¹

The Water Strategy should contain, among other things, details of-existing water services; the number and location of persons who are not provided with a basic water supply and basic sewerage services; standards for the progressive realisation of the right to water; and a resource mobilization strategy for the implementation of the plans.²²

The Cabinet Secretary should in consultation with county governments, provide a national water sector investment and financing plan aggregated from the county government plans which should include, among other details, the time frames for the plans and an investment programme based on the investment plans.²³

The basin area water resources management strategy should facilitate the establishment and operation of Water Resources Users Associations.²⁴ The Basin Water Resources Committees may contract water resource users associations as agents to perform certain duties in water resource management.²⁵

Upon the designation of a basin area, the Basin Area Water Authority is required to prescribe requirements and a time frame for resources the formulation of a basin area water resources management strategy.²⁶ The basin area water resources management strategy should be formulated by a basin water resources committee in consultation with the Authority and the county governments whose areas of jurisdiction lie within the basin area.²⁷

A basin area water resources management strategy should-be consistent with the national water resources policy; put in place measures to fulfill the water resource quality objectives for each class of water resource in the basin area; describe the measures to be put in place for the sustainable management of water resources of the basin area; contain a water allocation plan for the water resources of the basin area; provide systems and guidelines to enable the users of water resources within the basin area to participate in managing the water resources of the basin area; and provide a strategy for financing the management of the water resources of the basin area.²⁸

A basin water resources committee should consist of- not less than four and not more than seven members appointed by the Authority in consultation with the Cabinet Secretary; and a representative of each county government whose area falls within the basin appointed by the appointing authority after approval by the county assembly.²⁹

²¹ Ibid, S. 64(2).

²² Water Act 2016, S. 64(3).

²³ Ibid, S.64(5).

²⁴ Ibid, S. 29(3).

²⁵ Ibid, S.29(4).

²⁶ Ibid, S. 28(1)

²⁷ Ibid, S. 28(2).

²⁸ Ibid, S. 28(3).

²⁹ Water Act 2016, S. 26(1).

The persons appointed to the Basin Water Resources Committee must be residents of the respective basin area and should 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.³⁰

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 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.³¹ The Water Act 2016 also provides that it shall be the duty of a licensee receiving trade effluent into its sewerage system to ensure that it has in place measures for the receipt and handling of the effluent without causing- pollution of the environment; harm to human health; damage to the sewerage system: or a contravention of applicable laws or standards set by the Regulatory Board.³² A person should not discharge any trade effluent from any trade premises into the sewers of a licensee without the consent of the licensee.³³

In order to deal with disputes, the Act also establishes a Water Tribunal³⁴ and the same is empowered to exercise the powers and functions set out in this Act and in particular to hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.³⁵ In addition to the powers set out in subsection (1), the Tribunal has the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.³⁶

A person aggrieved by a decision of the Tribunal may, within twenty-one days from the date of that decision, appeal to the Land and Environmental Court, established under article 162(2) of the Constitution on an issue of law.³⁷ A decision of a water basin organization, the Authority, the Regulatory Board or the Tribunal against which no appeal has been preferred within thirty days from the date on which the decision was made, becomes binding on all parties.³⁸

³⁰ Ibid, S.26(3).

³¹ Ibid, S. 27.

³² Ibid, S. 108(1).

³³ Ibid, S. 108(2).

³⁴ Ibid, S. 119(1).

³⁵ Water Act 2016, S. 121(1).

³⁶ Ibid, S. 121(2).

³⁷ Ibid, S.124.

³⁸ Ibid, S. 125.

3.2 Establishment of Protected Areas and Ground Water Conservation Area

Section 22(1) of the Water Act 2016 provides that where the Authority is satisfied that in order to conserve a vulnerable water resource, special measures are necessary for the protection of a catchment area or a part thereof, it may by Order published in the Gazette declare such catchment area to be a protected area.

Section 23(1) of the Water Act provides that the Authority may declare the area to be a ground water conservation area, where it is satisfied that, in any area, special measures for the conservation of ground water are necessary in the public interest for- the protection of public water or water supplies used for industry, agriculture or other private purposes; the conservation of the water resources of the aquifer of the ground water resources; or ecological reasons. Section 24(1) requires the Water Resources Authority, in consultation with the Cabinet Secretary, may designate a defined area from which rain water flows into a watercourse to be a basin area for the purposes of this Act.³⁹

3.3 Operational Permits

One of the characteristics of privatisation and commercialisation 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.

Further, Section 42(1) provides that the conditions on a permit may require that on the issue of the permit and at prescribed intervals thereafter, the permit holder shall pay charges to the Authority for the use of water in accordance with the terms of the permit and the Regulations prescribed by the Authority. The charges are to be determined by reference to a schedule of charges published in the Gazette by the Authority following public consultation.⁴⁰

Where there is an agreement between the Authority and a water resources users' association, the Authority may make available a portion of the water use charges to be used for financing such regulatory activities as the water resources users association has agreed to undertake on behalf of the Authority.⁴¹

Section 43(1) provides that in issuing a permit, and in fixing any conditions to be imposed on a permit, the Authority shall take into account such factors as it considers relevant, including- existing lawful uses of the water; efficient and beneficial use of water in the public interest; any basin area water resources management strategy applicable to the relevant water resource; the likely effect of the proposed water use on the water resource and on other water users; the classification and the resource quality objectives of the water resource; the investments already made and to be made by the water user in respect of the water use in question; the strategic importance of the proposed water use; the quality of water in the water resource which may be

³⁹ Ibid, S.24(1).

⁴⁰ Water Act 2016, S. 42(2).

⁴¹ Ibid, S. 42(3).

required for the reserve; and the probable duration of the activity or undertaking for which a water use is to be authorised.

The water Act 2016 provides that where, in the opinion of the Authority, it is desirable that water use in respect of one or more water resources, including ground water, within a specific geographic area be rationalized or reviewed so as to- achieve a sustainable allocation of water from a water resource which is under stress; achieve equity in allocations; promote beneficial use of water in the public interest; facilitate efficient management of water resources, or protect water resource quality, the Authority may issue a notice in the Gazette requiring all water users, including permit holders, to apply or reapply for permits for one or more types of water use.⁴²

The Act requires that the proposed allocation schedule must be subjected to public consultation, after which the basin water resources committee should prepare a preliminary allocation schedule and ought to, by notice published in the Gazette advertise the times and places at which a copy of the schedule may be inspected.⁴³ A person dissatisfied with the preliminary allocation schedule may appeal to the Water Tribunal within thirty days of the publication under subsection (3).⁴⁴

The Authority may also in the case of an inter basin water transfer cancel or vary a permit if such cancellation or variation is necessary for the accommodation of additional water users of a water source.⁴⁵

3.4 Privatisation and Commercialisation of Water Resources

The United Nations estimates that over one billion people across the world do not have access to safe, clean drinking water, although this is a basic human need.⁴⁶ This may be attributed to different problems and challenges which may range from water availability, supply and access, amongst others. Water, being mainly a public good commodity, is mostly vested in the state and hence public institutions are tasked with its management and distribution. However, over the years this has changed internationally, with more private players entering the scene in order to enhance efficiency. It has been observed that when public companies entrusted with the supply of water in the vast majority of developing countries failed to make the infrastructural investments required to provide water services to all, reforms involving commercialization of water services—the application of principles of cost recovery and profit maximization—and private sector participation were proposed as a way to increase investment in water delivery networks, improve access for all sectors of the population and reduce the burden of public services on government finances.⁴⁷

It has been argued that water should be treated “as an economic good”, a proclamation that originated in the International Conference on Water and the Environment (Dublin Conference

⁴² Water Act 2016, S. 47(1).

⁴³ Ibid, S. 47(3).

⁴⁴ Ibid, S. 47(4).

⁴⁵ Ibid, S. 48(1).

⁴⁶ United Nations Research Institute for Social Development, ‘Commercialization, Privatization and Universal Access to Water,’ available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA) [Accessed on 5/1/2017].

⁴⁷ Ibid.

1992).⁴⁸ Managing water as an economic good is said to be an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.⁴⁹

It has however been argued that water's characteristics that make it difficult to marketize include its status as a public good, a natural monopoly, a merit good and/or basic (human) right and a scarce resource.⁵⁰ The UN Committee on Economic, Social and Cultural Rights, in their publication, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*⁵¹, asserts that water is a limited natural resource and a public good fundamental for life and health. Furthermore, the human right to water is indispensable for leading a life in human dignity, and it is a prerequisite for the realization of other human rights.⁵² According to the Committee, the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.⁵³

The right to water falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.⁵⁴ It is also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food.⁵⁵ Priority in the allocation of water must be given to the right to water for personal and domestic uses, and also to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.⁵⁶

The foregoing assertions by the UN Committee on Economic, Social and Cultural Rights have been captured in the Constitution of Kenya which provides 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

⁴⁸ Perry, C.J., et al, *Water as an Economic Good: A Solution, or a Problem?* Research Report 14, (International Irrigation Management Institute, Colombo, 1997), p. 1.

⁴⁹ *Ibid.*

⁵⁰ Akech, J.M.M., 'Governing Water And Sanitation In Kenya: Public Law, Private Sector Participation And The Elusive Quest For A Suitable Institutional Framework,' Paper prepared for the workshop entitled 'Legal Aspects of Water Sector Reforms' to be organised in Geneva from 20 to 21 April 2007 by the International Environmental Law Research Centre (IELRC) in the context of the Research partnership 2006-2009 on water law sponsored by the Swiss National Science Foundation (SNF), p. 6. Available at http://www.ielrc.org/activities/workshop_0704/content/d0702.pdf [Accessed on 5/01/2017].

⁵¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11. 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).

⁵² *Ibid.*, para.1.

⁵³ *Ibid.*, para. 2.

⁵⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, op cit. Para. 3.

⁵⁵ *Ibid.*, para. 3.

⁵⁶ *Ibid.*, para. 6.

sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities.⁵⁷

Section 43(2) of the Water Act provides that the use of water for domestic purposes shall take precedence over the use of water for any other purpose, and the Authority may, in granting any permit, reserve such part of the quantity of water in a water resource as in its opinion is required for domestic purposes. These are important provisions considering that providing access to water not only for domestic uses, but also for growing, preparing and selling food and other products that are vital for family welfare and food security is a key element in the realisation of the right to water as a part of the right to food, the right to health, and the right to an adequate living standard.⁵⁸ The Act also provides that nature and degree of water use authorized by a permit should be reasonable and beneficial in relation to other persons who use the same sources of supply or bodies of water.⁵⁹ The International Conference on Water and the Environment which resulted in the Dublin Statement on Water and Sustainable Development⁶⁰ came up with four guiding principles which should inform water governance at both international and national levels. The fourth Dublin principle on water is that water has an economic value in all its competing uses and should be recognized as an economic good. The argument has been that this principle should be interpreted to mean that water should be provided by private companies and that consumers should pay the full cost of water provision (full-cost recovery), signaling a radical shift from the subsidized public provision of water that had previously been the norm in many parts of the world.⁶¹

In the water sector, one of the most common ways of bringing in the private sector is through concession agreements, via which the state, while retaining ownership, transfers the right of operating the water utility to a private company.⁶² Section 93(1) of the Water Act 2016 provides that a water services provider may enter into a public private partnership or public partnerships for the exercise and performance by another person of some or all of its functions as a licensee with respect to a part or the whole of its area of water service provision.

The advocates for private sector participation on the water and sanitation policy agenda for the South saw it as a means of achieving greater efficiency and expansion in the water and sanitation sector.⁶³ This is because there is general agreement that public utilities have been too slow in

⁵⁷ Article 43(1), Constitution of Kenya 2010.

⁵⁸ Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' op cit., p. 23.

⁵⁹ Section 43(2), Water Act 2016.

⁶⁰ United Nations, The Dublin Statement on Water and Sustainable Development, Adopted January 31, 1992 in Dublin, Ireland, International Conference on Water and the Environment. Dublin, Ireland, International Conference on Water and the Environment, available at <http://un-documents.net/h2o-dub.htm> [Accessed on 05/10/2016]

⁶¹ Miroso, O. & Harris, L.M., 'Human Right to Water: Contemporary Challenges and Contours of a Global Debate,' *Antipode*, Vol. 44, No. 3, 2012, pp. 932-949 at p. 935.

⁶² United Nations Research Institute for Social Development, 'Commercialization, Privatization and Universal Access to Water,' available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA)

⁶³ Budds, J. & McGranahan, G., 'Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America,' *Environment & Urbanization*, Vol. 15, No. 2, October 2003, pp. 87-114 at p. 87.

extending access to services and that they can be inefficient and corrupt, and increasing private sector involvement was meant to address these problems.⁶⁴

It has been argued that under the right circumstances, it may well be possible for private sector participation to improve efficiency and increase the financial resources available for improving water and sanitation services.⁶⁵ However, it can also direct finance to urban centres and neighbourhoods that are already comparatively well served, further polarize the politics of water and sanitation (especially when prices increase) and create new regulatory problems. Much depends on the way privatization is developed and the local context.⁶⁶ This seems to be the approach that was adopted by the water Act 2016, with much emphasis being on the provision of water to the urban areas and extension to the rural areas only being a matter left to the licensing authorities.

For instance, the Water Act 2016 empowers county governments to establish water services providers, which may be a public limited liability company established under the Companies Act, 2015 or other body providing water services as may be approved by the Regulatory Board. In establishing a water services provider, a county government must comply with the standards of commercial viability set out by the Regulatory Board.⁶⁷ A water services provider shall be responsible for- the provision of water services within the area specified in the licence; and the development of county assets for water service provision.⁶⁸ The Act also provides that a county water services provider may with the approval of the relevant licensing authority extend water services to rural or developing areas.⁶⁹ The Act further provides that nothing in its provisions should deprive any person or community of water services on the grounds only that provision of such services is not commercially viable.⁷⁰

The Act also requires every county government to put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.⁷¹ The measures referred to in subsection (2) shall include the development of point sources, small scale piped systems and standpipes which meet the standards set by the Regulatory Board and which may be managed by the Water community associations, public benefits organizations or a private person under a contract with the county government.⁷² Further, in order to implement its obligations under this section, a county government should formulate and submit annually to the Regulatory Board and to the Cabinet Secretary, a five year development plan incorporating an investment and financing plan for the provision of water services in the rural areas referred to subsection (1) within its area of jurisdiction.⁷³ The Cabinet Secretary is also to provide

⁶⁴ Ibid, p. 87.

⁶⁵ Ibid, p. 88.

⁶⁶ Ibid, p.88.

⁶⁷ Water Act 2016, S. 77.

⁶⁸ Ibid, S. 78(1).

⁶⁹ Ibid, S. 81.

⁷⁰ Ibid, S. 94(1).

⁷¹ Ibid, S. 33(2).

⁷² Ibid, S. 33(3).

⁷³ Ibid, S. 33(4).

technical, financial and other assistance to a county government to enable the county government to discharge its responsibility under this section.⁷⁴

Under the Water Act 2016, there is also established a water sector financing institution to be known as the Water Sector Trust Fund.⁷⁵ 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.⁷⁶

It has been argued that, in practice rather than in theory, many stakeholders, including water users associations, non-governmental organizations (NGOs) and local communities, may build on local knowledge and networks, but may often lack support, funds, institutional and technical capacities or even membership to significantly contribute to the management of water resources.⁷⁷ It is therefore a laudable move to have in place a fund that seeks to community level initiatives and ensuring that all persons have access to clean and safe water in adequate amounts, as a matter of right. This is especially important in areas that may have been sidelined on the basis of not being commercially viable for provision of water services by licensees. The fund however needs to be scrupulously guarded against misappropriation and diversion by self-seeking stakeholders, if the above objectives are to be realized.

It is noteworthy that most of the institutions established under this law comprise of professionals and even where the Act provides for consultations, the same is provided for in simplistic terms. The main players in the water governance matters are the government organs and private sector players, with little or no role for communities who may usually be the most affected by policies and state actions on water. It has been suggested that by directly involving users of water in the governance of the resource, the knowledge on which this participation is based may be more meaningful than otherwise may have been possible since local stakeholders may often be more familiar with the peculiarities of local economic, social, cultural and environmental situations.⁷⁸ Further, it might also mean that users involved may accept the regulations as appropriate and consistent with their values and interests and may also be more willing to comply with them.⁷⁹

4. Bridging the Gap

It has been posited that the basic principles for effective water governance include open and transparent, inclusive and communicative, coherent and integrative, equitable and ethical approaches while in terms of performance, the basic attributes include accountable, efficient,

⁷⁴ Ibid, S. 33(5).

⁷⁵ Water Act 2016, S. 113(1).

⁷⁶ Ibid, S. 114.

⁷⁷ Tortajada, C., 'Water Governance: Some Critical Issues,' op cit, p. 300.

⁷⁸ Ibid, p. 300.

⁷⁹ Ibid, p. 300.

responsive and sustainable operations.⁸⁰ The degree of integration of the principles and attributes in any system serve as good indicators of whether the system will be able to achieve effective governance or not.⁸¹

4.1 A Human Rights Approach to Water

It has been acknowledged that one of the problems believed to contribute to inequitable access to water is a perception among community members that there are cartels comprising of powerful politicians, employees of water service providers, water vendors, and government employees, among others who are out to ensure that the status quo of the existing water problems is maintained.⁸² It is estimated that over 50% of Kenya's households do not have access to safe drinking water and the proportion is higher for the poor.⁸³

It is noteworthy that the user water rights are different from the human right to water in that while water rights are the legal authorization to use a specified quantity of water "for a specific purpose under specific conditions," the human right to water focuses on the amount and quality of water required by human beings to meet their basic needs, which should serve as a minimum requirement for water rights to be granted to each individual.⁸⁴

From the Act, it seems that the law places greater emphasis on the water rights while sidelining the human right to water. This is seen from the emphasis on licenses for the various uses of water. There are inadequate provisions placing elaborate responsibility on the various institutions and governance bodies in implementation of the human right to water. The UN General Assembly Resolution on the human right to water and sanitation⁸⁵ formally recognises the right to water and sanitation and acknowledges that clean drinking water and sanitation are essential to the realisation of all human rights. The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all. The implementation of the Act should adopt a human rights approach which would help in addressing the inequitable distribution and access to water resources.

4.2 Opportunities for Public Participation in Water Governance

Public participation means different things to different people and may take several forms, ranging from information supply— to consultation, discussions with the public, co-decision making—to a situation in which the "public" is in charge of parts of natural resources management, for example, through water users' associations.⁸⁶ Public participation would improve the quality of decision

⁸⁰ K'Akumu, O.A., 'Toward effective governance of water services in Kenya,' op cit at p. 531.

⁸¹ Ibid, p. 531.

⁸² Moraa, H., Water governance in Kenya: Ensuring Accessibility, Service delivery and Citizen Participation, (iHub Research, July 2012), p.9. Available at http://ihub.co.ke/ihubresearch/uploads/2012/july/1343052795__537.pdf.

⁸³ Ibid, p.5.

⁸⁴ Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 26.

⁸⁵ The United Nations General Assembly Resolution, The human right to water and sanitation, A/RES/64/292, July 2010.

⁸⁶ Huitema, D., et al, 'Adaptive Water Governance: Assessing the Institutional Prescriptions of Adaptive (Co-)Management from a Governance Perspective and Defining a Research Agenda,' Ecology and Society, Vol. 14, No.1, pp.1-26 at p. 5.

making by opening up the decision-making process and making better use of the information and creativity that is available in society. Moreover, it would improve public understanding of the management issues at stake, make decision making more transparent, and might stimulate the different government bodies involved to coordinate their actions more in order to provide serious follow-up to the inputs received. Management itself would become less controversial, less litigation would take place, and implementation of decisions would be much smoother. Finally, public participation could improve democracy. Public participation would be imperative whenever government does not have enough resources (information, finance, power, etc.) to manage an issue effectively, as is usually the case in water management.⁸⁷

Scholars have argued that inclusiveness requires wide participation throughout the policy chain right from conception to implementation.⁸⁸ Furthermore, participation is necessary to make decisions more politically acceptable and to foster accountability and stakeholders should collectively design and implement policies and management strategies that meet their goals effectively and acceptably.⁸⁹

It has been argued that the community-based water governance systems anchored in unwritten customary norms and values shape perceptions of water rights and water governance at local levels.⁹⁰ The Community-based norms and practices often referred to as ‘living customary law,’ have endured in spite of efforts by both colonial and independent African governments to redefine citizen’s relationship to water through state laws and policies.⁹¹

4.3 Effective Water Governance for the Realisation of Sustainable Development Agenda

Water is a finite and irreplaceable resource that is fundamental to human well-being. It is only renewable if well managed. Today, more than 1.7 billion people live in river basins where depletion through use exceeds natural recharge, a trend that will see two-thirds of the world’s population living in water-stressed countries by 2025. While water scarcity can pose a serious challenge to sustainable development, if managed efficiently and equitably, it can play a key enabling role in strengthening the resilience of social, economic and environmental systems in the light of rapid and unpredictable changes. Water is one of the natural resources at the core of sustainable development debate and it is critical for socio-economic development, healthy ecosystems and for human survival itself.⁹² Goal 6 of the United Nation’s *Transforming our world: the 2030 Agenda for Sustainable Development* acknowledges states’ obligation to ensure availability and sustainable management of water and sanitation for all. It requires that by 2030, states should achieve universal and equitable access to safe and affordable drinking water for all.⁹³ States are also required to

⁸⁷ Ibid, p.5.

⁸⁸ K’Akumu, O.A., ‘Toward effective governance of water services in Kenya,’ op cit at p. 538.

⁸⁹ Ibid, p. 538.

⁹⁰ Hellum, A., et al, ‘The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,’ op cit., pp. 6-7; 20.

⁹¹ Ibid, p. 7.

⁹² United Nations, ‘International Decade for Action ‘water for Life 2005-2015’: Water and sustainable development,’ available at http://www.un.org/waterforlifedecade/water_and_sustainable_development.shtml [Accessed on 05/10/2016].

⁹³ Paragraph 6.1, *Transforming our world: the 2030 Agenda for Sustainable Development*.

achieve access to adequate and equitable sanitation and hygiene for all.⁹⁴ By 2030, they are also required to substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity.⁹⁵

In order to protect the water sources and guarantee supply, states are also required to protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.⁹⁶ This is besides the obligation to achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment.⁹⁷ They are also required to ensure the 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.⁹⁸ It is worth pointing out that focus should not only be on the water resources and their access and use, but there should also be the responsibility to ensure that the resources are not depleted. Hence, there should be an integrated approach to water resources governance.

Access to safe water and sanitation are crucial for human survival and are believed to be essential considerations when addressing socioeconomic development, poverty, and health problems.⁹⁹ The United Nation's 2030 Agenda on Sustainable Development affirms that social and economic development depends on the sustainable management of our planet's natural resources. As such, it captures the determination to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife, and also to promote sustainable tourism, to tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.¹⁰⁰ To achieve this, the 2030 Agenda requires the states to implement integrated water resources management at all levels, including through transboundary cooperation as appropriate.¹⁰¹

Scarcity and misuse of fresh water is believed to pose a serious and growing threat to sustainable development and protection of the environment.¹⁰² This is because, 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.¹⁰³

⁹⁴ Ibid, Para. 6.2.

⁹⁵ Ibid, Para. 6.4.

⁹⁶ Transforming our world: the 2030 Agenda for Sustainable Development, para.6.6.

⁹⁷ Ibid, Para. 12.4.

⁹⁸ Ibid, Para. 15.1.

⁹⁹ Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit., p. 25.

¹⁰⁰ Target 33, United Nation 2030 Agenda on Sustainable Development.

¹⁰¹ Ibid, Para.6.5.

¹⁰² United Nations, The Dublin Statement on Water and Sustainable Development, 1992, op cit.

¹⁰³ Gorre-Dale, E., 'The Dublin Statement on Water and Sustainable Development', Environmental Conservation, Vol. 19, No.2, 1992, p. 181. Available at <https://www.cambridge.org/core/services/aop->

The United Nations affirms that water is also at the heart of adaptation to climate change, serving as the crucial link between the climate system, human society and the environment.¹⁰⁴ It is vital for reducing the global burden of disease and improving the health, welfare and productivity of populations.¹⁰⁵ This is affirmed in the 2030 Agenda on Sustainable Development which obligates states to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.¹⁰⁶

It is notable that Kenya's Water Act 2016 has provisions covering these areas, by mainly obligating licensed water providers and users to take particular measures. However, this Act does not have clear provisions on the role of local communities in water provision, use and conservation measures. While it is notable that a number of provisions provide for consultations and public participation, there is the risk of communities being sidelined in governance issues and having them reduced to mere spectators and recipients of institutional policies and decisions. This would be against the constitutional principles and values of governance including 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.¹⁰⁷ It is imperative to ensure that these principles and values are implemented in water resources governance for realisation of the human right to water and sustainable development agenda.

The 2030 Agenda on Sustainable Development tasks states to support and strengthen the participation of local communities in improving water and sanitation management.¹⁰⁸ Arguably, sustainable use of resources such as water requires the meaningful participation of all. This is alongside the obligation to expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.¹⁰⁹ Kenya should ensure that local communities are actively involved in water resources governance in the country for realisation of sustainable development agenda. This will ensure that policy measures adopted by the state agencies incorporate the unique but useful knowledge of these communities in conservation measures.

5. Conclusion

From the highlighted provisions in this paper, the Water Act 2016 mainly seeks to address depletion, inefficient consumption and pollution of water resources in the country, through a

cambridge-core/content/view/843EB9B98E0F63A3DA36041F7BF3BF16/S0376892900030733a.pdf/div-class-title-the-dublin-statement-on-water-and-sustainable-development-div.pdf [Accessed on 05/10/2016].

¹⁰⁴ United Nations, 'International Decade for Action 'water for Life 2005-2015': Water and sustainable development,' op cit.; See generally, UN Water, 'Climate Change Adaptation: The Pivotal Role of Water,' available at http://www.unwater.org/downloads/unw_ccpoL_web.pdf [Accessed on 05/2/2016].

¹⁰⁵ Ibid.

¹⁰⁶ United Nation 2030 Agenda on Sustainable Development, Para. 6.3.

¹⁰⁷ Art. 10(2), Constitution of Kenya 2010 (Government Printer, 2010, Nairobi)

¹⁰⁸ United Nation 2030 Agenda on Sustainable Development, Para. 6.b .

¹⁰⁹ Transforming our world: the 2030 Agenda for Sustainable Development, Para. 6.a.

number of measures, as discussed. While this law can be hailed as a positive step towards addressing the ever worsening problem of access, use and governance of water resources, there is need for periodic review of the performance especially as far as the implementation of provisions on the access, use and public participation are concerned.

Under the current constitutional dispensation, the right of access to clean and safe drinking water is recognised as significant in the quest for realisation of the human right to economic and social rights such as the highest attainable standard of health, reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality. This reflects the international human rights law position on the issue. Arguably, these rights cannot be reasonably achieved without first securing the right to clean and safe water in adequate amounts. Streamlining water governance in Kenya for sustainable development is thus urgent and necessary.

Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya

Abstract

This paper discusses the constitutional provisions on the policy, legal and institutional framework on natural resource and environmental management in Kenya. Mainly based on the current Constitution of Kenya 2010, the paper explores international best practices in environmental and natural resources management and highlights some of the weaknesses in the existing national framework. The author offers suggestions on plausible ways of effectively implementing the constitutional provisions on natural resources and the environment, in order to achieve sustainable development.

1. Introduction

The Constitution of Kenya 2010 provides for the obligations of the State with respect to the environment. This paper discusses the constitutional provisions covering the policy, legal and institutional framework on natural resource and environmental management in Kenya. It seeks to examine the opportunities where, the constitutional framework exists but the required implementation tools are either non-existent or underdeveloped. The author offers suggestions on some of the most plausible ways of effectively implementing these provisions.

The paper first briefly discusses the content of the provisions of the Constitution of Kenya 2010 relating to the environment and what they ideally mean. Secondly, the paper examines select policy, legal and institutional framework on natural resource and environmental management in Kenya, the challenges they face and the extent to which they reflect the spirit of the Constitution. Finally, the author proffers suggestions on how best to realise the implementation of the environmental obligations as spelt out under the Constitution.

2. Constitution of Kenya 2010 and Natural Resource and Environmental Management

The Constitution of Kenya provides for obligations meant to ensure sustainable management of natural resources and the environment, which lie against both the State and individual persons. This section briefly looks at these functions as encapsulated by the Constitution.

2.1 State Obligations in Environmental and Natural Resources Governance

Constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.¹ This approach can be argued to have been informed by the adoption of a human rights approach to environmental matters. The link between human rights and the environment may have first been established by the *Stockholm Declaration* in 1972.²

¹ 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.

² UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

It has also 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 resources³, 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, biodiversity⁴ and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity⁵; 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.⁶

The Preamble to the Constitution of Kenya, which is meant to be a declaration by the citizenry, may be construed to mean that the duty to conserve and sustainably manage the environment does not only lie against the State but also every individual person.⁷ 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.⁸ The Preamble to the Constitution of Kenya acknowledges the need to be respectful of the environment, which is the people's heritage, and also expresses the determination to sustain it for the benefit of future generations.⁹

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.

³ 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 (Art. 260).

⁴ 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 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).

⁵ 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.

⁶ Art. 69(1).

⁷ 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:....

⁸ Art. 69(2).

⁹ Preamble, Constitution of Kenya 2010.

2.2 Obligations of Citizens in Environment and Natural Resources Management: Co managers or Mere Spectators?

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. While this is a positive step in environmental management and conservation, the provision can be faulted as being inadequate. The duty is only limited to cooperation with the state. Thus, it is the State and its organs that are to take initiative in management and the rest are only expected to offer support and follow any direction given. However, there are additional provisions for the citizenry to take active measures in the quest for attaining sustainable development.

The Constitution has gone 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 role of ensuring that their rights in relation to the environment are not violated, by way of litigation.¹⁰ This is also captured in the various statutes such as the Forest Act, which provides that persons can sue for enforcement of environmental rights.¹¹ The Constitution also recognises 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 70.¹²

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.¹³ A good

¹⁰ 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 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 (Art. 70(2)). For the purposes of this Article, 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.

¹¹ Forest Act, No. 7 of 2005, s.58(1) provides that every citizen of Kenya, and any person who is ordinarily resident in Kenya, who has reason to believe that the provisions of this Act have been, are being or are about to be violated, may petition the High Court for- a) a declaration that the provisions of this Act are being, have been or are about to be contravened; b) an injunction restraining any specified person from carrying out such a contravention; c) the writ of mandamus against any officer or person who has failed to perform any duty imposed by or under this Act; and d) any remedy at law or equity for preventing or enforcing the provisions of this Act.

¹² Art. 42.

¹³ 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. At the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities,

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. Where the framework law provides for consultations, the same are purely 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.¹⁴ 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. The *Agenda 21*¹⁵ 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.

The need for public participation is also affirmed under the *Rio Declaration* which largely adopts an anthropocentric approach to environmental conservation and sustainable development in general. Principle 1 thereof is to the effect that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. This is also captured under Principle 10 of thereof which affirms 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 should also facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, should also be provided.

While the Constitution of Kenya has not been very clear on the specific role of communities as far as environmental governance is concerned, it has however addressed the right of communities to seek legal redress. Art. 22(1) guarantees that every person has the right to institute court

including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States should also facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, should also be provided. 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, Articles 4, 5, 6 & 9 respectively. Although the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or 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).

¹⁴ See also the the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulation 17 which provides for public participation albeit inadequately.

¹⁵ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

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) also 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. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.¹⁶ The right to seek legal redress is also guaranteed under s. 3(3) of the *Environmental Management and Co-ordination Act*.¹⁷ The State should ensure that communities play a key role in these efforts and thus, there is need to align these laws with the current Constitution.

3. Policy, Legal and Institutional Framework on Natural Resource and Environmental Management in Kenya: The Disconnect

Policies and laws on natural resources and environment in Kenya should be aligned to reflect the requirements and spirit of the Constitution. This section examines the extent to which select existing legislation on resources such as natural resources include land, water, forests, minerals, and wildlife reflect the spirit of Article 69 and the Constitution in general as far as resource management is concerned.

3.1 Resource Management Approaches

It is arguable that some of the current laws on natural resources management in Kenya still suffer from adopting approaches that defeat any efforts aimed at achieving sustainable development. This section briefly interrogates some of these laws and the specific approaches that they adopt.

a. Wildlife, Biodiversity and Forest Management Approaches

The *Forest Act, 2005*¹⁸ was enacted, as an attempt to provide for involvement of local communities living around any forest in the management of those forests.¹⁹ The Act provides 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.²⁰ 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)²¹, and the formation of Community Forest Associations (CFAs)²².

¹⁶ (Art. 70(3)).

¹⁷ No. 8 of 1999, Laws of Kenya; 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).

¹⁸ No. 7 of 2005, Laws of Kenya.

¹⁹ Part IV, SS. 45-48.

²⁰ 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.

²¹ S.4, No. 7 of 2005.

²² No. 7 of 2005, S. 45.

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.²³ However, one of the most glaring shortcomings in this provision is the exclusion of communities in such deliberations. This is because, although the Act provides 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.²⁴ It is also worth mentioning that the associations, as envisaged in structure in the Act, only target formally educated people and locks out those who may possess traditional ecological knowledge but not necessarily formal environmental law knowledge.²⁵ 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.²⁶ Further, the Constitution 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; 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.²⁷ 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.²⁸ He added that such people have the traditional skills needed to help the Government conserve the forests.²⁹ 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.³⁰ 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 does 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

²³ *Ibid.*, s. 13(3) (e).

²⁴ *Ibid.*, s. 13(4).

²⁵ S. 45(3) of the Forest Act 2005 outlines the formal requirements of such an association, before registration.

²⁶ Art. 11(1), Constitution of Kenya 2010.

²⁷ Art. 11(2), Constitution of Kenya 2010.

²⁸ Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (*The Standard Group, Nairobi, 2016*), p. 2.

²⁹ *Ibid.*

³⁰ *Ibid.*

where it deems fit to the Director of KFS to do so.³¹ Thus this Act seems to have adopted both incentive 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.

In addition to the foregoing challenges, the *Forest Policy 2014* also identifies key issues and challenges in the forestry sector which needs to be addressed. First, there has been ineffective regulatory mechanisms and inadequate law enforcement. These challenges are compounded by dwindling public land meaning that forestry development has to expand into private and community land, which need incentives and clear methods of engagement to encourage investments in commercial forestry on private land.³² 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.³³ Therefore, the need to enact supporting legislation following the promulgation 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.³⁴

With regard to wildlife biodiversity, it has been observed that many of the regions with abundant and diverse wildlife communities remaining in East Africa are occupied by pastoralists.³⁵ 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.³⁶ 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.³⁷

³¹ S. 48, Forest Act 2005.

³² Forest Policy, 2014, para. 2.1.1.

³³ Ibid, para. 2.1.1.

³⁴ Ibid, para. 2.1.2.

³⁵ 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].

³⁶ Ibid.

³⁷ Ibid, p. 74.

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.³⁸ 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.³⁹

Wildlife is required to contribute directly and indirectly to the local and national economy through revenue generation and wealth creation.⁴⁰ 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.⁴¹

From the Policy, it is also worth noting 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 social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.⁴² 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.⁴³ 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.⁴⁴

The *Wildlife Conservation and Management Act, 2013*⁴⁵ 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.⁴⁶ 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

³⁸ Republic of Kenya: Ministry of Forestry and Wildlife, National Wildlife Conservation and Management Policy, 2012, p. 1.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid, p.2.

⁴³ 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.

⁴⁴ Ibid, p. 604.

⁴⁵The Wildlife Conservation and Management Act, No. 47 of 2013.

⁴⁶ Ibid, Preamble.

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.⁴⁷ The Act provides for consumptive wildlife use activities, which include, game farming, ranching, live capture, research involving off-take, cropping and culling.⁴⁸ However, hunting is prohibited as a form of consumptive utilization.⁴⁹

The Act also provides for non-consumptive utilization of wildlife. A general permit may be issued by the Cabinet Secretary for non-consumptive wildlife user rights, including - wildlife-based tourism; commercial photography and filming; educational purposes; research purposes; cultural purposes; and religious purposes.⁵⁰

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.⁵¹

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.⁵²

One of the requirements for issuance of a permit to any person desirous of undertaking bio-prospecting involving any wildlife resources is proof of: disclosure of all material information relating to the relevant bio-prospecting to the stakeholder, and on the basis of that disclosure, to obtain the prior consent of the stakeholders for the provision of or access to such resources; and the applicant and the stakeholder to have entered into-a material transfer agreement that regulates the provision of or access to such resources; and a benefit-sharing agreement that provides for sharing by the stakeholders in any future benefits that may be derived from the relevant bio-prospecting.⁵³ Where a community is involved, disclosure and agreement will be to the community

⁴⁷ Ibid, s.4.

⁴⁸ Ibid, s.80 (3).

⁴⁹ Ibid, s. 97 & s. 98; See also Eighth Schedule to the Act.

⁵⁰ Ibid, s. 80.

⁵¹ Ibid, s.7 (e) (f).

⁵² Ibid, s. 19(b) (c) (d).

⁵³ Ibid, s. 22(4). There is however the need to protect communities from bio-piracy as witnessed in the matter where British scientists from Leicester University worked with US firm Genencor to patent-utilise without consent, a microbe that lives in the caustic lakes of Kenya's Rift Valley (Muiruri, M., 'Kenya loses Sh70m to biopirates in Biopiracy,' (Northwest Resistance against Genetic Engineering). Available at <http://nwrage.org/content/kenya-loses-sh70m-biopirates> [Accessed on 27/07/2016]). This is just one of the many instances where communities have lost genetic resources to biopirates (See Biopirates Are Harming Indigenous Livelihoods, available at <https://www.newsrecord.co/biopirates-are-harming-indigenous-livelihoods/> [Accessed on 27/06/2016]). It is important that the trend is curbed through putting in place an effective framework.

in question.⁵⁴ Notable is the requirement that the Kenya wildlife Service shall, in all bio-prospecting involving any wildlife resources, be a joint partner on behalf of the people of Kenya.⁵⁵

Also significant is the provision that every person has the right to practice wildlife conservation and management as a form of gainful land use.⁵⁶ Further, every person has the right to reasonable access to wildlife resources and shall be entitled to enjoy the benefits accruing there-from without undue hindrance.⁵⁷ However, utilisation and exploitation of wildlife resources by any person whether individual land owner or in a conservation area, and wherever else should be practised in a manner that is sustainable and in accordance with regulations made under this Act.⁵⁸

The Act requires the Cabinet Secretary, in consultation with the land owner, the National Land Commission, the Commission on Revenue Allocation and in liaison with the Service, to formulate regulations and guidelines on access and benefit sharing.⁵⁹

In a bid to curb human-wildlife conflict, the Act provides that in furtherance of the spirit mutual co-existence in the framework of human – wildlife conflict, every decision and determination on the matter of conservation and management of the wildlife resource should not be exercised in a manner prejudicial to the rights and privileges of communities living adjacent to conservation and protected areas: Provided that in the parties should have due regard for the provisions of the appropriate and enabling laws, including laws on devolution and land management.⁶⁰ Where animals enter community's areas of living, only authorised officers may kill them where there is potential risk of injury, and any unauthorized persons who may kill a rogue animal, unless for self defence, may be prosecuted.⁶¹

The 2013 Act provides for County Wildlife Conservation Committees, Community Wildlife Associations and Wildlife Managers and community conservancies as institutions of promoting community participation. As far as regulation is concerned, the Act does away with an autonomous regulatory agency and instead gives powers of wildlife regulation and licensing to the Cabinet Secretary in charge of wildlife. The various institutions are mostly to advise the Cabinet secretary who then makes the final decision. It is therefore clear that the Act does not create clear channels for the communities to participate in decision making. The approach adopted is also broadly protectionist and does little to bring a change of attitude by local communities regarding wildlife diversity. While the Policy framework seems to acknowledge the importance of community inclusion, there is little evidence in the Act that the same was considered during deliberations to formulate the law.

⁵⁴ Wildlife Conservation and Management Act, 2013, s. 22(5).

⁵⁵ *Ibid*, s. 22(6).

⁵⁶ *Ibid*, s. 70(1).

⁵⁷ *Ibid*, s. 71(1).

⁵⁸ *Ibid*, s. 72(1).

⁵⁹ *Ibid*, s. 73; See also s. 76(1)-The Cabinet Secretary shall, upon advice by the Service, in consultation with the Commission on Revenue Allocation, formulate guidelines regarding incentives and benefit sharing, and the nature and manner in which the same shall be distributed.

⁶⁰ *Ibid*, s. 75(1).

⁶¹ *Ibid*, ss. 77-78.

If the affirmations in the Wildlife Policy are anything to go by, then the protectionist approaches adopted in management and conservation of biological diversity are not justified and do little to achieve the desired objectives of sustainable development. It has been suggested that there is need to adopt a more active participatory approach which is mainly informed by two additional principles: putting resources under local control; and giving local communities a decisive voice and representation through their own local institutions, which means participation in making decisions that affect them.⁶² These principle, it has been contended, intends to increase trust and confidence and strengthen leadership capabilities at the community level.⁶³ While it may not be necessarily important to devolve control and ownership, there is need for more active and quality community participation in decision-making processes.

4. Implementing the Constitutional Obligations of the State in Respect of the Environment

It has been observed that management regimes of public forests (and perhaps even other natural resources in Kenya), whether they are protectionist oriented or incentive-based are important in determining outcomes of conservation and sustainable use.⁶⁴ 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.⁶⁵ Broadly, this approach viewed development objectives of local communities as being in direct conflict with the objectives of biodiversity conservation.⁶⁶ It is for this reason that this section explores measures that may facilitate securing the dream of sustainable exploitation, utilisation, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits. This is in recognition of the fact that the Constitution contemplates adoption of measures that not only promote sustainable management of resources but also actively and meaningfully engage communities in such efforts.

4.1 Sustainable and Inclusive Approaches to Environmental Management

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.⁶⁷ 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

⁶² See Songorwa, A.N., et al, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature,' op cit. p. 607; See also Colchester, M., 'Sustaining the Forests: The Community-Based Approach in South and South-East Asia,' (United Nations Research Institute For Social Development, 1992). Available at [http://www.unrisd.org/80256B3C005BCCF9%2F%2F53024E4A3BAA768480256B67005B6396%2F\\$file%2Fdp35.pdf](http://www.unrisd.org/80256B3C005BCCF9%2F%2F53024E4A3BAA768480256B67005B6396%2F$file%2Fdp35.pdf) (httpAuxPages) [Accessed on 28/07/2016].

⁶³ Ibid.

⁶⁴ 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.

⁶⁵ Ibid, p. 146.

⁶⁶ Ibid.

⁶⁷ 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.

wildlands for other purposes.⁶⁸ 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.⁶⁹

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.⁷⁰ 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.⁷¹ There is however, hope in Kenya after the recently developed Draft National Land Use Policy 2016⁷² 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.⁷³

The various sectoral laws and policies must be designed in way that protects the environment from degradation, and also involves communities in such measures, first through decision-making, and then encouraging active participation, whether through incentives or otherwise.

⁶⁸ Ibid.

⁶⁹ 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]

⁷⁰ Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' African Journals Online, op cit at p.78.

⁷¹ 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]

⁷² Developed by the Ministry of Lands and Physical Planning, Kenya, May 2016.

⁷³ 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;

*Agenda 21*⁷⁴ which was adopted in 1992 to facilitate 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.⁷⁵ Notably, Clause 3.2 thereof 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.⁷⁶ Governments, with the assistance of and in cooperation with appropriate international, nongovernmental and local community organizations, are also required 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.⁷⁷

Clause 4.5 thereof notes that special attention should be paid to the demand for natural resources generated by unsustainable consumption and to the efficient use of those resources consistent with the goal of minimizing depletion and reducing pollution.⁷⁸ With regard to natural resources and 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.⁷⁹ 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.⁸⁰ 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.⁸¹

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*⁸², which recognises that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an

⁷⁴ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

⁷⁵ Ibid, Preamble.

⁷⁶ Ibid, Clause 3.2.

⁷⁷ Ibid, Clause 3.8.

⁷⁸ Ibid, Clause 4.5.

⁷⁹ 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].

⁸⁰ Ibid.

⁸¹ Ibid, p. 11.

⁸² 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.

indispensable requirement for sustainable development. Some of the Agenda's key principles include sustainability and inclusivity.⁸³

4.2 Achieving Ten Percentage Forest Cover

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.⁸⁴

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.⁸⁵

Principle 8(a) of the *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (the Forest Principles of the United Nations Conference on Environment and Development (UNCED))⁸⁶ provide that efforts should be undertaken towards the greening of the world. Thus, all countries, notably developed countries, should take positive and transparent action towards reforestation, afforestation and forest conservation, as appropriate. 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. The United Nations Forum of Forests (UNFF) had developed four global objectives on forests, including an objective to "reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation". Members had agreed to work globally and nationally and to make progress toward the achievement of these objectives by 2015.⁸⁷ The General Assembly of the United Nations also affirmed that social and economic development depends on the sustainable management of the planet's natural resources. As such, the expressed determination to conserve and sustainably use

⁸³ Ibid.

⁸⁴ 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].

⁸⁵ Ibid.

⁸⁶ 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).

⁸⁷ United Nations Forum of Forests, Global Objectives on Forests, available at <http://www.un.org/esa/forests/documents/global-objectives/index.html> [Accessed on 13/07/2016].

oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife.⁸⁸

*Draft National Forest Policy, 2015*⁸⁹ 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.⁹⁰ The overall goal of the Policy is sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.⁹¹

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.⁹² The Policy also recommends that to achieve the foregoing target, the Government should: promote partnerships with land owners to increase on-farm tree cover and to reduce pressure on reserved forests; promote investment in farm forestry through provision of economic and non-economic incentives; promote on-farm species diversification; promote development of forest based enterprises; promote processing and marketing of farm forestry products; promote forestry development through irrigation; and promote forestry extension and technical services.⁹³

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. Consequently, it recommends that the Government should: support non-state actors and local communities to undertake forest-related development activities and investments; promote stakeholders participation at all levels in forest sector planning, implementation and decision making; develop and implement strategies for forest resource conflict resolution and management; and strengthen linkages between forest research, education, industry and management institutions; develop institutional framework and mechanisms for effective participation of stakeholders in forest management develop and implement an equitable benefits sharing scheme in the forest sector; and support communities, commercial tree growers and land owners to invest in forestry as a viable land use option; promote partnerships in afforestation and reforestation programmes on public, private and community lands; and provide incentives to communities, commercial tree growers and landowners for forest management and conservation, and encourage voluntary conservation easements.⁹⁴

⁸⁸ 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.

⁸⁹ Forest Policy, 2015 (Government Printer, Nairobi, 2015).

⁹⁰ Ibid, para. 1.1.9.

⁹¹ Para. 3.1.

⁹² Para. 4.5.

⁹³ Ibid.

⁹⁴ Para. 8.2.

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.⁹⁵

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.⁹⁶ 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.⁹⁷ 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.⁹⁸ Therefore, the argument is that 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 interest groups in a participatory and constructive dialogue with a commitment to an equitable outcome.⁹⁹

The *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (the Forest Principles of the United Nations Conference on Environment and Development (UNCED)¹⁰⁰), are meant to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.¹⁰¹ Principle 2(b) thereof provides that forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. Furthermore, Principle 2(d) provides that governments should promote and provide opportunities for the participation of interested parties, including local communities and indigenous people, industries,

⁹⁵ Draft National Land Use Policy 2016, para. 3.8.3.

⁹⁶ 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].

⁹⁷ Ibid.

⁹⁸ 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).

⁹⁹ Ibid, pp. 66-7.

¹⁰⁰ United Nations, *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).

¹⁰¹ Ibid, Preamble.

labour, non-governmental organizations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies.

In a bid to deal with some of the highlighted challenges, there is a pending proposed law, Forest Conservation and Management Bill, 2015. The *Forest Conservation and Management Bill, 2015* is meant 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 proposed law is to apply to all forests on public, community and private lands.¹⁰² Among the guiding principles of the proposed law will be: public participation and community involvement in the management of forests; and consultation and co-operation between the national and county governments. The proposed law 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.¹⁰³

The proposed law notably retains provisions for formation and registration a community forest association in accordance with the provisions of the Societies Act.¹⁰⁴ The management agreement between the Kenya Forest Service and the community forest association may permit the association to —collect medicinal herbs in the forest; harvest honey in the forest; harvest fuel wood in the forest; harvest grass in the forest or graze livestock in the forest; collect forest produce for community-based industries; carry out ecotourism or recreational activities in the forest; carry out scientific research or education activities in the forest; establish a plantation in the forest; develop community wood and non-wood forest based industries; and enjoy other benefits which, may from time to time, be agreed upon between an association and the Service: provided that — none of the activities specified in this section shall be carried out so as to conflict with the conservation of biodiversity; and the Director-General may, in consultation with the association, prescribe rules for the conduct of the activities specified in this section.¹⁰⁵ Such forest user rights may, with the approval of the Director-General, be assigned either partly or all under a management agreement to a suitably qualified agent on mutually agreed terms.¹⁰⁶

The proposed law also provides that subject to Article 66¹⁰⁷ of the Constitution, investors in forests must share the benefits of their investment with local communities by applying various options including but not limited to infrastructure, education and social amenities.¹⁰⁸ This provision is in recognition of the fact that "benefits" mean quantifiable and non-quantifiable goods and services provided by forest ecosystems.¹⁰⁹ The other mechanism for benefit sharing as envisaged under this

¹⁰² Forest Conservation and Management Bill, 2015, (Government Printer, Nairobi, 2015), clause 3.

¹⁰³ Ibid, clause 5.

¹⁰⁴ Ibid, Clause 47(1).

¹⁰⁵ Ibid, clause 48.

¹⁰⁶ Ibid, Clause 49.

¹⁰⁷ Art. 66(1)- The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

¹⁰⁸ Ibid, clause 52.

¹⁰⁹ Ibid, clause 2. 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 under Regulation 20 (1) provides that 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

law is through joint management agreement. Clause 2 thereof interprets joint management agreements to mean authorization where the Service or the County Department responsible for forestry agrees to enter into partnership with other persons for the joint management of a specified forest area, specifying the contribution, rights and obligations of each party and setting out the methods of sharing the costs and benefits accruing from the forest so managed.¹¹⁰

Proposals for any concession on national and county public forests can only be approved where there is proof of, inter alia: preparation of environmental and social impact assessments as may be required under any other written law; and preparation of a concession area forest management plan that shall include inventories, reforestation or replanting programmes, annual operation plans and community user rights and benefits.¹¹¹

While the proposed law 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

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.

¹¹⁰ Clause 20(1) thereof provides that the county executive committee member responsible for forestry in each county may enter into joint management agreements with communities or individuals for the management of community forests or private forests.¹¹⁰ Clause 41(3) is also to the effect that the Service may enter into a joint management agreement for the management of any indigenous forest or part thereof with any person, institution, government agency or forest association.

¹¹¹ Ibid, clause 43.

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)¹¹². This accreditation gave NEMA the mandate to offer vetting, approval and supervision of projects financed by the Adaptation Fund.¹¹³ 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 titled 'Integrated Programme to Build Resilience to Climate Change and Adaptive Capacity of Vulnerable Communities in Kenya' that will be implemented in 14 counties. The launch was held on 29th January, 2016 at Boma Hotel, South C in Nairobi. The programme will 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.¹¹⁴ The Green Climate Fund (GCF) is a finance mechanism established under the UNFCCC.

Furthermore, the Green Climate Fund (GCF)¹¹⁵ 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.¹¹⁶ NEMA is 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. This follows NEMA's application submitted in May 2015 to the GCF board for accreditation.¹¹⁷

In addition to the foregoing, the *National Climate Change Response Strategy 2010* (NCCRS)¹¹⁸, 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

¹¹² 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, Art. 2)

¹¹³ 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].

¹¹⁴ Ibid.

¹¹⁵ 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.

¹¹⁶ National Environment Management Authority, 'Adaptation Fund and GCF programmes,' op cit.

¹¹⁷ Ibid.

¹¹⁸ See para. 4.2.5.2, Government of Kenya, 2010.

the REDD mechanism, to implement sustainable forest management approaches.¹¹⁹ Kenya is also observer country to the UN-REDD Programme and it is a participant country to the Forest Carbon Partnership Facility (FCPF).¹²⁰ As part of its FCPF programme Kenya is 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.¹²¹

These efforts and initiatives should be supported as they demonstrate Kenya's commitment to climate change mitigation, a positive step towards attaining sustainable development. *The Bali Principles of Climate Justice of 2002* (Bali Principles)¹²² 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 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.¹²³

¹¹⁹ The REDD Desk, REDD in Kenya, available at <http://theredddesk.org/countries/kenya> [Accessed on 28/07/2016].

¹²⁰ Ibid.

¹²¹ 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-project/20140821%20BP%20Overview%20of%20REDD-%20in%20Kenya.pdf> [Accessed on 28/07/2016].

¹²² Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 28/07/2016].

¹²³ Though non-binding, the Bali Principles give some recommendations that can boost efforts to achieve sustainable development. These include, inter alia: the need to reduce with an aim to eliminate the production of greenhouse gases and associated local pollutants; the rights of indigenous peoples and affected communities to represent and speak for themselves; Governments' responsibility for addressing climate change in a manner that is both democratically accountable to their people and in accordance with the principle of common but differentiated responsibilities; fossil fuel and extractive industries be held strictly liable for all past and current life-cycle impacts relating to the production of greenhouse gases and associated local pollutants; clean, renewable, locally controlled and low-impact energy resources in the interest of a sustainable planet for all living things; the right of all people, including the poor, women, rural and indigenous peoples, to have access to affordable and sustainable energy; the need for solutions to climate change that do not externalize costs to the environment and communities, and are in line with the principles of a just transition; the need for socio-economic models that safeguard the fundamental rights to clean air, land, water, food and healthy ecosystems; the rights of communities dependent on natural resources for their livelihood and cultures to own and manage the same in a sustainable manner, and avoiding the commodification of nature and its resources; recognition of the right to self-determination of Indigenous Peoples, and their right to control their lands, including sub-surface land, territories and resources and the right to the protection against any action or conduct that may result in the destruction or degradation of their

4.3. Realising the State's Role in Facilitating Equitable Benefit Sharing for Social Sustainability

The proposed legislation *Natural Resources (Benefit Sharing Bill)*¹²⁴ 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 Act applies with respect to petroleum and natural gas, among other natural resources. The Act provides for guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.¹²⁵ The legislation seeks to set up a Benefit Sharing Authority which will be mandated to coordinate the preparation of benefit sharing agreements between local communities and affected organizations, review and where appropriate determine the royalties payable to an affected organization engaged in natural resource exploitation, identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties oversee the administration of funds sets out for county projects as identified and determined under and benefit sharing agreement, monitor the implementation of any benefit sharing agreement entered between a county and an affected organization, conduct research regarding the exploitation and development of natural resources and benefit sharing in Kenya recommend on better exploitation of natural resources in Kenya, determine appeals arising out of conflict and advise the national government on policy/ enactment of legislation relating to natural resource benefit sharing.¹²⁶ There is need to actively involve communities in the implementation of this law 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.

There is also the proposed National Assembly's *Community Land Bill, 2015* which is meant to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.¹²⁷ Clause 36 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

territories and cultural way of life; the right of indigenous peoples and local communities to participate effectively at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation, the strict enforcement of principles of prior informed consent, and the right to say "No"; the need for solutions that address women's rights; the right of youth as equal partners in the movement to address climate change and its associated impacts; education of present and future generations, emphasising on climate, energy, social and environmental issues, while basing itself on real life experiences and an appreciation of diverse cultural perspectives; the need for we, as individuals and communities, to make personal and consumer choices to consume as little of Mother Earth's resources, conserve our need for energy; and make the conscious decision to challenge and reprioritize our lifestyles, re-thinking our ethics with relation to the environment and the Mother Earth; while utilizing clean, renewable, low impact energy; and ensuring the health of the natural world for present and future generations; and the rights of unborn generations to natural resources, a stable climate and a healthy planet.

¹²⁴ 2015 (Government Printer, Nairobi, 2015).

¹²⁵ S. 4.

¹²⁶ Clause 6, *Natural Resources (Benefit Sharing Bill)*, 2015.

¹²⁷ Preamble, *Community Land Bill, 2015* (Government Printer, Nairobi, 2015).

the basis of equitable sharing of accruing benefits. This provision thus requires all those charged with administration of such jointly owned resources to not 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 proposed law 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.¹²⁸

It is important to point out that for the community to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way. They must be made to understand that the expected benefits will not only come in monetary terms only and must be made aware of the various non-monetary forms that benefits may accrue to them, envisaged under the *Nagoya Protocol*.¹²⁹ 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.¹³⁰

¹²⁸ Ibid, Clause 37.

¹²⁹ 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).

¹³⁰ 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;

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.¹³¹

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.¹³² 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.¹³³

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.¹³⁴ Foundations and other long-term approaches may also be good

(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.

¹³¹ 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.

¹³² 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].

¹³³ *Ibid*, p. 61.

¹³⁴ Art. 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, Art. 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. Art. 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 (Art. 67(2) (f). Also relevant is Art. 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

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.¹³⁵

There is need to ensure that the any model that is put in place guarantees a fair and equitable benefit-sharing, with 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.¹³⁶

4.4 Empowerment and Public Participation for Effective Natural Resources Management

It has been observed that an emphasis on responsibilities rather than rights echoes language from the Stockholm Declaration and subsequent instruments that emphasize the duty of each person to protect and improve the environment for present and future generations.¹³⁷ This, it is arguable, calls for empowerment of the citizenry to enable them carry out their duties towards environmental management effectively. The fact that the Constitution of Kenya¹³⁸ and EMCA¹³⁹ 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*¹⁴⁰ 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

platform upon which communities and other stakeholders can enjoy grievance mechanisms that are easily understood, accessible and linked directly to project performance measures.

¹³⁵ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 61.

¹³⁶ See generally, Jonge, B.D., 'What is Fair and Equitable Benefit-sharing?' *Journal of Agricultural and Environmental Ethics*, Vol. 24, 2011, pp.127–146.

¹³⁷ Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' op cit. p. 3.

¹³⁸ For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)).

¹³⁹ S.3 (4) A person proceeding under subsection (3) of this section 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.

¹⁴⁰ [2013] eKLR, Environment and Land No. 273 of 2013.

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...*¹⁴¹ (emphasis added)

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, which guarantees the right to information.¹⁴²

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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

The Constitution provides for the role of devolved governance system in the management of natural resources and the environment. The Fourth Schedule to the Constitution¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

¹⁴¹ Paras 25 & 28.

¹⁴² Art. 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 proposed legislation, 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.

¹⁴³ United Nations Development Programme, Decentralized Governance of Natural Resources, available at <http://web.undp.org/drylands/decentralized-governance.html> [Accessed on 14/07/2016].

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ (Article 185 (2), 186 (1) and 187 (2)), Constitution of Kenya.

¹⁴⁷ Fourth Schedule, Clause 22.

¹⁴⁸ Fourth Schedule, clauses 10 & 14.

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.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹

Thus, it is important to ensure that 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 in nature. 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.¹⁵² 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.¹⁵³

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 statutes and regulations.¹⁵⁴ Allowing citizens to have a concrete role in implementing the regime they helped to design strengthens public support for and awareness of environmental goals.¹⁵⁵ 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.¹⁵⁶

¹⁴⁹ 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]

¹⁵⁰ Ibid.

¹⁵¹ Agenda 21, clause 3.7(d).

¹⁵² Roberts E. & Dobbins J., 'The Role of the Citizen in Environmental Enforcement,' op cit.

¹⁵³ Ibid.

¹⁵⁴ 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).

¹⁵⁵ 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/4thvol1/futrell.pdf> [Accessed on 16/07/2016]

¹⁵⁶ Ibid.

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)”¹⁵⁷

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 (3) 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 (long-term) economic benefits of sustainable utilisation, and they are willing to invest time and resources in natural resource management.¹⁵⁸

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.¹⁵⁹ 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

¹⁵⁷ 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].

¹⁵⁸ 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].

¹⁵⁹ InterAction, Environment & Climate: Overview-Our Work, available at <https://www.interaction.org/project/environment/overview> [Accessed on 6/07/2016].

management and conservation; and the establishment of national programmes to support community forest management and afforestation/reforestation on community and private land.¹⁶⁰

4.5 Establishment of systems of 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. The *Environment (Management and Coordination) Act* (EMCA)¹⁶¹ 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.¹⁶² 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.¹⁶³

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’.¹⁶⁴ 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.¹⁶⁵ 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

¹⁶⁰ Draft National Forest Policy, 2015, pp. i-ii.

¹⁶¹ No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999), s.68.

¹⁶² 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].

¹⁶³ Regulation 16, Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003.

¹⁶⁴ Ingelson, A., et al, ‘Philippine Environmental Impact Assessment, Mining and Genuine Development’, 5/1 Law, Environment and Development Journal (2009), p. 7, available at <http://www.leadjournal.org/content/09001.pdf> [Accessed on 20/07/2016].

¹⁶⁵ 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>

on natural resource development.¹⁶⁶ 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.¹⁶⁷

The mandatory requirements for Environmental Impact Assessment, Strategic Environmental Assessment¹⁶⁸ and Strategic Environmental and Social Assessment (SESA) also present viable channels through which communities can actively participate in sustainable development agenda in the country.¹⁶⁹ Section 115 of the *County Governments Act 2012*¹⁷⁰ provides that Public participation in the county planning processes shall be mandatory and be facilitated through—mechanisms provided for in Part VIII¹⁷¹ 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 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).¹⁷² 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.

¹⁶⁶ 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.

¹⁶⁷ Ibid, p. 6.

¹⁶⁸ "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.

¹⁶⁹ 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).

¹⁷⁰ 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.

¹⁷¹ Ibid, Ss. 87-92.

¹⁷² See the East African Community Protocol on Environment and Natural Resources Management, 2005. Art. 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.

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).¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

These exercises should not be just a matter of formality and paper work.¹⁷⁸ 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.

¹⁷³ 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.

¹⁷⁴ *Ibid*; See also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulations 42 & 43.

¹⁷⁵ Environmental Management and Co-Ordination Act, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

¹⁷⁶ *Ibid*.

¹⁷⁷ 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 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.

¹⁷⁸ 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

4.6 Judicial Activism

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.¹⁷⁹ For instance, *the Environmental Management and Co-ordination (Amendment) Act, 2015*¹⁸⁰ 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 shall *provide incentives to promote community conservation* (emphasis added).¹⁸¹ Such an approach can boost the State's efforts in sustainable development.

In *Peter K. Waweru v Republic*,¹⁸² 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.¹⁸³ 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.’¹⁸⁴

Kenyan Courts' position in the foregoing case was reflected in the practice of Indian Courts. The Supreme Court of India held in *Subhash Kumar v. State of Bihar*,¹⁸⁵ 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*

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.

¹⁷⁹ 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].

¹⁸⁰ No. 5 of 2015, Laws of Kenya.

¹⁸¹ S. 31, Environmental Management and Co-ordination (Amendment) Act, 2015.

¹⁸² [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

¹⁸³ p.14.

¹⁸⁴ *Ibid*, p.8.

¹⁸⁵ AIR 1991 SC 420, 1991 (1) SCC 598.

by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others¹⁸⁶, 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)¹⁸⁷

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.¹⁸⁸

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 Green Tribunal Act 2010*¹⁸⁹ 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.¹⁹⁰ It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.¹⁹¹

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.¹⁹² Having on board non-judicial members with specialised knowledge in environmental matters may help come up with better approaches to environmental

¹⁸⁶ 48 DLR 1996 (SC Bangladesh, 1996).

¹⁸⁷ AIR 1999 Ker 385, p.11.

¹⁸⁸ Constitution of Kenya, Art. 43(1).

¹⁸⁹ No. 19 of 2010, Laws of India.

¹⁹⁰ National Green Tribunal, available at <http://www.greentribunal.gov.in/> [Accessed on 28/07/2016].

¹⁹¹ 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].

¹⁹² 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).

and natural resource management. Access to environmental justice also becomes easier.¹⁹³ They can work more closely with mainstream courts to promote sustainable development.

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.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶

The *suo moto* powers of the Court in environmental matters is also reflected under provisions of the *Environment and Land Act*.¹⁹⁷ 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. 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 the 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 the law.

5. Conclusion

The existing policies, legal and institutional frameworks, as already 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 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

¹⁹³ 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.

¹⁹⁴ Art. 70(2).

¹⁹⁵ Art. 70(3); See also section 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

¹⁹⁶ *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

¹⁹⁷ 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.

(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.

opportunities to apply for resource user rights, with little or no consultations regarding management. The Constitution 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 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.

Negotiating Dispute Settlement terms in Bilateral Investment Treaties (BITS) and Economic Partnership Agreements (EPAs)

Abstract

This paper critically discusses the investor-state dispute settlement and other aspects of investment treaties or agreements that are likely to defeat the original purpose of BITS, that is, promoting trade and investment for national development for both the domestic and host states. The discussion is mainly in the context of developing world and focuses on the main aspects that negotiators should look out for in order to ensure that such treaties facilitate trade and investment in a mutual way between contracting states, especially where the host country is from the developing world.

1. Introduction

Bilateral treaties on the promotion and protection of investments of investors of one contracting party in the territory of the other contracting party can be traced back to 1959, when the first BIT was signed between the Federal Republic of Germany and Pakistan.¹ It is estimated that the international investment framework consists today of a web of roughly 3,000 investment treaties, including bilateral investment treaties between two states, regional agreements, and investment protection provisions in free trade agreements between two or more countries.² A key driver of these instruments has historically been the desire of developed, capital-exporting states to ensure that their nationals are financially and legally protected when investing in developing, capital-importing states. Consequently, the majority of investment treaties are between developed countries and developing countries or economies in transition, though this is slowly changing.³

It has been observed that since the first BIT, they had a relatively uniform content that had not changed markedly, apart from the introduction of provisions on national treatment and investor–State dispute resolution in the 1960s.⁴ These treaties are not mere friendly diplomatic instruments, as some countries had first expected, but are actual treaties setting out hard legal obligations for the state hosting the investment and enforceable rights for the foreign investor.⁵ Indeed, performance of the arising obligations and rights is buttressed by the provision for dispute settlement clauses in these treaties, to deal with any violation or breach. This is evidenced by the fact that one of the key provisions to be captured in these agreements is the Investor-State Dispute Settlement (ISDS) mechanism. The implication is that negotiating parties must take the contents

¹ United Nations Conference on Trade and Development, ‘Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,’ (United Nations, New York and Geneva, 2007), p. 1. Available at http://unctad.org/en/docs/iteia20065_en.pdf [Accessed on 9/11/2016].

² International Institute for Sustainable Development, ‘Investment Treaties,’ available at <http://www.iisd.org/investment/law/treaties.aspx> [Accessed on 2/11/2016].

³ International Institute for Sustainable Development, ‘Investment Treaties,’ op cit.

⁴ United Nations Conference on Trade and Development, ‘Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,’ op cit. p.1.

⁵ Ibid; See also generally Potesta, M., ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’ (July 9, 2012). Society of International Economic Law (SIEL), 3rd Biennial Global Conference. Available at SSRN: <https://ssrn.com/abstract=2102771> [Accessed on 2/11/2016].

of these treaties or agreements very seriously considering that their performance is not optional and could lead to legal action. The majority of the investment protection treaties still include potentially broad and vague standards, providing little legal certainty and allowing tribunals to interpret the standard in ways that significantly limit the governments' regulatory powers.⁶

It is therefore possible to have unintended outcomes from the interpretation and enforcement of dispute settlement clauses. This paper mainly focuses on this aspect of investment treaties or agreements. It discusses the ISDS factors that are likely to defeat the original purpose of BITS, that is, promoting trade and investment for national development for both the domestic and host states.

2. Need for Bilateral Investment Treaties (BITS) and Investment Agreements in the Developing World

Generally, investment treaties are concluded between two or more governments to offer covered foreign investors protection for their investments from host government conduct in violation of the treaty such as expropriation without compensation, discrimination or treatment that is not in accordance with "fair and equitable treatment" obligations.⁷ They include both stand-alone investment treaties (often referred to as bilateral investment treaties or BITS) and investment chapters in broader trade and investment agreements such as the North American Free Trade Agreement (NAFTA), the Transpacific Partnership agreement (TPP) or the Economic Partnership Agreement (EPA) in our case.⁸

BITS are negotiated with two very distant interests: on the one hand, one state aims to protect its investors with money in another state against any incidental changes to the legislation of the host country, while the recipient state wishes to achieve a high economic growth.⁹ This is especially so with reference to BITS agreed between either capital exporting or capital importing countries.¹⁰ BITS are also meant to reduce the risk of unfair treatment where a host state can give preference to nationals to the detriment of international investors.¹¹ Furthermore, BITS are also designed to minimise political or economic instability that are likely to arise in relation to such processes as building a plant, hiring people and transferring technology.¹² This may especially arise where the investors' obligations does not meet the local people's expectations as per such national policies

⁶ International Institute for Sustainable Development, 'Investment Treaties,' available at <http://www.iisd.org/investment/law/treaties.aspx> [Accessed on 2/11/2016].

⁷ OECD, 'Chapter 8: The impact of investment treaties on companies, shareholders and creditors,' OECD Business and Finance Outlook 2016, P. 224. Available at <http://www.oecd.org/daf/inv/investment-policy/BFO-2016-Ch8-Investment-Treaties.pdf> [Accessed on 2/11/2016].

⁸ *Ibid*, p. 224.

⁹ Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' *op cit.*, p. 16; See also Yackee, J.W., 'Conceptual Difficulties in The Empirical Study of Bilateral Investment Treaties,' *Brooklyn Journal of International Law*, Vol. 33, 2008, p. 405.

¹⁰ See generally, Balassa, B., 'Trade between Developed and developing Countries: The Decade Ahead,' available at <http://www.oecd.org/eco/growth/2501905.pdf> [Accessed on 2/11/2016].

¹¹ Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' *op cit.*, p. 16; See also generally, Mahmood, N., 'Democratizing Investment Laws: Ensuring 'Minimum Standards' for Host States,' *The Journal of World Investment & Trade*, Vol. 14, 2013, pp.79–113; See also Falsafi, A., 'The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard,' *Suffolk Transnational Law Review*, No. 30, 2007, p.317.

¹² Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' *op cit.*, p. 16.

Negotiating Dispute Settlement terms in Bilateral Investment Treaties (BITS) and Economic Partnership Agreements (EPAs)

as benefit sharing arrangements and other local initiatives that are geared towards promoting equitable national development.

It has been observed that while some commentators view bilateral investment treaties as a development tool, arguing that BITs channel much needed capital to poor countries, others fear that the favourable treatment given to foreign investors through BITs can worsen the environmental or human rights practices of states amongst a number of other negative effects.¹³

Generally, EPAs are said to be designed to ‘lock-in’ policy reforms by establishing binding regulations in the areas of trade, investment and other trade-related issues.¹⁴ The *Cotonou Agreement*¹⁵ set the stage for Economic partnership agreements to be negotiated during the preparatory period which was to end by 31 December 2007 at the latest. The Cotonou Agreement’s main objectives are the reduction and eventual eradication of poverty and the gradual integration of African, Caribbean and Pacific States into the global economy, whilst adhering to the aims of sustainable development.

Formal negotiations of the new trading arrangements were to start in September 2002 and the new trading arrangements were to enter into force by 1 January 2008, unless earlier dates were agreed between the Parties.¹⁶ Negotiations of the economic partnership agreements was to be undertaken with ACP (African, Caribbean and Pacific Group of States) countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP.¹⁷

According to the Cotonou Agreement, negotiations of the economic partnership agreements were to aim notably at establishing the timetable for the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules. On the Community side trade liberalisation was meant to build on the *acquis* and was aimed at improving current market access for the ACP countries through *inter alia*, a review of the rules of origin. Negotiations were to take account of the level of development and the socioeconomic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. Negotiations are

¹³ Bodea, C. & Ye, F., ‘Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,’ 2015, p.1, available at http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf [Accessed on 2/11/2016]; See also Kerner, A., ‘Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties,’ *International Studies Quarterly*, Vol.53, 2009, pp.73–102; See also Bodea, C. & Ye, F., ‘Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,’ (2015). Available at http://wp.peio.me/wp-content/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf [Accessed on 2/11/2016]

¹⁴ Meyn, M., *Economic Partnership Agreements: A ‘historic step’ towards a ‘partnership of equals’?* Overseas Development Institute Working Paper 288, March 2008, p.2. Available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1714.pdf> [Accessed on 2/11/2016].

¹⁵ 2000/483/EC: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, *Official Journal of the European Communities*, OJ L 317, 15.12.2000.

¹⁶ *Ibid*, Art. 37(1).

¹⁷ *Ibid*, Art. 37(5).

therefore meant to be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.¹⁸

It is noteworthy that the East African Community (EAC) is yet to agree on a number of issues concerning the signing of the foregoing EPA with the European Union. While Kenya and Rwanda had already signed the deal, other EAC member states have been adamant to do the same.¹⁹

It is noteworthy that Kenya has in the past concluded Investment Promotion and Protection Agreements with France, Finland, Germany, Italy, Netherlands, Switzerland, China, Libya, The Islamic Republic of Iran, Burundi and the United Kingdom, and is currently negotiating a number of others with various countries.²⁰ The most recent BIT was with Japan and it was signed on 28th August 2016 although it is yet to come into force. Kenya is also a member of the Multilateral Investment Guarantee Agency (MIGA) and the African Trade Insurance Agency (ATIA), which guarantees investors against non-commercial risks, and the International Centre for Settlement of Investment Disputes (ICSID).²¹ These are meant to make Kenya an attractive foreign investments destination.

3. Investor-State Dispute Settlement mechanism (ISDS) And the International Centre for Settlement of Investment Disputes

One of the arguments in favour of BITs is that they aim to guarantee standards of protections for investors such as compensation for expropriation, national treatment of foreign investors or most favored nation treatment.²² Even more, it has been argued, investors can enforce their rights in a timely manner and through investor chosen venues that are unlikely to favor host states: Early BITs provided investor protection through state to state dispute resolution, via the establishment of tribunals or submission to the International Court of Justice. However, more recent BITs grant foreign investors the right to adjudicate alleged violation of rights in international tribunals, without the need to exhaust local remedies, and, in case of non-compliance with the arbitration decisions, broad rights to request the confiscation of host government's property from around the world.²³ One such international tribunal that is preferred in settlement of state investment disputes

¹⁸ 2000/483/EC: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, Art. 37(7).

¹⁹ Crawford, R., 'Tanzania & Uganda stand up against unfair EU-East Africa trade deal,' (Stronger Unions, 29 Jul 2016). Available at <http://strongerunions.org/2016/07/29/tanzania-and-uganda-stand-up-against-unfair-eu-east-africa-economic-partnership-agreement/> [Accessed on 4/11/2016].

²⁰ Kenya Investment Authority, 'Frequently Asked Questions,' available at http://investmentkenya.com/index.php?option=com_content&view=article&id=33&Itemid=161

²¹ United Nations Conference on Trade and Development, Kenya: Report on the Implementation of the Investment Policy Review, UNCTAD/DIAE/PCB/2012/6 (United Nations, 2013), p.5. Available at http://unctad.org/en/docs/iteipc20061_en.pdf [Accessed on 2/11/2016].

²² International Institute for Sustainable Development, 'Investment Treaties,' op cit, p.6; See also Mestral A.D., 'Investor-State Arbitration Between Developed Democratic Countries,' CIGI Investor-State Arbitration Series

Paper No. 1 — September 2015. Available at https://www.cigionline.org/sites/default/files/isa_paper_series_no.1.pdf [Accessed on 2/11/2016].

²³ International Institute for Sustainable Development, 'Investment Treaties,' op cit, p.6; See also Ngobeni, L. & Fagbayibo, B., 'The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance

is the International Centre for Settlement of Investment Disputes (the Centre). The Centre was established in order to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.²⁴

Since Investor-State Dispute Settlement (ISDS) is a mechanism that allows foreign individuals and foreign companies to sue host-country governments through ad hoc arbitration proceedings rather than through normal domestic administrative and judicial channels, it has been argued that the ISDS provision in trade and investment agreements poses a risk to the development, enforcement and application of domestic law.²⁵ In respect of this, it has been argued that access to international arbitration, as opposed to access to municipal courts in the host state, is essentially because investors typically assume that municipal courts in developing countries will lack the technical competence or neutrality to adequately and fairly resolve investment disputes.²⁶

It has been observed that whereas Bilateral Investment Treaties (BITs) have become the dominant source of rules on foreign direct investment (FDI), they vary significantly in at least one important respect: whether they allow investment disputes to be settled through the International Centre for the Settlement of Investment Disputes (ICSID).²⁷ Indeed, among the issues that are carefully negotiated by BIT signatories are procedures for the settlement of any future disputes that might arise between foreign firms and the governments in which they invest.²⁸

Africa, being one of the main destinations of foreign direct investments, has also not been left out as far as investment disputes are concerned. For instance, out of all cases registered under the International Centre for Settlement of Investment Disputes (ICSID), Sub-Saharan Africa accounts

and Investment: Challenges and opportunities for effective harmonization,' *Law, Democracy and Development*, Vol.19, 2015, pp.175-192. <https://dx.doi.org/10.4314/LDD.V19I1.9> [Accessed on 2/11/2016]; See also Junngam, N., 'An MFN Clause and Bit Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference,' *UCLA Journal of International Law and Foreign Affairs*, Vol. 15, 2010, p. 399.

²⁴ Art. 1, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159 (Came into force on 14 October 1966).

²⁵ Johnson, L., et al, 'Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law' (Columbia Center on Sustainable Investment, May 2015), p. 1. Available at <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf> [Accessed on 2/11/2016].

²⁶ Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' (The George Washington University School of Business & Public Management Institute of Brazilian Issues – IBI, Spring 2011), p.11. Available at https://www2.gwu.edu/~ibi/minerva/Spring2011/Alexandre_Martins.pdf [Accessed on 3/11/2016].

²⁷ Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions." *International Studies Quarterly*, vol. 54, no. 1, 2010, pp. 1–26. www.jstor.org/stable/40664235.

²⁸ *Ibid*, p. 2.

for 16% of these cases.²⁹ It is also reported that in 2014, cases against Sub-Saharan Africa amounted to 20% of the overall number of new cases brought under ICSID during that year.³⁰

International arbitration is preferred to domestic courts because: one, an investor in possession of a favourable international arbitral award has the very real ability to enforce the terms of the award even in the face of continued host state resistance due to a network of important international treaties, including most prominently the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which empowers investors to seek award enforcement against host state property located in third-party states.³¹ Secondly, authoritative, impartial arbitration awards are believed to have the tremendous potential to increase the reputation costs of the host state's breach by publicly clarifying both the facts surrounding the dispute and the content of the relevant legal rules, and by applying those facts to the rules.³²

Under international trade and investment, parties to treaties and agreements are bound by the non-discrimination principle which basically consists of two clauses: the most-favored nation (MFN) clause and the national treatment clause. Under these clauses, BITs require that a state should confer the other state-party's investors the same beneficial rights as the ones offered to third states' investors (most-favored nation clause), and should also mandatorily offer the other state-party's investors a treatment not less favourable than the one granted to national investors (national treatment clause).³³

However, it has been argued that the final verdict in the case of investor-state litigation is oftentimes unpredictable if the core argument of the plaintiff is based on a violation of either the MFN clause or the national treatment clause.³⁴ Both in the trade and investment areas, the disputes submitted to arbitration reveal a constant friction between the trend to liberalize trade and investment flows and the state's right to regulate its tax system and public policies.³⁵

4. EPAs and BITs: The Downside

Notably, bilateral investment treaties include provisions that guarantee investor rights as well as mechanisms that investors can use to legally enforce such provisions.³⁶ The world economy under

²⁹ Mohamadieh, K. & Uribe, D., 'The Rise of Investor-State Dispute Settlement in the Extractive Sectors,' March, 2016. Available at <http://www.ipsnews.net/2016/03/the-rise-of-investor-state-dispute-settlement-in-the-extractive-sectors/> [Accessed on 2/11/2016].

³⁰ Ibid.

³¹ Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 12; See also Puig, S., 'Investor-state tribunals and constitutional courts: The Mexican sweeteners saga,' Mexican Law Review, Volume 5, Issue 2, January–June 2013, pp. 199–243.

³² Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p.12.

³³ Ibid, p. 17; See also United Nations Conference On Trade And Development, Most-Favoured Nation Treatment: A Sequel, UNCTAD Series on Issues in International Investment Agreements II (United Nations, New York, 2010). Available at http://unctad.org/en/Docs/diaeia20101_en.pdf [Accessed on 2/11/2016].

³⁴ Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 18.

³⁵ Ibid, p. 18.

³⁶ Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' 2015, p.1, available at

a globalized market is run by a number of international economic institutions whose functions are policy formulation, managing and monitoring global markets. The main international economic institutions that impact on African policies are: World Bank, International Monetary Fund (IMF), the UN Conference on Trade and Development (UNCTAD), African Development Banks, European Bank for Reconstruction and Development and Canadian International Development Agency.³⁷

Some of these institutions are specialized agents of the international community while others are a coalition of States drawing membership from State members. Whereas developing countries are part of the international economic institutions, decision making on policy is done by developed countries which enjoy international market dominance.

BITS and other investment agreements have thus been seen as instruments domination used by the developed world to secure economic fortunes for their people and countries in general, from the developing world. This is due to a number of negative factors that result from their implementation.

4.1 Human Rights Violation

It has been argued that BITS have the potential to negatively influence human rights practices because they lock in legally enforceable conditions attractive to investors, both retrospectively and into the future. Further, the lock-in effect of BITS can force the hand of the government to favour multi-national corporations or foreign investors even at the cost of violating the rights of their own citizenry.³⁸

4.2 Hindered National Development

It was recently reported that Tanzania and Uganda refused to sign the Economic Partnership Agreement between the EU and East African Community countries — Kenya, Uganda, Tanzania, Burundi and Rwanda —partly due to concerns about the negative impact of the agreement on democracy and development.³⁹ This has been attributed to the argument that EPAs require countries to remove tariffs from all but a few products, depriving them of a key source of income and undermining their ability to protect their industries that are not able to compete with European goods.⁴⁰

http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf
[Accessed on 2/11/2016].

³⁷ The WTO and other organizations - World Trade Organization, www.wto.org > ... > wto & other organizations

³⁸ Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITS): The Global Investment Regime and Human Rights,' 2015, p.2, available at

http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf
[Accessed on 2/11/2016];cf. Fry, J.D., 'International Human Rights Law In Investment Arbitration: Evidence Of International Law's Unity,' (2007). Available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1077&context=djci> [Accessed on 4/11/2016].

³⁹ Crawford, R., 'Tanzania & Uganda stand up against unfair EU-East Africa trade deal,' (Stronger Unions, 29 Jul 2016). Available at <http://strongerunions.org/2016/07/29/tanzania-and-uganda-stand-up-against-unfair-eu-east-africa-economic-partnership-agreement/> [Accessed on 4/11/2016].

⁴⁰ Ibid.

Africa has lost huge revenues to fraudsters. For example, Democratic Republic of Congo has in the past lost an estimated US\$ 1.36 billion through a protracted systematic undervaluation and sale of mineral assets to unknown buyers.⁴¹ Members of the international community should put in place measures to deal with false companies in their jurisdictions.

4.3 Unfair Trade Practices and Unequal Bargaining Power

There has been a contention that international arbitration through ICSID is not a substitute for poor domestic institutions in host countries, but rather is a commonly preferred course of action for powerful countries, who often, but not always, attain their preferred outcomes in BIT negotiations.⁴²

The African continent arguably lies on the greatest percentage of earth's natural resources comprising rare minerals, huge oil deposits and a variety of physical features. This also makes Africa become possibly one of the biggest contributors to the percentage of the world's natural resources.⁴³ The result of this is that the rest of the world seeks to have a stake in the exploration and exploitation of these resources.

Economic talks about African economy observe that Africa's resources have fueled economic growth but most Africans have not benefited.⁴⁴ While Africa is recognised as rich in unexploited natural resources, the same may not be said for governance structures. Some of the channels through which opportunities to benefits from these resources are lost include skewed economic agreements where investors from the developed world may get away with huge returns from their investments but giving little or nothing to the host states. Any attempts by host governments to go after such violators of national laws and policies come with the potentially high cost risk of complaint and dispute before international tribunals. It cannot also be ruled out that some African governments have arguably played a role in making the continent poor. There has been collusion between dishonest leaders and foreign companies to sell out resources and manipulate national laws for easy access by the foreign companies.⁴⁵ It is noteworthy that many at times African governments do not uphold the key principles of democracy, transparency and accountability in governance especially during negotiation of key international treaties.⁴⁶

⁴¹ 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>

⁴² Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," *op cit.*, p. 3.

⁴³ Global Policy Forum, Poverty and Development in Africa, Available at <http://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html> [Accessed on 17/11/2016].

⁴⁴ 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 14/11/2016]

⁴⁵ Dare, S., 'A Continent in Crisis: Africa and Globalization,' *Third World Traveller*, Dollars and Sense magazine, July/August 2001, available at http://www.thirdworldtraveler.com/Africa/Continent_Crisis.html

⁴⁶ Akindele, S.T., et. al., *Globalization, Its Implications and Consequences for Africa*.

5. Dispute Settlement terms in Bilateral Investment Treaties (BITS) and Economic Partnership Agreements (EPAs)

Over the years, there has been a shift in negotiations where some BITs have undertaken to address *investor–State dispute settlement* procedures in greater detail, providing more guidance to the disputing parties concerning the conduct of arbitration and strengthening the rule orientation of adjudication mechanisms.⁴⁷ This is unlike the traditional approach of only sketching out the main features of investor–State dispute settlement, relying on specific arbitration conventions to regulate the details.⁴⁸

5.1 Implications of Investment Disputes on States: Forestalling Trouble

It is at the negotiations stage that parties to treaty can agree whether or not the BIT in question should allow foreign investors to challenge a government’s actions before ICSID. This is arguably driven by the particular parties interests.⁴⁹ For instance, it has been contended that governments whose firms engage in considerable outward FDI (“home” governments) typically prefer investment disputes to be settled through international arbitration, whereas governments that receive substantial inward FDI (“host” governments) generally prefer to have disputes over the treatment of foreign investment handled by domestic courts.⁵⁰

The government’s decision in the foregoing case has implications on its economic fortunes. On the one hand, a host government that allows its actions to be challenged before ICSID faces potential new costs, as it stands to lose the benefits of any “taking” if the action is deemed by an ICSID tribunal to be a breach of BIT obligations. Furthermore, being found “guilty” in one or more ICSID disputes could cause broader damage if outside investors then begin to question the environment within the host state.⁵¹

5.2 Dealing with Unintended Beneficiaries: Treaty Shopping

It is possible for countries from the developing world to sign treaties that may later impact them negatively and fail to achieve the main goals of development. This is attributable to the fact that the negotiators may not have fully grasped the full implications of the treaty at the time of signing. This is especially more pronounced where investors from non-signatory countries identify and exploit the existing loopholes for forum shopping.

It has been argued that treaty shopping violates the principle of reciprocity, where, investment treaties, like most bilateral treaties, establish reciprocal rights and obligations between the contracting states. Treaty shopping runs counter to this principle, in that an entity with no substantial ties to a contracting state could avail itself of the treaty protections that its own state

⁴⁷ United Nations Conference on Trade and Development, ‘Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,’ (United Nations, New York and Geneva, 2007), p. xiii. Available at http://unctad.org/en/docs/iteia20065_en.pdf [Accessed on 9/11/2016].

⁴⁸ Ibid, p. xiii.

⁴⁹ Allee, T., & Clint P., “Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions,” op cit., p. 3.

⁵⁰ Ibid, p. 3.

⁵¹ Ibid, p. 3.

may not be willing to reciprocate to investors from the host state.⁵² For instance, whereas conditions related to human rights should be included in a reciprocal deal around investment protection, this could be undermined by investors who shop around for the most attractive jurisdiction to invest from.⁵³ It has also been observed that treaty shopping can expose a host country to claims by companies to which it would not otherwise allow entry.⁵⁴

It is therefore advisable that negotiators ensure that such loopholes are sealed to avoid unintended consequences of the treaty on the host country. It should be clear from the treaty or agreement who the covered parties are, especially through clear and substantive provisions on what entails investment and the contemplated meaning of investor under the legal instrument in question. This is the only way to ensure that any potential human rights violations are preempted, and that there are no social and environmental impacts of (foreign) investments in the host states.⁵⁵ The wording of these treaties is especially important considering that once a dispute arises, the host state's legal framework does not apply and interpretation is entirely left to the international tribunal.

5.3 Choice of Forum for Investment Disputes Settlement

Investor-state dispute settlement provisions in BITs vary, with some treaties providing investors with direct access to international arbitration through one or more permanent venues, some allowing for ad hoc arbitration, and others dictating the use of domestic courts to resolve disputes.⁵⁶ However, the most notable difference among treaties is believed to be whether they include dispute settlement via the International Centre for the Settlement of Investment Disputes (ICSID), an independent organization affiliated with the World Bank.⁵⁷

It has been observed that access by foreign investors to international arbitration as provided by the ISDS clauses of a vast majority of IIAs is a specific feature that has no equivalent in other areas of international economic law, granted to foreign investors as one of extraordinary legal nature insofar as it derogates from customary international law, which requires that any acts or measures taken by the State must be challenged before the national jurisdictions of the State.⁵⁸ Only after the investor has exhausted local remedies can the State from which it derives its nationality file an action against the host State, but never the investor himself.

⁵² Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012' Comments received as of 30 August 2012, (OECD, Paris, 2012), p. 77.

⁵³ Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012' op cit., p.77.

⁵⁴ Ibid, p. 77.

⁵⁵ Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012' op cit. p.77.

⁵⁶ Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," op cit., p. 2.

⁵⁷ Ibid, p.2.

⁵⁸ United Nations Conference On Trade And Development, Most-Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II, (United Nations, New York and Geneva, 2010), p.4.

5.4 Scope of Issues for Investment Disputes Settlement

It is important that parties clarify during negotiations what issues or scope of breach is to be covered by the particular agreement or treaty since this can be contentious in future. For instance, in *Salini v Morocco*,⁵⁹ the dispute resolution clause of the applicable bilateral investment treaty (BIT) in that case allowed for international arbitration with respect to “[a]ll disputes or differences...between a Contracting Party and an investor of the other Contracting Party concerning an investment.” The tribunal held that the terms of that provision were “very general” and that “[t]he reference to expropriation and nationalization measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article.” The approach has been inconsistent considering that in *Vivendi v. Argentina* annulment decision of 2002, the ad hoc committee was called upon to determine—in the context of the exercise by the investor of its jurisdictional option under the treaty’s fork in the road clause—the scope of a dispute resolution clause providing for international arbitration as regards disputes “relating to investments made under th[e] Agreement between one Contracting Party and an investor of the other Contracting Party.” The committee held that that provision “does not use a narrower formulation, requiring that the investor’s claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.”⁶⁰

Further, in 2004, the arbitral tribunal in *SGS v. Philippines*, also gave wide effect to the dispute resolution provision of the Swiss-Philippines BIT, which provided for ICSID arbitration as regards “disputes with respect to investments” between an investor and the host state. The tribunal held that “[t]he term ‘disputes with respect to investments’...is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a ‘dispute with respect to investments;’ so too would a dispute arising from an investment contract such as the CISS Agreement.”⁶¹ It further held that “the phrase ‘disputes with respect to investments’ naturally includes contractual disputes.”⁶²

This is an important aspect that needs to be well articulated since it may create the impression of erosion of state sovereignty especially in the case of most African states which are the main recipients of these treaties and are more often than not included in these disputes as respondents. There is also little evidence of these states ever winning these disputes especially the ones before the ICSID.

Investment dispute clauses should clarify whether the same covers both treaty obligations and contractual obligations. However, it may be advisable only treaty obligations covered and exclude contractual obligations to other channels to minimise the number of possible instances when host governments may be dragged to the international tribunals such as ICSID.

⁵⁹ *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, Decision on jurisdiction, July 16, 2001, 42 ILM 606 (2003), para. 59

⁶⁰ *Compañía de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic*, Decision of July 3, 2002, 41 ILM 1135 (2002), para. 55.

⁶¹ [*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on jurisdiction, Jan. 29, 2004, 19 MEALEY’S: INT’L ARB. REP. C1 (Feb. 2004), para. 131].

⁶² *Ibid*, para. 132.

5.5 BITS Enforcement Procedure

It has been argued that one of the most constraining elements of BITS are their enforcement procedures especially with regard to the procedures for investor-state dispute settlement.⁶³ Also relevant is the assertion that BITS that allow disputes to be resolved through ICSID impose the greatest constraints on signatories since they transfer the important functions of the treaty interpretation and enforcement from the domestic level to the international level.⁶⁴ In addition, by providing multinational corporations with direct recourse before ICSID, the host governments risk having their actions toward foreign investment reviewed by impartial legal tribunals, which could order them to pay billions of dollars in damages to aggrieved multinationals.⁶⁵

5.6 Host states Before ICSID: Disturbing the Tilt

Oil and mineral extraction in Africa is carried out by multinational companies. These companies enter into agreements with African Governments for the extraction of resources. They have high bargaining power in the negotiations due to their influential position and backing from their governments. On the other hand, African governments have low bargaining power in these contracts or agreements because they are less influential. They are more flexible in negotiations than their foreign counterparts. In exchange, they end up giving what rightfully belongs to the people to foreigners.⁶⁶ For instance, there is a need to tackle tax avoidance and tax evasion by foreign companies carrying out resource extraction in Africa. Tax avoidance is one of the biggest problems bedeviling African economies because it is reported that the revenue lost in Africa through tax avoidance is greater than the combined revenue from international aid and direct foreign investment.

The right of a people to own, utilize and control natural resources within their countries is an internationally recognized right.⁶⁷ It is a right provided for in the various international legal instruments on human rights and this has since been adopted in the national legislation of various countries around the world including African countries. However, this right is likely to be defeated where investors use international tribunals such as ICSID to interfere with the host government's efforts to mainstream its international policy framework for the achievement of this right. It should be clarified during negotiations as to what actions amount to violation of treaty obligations and the ones that are merely state's exercise of their sovereign rights through the government.

6. Conclusion

Bilateral investment treaties and other investment treaties have the potential to promote mutual benefit between domestic states and host states as contracting states to a treaty. Equitable international trade can enable countries to achieve food security, generate decent employment

⁶³ Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," *op cit.*, p. 4.

⁶⁴ *Ibid*, p.4.

⁶⁵ *Ibid*, p.4.

⁶⁶ Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief Available at <http://uk.reuters.com/article/2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616> [Accessed on 10 February, 2014]

⁶⁷UDHR, ICCPR, ICESCR, Banjul Charter.

opportunities for the poor, promote technology transfer⁶⁸, 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.⁶⁹

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 2020.⁷⁰ 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.⁷¹ As such, it seeks to continue to promote a universal, 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.⁷²

International trade and investment is one of the tools employed by national governments in their quest to improve the livelihoods of their people and eradication of poverty in general. Poverty does not merely mean lack of adequate income or inability to meet basic human needs. Notably, some people have good health and can live a productive life but are deprived of suitable opportunities.⁷³ The implied denial of opportunities pushes them into unemployment resulting in loss of income and finally inability to meet the basic human needs.⁷⁴ Lack of opportunity in economic and political life is the root cause of poverty and therefore should not be neglected while defining poverty.⁷⁵

Despite all the potential held by these treaties and other investment agreements, it is possible for a host government to lose all the opportunities that may come with foreign direct investments through unfair investment practices coupled with skewed investment dispute settlement provisions.

⁶⁸ 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."

⁶⁹ 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].

⁷⁰ 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, para. 17.11.

⁷¹ *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 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.

⁷² *Ibid.*, para. 68.

⁷³ See Sarshar, M., 'Amartya Sen's Theory of Poverty', *From the Selected Works of Mubashshir Sarshar*, January 2010. Available at: <http://works.bepress.com/mubashshir/16/> [Accessed on 20/11/2016].

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

Negotiating Dispute Settlement terms in Bilateral Investment Treaties (BITs) and Economic Partnership Agreements (EPAs)

Investor-state dispute mechanisms should be able to protect both the investor and the state from losses through such means as ensuring that while the investors may have recourse to international tribunals, the same are not used to defeat the right of host governments to hold these investors accountable.

It is suggested that developing countries especially in Africa should invest more time and resources in getting these BITs and other trade and investment agreements right considering that poor negotiations may lead to more adverse outcomes as against promotion of investments and development. States must ensure that its negotiators have the skills and the competence to safeguard the interests of their countries, since treaty negotiation is basically a skill that can and should be perfected. This is the only way to ensure that BITs become more of a blessing to the developing states than a curse to be shunned.

Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya

Abstract

This paper explores the concept of benefit sharing in natural resources exploitation in Kenya. The author argues that benefit sharing should be interpreted in its various forms, namely monetary and non-monetary since a narrower conception is likely to create confusion, potential conflict between investors and local communities as well as diminished hopes of improving the livelihoods of communities. The paper highlights the international best practices in the area of benefits sharing in natural resources exploitation and briefly looks at Nigeria and Ghana to draw lessons on the likely effects of mismanagement of natural resources. The author gives viable suggestions on some of the ways that Kenya can ensure that communities reap maximum benefits from exploitation of natural resources, including the recently discovered oil in the Northern part of the country.

1. Introduction

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.¹ It has also been observed that most private-sector investors realize that projects that are good for the host country and communities, and whose benefits are perceived to be shared reasonably, are less likely to face disruption, renegotiation, or even expropriation.²

Effective Natural Resources Management (NRM) contemplates the use, access of resources to preserve and conserve for the good of all generations.³ The NRM role is bestowed upon the state but with duty on cooperation from everyone to ensure that there is sound use of the natural resource.⁴ It is also noteworthy that whereas some natural resources are renewable, others are not. Thus, it is necessary to take care of natural resources to ensure that the benefits that accrue undoubtedly serve the present and the generations to come.⁵ The issue of benefit sharing has been a great challenge as far as natural resource exploitation is concerned as many factors hinder communities from achieving an equitable share of the benefits that accrue from natural resource exploitation. This has largely been attributed to lack of proper and ineffective management.⁶

¹ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 11. 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 26/04/2016].

² Ibid.

³ Child, B., et al, *Zimbabwe's CAMPFIRE Programme: Natural Resource Management by the People*. (1997) IUCN-ROSA Environmental Issues Series No. 2

⁴ See Article 69, Constitution of Kenya 2010.

⁵ See United Nations, *World Economic and Social Survey 2013: Sustainable Development Challenges*, E/2013/50/Rev. 1, ST/ESA/344. Available at <https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [Accessed on 22/05/2016]; See also Kibert, C.J., 'The Ethics of Sustainability,' available at <http://rio20.net/wp-content/uploads/2012/01/Ethics-of-Sustainability-Textbook.pdf> [Accessed on 22/05/2016].

⁶ Ochola, O.W., et al (eds), *Managing Natural Resources for Development in Africa: A resource Book*. IDRC, 2010. Available at <http://www.gbv.de/dms/zbw/646005146.pdf> [Accessed on 30/2016].

This paper reflects on equitable benefit sharing in the context of the emerging extractive industry in Kenya. The author briefly discusses ways in which communities can benefit while drawing lessons from other countries on how best to avoid the ‘resource curse’ phenomenon. The discourse thus goes beyond reliance on extractive industries to encourage communities on how best they can overcome the perennial problems of economic underdevelopment and consequently, poverty.

2. Extractive Industries Resources: The New Canaan for Kenya?

In the year 2012, the then president Hon. Mwai Kibaki announced the discovery of oil in Turkana County. Tullow Oil (London) and African Oil (Vancouver) evidenced the presence of enough crude oil viable. The three wells discovered were estimated to hold at least 250 million barrels.⁷ This announcement has led to a change in perception of the County. The North Western Kenya is predominantly pastoralist populated area. Turkana County borders West Pokot County, Marsabit County, Baringo County in the South, South East and East respectively. The county also borders South Sudan and Uganda.

Expanding extractive industries, particularly in sub-Saharan Africa, is characterized by increasing levels of political, social, technical and environmental risk.⁸ Changes brought about by extractive investment can have negative social impacts, such as rapid urban growth, physical and economic displacement of communities, weakening of traditional social structures, new conflicts, and even impoverishment.⁹ 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 has been recorded cases of terrible violence and immense human suffering.¹⁰ 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. Further, the illegal trade of minerals bars communities from benefiting from its resources.¹¹

There is conflicting literature on the potential of extractive industries capacity to promote national development. It has been observed that proponents of resource-led development, (i.e. how the extractive industries can contribute to poverty alleviation and sustainable development in the

⁷ Kagwe, W., ‘Kenya strikes new oil well, doubles estimates,’ *The Star*, 4 July 2013. Available at <http://allafrica.com/stories/201307040991.html> [Accessed on 22/05/2016]; Liloba, H., ‘Kenya: Tullow Hits another Oil Field,’ *East African Business Week* (Kampala), 9 July, 2013.

Available at <http://allafrica.com/stories/201307100096.html>

⁸ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge Of ‘New Oil’ In Uganda*, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

⁹ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 55.

¹⁰ 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 19/05/2016].

¹¹ See ‘Diamonds in Sierra Leone, A Resource Curse?’ available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 22/05/2016]; Kinniburgh, C., ‘Beyond “Conflict Minerals”: The Congo’s Resource Curse Lives On,’ *Dissent Magazine*, Spring 2014, available at <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 22/05/2016]; Free the Slaves, ‘Congo’s Mining Slaves: Enslavement at South Kivu Mining Sites,’ *Investigative Field Report*, June 2013. Available at <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 22/06/2016].

developing world) argue that the inflow of foreign direct investment (FDI) into the country and a model of export based growth will provide jobs, economic growth and ultimately, poverty reduction.¹² However, for many resource rich developing countries pursuing this model, the reality has been low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.¹³ Kenya is no different as far as expectations are concerned. There has been renewed hopes of ‘spurred economic growth and development’ in the country as a result of the recently discovered oil resources in the country.¹⁴ The Northwestern region of the country, where the deposits were first discovered, has been seen as the new frontier in driving Kenya’s economy. Turkana County has been documented as one of the Counties with the highest level of poverty in Kenya.¹⁵ The distrust between local communities around the region against each other¹⁶ has led to constant conflicts as well as cross border conflicts.¹⁷ The conflict is largely sparked by livestock rustling, harsh climate and boundary dispute. Due to low literacy levels,¹⁸ other communities have subsequently been employed as locals had no skills for drilling and seismic work.¹⁹

The local communities have viewed the oil discovery as ‘heaven sent’ in that it will help ‘open’ the region to development by the national government. While there are prospects of ‘real’ development in the region, the foregoing averments in the international arena affirms that the expected development may not be realized or may not achieve the desired outcome for the country and specifically the locals.²⁰ Pegging hopes of development on the extractive resources only may mean that the region remains under-developed or undeveloped for longer as the oil may not turn out as expected. If anything, it may add to the above mentioned problems that characterise the

¹² Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge of ‘New Oil’ In Uganda*, op cit, p. 48.

¹³ *Ibid*, p. 48.

¹⁴ See Institute for Human Rights and Business, ‘Human Rights Risks and Responsibilities: Oil and Gas Exploration Companies in Kenya,’ Background Paper, 2013. Available at http://www.americanbar.org/content/dam/aba/events/international_law/2015/06/Africa%20Forum/Security%201.authcheckdam.pdf [Accessed on 18/05/2016].

¹⁵ Turkana County –United Nations Joint Programme 2015-2018, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at <https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf> [Accessed on 26/05/2016].

¹⁶ Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. <http://www.jstor.org/stable/25842144>. [Accessed on 19/05/2016].

¹⁷ Johannes, E.M., et al, ‘Oil discovery in Turkana County, Kenya: a source of conflict or development?’ *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

¹⁸ Chikwanha, A.B., ‘The Anatomy of Conflicts in the East African Community (EAC): Linking Security With Development,’ Keynote speech to Development Policy Review Network-African Studies

Institute, Leiden University, the Netherlands, 2007. Available at <https://www.issafrica.org/uploads/EACANNIE.PDF> [Accessed on 21/05/2016]. See also <http://opendata.go.ke/Education/Percentage-distribution-of-population-15years-by-/jbxify92>

¹⁹ See Cordaid, ‘Oil Exploration in Kenya: Success Requires Consultation,’ Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya, August 2015, p. 36. Available at https://www.cordaid.org/media/publications/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf [Accessed on 20/05/2016]. See also Turkana is the least educated, says report, Daily Nation November 25, 2013. Available at <http://www.nation.co.ke/news/Turkana-is-the-least-educated-says-report-/-/1056/2087018/-/vvpqnq1z/-/index.html>; Kenya National Bureau of Statistics, Exploring Kenya’s Inequality: Pulling Apart or Pooling Together?

²⁰ Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctad.xiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 22/05/2016]

region in question. The fear of poor and low economic development despite the discovery of oil looms.²¹ Failed economies result in conflicts,²² as a result of natural resources bad governance or mismanagement.²³

It is expected that the economic gains that are likely to accrue from this venture will come with both rights and responsibilities for the concerned communities. However, also true is the fact that skewed distributions of benefits from natural resources can fuel social exclusion and conflict, threatening sustainability.²⁴ This is especially true for Kenya because, unlike the common perception that extractive industries come with a lot of wealth, this sector also requires much capital to venture and this may eat into the cumulative wealth accruing to the country of origin. For instance, in the case of Kenya, there has been reports that the Irish oil Firm Tullow, which was allocated the Lokichar Basin oil reserves, has so far incurred \$ 1.5 billion (Kenya Shillings 150 billion) in exploration costs and this amount is to be recovered once production begins.²⁵ This has led to the fears that in the absence of proper audits by Kenya, explorers such as Tullow Oil may inflate recoverable costs ultimately denying Kenyans the full benefits of their national resource.²⁶ The recovery of the full costs over production cycle is one of the contractual terms in the production sharing contracts signed between Kenya and oil explorers. Indeed, Kenya has in the past been advised that since it has a very short period within which it can maximize benefits from the oil sector before their depletion, it should continue to focus on key sectors such as agribusiness and service sectors.²⁷

Resource governance has been defined as the hard and soft rules which shape and constrain the way hydrocarbons contribute to sustainable development and poverty alleviation within host countries.²⁸ It is for this reason that this discourse explores evidence from other jurisdictions with a view to identifying ways in which the country can ensure that maximum benefits accrue to the locals from extractive industries though not necessarily directly and without relying on what may be referred to as hand-outs from the government of the day. It seeks to suggest ways in which the country can achieve effective resource governance in the said sector and other natural resource-reliant sectors.

²¹ See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012.)

²² Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

²³ Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf>

²⁴ Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' *World Development*, Vol. 72, pp. 408–418, 2015, p. 408.

²⁵ Herbling, D., 'Tullow's Sh 150bn Exploration bill Raises Queries on Costing methods,' *Business Daily*, Monday, April 18, 2016 (Nation Media Group Publication No. 2331), pp. 1 & 4.

²⁶ *Ibid*, p. 1.

²⁷ *Ibid*, p. 4.

²⁸ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda*, op cit., p. 49.

3. Benefit Sharing: Community Rights and Responsibilities

Equitable benefit sharing can be defined as the access to benefits that accrue from natural resources by stakeholders including indigenous communities.²⁹ It has been noted that the notion of benefit sharing in natural resources was first formalised in international law in 1992 through the Convention on Biological Diversity (CBD), a move that was expected at the time to address problems with the governance of socio-ecological systems in developing countries.³⁰ The international recognition of the right to benefit from natural resources wealth may be predicated upon such recognised rights of communities as the right to self-determination, right to development and the right of peoples to freely dispose of their wealth and natural resources.³¹

Article 21(1) of the *African Charter on Human and Peoples' Rights*³² provides that all peoples shall freely dispose of their wealth and natural resources. This right is to be exercised in the exclusive interest of the people and in no case should people be deprived of it. The free disposal of wealth and natural resources must however be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.³³ The Charter also obligates States parties to the Charter to undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.³⁴ Further, Article 22(1) provides that all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States also have the duty, individually or collectively, to ensure the exercise of the right to development.³⁵

The international framework on natural resources and the environment envisages a scenario where the benefits accruing from the exploitation of resources in a country or region will in turn benefit the lives of the concerned people through improved livelihoods and an improved national economy for overall development of the country. Indeed, one of the international principles of sustainable development is that states are under a duty to manage natural resources, including natural resources solely within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems.³⁶

²⁹ Jonge, B., What is Fair and Equitable Benefit Sharing? *Journal on agricultural and environmental ethics*, vol. 24, issue 2, 2011.

³⁰ Pham, T.T., et al, 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,' Working Paper 108, 2013, CIFOR, Bogor, Indonesia, p. 1. Available at http://www.cifor.org/publications/pdf_files/WPapers/WP108Pham.pdf [Accessed on 28/05/2016].

³¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1.

³² 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).

³³ Art. 21(3).

³⁴ Art. 21(5).

³⁵ Art. 22(2).

³⁶ CISDL, 'The Principles of International Law Related to Sustainable Development,' available at <http://cisdl.org/tribunals/overview/principles/1.html> [Accessed on 28/05/2016].

The principle of equitable benefit sharing is acknowledged in several international environmental and natural resources law instruments some of which are highlighted in this section.

Convention on Biological Diversity³⁷ which governs the activities of countries in biodiversity protection in its third objective emphasizes the essential need to fairly and equitably share benefits from resources³⁸ taking into account rights over those resources.³⁹ The aim of natural resource management is to ensure the sound use of the environment for the food of the present and future generations. Working towards ensuring equitable benefit sharing may guarantee conservation and protection of natural resources, coexistence among communities, promote human rights and sustainable and economic development.⁴⁰ Article 19 of the OECD Energy Charter Treaty 1994⁴¹ obligates contracting states to strive to minimize in an economically efficient manner harmful environmental impacts by acting in cost effective manners.

Implementation of equal benefit sharing in natural resources requires balancing with the need to achieve sustainable development. Article 162 of the Constitution of Kenya⁴² establishes an environmental court to deal with environmental matters. Through their decisions, the court has attempted to promote the right of communities to benefit from natural resources while at the same time safeguarding the need for the country to achieve sustainable development. In the case of *R v Kenya Forest Services ex parte the National Alliance of Community Forest Association*, the appellant sought orders to quash the respondent's decision⁴³ calling on individuals and interested institutions to apply for concessions in state forest plantations for parcels of between 1000 and 12000 hectares each. The court granted their prayer to prohibit any processing of any bids that may be received by the officials, agents, servants or officers and compelled the respondent to comply with the constitutional requirement that requires forests and catchment areas in Kenya are protected and that a tree cover of at least 10% is maintained in Kenya.

As a potentially major importer of oil in future,⁴⁴ the discovery of oil is deemed as a major boost to the Kenyan economy.⁴⁵ The economic value of oil is expected to be high and central to the development of the local community, though it has its benefits and challenges in equal measure.⁴⁶

³⁷ It was adopted in 1992 at the Earth Summit, Rio de Janeiro, Brazil; UNGA.

³⁸ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable and the Fair and Equitable Sharing of Benefits Arising from their utilization to the Convention of the Biological Diversity was adopted in 2010 at the 10th Conference of Parties.

³⁹ An Ad-Hoc Open-ended Working Group was established between 2000 and 2007 to implement this objective and was mandated to come up with Bonn Guidelines to assist parties with the implementation of the benefit sharing.

⁴⁰ See Huggins, C., et al., 'Chapter 12: Environment for Peace and Regional Cooperation,' Africa Environment Outlook 2: Our Environment, Our Wealth. Available at http://www.unep.org/DEWA/Africa/docs/en/aeo-2/chapters/aeo-2_ch12_ENVIRONMENT_FOR_%20PEACE_AND.pdf [Accessed on 28/05/2016].

⁴¹ 1994, OECD

⁴² Government printer, Nairobi, 2010.

⁴³ *R v Kenya Forest Service Ex parte and Clement Kariuki & 2 others suing as the Chairman, Secretary and Treasurer of the National Alliance of Community Forest Association*, Judicial Review Case No 285 of 2012.

⁴⁴ The 2015 Economic Survey Report by Kenya National Bureau of Statistics.

⁴⁵ <http://www.tradingeconomic.com/kenya/imports>

⁴⁶ BBC (2012, March 26) Kenya oil discovery after Tullow Oil Drilling; The paradox of plenty is a fear that may hit the county In comparison to countries in Africa, those which are rich in minerals are the lowest in terms of development.

Indeed, it has been reported that the discovery of oil has facilitated infrastructural developments such as schools, health amenities and making the area easily accessible. Within two years of discovery, buildings were erected, human population was recorded at 500% growth in several towns within Turkana County.⁴⁷ This an indication of the high hopes that have been pegged on the potential benefits that may accrue from this venture.

The *Nagoya Protocol* is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way.⁴⁸ One of the key factors informing the drafting of this protocol was the recognition that that public awareness of the economic value of ecosystems and biodiversity and the fair and equitable sharing of this economic value with the custodians of biodiversity are key incentives for the conservation of biological diversity and the sustainable use of its components.⁴⁹ It was also an acknowledgement of the potential role of access and benefit-sharing to contribute to the conservation and sustainable use of biological diversity, poverty eradication and environmental sustainability and thereby contributing to achieving the Millennium Development Goals.⁵⁰ Although the scope of application of this Protocol is limited to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources, as well as to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge,⁵¹ it nevertheless offers important guidelines on benefit sharing.

Of particular relevance is the Annex to the *Nagoya Protocol* which 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.⁵²

On the other hand, there are a number of non-monetary benefits. Some of the benefits include the sharing of research and development results and collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the Party providing genetic resources. While this is specific to the genetic resources, it is within the type of natural resources that should be protected as envisaged under the current Constitution of Kenya. The Constitution obligates the State to recognise the role of science

⁴⁷ Kenya County Fact Sheet, 2014; Kornet, J., 'Oil in the cradle of mankind - A glimpse of Africa's future,' available at <http://www.frontiermarketscompendium.com/index.php/news-commentary/entry/oil-in-the-cradle-of-mankind-a-glimpse-of-africa-s-future> [Accessed on 20/05/2016].

⁴⁸ Convention on Biological Diversity, 'The Nagoya Protocol on Access and Benefit-sharing,' available at <https://www.cbd.int/abs/>. Art. 1 thereof is to the effect that 'the objective of this Protocol is the fair and equitable sharing of the benefits arising from 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, thereby contributing to the conservation of biological diversity and the sustainable use of its components.'

⁴⁹ Preamble to the Protocol.

⁵⁰ Ibid.

⁵¹ Art. 3.

⁵² Annex to the Nagoya Protocol on Access and Benefit-sharing.

and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.⁵³ One of the ways of implementing the constitutional provision is through ensuring that communities participate fully and meaningfully as envisaged by the Nagoya Protocol.

The other forms of non-monetary benefit are through participation in product development; collaboration, cooperation and contribution in education and training; admittance to *ex situ* facilities of genetic resources and to databases; transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on 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; strengthening capacities for technology transfer; institutional capacity-building; human and material resources to strengthen the capacities for the administration and enforcement of access regulations; training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries; access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; contributions to the local economy; research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in the Party providing genetic resources; institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities; food and livelihood security benefits; social recognition; and joint ownership of relevant intellectual property rights.⁵⁴

These approaches arguably form the core of an effective benefit sharing agreement. This is because they are geared towards building capacity for the local people that may go beyond the lifespan of the resources being exploited. They are also meant to address the real needs of the people by investing in tangible projects. This is a viable means of ensuring benefits accrue to the communities in ways that are not prone to corruption and wastage of resources, as it would be the case in the monetary forms of benefits.

It is also worth pointing out that most of these benefits are applicable to the exploitation of other types of natural resources, including oil. The Nagoya protocol approach to benefits sharing can help in building benefit sharing mechanisms applicable in the exploitation of the other forms of natural resources. They are important in ensuring that even as communities receive benefits in forms of access fees/fee per sample collected or otherwise acquired, up-front payments, milestone payments, payment of royalties and licence fees in case of commercialization, they also get to participate by engaging in activities that will ensure that they benefit from the exploitation of the resources beyond the resources' lifespan. The monetary forms of benefits may be limited in the ways they benefit communities while the non-monetary benefits are likely to reach a bigger group of beneficiaries and thus more effective.

Capacity building within the community ensures that communities become less dependent on the immediate benefits accruing from commercial exploitation of the resources and instead have

⁵³ Art. 11(2) (b) (c), Constitution of Kenya 2010.

⁵⁴ Annex to the Nagoya Protocol on Access and Benefit-sharing.

enduring sources of livelihoods. Research may go a long way in helping communities realise the other forms of investments or economic activities that may be viable within their localities. Thus, communities should not only seek to receive the monetary benefits but should also take advantage by acquiring the relevant skills and investing in businesses or venture that will help them in the long term even after the oil reserves are depleted.

4. Legal Framework on Benefit Sharing and Natural Resource Exploitation in Kenya

One of the most important provisions in the current Constitution of Kenya 2010 outlines the national values and principles of governance as including, 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; and sustainable development.⁵⁵ These values and principles are binding on 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.⁵⁶ Arguably, one of the ways of implementing these principles as far as natural resources governance and management is concerned is equitable benefit sharing. A viable benefit sharing framework should be able to reflect and promote the foregoing values and principles of governance.

The Constitution also 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 70.⁵⁷ The Constitution also outlines the principles of land policy and provides that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—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.⁵⁸ These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.⁵⁹

Relevant to this discussion is the provision for community land which is to vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.⁶⁰ The

⁵⁵ Art. 10(2).

⁵⁶ Art. 10(1).

⁵⁷ Art. 42. 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.

⁵⁸ Art. 60(1).

⁵⁹ Art. 60(2).

⁶⁰ Art. 63(1). Art. 63(2) provides that community land consists of— (a) land lawfully registered in the name of group representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any

Constitution also provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.⁶¹ Land in Kenya is also classified as public, community or private.⁶² Also noteworthy is the provision that regardless of their location, the Constitution classifies all minerals and mineral oils as defined by law and all rivers, lakes and other water bodies as defined by an Act of Parliament as forming part of public land.⁶³

The Constitution also outlines the obligations of the State in respect of the environment and these may be relevant as far as benefit sharing in natural resources exploitation is concerned. The State is required 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* (emphasis added); 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.⁶⁴ However, 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.⁶⁵

The Constitution also tasks the Parliament to enact legislation ensuring that investments in property benefit local communities and their economies.⁶⁶ This may be strengthened by the provision that a transaction is subject to ratification by Parliament if it— involves the grant of a right or concession⁶⁷ by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.⁶⁸ The resources in question range from wildlife resources and habitats; resources of gazetted forests, water resources, resources on community land; and biodiversity resources. This provision is to be implemented through the proposed law, *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2015*.

process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2). Clause (3) thereof further provides that any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. Clause (4) also provides that community land must not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

⁶¹ Art. 61(1).

⁶² Art. 61(2).

⁶³ Art. 62(1) (f) (i).

⁶⁴ Art. 69(1).

⁶⁵ Art. 69(2).

⁶⁶ Art. 66(2).

⁶⁷ "concession" is defined in the proposed legislation, *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2015*, to mean the right to exploit a natural resource pursuant to an agreement between the grantor and the beneficiary or a permit issued under national or county legislation (clause 2).

⁶⁸ Art. 71(1).

The *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2015* is meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.⁶⁹ Notably, the proposed law outlines the relevant considerations in deciding whether or not to ratify an agreement 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.⁷⁰

While these provisions are commendable in that they acknowledge the need for public participation and benefit sharing in natural resources exploitation arrangements, the proposed law is quiet on the thresholds necessary for such approval. This leaves room for political manipulation by politicians and other powerful groups creating the likelihood of an elite capture scenario where the exploitation is approved by a few for their own selfish interests. The effectiveness of this legislation will largely depend on the goodwill of the law enforcers as well as the level of information held by the affected communities. It is also noteworthy that the means and extent of benefits accruing to the community is to be left to community or their representatives. Thus, the communities will get a deal as good as the negotiation ability of their representatives or the leaders. While there are other laws that may be resorted to, some of the issues that will arise may not be addressed under such laws. These may include social and cultural effects of the resource exploitation. This affects the ‘social licence’ required for such activities by both local and foreigner investors.

The proposed legislation *Natural Resources (Benefit Sharing Bill)*⁷¹ 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 Act applies with respect to petroleum and natural gas, among other natural resources. The Act provides for guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.⁷² The legislation proposes setting up a Benefit Sharing Authority which will be mandated to coordinate the preparation of benefit sharing agreements between local communities and affected organizations, review and where appropriate determine the royalties payable to an affected organization engaged in natural resource exploitation, identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties oversee the administration of funds sets out for county projects as identified and determined under and benefit sharing agreement, monitor the implementation of any benefit sharing agreement entered between a county and an affected organization, conduct research regarding the exploitation and development of natural resources and benefit sharing in Kenya recommend on better exploitation of natural resources in Kenya, determine appeals arising out of conflict and advise the

⁶⁹ See also S. 124A, Environment (Management and Coordination) Act, No.8 of 1999, Laws of Kenya.

⁷⁰ Clause 9.

⁷¹ 2015 (Government Printer, Nairobi, 2015).

⁷² S. 4.

national government on policy/ enactment of legislation relating to natural resource benefit sharing.⁷³

The *Environment (Management and Coordination) Act* (EMCA)⁷⁴ is the framework law providing for the legal and institutional framework for the management of the environment. It recognizes in its preamble that the environment is the foundation of the economic, social, cultural and spiritual enrichment. Section 3 of the Act entitles every Kenyan to a healthy and clean environment and obligates them to safeguard and enhance the environment.

The *Environmental Management and Co-ordination (Amendment) Act, 2015*⁷⁵ 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 shall provide incentives to promote community conservation.⁷⁶ This is an important clause that can promote forests conservation through the use of incentives. The incentives can be in the form of benefits that accrue to the community from the forests resources.

The Mining Act 2016, defines a “mineral” as a geological substance whether in solid, liquid or gaseous form occurring naturally in or on the earth, in or under water, in mine waste or tailing and includes the minerals specified in the First Schedule but does not include petroleum, hydrocarbon gases or groundwater.⁷⁷ The Bill also defines mining operations to mean an operation carried out in connection with a mine- to win a mineral from where it occurs; to extract metal or precious mineral from a mineral so won, or to beneficiate a mineral so won; or to dispose of a mine waste or tailings resulting from winning, extraction or benefaction.⁷⁸ The Act provides for accruing benefits in the form of financial and other benefaction to which communities in mining areas are entitled to receive from the proceeds of mining and related activities.

The *Petroleum (Exploration and Production) Act*⁷⁹ defines petroleum as mineral oil including crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.⁸⁰ In the Act, “petroleum operations” is defined as the exploration for, development, extraction, production, separation, and treatment, storage, transportation and sale or disposal of, petroleum including natural gas processing but does not include petroleum refining operations.⁸¹ The Petroleum (Exploration and Production) Act⁸² provides that the relationship between the Government and an exploration and production company is governed by a Production Sharing Contract (PSC).⁸³

⁷³ Clause 6, Natural Resources (Benefit Sharing Bill), 2015.

⁷⁴ No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999).

⁷⁵ No. 5 of 2015, Laws of Kenya.

⁷⁶ S. 31, Environmental Management and Co-ordination (Amendment) Act, 2015.

⁷⁷ Act No. 12 of 2016, Laws of Kenya, s.4.

⁷⁸ Ibid, s.4.

⁷⁹ Chapter 308, Laws of Kenya.

⁸⁰ Ibid, S. 2.

⁸¹ Ibid.

⁸² Chapter 308, Laws of Kenya.

⁸³ Ibid.

The PSC stipulates that the exploration and production company gets a share of the oil and gas produced and its share is in the form of oil barrels. Essentially, the petroleum exploration and production company does not own the oil or gas but rather the Government retains title to the oil or gas produced. Should the exploration and production company not find any oil then the cost of exploration is borne solely by the company. The Government does not participate in meeting any exploration costs that do not result in any oil revenue. Therefore should oil be produced, the exploration and production company can recover that cost against the oil produced.⁸⁴

The proposed law, *Petroleum (Exploration, Development and Production) Bill, 2015*, was developed to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations; and for connected purposes. If approved, the Bill seeks to repeal *Petroleum (Exploration and Production) Act*.⁸⁵ Notably, the Bill introduces the concept of "local content" which means the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.⁸⁶ For the purpose of subsection (1) the contractor must, before engaging in upstream petroleum operations, prepare and submit a long term and annual local content plan which corresponds with the work program to the Authority for approval.⁸⁷ The local content plan should address- employment and training; research and development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; and succession plans for positions not held by Kenyans.⁸⁸

The proposed law requires that a contractor and a sub-contractor of the contractor conducting upstream petroleum operations must comply with local content requirements in all of the contractor's or sub-contractor's operations; give priority to services provided and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by the Kenya Bureau of Standards or in absence of a Kenyan standard any other internationally acceptable standard that the (Upstream Petroleum Regulatory) Authority shall approve; and ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain: Provided that the cost of local content should not be higher than at any other place.⁸⁹

The requirement on local content can go a long way in enhancing benefit sharing mechanism in the extractive industry in Kenya, an aspect that was missing or inadequate in the Kenyan framework. The *National Sovereign Wealth Fund Bill, 2014* is a proposed legislation that seeks to establish Kenya's National Sovereign Wealth Fund to undertake diversified portfolio of medium and long term local and foreign investment to build a savings base for purposes of national development, stabilization the economy at all times, enhance interregional equity in Kenya, to give

⁸⁴ See Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, Nairobi, August, 2015), pp. 248-251.

⁸⁵ Chapter 308, Laws of Kenya.

⁸⁶ Clause 77(1), *Petroleum (Exploration, Development and Production) Bill, 2015*.

⁸⁷ *Ibid*, Clause 77(2).

⁸⁸ Clause 77(3).

⁸⁹ Clause 77(1), *Petroleum (Exploration, Development and Production) Bill, 2015*.

effect to the provisions of Article 201 of the constitution of Kenya and connected purposes.⁹⁰ The object and purpose of the fund is to— build a savings base for the people of Kenya; protect and stabilize the budget and economy from excess volatility in revenues or exports; provide a mechanism for the diversification from non-renewable commodity exports; assist monetary authorities dissipate unwanted liquidity; increase savings for future generations; fund social and economic development; enhance sustainable long term capital growth; and support and promote any other strategic objectives of the country.⁹¹ This fund will be important in promoting intergenerational and intragenerational equity in natural resource benefits sharing.

According to the draft National Energy Policy, 2014,⁹² the Government shall adopt and implement the Extractive Industries Transparency Initiative (EITI)⁹³ as a demonstration of its commitment to good governance, increased scrutiny over revenue collection from petroleum and coal resources and improvement of the country's investment climate, reconstitution of the National Fossil Fuels Advisory Committee (NAFFAC) and development of mechanisms for sharing of benefits between the National and County Governments as well the local communities in accordance with Article 69 of the Constitution. The Government also commits to establish a one stop shop for licensing of fossil fuel operations and undertakings with a view to enhancing development of the requisite infrastructure for fossil fuels.⁹⁴

The proposed National Assembly's *Community Land Bill, 2015* is meant to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.⁹⁵ The proposed law defines "community" to mean an organized group of users of community land who are citizens of Kenya and share any of the following attributes- common ancestry; similar culture; socio-economic or other common interest; geographical space; or ecological space.⁹⁶ This definition is relevant in that it helps clarify the target group in case of benefits accruing from what would fall under community land and consequently avert potential conflict. This is affirmed under clause 31 thereof provides that every member of the community has the right to equal benefit from community land, where equality includes full and equal enjoyment of rights of use and access. This is a form of promoting benefit sharing as far as community land is concerned.

Clause 36 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

⁹⁰ Preamble, National Sovereign Wealth Fund Bill, 2014.

⁹¹ National Sovereign Wealth Fund Bill, 2014, Clause 4.

⁹² Draft National Energy Policy, 2014, Government Printer, Nairobi.

⁹³ See Extractive Industries Transparency Initiative (EITI) <https://eiti.org/eiti>. This is voluntary mechanism setting international standards for enhanced transparency and accountability in the oil, gas and mining sectors. The Extractive Industries Transparency Initiative (EITI) was launched at the World Summit on Sustainable Development (Earth Summit), held in Johannesburg, September 2002 as a way to address the resource curse phenomenon, globally. (Ugolor, D., Briefing Paper on the Extractive Industries Transparency Initiative (EITI) (Heinrich Boll Foundation). Available at https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/intlpolitics/ugolor_nigeria.pdf [Accessed on 02/06/2016].

⁹⁴ Draft National Energy Policy, 2014, p. 4.

⁹⁵ Preamble, Community Land Bill, 2015.

⁹⁶ Ibid, Clause 2.

including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits. 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.

Where need for concessions arise, the proposed law 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; 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.⁹⁷

The content of this provision, if fully implemented, is likely to impact positively on the community in ways that ensure that the community becomes self-sustaining as far as livelihood sustenance is concerned. However, it must be noted that for the community to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way. They must be made to understand that the expected benefits will not only come in monetary terms only and must be made aware of the various non-monetary forms that benefits may accrue to them, envisaged under the *Nagoya Protocol*. Some of the forms 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.

5. Lessons from Ghana: Catapulting National Development through Extractive Industries

It has been observed that while many African countries do not have a strong track record of managing mineral wealth well, Ghana is often considered a model of best practice, based on the government's distribution of a proportion of mining rents to mining affected communities.⁹⁸ In Ghana's mining sector, the system devised to distribute mining wealth to local level is royalty, with royalty agreements being set at between 3% and 6%, provided directly to the government quarterly, which is the main source of revenue derived by gold mining.⁹⁹ The mine revenue is paid to the Large Tax Unit of the Ghana Revenue Authority, which then dispenses the money into the Consolidated Fund. Of this sum, 80% is retained by the government and used for general budget support. 10% is dispensed into the Mineral Development Fund (MDF), which is ostensibly used to help fund public mining sector institutions and for funding ad-hoc flagship projects in mining communities.¹⁰⁰

Decentralization of mining revenue in Ghana is legislated as compensation for mining-affected communities; it is not a dividend or admission that citizens in mining areas have economic rights

⁹⁷ Ibid, Clause 37.

⁹⁸ Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' Resources Policy, vol. 40, 2014, pp.74–82, p. 74.

⁹⁹ Ibid, p. 75; See S. 25, Minerals and Mining Act, 2006 (Act 703), Laws of Ghana.

¹⁰⁰ Ibid, p. 75.

to mineral deposits.¹⁰¹ It is however noteworthy that even in Ghana, it has been observed that as is the case in many countries, the relationship between industrial mining and communities in Ghana is complex and highly contested, because, despite macroeconomic growth fueled by the mining boom, Ghana remains a country with high rural poverty.¹⁰² There have even been instances of misappropriation of mineral benefits distributed through the grassroots leaders, namely, village chiefs who are supposed to ensure that the funds are invested well for the benefit of the communities.¹⁰³ The result has been unending poverty despite the presence of resources. Ghana can offer good lessons in terms of models of division, while ensuring that Kenya does not fall into the same problem of misappropriation of funds.

Thus, while Ghana remains a model country for countries venturing into extractive industries in Kenya, it demonstrates the important point that national development should not entirely be pegged on resources accruing from extractive industries but local communities should be supported and encouraged to diversify their sources of livelihood in a way that ensures sustainability in income and growth for both the communities and the country.

6. Nigeria: Resource Curse or Blessing?

There has been documented evidence from the vast majority of resource-rich countries, especially those endowed with depletable natural resources (i.e. fuels, ores, minerals and metals), which suggests that resource riches can be a “curse” rather than a “blessing”.¹⁰⁴ Some of the factors that are believed to contribute to such eventualities include unpredictable commodity prices with abrupt fluctuations, booms and busts in macroeconomic and fiscal balances that follow the swings in resource rents, inter- and intra-generational misallocation of resource revenues and increasing corruption.¹⁰⁵ One such country is Nigeria, which is listed as one of the largest economies of the African continent and one of the leading oil producer in the world.¹⁰⁶ It is estimated that oil accounts for more than 90 percent of the country’s exports, 25 percent of the Gross Domestic Product (GDP), and 80 percent of government total revenues.¹⁰⁷ Notable is the observation that the oil boom of the 1970s led to the neglect of agriculture and other non-oil tax revenue sectors, expansion of the public sector, and deterioration in financial discipline and accountability.¹⁰⁸

Oil revenues are divided between the three tiers of government: federal, state and local. The federal government typically gets about half of revenues; the 36 state governments about a quarter; and the 774 local governments about a fifth. The rest flows to special funds.¹⁰⁹ Despite the oil revenue,

¹⁰¹ Standing, A., ‘Ghana’s extractive industries and community benefit sharing: The case for cash transfers,’ *op cit*, p. 74; See also Ayee, J., et al, ‘Political Economy of the Mining Sector in Ghana,’ The World Bank Policy Research Working Paper 5730, July 2011. Available at <http://www.cmi.no/publications/file/4091-political-economy-of-the-mining-sector-in-ghana.pdf> [Accessed on 29/05/2016].

¹⁰² *Ibid*, p. 75.

¹⁰³ *Ibid*.

¹⁰⁴ Tsani, S., ‘Natural resources, governance and institutional quality: The role of resource funds,’ *Resources Policy*, 38(2013), pp.181–195, p. 181.

¹⁰⁵ *Ibid*.

¹⁰⁶ See Agbaeze, E. K, ‘Resolving Nigeria’s dependency on oil – The derivation model,’ *Journal of African Studies and Development*, Vol. 7(1), pp. 1-14, January 2015.

¹⁰⁷ *Ibid*, p. 3.

¹⁰⁸ *Ibid*, p. 2.

¹⁰⁹ Shaxson, N., ‘Nigeria’s Extractive Industries Transparency Initiative: Just a Glorious Audit?’ (Royal Institute of International Affairs, 2009), pp. 3-4.

poverty rates are generally higher and infrastructure is poorer in the oil-rich states and there is disproportionate allocation of such funds.¹¹⁰ It has been observed that while oil exports have fuelled real GDP growth of over 5 per cent a year in Nigeria, the official unemployment rate climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates are estimated to be as high as 60 per cent.¹¹¹

In Nigeria, negative effects of the extractive sector which is said to be poorly regulated have not only been the limited resources accruing to the locals. There has also been huge environmental damage. It is contested that the source of Nigeria's vast oil wealth is also a site of an ecological disaster that has destroyed livelihoods of farmers and fisher folk in the delta's inlets on a huge scale.¹¹² This is because environmental damage not only affects health and wellbeing but also decimates livelihoods, such as fishing and agriculture that depend upon natural resources.¹¹³

The scenario has led to legal battles: *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* were three lawsuits filed by the Center for Constitutional Rights (CCR) and co-counsel from EarthRight International on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria.¹¹⁴ Royal Dutch/Shell began using land in the Ogoni area of Nigeria for oil production in 1958. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. Also, Royal Dutch/Shell for decades, is said to have worked with the Nigerian military regime to suppress any and all demonstrations that were carried out in opposition to the oil company's activities.¹¹⁵

It has been alleged that Shell's aim for the lowest possible production cost including the practice of gas flaring, without regard for the resulting damage to the surrounding people and land, wreaked havoc on local communities and the environment.¹¹⁶ In the early 1990s, the Ogoni, led by Ken Saro-Wiwa and the Movement for the Survival of the Ogoni People, began organized, non-violent protests against Shell's practices. Shell grew increasingly concerned with the heightened international prominence of the Ogoni movement and made payments to security forces that they knew to be engaging in human rights violations against the local communities. The military government violently repressed the demonstrations, arrested Ogoni activists, and falsely accused nine Ogoni activists of murder and bribed witnesses to give fake testimony.¹¹⁷ From the foregoing,

¹¹⁰ Ibid, p. 4.

¹¹¹ Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' Africa Progress Report 2013, p. 31. Available at http://appcdn.acwupload.co.uk/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf [Accessed on 27/05/2016].

¹¹² Ibid, p. 32.

¹¹³ Ibid, p. 33.

¹¹⁴ Centre for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al.*, available at <http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> [Accessed on 29/05/2016].

¹¹⁵ Ibid.

¹¹⁶ Centre for Constitutional Rights, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, New York, June 8, 2009. Available at <http://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell> [Accessed on 29/05/2016].

¹¹⁷ Ibid.

it is apparent that the Nigerian people have not benefited much, if at all, from the extractive industry in their country but instead have suffered more tragedy as a result.

Kenya should therefore avoid a scenario where oil exploration result in human rights abuse and environmental degradation which in turn affects the livelihoods of the people. Corruption should also be shunned as it would lead to a scenario where the intended beneficiaries are locked out for the benefit of a few people, both in the public sector and private individuals.

7. Opportunities: Making Natural Resources Wealth Count

Arguably, benefit-sharing mechanisms involve a variety of institutional means, governance structures and instruments for distributing finance and other benefits.¹¹⁸ Further, Benefit-sharing mechanisms can be organized along two main axes: a *vertical axis* of benefit sharing across scales from national to local, and a *horizontal axis* of sharing within scales, including within and across communities, households and other local stakeholders.¹¹⁹

It has been argued that Free and prior informed consent of local communities and transparent and equitable benefit-sharing mechanisms can bring affected communities into the mainstream of a natural resource dominant development model.¹²⁰ Understanding who the key stakeholders are, what their aspirations, concerns and expectations of a project are, and what drives these is important for judging the reasonableness of a benefit sharing settlement and its legitimacy and durability over time.¹²¹ Key stakeholders may include the government (national and sometimes county), citizens at large, affected communities, and investors.¹²²

Some governments argue that no special transfer of revenues to producing regions is justified. These governments hold that the most effective approach to governance and development is for national governments to collect all tax revenues and then use them to benefit the country as a whole, including producing areas. They feel that the producing regions will gain net benefits from projects in their regions, such as jobs, infrastructure, and economic activity, so no additional resources are justified. Other governments and commentators maintain that natural resource projects impose costs on producing regions, and that communities should be compensated adequately for the 'loss' of a non-renewable resource.¹²³

The UN Declaration on the Rights of the Indigenous Peoples, adopted by the UNGA, guarantees indigenous people to fully enjoy human rights and fundamental freedom without discrimination. Article 4 of the convention obligates state to take up special measure in accordance with their free wishes in protecting the vulnerable themselves, their culture, environment and property.

¹¹⁸ Pham, T.T., et al, 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,' op cit. p. 1.

¹¹⁹ Ibid.

¹²⁰ Talbott, K. & Thoumi, G., 'Common ground: balancing rights and responsibilities for natural resource investments and community development,' 3rd April 2015, available at <https://news.mongabay.com/2015/04/common-ground-balancing-rights-and-responsibilities-for-natural-resource-investments-and-community-development/> [Accessed on 28/04/2016]

¹²¹ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 12.

¹²² Ibid.

¹²³ Ibid, p. 37.

Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹²⁴ recognizes the right of states to self-determination including the right to freely determine their political status, pursue their economic social and cultural goals and manage and dispose of their resources. Equitable benefit sharing is a prerogative of the government. From equitable benefit sharing stems economic development, co-existence and co-operation as well as sound natural resource management system. The preamble to the constitution of Kenya 2010 acknowledges the will of the people of Kenya as being proud of their ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation; respectful of the environment which is their heritage and determined to sustain it for the future generations benefit of future generations and committed to nurturing and protecting well-being of the individual, the family, communities and the nation and recognizing the aspirations of all Kenyans for the government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law and in exercising their sovereign and inalienable Right to determine the form of governance of their country and having participated fully in the making of the constitution.

On the other hand, state and state organs actions must be bound by the constitutional values and principles of governance. The national values and principles of governance include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people; human dignity, equality, social justice, inclusiveness, equity, human rights, nondiscrimination and protection of marginalized; good governance, integrity, transparency and protection and accountability and sustainable development.¹²⁵

The social and economic development is essential to enable for a favourable living and working environment.¹²⁶ Natural Resource Management plays a key role in the conservation of the environment. The benefit of a clean environment extends to biodiversity and wildlife ecosystems which ultimately enables for the enjoyment of other rights.¹²⁷ Human rights remains the obligation of the state to protect and may be done through inclusive decision making processes.¹²⁸

Therefore, while it is important for the state to promote the people's right to benefit from their natural resources as envisaged in international and national legal and human rights instruments, this should be done within the framework of achieving sustainable development. All stakeholders must work towards implementing the sustainable development agenda which would mean that communities are obligated to diversify modes of development and production through adoption of more sustainable means. However, it is important for the Kenyan people to look beyond oil resources in the country and invest in innovation to boost production in other areas such as livestock and agriculture production as well as innovative business investment in creative technologies.

¹²⁴ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹²⁵ Article 10, Constitution of Kenya, 2010.

¹²⁶ Principle 8, UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

¹²⁷ Article 24 of the ACHPR provides that every person shall have a right to a general satisfactory environment for development. This right connects to other human rights such as the right to life and the right to standard health care.

¹²⁸ Aarhus Convention in Access to Information, Public participation in decision making and Access to Justice in Environmental Matters 1989 recognizes the nexus between human right and the environment as being essential in the well-being of human beings.

7.1 Foundations and Trusts

The approaches taken by Kenya towards resource management for instance has been through Foundations, Trusts and Funds initiatives in the energy sector. FTF represent a wider range of financial and institutional framework that channel revenues to local communities. This mode of benefit sharing enable for the operation of government payment, compensation and community investment. The author suggests that they establish a systematic, professional formal approach to development. This has been successful in jurisdictions such as Senegal, Ghana, Australia and Canada.¹²⁹

7.2 Enhancing Local Accountability and Building Capacity

Minerals are non-renewable resources.¹³⁰ There is emphasis on the importance of sound environmental management and effective governance as priority to ensure rapid development and poverty reduction. There is demonstrable shift from a predominantly centralized natural resource management to devolved models such as CBNRM.¹³¹ Communities with more control over access and better common property management regimes play stronger decision making roles.¹³² They acknowledge that land-use decision making is inherently a multilevel process since numerous actors are involved both directly and indirectly representing multiple sectors with different roles, interests and incentives.¹³³

It has been suggested that in terms of transparency, resource fund establishments may provide what it seems to be of great importance for the resource- rich countries: transparency on resource wealth management.¹³⁴ Arguably, resource funds (RF) may provide, even to a limited degree, a track record of windfalls.¹³⁵ It has also been suggested that through CSR and social investment strategies, extractive firms can provide local socio-economic development where the government is unable or unwilling to do so, and thus may help mitigate against the potentially harmful impacts of resource-led growth.¹³⁶ Some of the suggested types of CSR and social investment programmes include those relating to employment, such as local hiring practices; environmental impact assessments and mitigation measures; local community development projects, such as providing safe drinking water, building health centres and school classrooms, training peer educators for community health programmes and supplying equipment; providing microcredit schemes; and

¹²⁹ Muigua K., et al, *Natural Resources and Access to Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

¹³⁰ Masters, L. & Kisiangani, E., *Natural resource Governance in Southern Africa*, (Institute of Global Dialogue, South Africa, 2010).

¹³¹ Roe, D., et al, *Community management of natural resources: impacts experiences and future directions*. IIED Publishing.

¹³² Myrers, R., et al, 'Benefit sharing in context: a comparative analysis of 10 land-use change case study in Indonesia,' *Infobriefs*, No. 118, May 2015. Available at http://www.cifor.org/publications/pdf_files/infobrief/5585-infobrief.pdf [Accessed on 26/05/2016].

¹³³ *Ibid*, p.1.

¹³⁴ Tsani, S., *Natural resources, governance and institutional quality: The role of resource funds*, op cit, p. 190; cf. Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda*, op cit, p. 50. There is an argument that transparency in resource governance in and of itself may not be capable of facilitating good governance. The argument, thus, is that synergies with other poverty reduction and sustainable development initiatives need to be explored. One of the suggested approaches is synergy with CSR initiatives of extractive industry firms at the regional and local levels.

¹³⁵ *Ibid*.

¹³⁶ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda*, op cit, p. 50.

scholarships for youth and women.¹³⁷ Notable is the assertion that the ideal goal is for private sector development interventions to supplement government service provision, to avoid a situation of dependency on the private sector, and not to impact the willingness or ability of the state to develop its capacity.¹³⁸

However, it is noteworthy that CSR as a means of benefit sharing, albeit informally, may not be effective as it wholly depends on the goodwill of the company or corporation in question. It may therefore be necessary to have a more formalized framework under which the same benefits can accrue to the communities in a more certain and sustainable manner. This may call for a framework that is anchored in law to shield it from the uncertainties that come with CSR arrangements. This also increases accountability not only to the local communities but also the government.

7.3 Achieving Right to environmental information

Environmental information comprises of information held by authorities, factors that affect the environment, research on the environment, health and safety measures¹³⁹, and reports on the implementation of environmental legislation and so forth.¹⁴⁰ Lack of environmental information regarding conservation and management becomes more technical in undertaking natural resource management.

Like many African countries that have natural resources, Kenya generally lacks the capacity to explore and extract them as they lack the required equipment and knowledge on the same.¹⁴¹ Illiteracy levels remain high in the county as it is in many parts across the country. African governments have entered into multinational contracts inviting foreign investors to their countries. The foreign investors, with the literacy, technology and advanced equipment, explore, extract and export to their countries for manufacturing. African countries import these finished products at a higher price.¹⁴² As far as indigenous communities are concerned, their right to information should be upheld by ensuring that any information needed is received as soon as possible. Enabling access to environmental information forms basis to access environmental justice.¹⁴³ Communities are also likely to understand the implications of extractive industries on their day to day lives as far as the environment is concerned.

¹³⁷ Ibid, p. 50.

¹³⁸ Ibid.

¹³⁹ Convention on Environment Impact Assessment in a Transboundary Context, 1991, calls for the establishment of EIA procedures that involves public participation.

¹⁴⁰ http://www.citizensinformation.ie/en/environment/environmental_law/access_to_environmental_information.htm.

¹⁴¹ World Bank Investments Projects, www.ggr.org

¹⁴² African Development Bank, et al, African Economic Outlook 2013: Structural Transformation and Natural Resources, 2013, available at <http://www.undp.org/content/dam/rba/docs/Reports/African%20Economic%20Outlook%202013%20En.pdf>, [Accessed on 29/05/2016].

¹⁴³ Muigua, K., Natural Resources and Environmental justice in Kenya, op cit; See also The Access to Information Bill, 2015 (Government Printer, Nairobi, 2015); See also Art. 35 of the Constitution of Kenya 2010.

7.4 Devolution and Benefit Sharing

The 2010 Constitution requires that services be devolved and both the national and county governments ensure reasonable access to its services so far as it is appropriate.¹⁴⁴ Ideally, local communities should be allowed to access natural resources for them to be able to uphold their responsibilities for future generations.¹⁴⁵ Natural resources are a source of livelihood as they form part of their economic activity. If natural resources are accessed and well managed, they provide for raw materials which are then processed to get products that are sold and thereby generating income.

Allowing communities to access natural resources will undoubtedly promote sustainable development. However, criticisms of fiscal decentralization focus on weak capacity of Sub-national governments (SNGs) to manage intrinsic volatility in revenue flows, and limited know-how of public financial management, planning and investments, and fragility of financial control systems. They also point to poor accountability of local authorities and corruption as a result. Moreover, complete decentralization of resource rents could deprive central government of funds necessary for providing national functions and could create geographical disparity and conflict.¹⁴⁶ In contrast, proponents argue that devolution would enhance allocative efficiency, as SNGs can more accurately determine needs and find appropriate solutions. Importantly, supporters argue that producing regions must be compensated for negative impacts and for the loss of a non-renewable resource which local communities feel they own.¹⁴⁷

Despite the foregoing arguments, it is important to make use of the devolved system to empower communities and build capacity through investing accrued benefits in sustainable development projects which will go beyond the lifespan of oil exploration and at the same time uplift the livelihoods of the local people. The County governments are in a better position to identify the most viable and sustainable projects.

7.5 Public participation

The principles that govern natural resource management have been enshrined in the 2010 Constitution of Kenya.¹⁴⁸ The *Public participation* allows individuals to express their views on

¹⁴⁴ Article 6, Constitution of Kenya, 2010.

¹⁴⁵ Article 40, United Nations Declaration on the Right of the Indigenous people, 2007; In *Joseph Letuya and 21 others v AG and 5 others* civil suit no 821 of 2012, the court was challenged to determine whether an indigenous community (Ogiek) had rights arising from their occupation of parts of the East Mau forest and whether their eviction was an infringement to their right. The court held that the applicant were indeed recognized as indigenous people being a minority, they had been discriminated upon by the said eviction. Their rights to life, dignity, economic and social rights had been infringed from the eviction.

¹⁴⁶ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 33.

¹⁴⁷ *Ibid*, p. 33.

¹⁴⁸ Article 61, Constitution of Kenya, 2010; Sustainable development principle seeks to lessen the depletion of the non-renewable resources and pollution in the environment. The Brundtland Commission defined sustainable development as development that meets the needs of the present generation without comprising the ability of the future generations to meet their own needs. Sustainable use principle considers the need to reduce and eliminate unsustainable patterns of production and consumption. It is applied to determine the permissibility of the natural resource exploitation and is central to the principle of sustainable development. Polluter pays principle provides that where a person is responsible for causing the pollution, costs for such pollution should be borne by that person. States are held liable for internationally wrongful acts or omissions that arise out of their customary international law or treaty obligations. The concept of state responsibility

key governmental policies and laws concerning conditions in their communities. Fostering public participation will mean that authorities dispense their constitutional and legislative obligation, positive deviation in terms of contribution and motivation. *In The Matter of the National Land Commission [2015] eKLR*,¹⁴⁹ one of the issues that the Supreme Court of Kenya had to deal with was the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ observed 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).¹⁵⁰

He went further to state 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 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).¹⁵¹ The Chief Justice further rightfully 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.¹⁵²

The Supreme Court's advisory opinion is an affirmation of the important role that the principle of public participation can play in enhancing people's appreciation of the management of natural resources in the country. Apart from enhancing people's role in management, public participation

protects fundamental values. In the Corfu channel case, it was held that states have an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states. Precautionary principle aims at averting danger to the environment before it actually occurs.

¹⁴⁹ Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

¹⁵⁰ Ibid, para. 45.

¹⁵¹ Ibid, para. 47.

¹⁵² Ibid, para. 49.

may promote co-existence among indigenous communities.¹⁵³ All the concerned groups may get a chance to express their fears and concerns as well as needs as far as resource exploitation is concerned. Although it may slow down the decision making process, public participation will prevent conflict of decisions and this may also enable the investors obtain the ‘social license’ to operate in the affected regions.¹⁵⁴ If the state seeks to implement this principle, recourse must be paid to the existing traditional institutional structures which provide a structural base to public participation. In addition, promoting public participation contributes to their economic development.¹⁵⁵ It has also been observed that procedural equity, which concerns participation in decision-making and the inclusion and negotiation of competing views, is seen as critically important for any benefit-sharing mechanism.¹⁵⁶

There is need to diversify the type of expected benefits from the exploitation of the existing resources. The benefits envisaged should be in both monetary and non-monetary forms where possible. Equitable Benefit Sharing may take monetary or non-monetary forms.¹⁵⁷ It may also be direct or indirect. This may include participation, sharing scientific research and development results access to technology and payment of royalties and other compensation. Kenyan people and policy makers, however, seem to be more concerned with royalties, at the expense of other forms of accruing benefits which may arguably have longer sustainability as far as improving the lives of the people is concerned.

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.¹⁵⁸ 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.¹⁵⁹

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. 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

¹⁵³ See Yagoub, A.M., ‘Public Participation in Natural Resource Management in Sudan.’

¹⁵⁴ Mohair, P., Public Participation and Natural resource Decision Making: the Case of RARE II Decisions, Utah Agricultural Experiment Station, Journal Paper No. 3282.

¹⁵⁵ R v Kenya Forest Services ex parte the National Alliance of Community Forest Association.

¹⁵⁶ Pham, T.T., et al, ‘Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries,’ op cit. p. 31.

¹⁵⁷ Nandozie, K., et al, African Perspective on Genetic Resources: A Handbook of Laws Policies and Institutions. (Environmental Law Institute, Washington DC, 2003).

¹⁵⁸ Lohde, L.A., The Art and Science of Benefit Sharing in the Natural Resource Sector, (International Finance Corporation, February 2015), op cit. p. 61.

¹⁵⁹ Ibid, p. 61.

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.

The suggestions by IFC are worth considering in the case of Kenya, to build sustainable and enduring local economies for the local people. These propositions are closely related to the non-monetary forms of benefits as envisaged in the *Nagoya protocol*. They ought to be integrated into the national legal framework on natural resource management and benefit sharing since they are more practical and likely to result in realistic and viable outcomes for easy implementation. This is because by their very nature, they would be based on commendations from all the relevant stakeholders, including the affected communities. This enhances chances of the outcome being more acceptable to the community for purposes of social licence in natural resources exploitation.

7.6 Addressing Resource Capture Phenomenon/Corruption

It has been argued that rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption.¹⁶⁰ Corruption has been termed as a threat to protected human security.¹⁶¹ It calls for global effort to combat corruption.¹⁶² Resources have fostered corruption, undermined inclusive economic growth, incited armed conflict and damaged the environment.¹⁶³ The governments managing significant resource rents, rent appropriation may be preferable when compared to the promotion of wealth creation policies.¹⁶⁴ The argument is based on the preposition that rent appropriation may dominate over wealth generation as it offers immediate economic and political gains. These gains appear quite appealing as they can, arguably, be highly personal, favouring the specific members of the ruling elite.¹⁶⁵

8. Conclusion

It is a blessing that Kenya has natural resources that can be exploited. Effective management of these resources and equitable benefit sharing are essential. The natural resources can assist Kenya to achieve sustainable development as envisaged in the United Nations sustainable development goals.¹⁶⁶ There is need for debate and consensus on how best to manage natural resources and the extractive industry so as to avoid the resource curse and alleviate poverty and promote development. A strong legal framework for benefit sharing ought to be put in place covering the expectations, rights and obligations of all parties concerned.

¹⁶⁰ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds, 'Resources Policy, 38(2013), pp.181–195, p. 184.

¹⁶¹ Alao, A., Natural Resource Management and Human Security in Africa, in Abass, A., Protecting Human Security in Africa (ISBN-13: 9780199578986, Oxford University Press, 2010).

¹⁶² Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' Africa in Fact, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 26/05/2016].

¹⁶³ Aled, W., et al, Corruption in Natural Resource Management: An introduction (Bergen: Michelsen Institute, 2008). Available at <http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf> [Accessed on 29/05/2016].

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ 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.

Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya

Abstract

This paper critically examines the relationship between traditional or indigenous knowledge and environmental conflicts management in Kenya. The author argues that traditional or indigenous knowledge can be harnessed or used in management of environmental Conflicts. This paper is informed by the hypothesis that indigenous knowledge reflects communities' practices and beliefs, and it can effectively be used to address some of the localized conflicts that are environmental in nature.

The author examines the role and relevance of traditional knowledge in conflict management in environmental matters with the aim of achieving environmental security for the Kenyan communities and ultimately sustainable development.

1. Introduction

This paper critically examines the relationship between traditional or indigenous knowledge and environmental conflicts management in Kenya. The author traces the connection between traditional knowledge and environmental conflicts, with a view to making a case on how the knowledge can be harnessed or used in management of such conflicts. The main argument is that based on the fact that indigenous knowledge reflects communities' practices and beliefs, it can effectively be used to address some of the localized conflicts that are environmental in nature.

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. 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.¹ Thus, conflicts ought to be managed effectively. There have been convincing arguments that Africa had, from time immemorial, evolved its own mechanisms and institutions for managing and resolving disputes and conflicts in ways that preserved the fabric of society and encouraged peaceful co-existence. Indeed, the argument is that the concept and practice of peace and conflict resolution is not new in Africa, but rather it is the institutionalization of peace and conflict studies at African Universities and schools and civil society organizations, that is the new phenomenon.² All African communities have had rules to ensure that individuals lived in harmony with one another and that justice was done when conflict broke out.³

¹ 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.

² Ibid, p. 229.

³ Ibid, p. 229; See also Irobi, E.G., 'Ethnic Conflict Management in Africa: A Comparative Case Study of Nigeria and South Africa,' May, 2005, available at <http://www.beyondintractability.org/casestudy/irobi-ethnic> [Accessed at 23/04/2016]; Mengesha, A.D., 'The Role of Sidama Indigenous Institutions in Conflict Resolution: In the Case of Dalle Woreda, Southern Ethiopia,' American Journal of Sociological Research, Vol. 6 No. 1, 2016, pp. 10-26.

The paper discusses the role and relevance of traditional knowledge in conflict management in environmental matters. The main goal, the author argues, is to use TK to achieve environmental security for the Kenyan indigenous communities and ultimately sustainable development.

2. Traditional or indigenous knowledge

Traditional knowledge (TK) may exist in various forms. While the discussion in this paper will highlight TK in other forms where relevant, the main focus shall be indigenous knowledge in the form of Traditional Ecological Knowledge (TEK). Traditional Ecological Knowledge has been defined as a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.⁴ Traditional knowledge (TK) has also been defined as knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.⁵ The term "indigenous knowledge" may generally refer to how members of a community perceive and understand their environment and resources, particularly the way they convert those resources through labour.⁶

From the foregoing definitions, TK or indigenous knowledge (IK) mainly originates from the communities and it can be said to be a reservoir for community expertise and experiences in relation to environmental matters. It has been argued that indigenous groups offer alternative knowledge and perspectives based on their own locally developed practices of resource use.⁷

Traditional knowledge may be holistic in outlook and adaptive by nature, gathered over generations by observers whose lives depended on this information and its use. It often accumulates incrementally, tested by trial-and-error and transmitted to future generations orally or by shared practical experiences.⁸ In general all traditional knowledge and resources are considered to be collective heritage of a community or ethnic group, even if the accumulation of knowledge is individual, because they are ancestral heritage, and are believed to come from God.⁹

⁴ Berkes, F., et. al., 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management,' *Ecological Applications*, Vol. 10, No. 5. (Oct., 2000), pp. 1251-1262 at p. 1252.

⁵ World Intellectual Property Organisation, 'Traditional Knowledge,' available at <http://www.wipo.int/tk/en/tk/>

⁶ 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).

Available at <http://www.fao.org/docrep/005/ac696e/ac696e09.htm> [Accessed on 10/04/2016].

⁷ Berkes, F., et. al., 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management,' op cit., p. 1251.

⁸ Ibid, p. 1252.

⁹ Swiderska, K., et. al., 'Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices,' Interim Report (2005-2006), November 2006, p. 13.

Available at <http://pubs.iied.org/pdfs/G01253.pdf> [Accessed on 10/04/2016].

3. Place of Traditional or indigenous knowledge in the Legal Framework

3.1 International Legal Framework on protection of TK/IK

The *Convention on Biological Diversity*¹⁰ 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 protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. The CBD is 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.¹¹

The *United Nations Declaration on the Rights of Indigenous Peoples*,¹² provides that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.¹³ In conjunction with indigenous peoples, States are obligated to take effective measures to recognize and protect the exercise of these rights.¹⁴

One of the factors that informed this Declaration is the recognition that that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.¹⁵

The objectives of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005*¹⁶ include, inter alia: to protect and promote the diversity of cultural expressions; to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner; to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace; to foster interculturality in order to develop cultural interaction in the spirit of building bridges among

¹⁰ 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

¹¹ 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.

¹² 61/295. United Nations Declaration on the Rights of Indigenous Peoples.

¹³ United Nations Declaration on the Rights of Indigenous Peoples, Art. 31(1).

¹⁴ Ibid, Art. 31(2).

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples, Preamble.

¹⁶ Passed by the General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 3 to 21 October 2005 at its 33rd session.

peoples; and to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link.¹⁷

The international recognition of indigenous knowledge means that national governments ought to give this knowledge more recognition and facilitate active uptake and use of the knowledge by communities.

3.2 National Legal Framework on protection of TK/IK

The *National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009*¹⁸ was developed in response to a growing need to address three main challenges facing the country today: accelerating technological development, integration of the world economic, ecological, cultural, trading and information systems and the growing relevance of intellectual property rights to these areas of activity.¹⁹ The Policy was formulated in order to provide a national framework for recognition, preservation, protection and promotion of sustainable use of traditional knowledge, genetic resources and traditional cultural expressions. Ultimately, this is meant to enhance mainstreaming of such knowledge systems into national development planning and decision making processes at all levels.²⁰

Notably, one of the Policy Statements is to the effect that the Government in collaboration with other stakeholders will endeavour to: create awareness on the importance and the value of TK and Traditional Cultural Expressions (TCE) for, education, conflict resolution, posterity and socio-economic development.²¹

The *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016*²² provides a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; and gives effect to Article 11, 40(5) and 69 of the Constitution. Notably, one of the purposes of this Act is to recognize the intrinsic value of traditional cultures and traditional cultural expressions, including their social, cultural, economic, intellectual, commercial and educational value.²³ It defines “traditional knowledge” as 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 and includes agricultural, *environmental* or medical knowledge, and knowledge associated with *genetic resources or other components of biological diversity* (emphasis added), and know-how of traditional architecture, construction technologies, designs, marks and indications.²⁴

¹⁷ Art. 1, Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

¹⁸ Government Printer, July 2009, Nairobi.

¹⁹ Ibid, preamble.

²⁰ Ibid, para. 1.1.10.

²¹ National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009, para. 4.4.

²² Act No. 33 of 2016 (Government Printer, Nairobi, 2016).

²³ Ibid, S. 2(d).

²⁴ Ibid, S. 4.

It is noteworthy that this definition is broad enough and it is relevant to the discussion in this paper in that it contemplates environmental knowledge as part of TK. The foregoing Act is, however, silent on the use of TK in conflict management. This does not however mean that it prohibits the same since it is drafted in broad terms envisaging conflict management as part of use and enjoyment of TK by communities.

4. Nature of Environmental Conflicts

Conflict has been 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.²⁵ Conflict is seen as an inevitable phenomenon in human society's sphere of life since the entire life of humankind is manipulated by the prevalence of conflict within the society when people set opinion against opinion, run interest against interests.²⁶ It has been observed that almost all societies, regardless of their location in time and space, have laws and mechanisms for handling disputes/conflicts and achieving resolution of differences.²⁷ The causes of environmental conflicts vary across the globe and their manifestations differ considerably. Causes can range from control over vital environmental resources to contestations over natural resources at the community and/or household level.²⁸ It, therefore, follows that such mechanisms are informed by knowledge originating from within such communities. TEK comes in handy when such communities are to deal with environmental conflicts.

There has also been documented evidence to the effect that if conservation and environmental management policies are not formulated and implemented in a holistic way to balance the needs and interests of conservation and people, it can lead to conflict.²⁹ Environmental deficiencies supply conditions which render conflict all the more likely. They can serve to determine the source of conflict, they can act as multipliers that aggravate core causes of conflict, and they can help to shape the nature of conflict. Moreover they can not only contribute to conflict, they can stimulate the growing use of force to repress disaffection among those who suffer the consequences of environmental decline.³⁰

While environmental conflicts take on different forms and have multiple and varying impacts in different contexts, the key points of conflict are in relation to climate change, conservation, water quality and availability, air quality and management aspects.³¹ Communities have special relationship with the environment in their areas and any adverse effect on such environment directly interferes with the livelihoods of the community. Shocks to natural systems are anticipated

²⁵ Mengesha, A.D., et al., "Indigenous Conflict Resolution Mechanisms among the Kembata Society." op cit, at pp. 225-226.

²⁶ Ibid, p.226.

²⁷ Ibid, p. 226.

²⁸ Bob, U & Bronkhorst, S., 'Environmental conflicts: Key issues and management implications,' African Journal on Conflict Resolution, Special Issue on Environment and Conflict, Vol. 10 No. 2, 2010, pp. 9-30 at p. 10.

²⁹ Ibid, p. 15.

³⁰ N. Myers, "Environmental Security: What's New and Different?"

Available at <http://www.envirosecurity.org/conference/working/newanddifferent.pdf> [Accessed on 11/10/2015], p.4.

³¹ Bob, U & Bronkhorst, S., 'Environmental conflicts: Key issues and management implications,' op cit, p. 27.

and where rights and processes are uncertain, this may lead to conflict.³² Such conflict can be between similar resource users (e.g. between pastoralists), or between users with different needs (farmers versus pastoralists), or even within families where gender based violence appears to surge with climate stresses.³³

5. Role and relevance of traditional knowledge in conflict management in environmental matters

Although customary laws vary widely between communities, underlying customary principles or values such as reciprocity, equilibrium, duality and brotherhood/solidarity are quite consistent across different ethnic groups. These principles give rise to the obligation to openly share bio-resources and TK; to reciprocate/ exchange equally; to maintain harmony in society; to help those in need; and to respect nature.³⁴

The resilience of indigenous peoples and local 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.³⁵ 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.³⁶

It has correctly been observed that ecological knowledge does not function in isolation but it is, instead, embedded in institutions and local social norms.³⁷ Further, the structure and dynamics of institutions are critical for implementation of management practices based on ecological understanding in any society.³⁸ The coordination of appropriate resource use practices is often entrusted with traditional leaders.³⁹

³² Crawhall, N., ‘Indigenous knowledge in adaptation: conflict prevention and resilience-building,’ op cit. p. 4.

³³ Ibid, p. 2.

³⁴ Mengesha, A.D., et al., “Indigenous Conflict Resolution Mechanisms among the Kembata Society.” op cit, p. 4.

³⁵ 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].

³⁶ 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].

³⁷ Berkes, F., et. al., ‘Rediscovery of Traditional Ecological Knowledge as Adaptive Management,’ op cit. p. 1258.

³⁸ Ibid, p. 1258.

³⁹ Ibid, p. 1258.

Traditional conflict resolution practices reflect principles of reconciliation based on long-standing relationships and values.⁴⁰ They tend to be effective in addressing intra-community and even inter-community conflict, where relationships and shared values are part of the reconciliation process.⁴¹ Traditional mechanisms are rooted in the culture and history of the African people. They emphasize group unity, reconciliation of individuals or groups, and peaceful reintegration into the community. Traditional techniques place the interest of the group above that of the individual. They assume that all parties are interested in and affected by the conflict. The goal is to reconcile the parties to the conflict so that there is a return to social harmony—the goal of cosmopolitanism.⁴²

It has rightly been argued that social realities within societies should be taken seriously and conflicts should be viewed as non-isolated events in their social contexts. This is because when Africans sit down to discuss a conflict, the talking usually covers all kinds of relevant background and goes into the thoughts and intentions of others. The elders from a family, clan or state see their traditional objectives in conflict resolution as moving away from accusations and counter-accusations, to soothe hurt feelings and to reach a compromise that may help to improve future relationships. They also dwell on values, aspirations, perceptions and visions.⁴³

However, 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.⁴⁴ 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.⁴⁵

There has been emphasis on the importance of achieving constructive conflict resolution in natural Resource Management (NRM) and highlight the importance of local government structures and traditional leaders in managing conflicts in developing contexts.⁴⁶ In this regard, *Community-based approaches to NRM and conflict resolution* are deemed to be useful, particularly to promote locally based, indigenous management strategies.⁴⁷ It has been suggested that drawing TK/IK holders into decision-making and policy dialogue may valorize TK/IK knowledge, facilitate participation

⁴⁰ Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World,' *Black Diaspora Review*, Vol. 2(1), Fall 2010.

⁴¹ Ibid.

⁴² Ibid, p. 3; Schaap, A., 'Reconciliation as Ideology and Politics,' *An International Journal of Democratic and Critical Theory*, 2008. Available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8675.2008.00488.x/pdf> [Accessed on 23/04/2016].

⁴³ Utne, B.B., 'Indigenous conflict resolution in Africa,' p. 8, A draft presented to the week-end seminar on indigenous solutions to conflicts held at the University of Oslo, Institute for Educational Research 23 – 24 of February 2001. Available at http://www.africavenir.org/fileadmin/_migrated/content_uploads/BrockUtneTradConflictResolution_06.pdf [Accessed on 12/04/2016].

⁴⁴ Castro, A.P. & Ettenger, K., 'Indigenous Knowledge and Conflict Management: Exploring Local Perspectives and Mechanisms for Dealing with Community Forestry Disputes,' op cit.

⁴⁵ Ibid.

⁴⁶ Bob, U & Bronkhorst, S., 'Environmental conflicts: Key issues and management implications,' op cit. p. 25.

⁴⁷ Ibid.

of traditional customary resource management institutions while informing and adjusting national or subnational policy to find equitable, socially just, and environmentally well-informed solutions during times of extreme weather shocks or threshold crises of natural resource systems.⁴⁸ This is based on the assertion that participation in both decision-making and locally-owned conflict resolution strategies are more likely to be sustained and respected. *Local institutions that are aligned to traditional values, clan systems or other local social network, may be able to identify opportunities for resolution that are not evident to outside arbitrators or judges* (emphasis added).⁴⁹

Since indigenous mechanisms of conflict management are based on the very values and tenets of the people, they maintain and protect the customs and traditions of the society. Thus, they are able to solve long standing disputes and promote durable peace.⁵⁰

5.1 Traditional Knowledge and Environmental Security

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.⁵¹ The notion of "environmental security," should also be understood to have two dimensions. On the one hand, in placing emphasis upon the environmental dimension, security means maintaining an ecological balance, at least to the extent necessary to sustain resource supplies and life-support systems. On the other hand, in emphasizing the dimension of security in the traditional sense, the term refers to the prevention and management of conflicts precipitated by environmental decline.⁵²

Environmental security 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.⁵³ The Constitution provides that the State shall, *inter alia*: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; 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* (emphasis added); 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

⁴⁸ Crawhall, N., 'Indigenous knowledge in adaptation: conflict prevention and resilience-building,' op cit. p. 2.

⁴⁹ Ibid, p.2.

⁵⁰ Azebre, A.I., et al, 'Indigenous Mechanisms of Dispute Resolution among the People of Adaboya Traditional Area,' July 2012, available at <https://www.modernghana.com/news/534448/1/indigenous-mechanisms-of-dispute-resolution-among-.html> [Accessed on 10/04/2016].

⁵¹ 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.

⁵² J. Brunnee, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?" *Fordham International Law Journal*, Vol. 18, 1995, pp. 1742-1747 at p. 1742.

⁵³ F. Rita, "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.

the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.⁵⁴

In the Northern parts of Kenya, the negative climate change impact on natural resources, stress existing mechanisms for sharing resources like food and pastures, and there is always potential for tensions which can often escalate into serious clan fights for the available limited resources.⁵⁵ The pastoralists graze their cattle on the existing pasture leaving the soil bare. Recently, the Turkana community has turned to agriculture as a way of livelihood.⁵⁶ However, considering that there are other communities in the area who are still pastoralists, there is likelihood of tribal clashes over the resources found in the irrigated areas.⁵⁷

The Food and Agriculture Organization of the United Nations (FAO) has suggested that the promotion and protection of traditional and local food and agricultural knowledge will require international, intercultural and interdisciplinary approaches, communication and cooperation.⁵⁸ Coordination of indigenous and local communities' sustainable use, conservation and management of food and agriculture within and across ecosystems, landscapes and seascapes will also require synergies that link food security, livelihood sustainability, poverty alleviation and food and agricultural productivity to rural development processes based on *in* and *ex situ* conservation of food and agricultural genetic resources.⁵⁹

6. Traditional Knowledge in Kenya: A mirage?

While the formal recognition of TK or IK has existed in Kenya's laws for some time, this has not translated to active utilisation of the knowledge by communities for management of environmental conflicts. The practice has been to suppress them or even overshadow them using the formal mechanisms. This has also been evidenced by court pronouncements on the same which have not been consistent. In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*⁶⁰, the Court observed that: "quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The Convention on Biological Diversity which Kenya has ratified and which is now part of Kenyan law by virtue of Article 2(6) of the Constitution recognizes the

⁵⁴ Article 69(1).

⁵⁵ Pkalya, R., et al, 'Conflict in Northern Kenya: A focus on the internally displaced conflict victims in Northern Kenya,' available at http://practicalaction.org/docs/region_east_africa/conflict_in_northern_kenya.pdf [Accessed on 23/04/2016].

⁵⁶ See African Development Bank, Socio-Economic Analysis and Public Consultation of Lake Turkana Communities – Draft Report, December, 2009, p. 141.

Available at

<http://www.afdb.org/fileadmin/uploads/afdb/Documents/ComplianceReview/PUBLIC%20CONSULTATION%20AND%20SOCIO%20ECONOMIC%20ANALYSIS%20OF%20LAKE%20TURKANA%20COMMUNITIES%20UPDATED%20VERSION.PDF> [Accessed on 23/04/2016].

⁵⁷ Ibid, p. 141.

⁵⁸ Food and Agriculture Organization of the United Nations (FAO), *FAO and traditional knowledge: the linkages with sustainability, food security and climate change Impacts*, 2009, p.9.

⁵⁹ Ibid.

⁶⁰ ELC Civil Suit No. 821 of 2012 (OS).

importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted.” Such an affirmation from courts is to be lauded. Ideally, the same should be extended in entrenching the richness of TK/IK in environmental matters. However, while the Constitution recognises customary law as source of law in Kenya, the same has been subjugated to the formal sources of law.⁶¹ It is also clear from the foregoing case that the concerned community had to fight their way through formal courts to secure their rights.

It is also noteworthy that in the past, the position has been that courts do not take judicial notice of customary law (including environmental customary law and norms) and the same must specifically be pleaded and proved by the person seeking to benefit from it. In the case of *Kimani v Gikanga*⁶² the Court of Appeal for Eastern Africa was dealing with the issue of how the Court would establish customary laws as facts before it. The Court held that any person seeking to rely on customary law must prove the same in court. In other words, the Court will not take judicial notice of customary law. Customary law contains environmental norms and edicts on how to manage the environment. This position raises substantial questions as to the place of customary law under the current Constitution of Kenya, 2010. It has not specifically been overturned by Kenyan courts and could only be inferred that it was changed by the provisions of the current Constitution of Kenya 2010.

However, even as the Constitution requires that, in exercising judicial authority, the courts and tribunals must be guided by the principles of, *inter alia*— alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms must be promoted, subject to clause (3)⁶³, it is not clear as to how the repugnancy clause may be applied. This therefore poses the same risk of subjugation of customary laws. Customary law and traditional ecological norms thus have the problem of general acceptance by the law enforcing authorities. While some of the foregoing case law seem to support and recognise the use of TK or IK, there has not been consistency. There is a need to clarify the place of traditional knowledge for environmental conflict management in Kenya.

7. Harnessing Traditional or Indigenous Knowledge: Walking the Talk

It has been proposed that traditional knowledge, either on its own or in conjunction with science, can greatly aid in predicting and preventing the potential environmental impacts of development, as well as informing wise land-use and resource management.⁶⁴ Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a

⁶¹ Art. 2(4) of the Constitution provides that any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

⁶² Court of Appeal for Eastern Africa, [1965] E.A. 735.

⁶³ (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.

⁶⁴ Ellis, S.C., *Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making*, *Arctic*, Vol. 58, No. 1 (March 2005), p. 66–77 at p. 67.

broader scope of environmental values, practices, and knowledge.⁶⁵ The United Nations 2030 Agenda for Sustainable Development⁶⁶ recognizes peace as a vital threshold condition for development, as well as a development outcome in its own right. The General Assembly of the United Nations, in adopting the 2030 Agenda for Sustainable Development affirmed their determination to foster peaceful, just and inclusive societies which are free from fear and violence. It also affirmed that there can be no sustainable development without peace and no peace without sustainable development.⁶⁷

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.⁶⁸ Exploring the community's knowledge and knowledge of people dealing with agriculture, is deemed crucial to determine their norms, values, and belief in regards to their activities, particularly in the area of water and land management.⁶⁹ The way how people develop such knowledge by understanding their environment through observation and experiences determine the specific group of people's knowledge.

7.1 Constitution of Kenya 2010 and Indigenous Knowledge

The Constitution of Kenya 2010 provides for the national values and principles of governance that 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.⁷⁰ These national values and principles of governance include, inter alia—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.⁷¹ Further, the Constitution provides that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁷² Notably, it also outlines the State's obligation 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

⁶⁵ *ibid* at p. 67.

⁶⁶ 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)], Goal 16.

⁶⁷ Preamble, the United Nations 2030 Agenda for Sustainable Development.

⁶⁸ 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].

⁶⁹ 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.

⁷⁰ Constitution of Kenya, 2010, Art. 10(1).

⁷¹ *Ibid*, Art. 10(2).

⁷² *Ibid*, Art. 11(1).

property rights of the people of Kenya.⁷³ The Constitution also guarantees every person's right to use the language, and to participate in the cultural life, of the person's choice.⁷⁴

The Constitution also obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups, inter alia—participate and are represented in governance and other spheres of life; and develop their cultural values, languages and practices.⁷⁵ One of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.⁷⁶ These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.⁷⁷

The functions of the National Land Commission include, inter alia: to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; and to encourage the application of traditional dispute resolution mechanisms in land conflicts.⁷⁸ The obligations of the State in respect of the environment as outlined in the Constitution include, inter alia: 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; and protect genetic resources and biological diversity.⁷⁹

The Constitution requires that, in exercising judicial authority, the courts and tribunals must be guided by the principles of, inter alia— alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* which must be promoted, subject to clause (3) (emphasis added).⁸⁰ It is noteworthy that these mechanisms form part of the TK or IK since when they are applied in the community setting, they mostly rely on such knowledge for their effectiveness.⁸¹

The objects of the devolution of government are, inter alia— 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; and to protect and promote the interests and rights of minorities and marginalised communities.⁸²

⁷³ Ibid, Art. 11(2).

⁷⁴ Ibid, Art. 44(1).

⁷⁵ Ibid, Art. 56.

⁷⁶ Ibid, Art. 60(1) (g).

⁷⁷ Ibid, Art. 60(2).

⁷⁸ Ibid, Art. 67(2) (f).

⁷⁹ Ibid, Art. 69(1) (C) (d).

⁸⁰ Ibid, Art. 159(2) (c).

⁸¹ 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," op cit.

⁸² Art. 174.

While the foregoing provisions are laudable in view of the fact that they have envisaged indigenous or traditional knowledge within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making. There is need to move beyond recognition of traditional knowledge in Kenya to ensuring that the same has been fully incorporated and reflected in decision-making and also left to function where the Constitution so requires. A good example of such provision is the application of traditional dispute resolution mechanisms in land conflicts (Art. 67) as well as dealing with the inter-community and intra community conflicts that are mostly natural resource based.

There is a clear need to integrate traditional and formal sciences for participatory monitoring, and taking feedback to achieve adaptive strategies for management of natural resources.⁸³ It has been argued that management of natural resources cannot afford to be the subject of just any single body knowledge such as the Western science, but it has to take into consideration the plurality of knowledge systems. There is a more fundamental reason for the integration of knowledge systems.

Application of scientific research and local knowledge contributes both to the equity, opportunity, security and empowerment of local communities, as well as to the sustainability of the natural resources. Local knowledge helps in scenario analysis, data collection, management planning, designing of the adaptive strategies to learn and get feedback, and institutional support to put policies in to practice. Science, on the other hand, provides new technologies, or helps in improvement to the existing ones. It also provides tools for networking, storing, visualizing, and analyzing information, as well as projecting long-term trends so that efficient solutions to complex problems can be obtained.⁸⁴ Through assimilation of indigenous knowledge, it is possible to capture the interests and genuine desires of the locals in natural resource exploitation activities. This reduces conflict not only within the concerned communities but also between the communities and the authorities. Where they do not perceive a likelihood of their livelihoods being endangered, these communities are unlikely to reject development projects or even turning to unconventional ways of protecting their livelihoods.

7.2 Concerted Efforts

However, harnessing this knowledge is not a one person affair but instead calls for concerted efforts from all quotas. Non-Governmental organisations, academia and government institutions directly concerned can collaborate in creating awareness of the ways in which the scientific knowledge can be applied concurrently with IK/TK to manage environmental conflicts for peace and sustainable development. Churches and other religious organisations can also come in to facilitate the actual processes of conflict management and also foster awareness creation efforts. 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.

⁸³ Pandey, D.N., 'Traditional Knowledge Systems for Biodiversity Conservation,' available at http://www.infinityfoundation.com/mandala/t_es/t_es_pande_conserve.htm

⁸⁴ Ibid.

The need to involve everyone is affirmed in the Constitution which 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.⁸⁵

8. Conclusion

There is clearly a link between traditional or indigenous knowledge and environmental conflict management in Kenya. TK or IK involve the knowledge of and application of conflict management mechanisms that are acceptable by communities and that promote peaceful co-existence. TK, TEK and IK are based on inclusivity. Community members are given a voice-they are able to take part in the management of natural resources within the areas that they live in. Within TK is to be found certain environmental ethics that relate to how human beings deal with the environment. The idea of being in harmony with nature is one that can work towards minimizing environmental conflicts. TK is relevant in conflict management in environmental matters. It may be used in tandem with other mechanisms to achieve the same end. Successful management of environmental conflicts has the desired goal of ensuring that Kenya achieves environmental security and sustainable development.

All knowledge including traditional knowledge, traditional ecological knowledge and indigenous knowledge should be brought to bear in a bid to address environmental conflicts in Kenya. Harnessing traditional knowledge for environmental conflict management is an idea that we cannot afford to ignore. The sustainable development agenda calls for an integrated approach to natural resources governance and management of associated conflicts to ensure that all groups and stakeholders are brought on board.

⁸⁵ Constitution of Kenya 2010, Art. 69(2).

Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya

1. Introduction

Conservation and development activities can potentially affect the lives of indigenous communities living in a targeted area, whether implemented in small scale or large scale.¹ It has been argued that indigenous peoples around the world typically have higher rates of poverty, food insecurity and malnutrition than non-indigenous populations.² In addition, their rights, territories and livelihoods are seriously threatened by the world's demographic pressure, compounded by the extractive industries' appetite for resources.³ A widespread lack of respect of their cultures and rights is also believed to have resulted in many communities being decimated, dispossessed of their lands and forcibly relocated.⁴

Despite the international recognition of the rights of these communities to be consulted and involved in decision-making processes that directly affect their livelihoods, countries around the world continue to disregard such rights with adverse effects on the ability of the affected communities to fight poverty and realise the right to self-determination. The global call for application of Free, Prior, And Informed Consent (FPIC) in mining is generally meant to address the abuse of the rights of indigenous peoples worldwide including: indigenous land rights, recognition of and respect for culture, the right to economic participation, to a livelihood and to a clean environment, among others.⁵

It is for this reason that this paper explores some of the ways that Kenyan communities that find themselves in similar circumstances can effectively exercise their FPIC as far as exploitation of their lands and the underlying resources is concerned. However, while FPIC is mostly associated with obtaining consent from indigenous communities, the discussion in this paper goes beyond indigenous peoples and towards broad-based community consent, at least in the Kenyan context.

2. Right to Free, Prior, And Informed Consent: Meaning and Scope

Notably, there is currently no singular or universally accepted definition of FPIC, no agreement on what a FPIC process must entail, and no functional clarity about what constitutes 'consent', with authors arguing that consent and associated processes should be determined locally.⁶ As such, there exist a number of definitions. For instance, some authors suggest that an FPIC process should be

¹ See Mckeehan, A. and Buppert, T., "Free, Prior and Informed Consent: Empowering Communities for People-Focused Conservation," *Harvard International Review*, Vol. 35, no. 3 (2014): 48.

² FAO, *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*, Manual for Project Practitioners, 2016, p. 4. Available at <http://www.fao.org/3/a-i6190e.pdf> [Accessed on 15/3/2019].

³ *Ibid*, p. 4.

⁴ *Ibid*, p.4.

⁵ Owen, J.R. and Kemp, D., "'Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing A Knowledge Base," *Resources Policy*, Vol.41 (2014): 91-100., at p. 92.

⁶ Owen, J.R. and Kemp, D., "'Free Prior And Informed Consent', Social Complexity And The Mining Industry: Establishing A Knowledge Base," *op cit.*, at p. 92.

grounded in the degree to which livelihood and culture are dependent on customary lands, rather than application being strictly tied to indigeneity.⁷

Free, Prior, And Informed Consent (FPIC) has been defined by some as ‘the principle that indigenous peoples and local communities must be adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin’. This includes participation in setting the terms and conditions that address the economic, social, and environmental impacts of all phases of extraction and post-extraction operations.’⁸ It is also contended that communities should have the right to continue to provide informed consent, or alternatively to withdraw consent, during the implementation of the project, in line with agreed procedures.⁹

FPIC is a right for indigenous peoples and it is also viewed as a principle of best practice for sustainable development, used to reduce social conflict as well as to increase the legitimacy of a project in the eyes of all stakeholders and rights holders.¹⁰ It is also seen as a requirement, prerequisite and manifestation of the fundamental, inherent right of indigenous peoples to self-determination.¹¹

From the foregoing definition, it is thus arguable that FPIC broadly falls within public participation but from an informed point of view and without any coercion either from the State or the investor or developer. Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples guarantees that indigenous people should not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 28 of the Declaration further provides that Indigenous peoples have the right to redress, by means that can include restitution or when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

⁷ Ibid, p.92.

⁸ Oxfam International, “Securing Communities’ Right to ‘Free Prior and Informed’ Consent in Kenya’s Extractive Sector,” Wednesday, November 8, 2017. Available at https://kenya.oxfam.org/press_release/securing-communities%E2%80%99-right-%E2%80%98free-prior-and-informed%E2%80%99-consent-kenya%E2%80%99s-extractive [Accessed on 15/3/2019]; Mullins, D. and Wambayi, J., , “Testing Community Consent:Tullow Oil project in Kenya,” Oxfam Briefing Paper, Oxfam International, November 2017, available at https://cng-cdn.oxfam.org/kenya.oxfam.org/s3fs-public/file_attachments/FPIC%20Report-November%202017.pdf [Accessed on 15/3/2019].

⁹ Ibid.

¹⁰ Mullins, D. and Wambayi, J., “Testing Community Consent: Tullow Oil project in Kenya,” op cit., p.10.

¹¹ Sena, K., Operationalizing Free, Prior and Informed Consent within REDD+ Projects in Kenya,’ Case study, 2014, p.3. Available at https://communitylegalresources.files.wordpress.com/2014/12/ci_fpic-case-study_kenya.pdf [Accessed on 15/3/2019].

Some scholars regard FPIC as an aspect of environmental justice and a tool for poverty alleviation.¹² In the context of environmental justice, FPIC is believed to empower indigenous communities by providing them access to environmental justice, which concept mandates that all people, regardless of their race, origin or income, have the ability to “enjoy equally high levels of environmental protection.¹³ FPIC also gives the most vulnerable members of society a platform from which they can express their rights.¹⁴

Within the context of the rights of indigenous peoples, FPIC requires that consent must be freely given and that the decision must be made after indigenous peoples have been educated about the project.¹⁵ Principle 10 of the Rio Declaration 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 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.¹⁶ Effective access to judicial and administrative proceedings, including redress and remedy, must also be provided. Public participation is, therefore, an essential principle in natural resources management. However, public participation is hampered by factors such as financial cost of engaging the public, time constraints, fear that participants may not be truly representative and belief that citizens lack knowledge of complex technical issues.¹⁷

In determining who falls within the category of the people to be consulted seeking FPIC, the ‘public’ in public participation is used to refer to individuals acting both in their roles as citizens, as formal representatives of collective interest or affected parties that may experience benefit or harm or that otherwise choose to become informed or involved in the process.¹⁸ The label ‘public’ is often used to refer to individual citizens or relatively unorganized groups of individuals but should be expanded to include the full range of interested and affected parties including corporations, civil society groups, technocrats and even the media.¹⁹

¹² Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," *Sustainable Development Law & Policy* 13, no. 1 (2013): 8.

¹³ Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," *op. cit.*, p. 37; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015; Muigua, K. and Kariuki, F., 'Towards Environmental Justice in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017).

¹⁴ Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," *op. cit.*, p. 37.

¹⁵ *Ibid.*, p. 38.

¹⁶ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

¹⁷ Senach, S.L., 'The Trinity of Voice: The Role of Practical Theory in Planning and Evaluating the Effectiveness of Environmental Participatory Process,' in Depoe, S.D. et al, (eds), *Communication and Public Participation in Environmental Decision Making* (SUNY Press Ltd., 2004) 13, p.16.

¹⁸ Dietz t. & Stern, P.C., (eds), *Public Participation in Environmental Assessment and Decision Making*, (National Academies Press, 2008), p.15.

¹⁹ *Ibid.*

Four categories of the public must be considered when deciding whether or not the ‘public’ has been involved. These are: stakeholders who are organized groups that are or will be affected by or that have a strong interest in the outcome of the decision; the directly affected public who will experience positive or negative effects from the environmental decision; the observing public which includes the media and opinion leaders who may comment on the issue or influence public opinion; and the general public who are all individuals not directly affected by the environmental issue but may choose to be part of the decision making process.²⁰

Courts have rightly pointed out that public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. In addition, Kenya’s jurisprudence has firmly established that Courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold.²¹

In *Hassan and 4 others v KWS*²² the court described the public as “those entitled to the fruits of the earth on which the animals live” when stating that there was no express consent from the community allowing KWS to translocate the rare hirola antelope from their land. Further, in *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*,²³ the court gave a much wider description of the public by stating that it is “the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised.”

FPIC requires that during the negotiation process, indigenous groups are made aware of their rights over their ancestral lands, the risks associated with the project, and the relationship between their rights and their access to natural resources, which the community may be dependent upon for sustenance.²⁴ It has been observed FPIC is not just a result of a process to obtain consent to a particular project; it is also a process in itself, and one by which Indigenous Peoples are able to conduct their own independent and collective discussions and decision-making.²⁵ This is to be achieved in an environment where they do not feel intimidated, and where they have sufficient time to discuss in their own language, and in a culturally appropriate way, on matters affecting their rights, lands, natural resources, territories, livelihoods, knowledge, social fabric, traditions, governance systems, and culture or heritage (tangible and intangible).²⁶

²⁰ Ibid, p.15.

²¹ Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

²² [1996] 1KLR (E&L) 214, p.215.

²³ HC Judicial Review No. 122 of 2011, [2012] eKLR.

²⁴ Zvobgo, T., "Free, Prior, and Informed Consent: Implications for Transnational Enterprises," op. cit., p. 38.

²⁵ FAO, Free Prior and Informed Consent: An indigenous peoples’ right and a good practice for local communities, Manual for Project Practitioners, 2016, op cit., p. 13.

²⁶ Ibid, p.13.

3. Right to Free, Prior, And Informed Consent under Kenyan Law: Prospects and Challenges

While the concept of FPIC has been universally recognised, it has not always come easy for some of the Kenyan communities, if at all. Despite the continued development in the policy and legal framework on public participation and inclusive decision-making processes, the level of openness of the government to citizen engagement in policy and development decision making broadly may be insufficient and sometimes completely missing.

There have been cases where communities and groups of persons in Kenya have sought court intervention, both locally and regionally, to have their right to participation in decision-making processes affecting their lands. For instance, in 2009, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, the African Commission on Human and Peoples' Rights held that by forcibly removing the Endorois people from their ancestral lands around Lake Bogoria to create a game reserve, the government of Kenya violated the Endorois' right to property (Article 14); natural resources (Article 21); development (Article 22); religion (Article 8); and culture (Article 17). The Commission noted in particular that the Endorois are "an indigenous community" and a "people," and that for "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."²⁷ There are instances where either consent is inappropriately obtained or the government invokes its powers on compulsory acquisition of land with or without adequate compensation.

3.1 Communities' Consent in Extractives Industry in Kenya

Extractive industry projects place intense pressure on land.²⁸ It has been observed that FPIC introduces heightened social performance requirements at a time where many mining companies are still grappling with the fundamentals of their corporate social responsibilities (CSR).²⁹ The *Mining Act 2016*³⁰ stipulates that prospecting and mining rights should not be granted under the Act with respect to private land without the express consent of the registered owner, and such consent should not be unreasonably withheld.³¹ In such a case, consent shall be deemed to be given for the purposes of the Act where the owner of private land has entered into -a legally binding arrangement with the applicant for the prospecting and mining rights or with the Government, which allows for the conduct of prospecting or mining operations; or an agreement with the

²⁷ African Commission on Human and Peoples' Rights, 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*; Greenspan, Emily. "Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects," Oxfam American Research Background series (2014): 1-56, p.13. Available at <https://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF> [Accessed on 20/3/2019].

²⁸ Emily Greenspan, Michelle Katz, Julie Kim, Serena Lillywhite, and Chris Madden, "Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior, and Informed Consent," Oxfam International July 2015, p.7. Available at https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp207-community-consent-index-230715-en_0.pdf [Accessed on 20/3/2019].

²⁹ Owen, J.R. and Kemp, D., "'Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing a Knowledge Base," op cit., at p.91.

³⁰ Mining Act 2016, No. 12 of 2016, Laws of Kenya.

³¹ Sec. 37(1), Mining Act, 2016.

applicant for the prospecting and mining rights concerning the payment of adequate compensation.³²

The Mining Act also provides that prospecting and mining rights should not be granted under the Act or any other written law over community land without the consent of the authority obligated by the law relating to administration and management of community land to administer community land; or the National Land Commission in relation to community land that is unregistered.³³ For the purpose of the foregoing subsection, consent should be deemed to be given for the purposes of the Act where the registered owners of community land have entered into - a legally binding arrangement with the applicant for the prospecting and mining rights or with the Government, which allows the conduct of prospecting or mining operations; or an agreement with the applicant for the prospecting and mining rights concerning the payment of adequate compensation.³⁴

It is however worth pointing out that the Cabinet Secretary may take steps under Compulsory acquisition of land or rights or interests in land, to vest the land or area in question, or rights or interests in such land or area, in the Government or on behalf of the Government, where the consent required under sections 36, 37 or 38 of the Mining Act 2016 is—unreasonably withheld; or the Cabinet Secretary considers that withholding of consent is contrary to the national interest.³⁵

Courts in Kenya have demonstrated willingness to uphold the requirement for seeking community consent where the same was not sought. For instance, in the case of *Mohamed Hussein Haji v Issa Kuno & 4 others [2018] eKLR*³⁶, the petitioner sought a declaration that the Petitioner was entitled to information from the Respondents to verify and confirm whether constitutional and statutory regulatory requirements were complied with before the 1st and 2nd Respondents began their mining activities in the Ali Jibril area, within Wabari Ward in Garissa County, amongst other reliefs. The Court, ruling in favour of the petitioner, observed as follows: in a community land which falls within the ambit of customary law ownership which is neither public nor private, before any interest is acquired by any individual, the persons who ordinarily use that particular land must be consulted.³⁷

Development that threatens life is not suitable development and it must be halted. In environmental law, intergenerational equity involves the application of equity within the present and future generation such that each member has an equal right to access the earth's natural and cultural resources.³⁸ The land in question had not been acquired by the government from the community concerned by way of compulsory acquisition. The land belonged to the community and held by the County Government of Garissa in trust for the affected community. There was no indication that consent was sought and obtained from the said County Government of Garissa.³⁹

³² Sec. 37(2), Mining Act, 2016.

³³ Sec. 38(1), Mining Act 2016.

³⁴ Sec. 38(2), Mining Act 2016.

³⁵ Sec. 40, Mining Act 2016.

³⁶ *Mohamed Hussein Haji v Issa Kuno & 4 others [2018] eKLR*, Environment and Land Petition 1 of 2018.

³⁷ Para. 31.

³⁸ Para. 34.

³⁹ Para. 36.

The land in question was an unregistered community land held in trust by the County Government of Garissa on behalf of the communities and as seen from the decision above, the consent of the county government must be obtained on behalf of the community. While the foregoing case is a step in the right direction by Kenyan courts to protect the interests of communities, there is still the risk of investors directly seeking the consent of county governments who then ignore communities and purport to grant consent on behalf of such communities. This may be done without the County government in question first engaging the communities to help them appreciate the whole project and the process in question and how the same might affect their livelihoods.

The question of consent has not only been arisen in the Kenyan context only. In South Africa's case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*⁴⁰, the Constitutional Court overruled an eviction order, issued by a lower court to a mining company, permitting it to evict 13 families from a farm in the Lesetlheng Community, North West Province, where the company had mining rights.⁴¹ Significantly, the court upheld a provision in the Interim Protection of Informal Land Rights Act, a law enacted to protect land rights after apartheid, which says that no person may be deprived of any informal right to land without his or her consent. The mining company had secured consent to the granting of the right from the minister who held the land in a trust and the traditional council but those living on the land were not consulted, as the Interim Protection of Informal Land Rights Act and the Mineral and Petroleum Resources Development Act required. The Constitutional Court ruled they could not be evicted because they had not been consulted and consented, nor were mechanisms for resolving disputes under the Mineral and Petroleum Resources Development Act exhausted.⁴²

This issue was also canvassed before the Pretoria High Court, where court has ruled that companies must first seek permission from local communities if they plan to mine on their ancestral land (Xolobeni judgment).⁴³ There are, however, those who have challenged the High Court decision as one that would make it practically impossible to get mining rights on traditional land because of the numbers of people affected.⁴⁴ The critics of the South African High Court's decision did not however see any problem with the Constitutional Court's decision which is seen as one with two sides of the requirement for consent of the occupiers: The first is the consent of the traditional authority as the lawful representative of the community; and the second is the consent of those

⁴⁰ *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (Dlamini and Land Access Movement of South Africa as Amici Curiae)*, CCT265/17.

⁴¹ Mavhinga, D., "South Africa's Constitutional Court Protects Land Rights: Landmark Rulings Protect Women and Communities Affected by Mining Companies," Human Rights Watch, November 6, 2018. Available at <https://www.hrw.org/news/2018/11/06/south-africas-constitutional-court-protects-land-rights> [Accessed on 19/3/2019].

⁴² Booyesen, M., 'Mining Rights and Communities – Does The Xolobeni Judgment Take South Africa Forwards Or Backwards?' iAfrica, February, 4, 2019. Available at <https://www.iafrica.com/mining-rights-and-communities-does-the-xolobeni-judgment-take-south-africa-forwards-or-backwards/> [Accessed on 19/3/2019].

⁴³ United Nations Environmental Programme, "South African indigenous community win environmental rights case over mining company," December 7, 2018. Available at <https://www.unenvironment.org/news-and-stories/story/south-african-indigenous-community-win-environmental-rights-case-over-mining> [19/3/2019].

⁴⁴ Booyesen, M., 'Mining Rights and Communities – Does The Xolobeni Judgment Take South Africa Forwards Or Backwards?' iAfrica, February, 4, 2019.

directly affected, both of which do not require the consent of every single occupier and makes a provision for majority consent under common law.⁴⁵

The problem with requiring consent of every person living within an area, even those not directly affected by any proposed development project is that one faction of the community in question may be in favour of the mine because of the potential economic benefits as a result of compensation and the other would be opposed because it would affect their traditional way of life.⁴⁶

The Court, in the case of *Patrick Musimba v National Land Commission & 4 others [2016] eKLR*, opined that it had no doubt that 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 healthy 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 safe guards to be observed when a person or the State initiates any physical development.⁴⁷

The Court went on to state that 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.⁴⁸

The challenge is thus balancing the interests of both groups while ensuring that the ensuing court battles do not affect the country’s development agenda. Some scholars have rightly observed that States, in addition to securing a balance between corporate and citizen rights, face the challenge of creating and fostering conditions for sustainable and diversified economic growth if they are to avoid the so-called ‘resource curse’.⁴⁹

3.2 Right to Free, Prior, And Informed Consent and Compulsory Acquisition of Land

As already pointed out, the Cabinet Secretary in charge of mining may take steps under compulsory acquisition of land or rights or interests in land, to vest the land or area in question, or rights or interests in such land or area, in the Government or on behalf of the Government, where the consent required under sections 36, 37 or 38 of the Mining Act 2016 is—unreasonably withheld; or the Cabinet Secretary considers that withholding of consent is contrary to the national interest.⁵⁰ The

¹bid.

⁴⁶ Ibid.

⁴⁷ Patrick Musimba v National Land Commission & 4 others [2016] eKLR, para. 140.

⁴⁸ Ibid., para. 141.

⁴⁹ Owen, J.R. and Kemp, D., “Free Prior and Informed Consent’, Social Complexity and the Mining Industry: Establishing A Knowledge Base,” op cit., p. 91.

⁵⁰ Sec. 40, Mining Act 2016.

Constitution of Kenya also provides that:- 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- 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 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- requires prompt payment in full, of just compensation⁵¹ to the person; and allows any person who has an interest in, or right over, that property a right of access to a court of law.”⁵²

The statutory framework for compulsory acquisition is comprehensively founded under Part VIII of the Land Act, 2016⁵³. Courts have observed that with a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the State’s developmental needs, Part VIII was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton and unnecessary deprivation of his private property.⁵⁴ The Judge, in the *Patrick Musimba case*, further observed that the power to expropriate private property as donated to the State by both the Constitution and statute law (the Land Act) leaves the private land owner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized.⁵⁵

It is for the court consequently to ensure that the process is free from any rebuke and in this regard; the statutory provisions must be followed and be adhered to strictly.⁵⁶ The question of compulsory acquisition of land and when the same should be considered as necessary due to ‘unreasonable withholding’ of consent is a potential hurdle when it comes to achieving FPIC in Kenya. As held by courts, there is a need for continued supervision of the way this power is exercised to avoid any abuse of the same to the disadvantage of communities.

4. Maximising the Right to Free, Prior, And Informed Consent in Kenya

The current constitutional dispensation is geared towards ensuring that there is a greater level of meaningful participation of the general public and specific groups of persons in matters of national development and all issues directly affecting their lives. While this section is not conclusive on how to achieve FPIC in the context of Kenya, the same raises some of the most important issues that ought to be first addressed. The policymakers and the judiciary must grapple with some of

⁵¹ The law allows compensation to take the form of either an alternative parcel of land or cash in lieu: see Section 114(2) of the Land Act (see also *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, Petition 613 of 2014, para. 116.

⁵² Article 40 (3), Constitution of Kenya.

⁵³ Land Act, No 6 of 2012, Laws of Kenya.

⁵⁴ *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, Petition 613 of 2014, para. 84.

⁵⁵ *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, para. 114.

⁵⁶ *Ibid.*, para. 115.

these questions when they arise. They must address the question on the methods or mechanisms for achieving or obtaining FPIC.

4.1 Enhanced Public Participation as a Tool for Obtaining FPIC

In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR⁵⁷ the Court, in its finding, stated that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles: **First**, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities; **Second**, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness.

A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus: *“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”*; **Third**, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)*. In relevant portion, the Court stated: *“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”*; **Fourth**, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition.

In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account; **Fifth**, the right of public participation

⁵⁷ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box; *Sixthly*, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.⁵⁸

These tools, if taken into account when coming up with legal and policy frameworks, can potentially help in making FPIC in development projects in Kenya a reality. The existing framework should be geared towards promoting these principles.⁵⁹ The existing tools for public participation include but are not limited to Environmental Impact Assessment among other environmental assessment and audit tools.⁶⁰

4.2 Access to Information for Effective FPIC

Public participation requires the right of access to appropriate, comprehensible and timely information held by public institutions.⁶¹ This is a constitutional requirement as well as a statutory one under the *Access to Information Act, 2016*⁶² whose object and purpose is to—give effect to the right of access to information by citizens as provided under Article 35 of the Constitution; provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law; promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; provide for the protection of persons who disclose information of public interest in good faith; and provide a framework to facilitate public education on the right to access information under the Act.⁶³

The Community Land Act, 2016⁶⁴ provides that an agreement relating to investment in community land shall only be made between the investor and the community.⁶⁵ In addition, no agreement between an investor and the community shall be valid unless it is approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of

⁵⁸ Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.

⁵⁹ See Muigua, K., "Towards Meaningful Public Participation in Natural Resource Management in Kenya," (2014). Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> [Accessed on 23/3/2019].

⁶⁰ Muigua, K., Legal Aspects of Strategic Environmental Assessment and Environmental Management, available at <http://www.kmco.co.ke/index.php/publications/182-legal-aspects-of-strategic-environmental-assessment-and-environmental-management> [accessed on 23/3/2019].

⁶¹ UNEP, Training Manual on International Environmental Law, op cit, p.193.

⁶² Access to Information Act, 2016, No. 31 of 2016, Laws of Kenya.

⁶³ Ibid, sec. 3.

⁶⁴ Community Land Act, No. 27 of 2016, Laws of Kenya.

⁶⁵ Ibid, sec. 36(2).

two thirds of the adult members of that community is represented.⁶⁶ Also relevant is the provision that the community may request the guidance and assistance of the county government or any other relevant stakeholders in considering the offer of investment.⁶⁷ These provisions are meant to ensure that the community members fully and meaningfully participate and where their consent is required, the same is freely obtained from an informed point.

In *Meza Galana and 3 others v AG and 2 others*,⁶⁸ community representatives from Tana River District filed a suit against the defendants seeking, *inter alia*, a declaration that the legal notice declaring Tana Primate Reserve to be a national reserve to be quashed as it was not a valid notice. The court held that the legal notice was indeed not valid as the community had not been made aware of the decision to gazette the area as a national reserve and their views had not been sought before the decision was made.

In the case of *John Muraya Mwangi & 495 Others & 6 Others v Minister For State For Provincial Administration & Internal Security & 4 Others [2014]*, the Court stated that although the concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one, it needs to be given effect both before and after legislative enactment. This may take several forms:- the concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office; the right to be engaged in public debate and dialogue with elected representatives at public hearings; the duty to facilitate public participation in the conduct of public affairs; ensuring that ordinary citizens the “hoi polloi,” the “lala hoi” have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs.⁶⁹

While this case may not be directly relevant to the concept of FPIC, as far as public participation which is a conduit for achieving FPIC is concerned, the case demonstrates the need for public participation in different affairs which impact on social, economic and political life of communities. The provision for access to information is not enough. It must be adequately provided for as far as the quality and forms of getting such information are concerned. The language of the information ought to be favourable. The information can be translated into local languages to enable the target audience appreciate the same and also facilitate meaningful engagement with the relevant stakeholders. Different channels and community leaders can be used to facilitate this and ensure that any decisions that affect the communities consider and take on board the views of such community members.

4.3 Balancing Community Rights to Self Determination and the National Development Agenda

While the communities’ right to FPIC ought to be fully implemented for their own good and as part of the recognised human rights, this concept raises a number of issues that must delicately be tackled at least within the context of Kenya. For instance, while the various sectoral laws on

⁶⁶ Ibid, sec. 36(3).

⁶⁷ Community Land Act, sec. 36(4).

⁶⁸ HCCC No. 341 of 1993, [2007] eKLR.

⁶⁹ *John Muraya Mwangi & 495 others & 6 Others V Minister for State for Provincial Administration & Internal Security & 4 others [2014 eKLR]*.

exploitation and exploration of natural resources recognise the right of communities to give their consent in projects that potentially affect their lives and for the investors' (local and foreign) obligation to meaningfully engage these communities to obtain such consent, the Cabinet Secretary in charge still retains the power to invoke state's power of compulsory acquisition albeit with adequate compensation. The questions that arise are: under particular circumstances, who decides that the consent obtained was informed? Who determines that consent was unreasonably withheld? Where community or public meetings are held, who determines or establishes the number of people who attended such meetings, how the meetings were convened and the quality of the agenda for the meetings especially where the rapporteurs are the potential beneficiaries? Where the land in question is held by a County government in trust for an unregistered community, what safeguards will ensure that the decision-makers in that county are not driven by their selfish interests to grant such consent? Would representatives of the said unregistered community challenge the county government's decision in court on grounds of lack of participation or would the participation of 'non-community members' suffice in meeting the requirements of public participation? What measures will ensure that the consent from members who stand to get monetary benefits from any compensation and those seeking to protect the traditional heritage or interests of the community is balanced?

These are some of the questions that may require to be thought through in the long-term, especially in the current era when Kenya is at a stage where the government is seeking rapid infrastructural development in a bid to meet the Vision 2030 goals.

5. Conclusion

The right of communities to give their free, prior and informed consent to authorities when projects that adversely affect their normal life is now part of the international bill of human rights. The requirement for FPIC is an acknowledgement of the fact that the state's decision-making processes must bring on board those people who are either to benefit or are likely to suffer from implementation of certain projects. It is also worth pointing out that FPIC is not only applicable to extractives industries but must also be applied in other projects in various sectors such as water, energy, and other natural resources exploration projects. Environmental decisions that are meant to pave way for infrastructural development must also consider the interests of communities.

This paper suggests some of the ways that FPIC can be obtained from local communities and also highlights some of the issues that are likely to affect this process. It is important for the same to be addressed for effective participation of communities in the national development agenda. Maximising the right to free, prior and informed consent is certainly vital for enhanced environmental justice in Kenya.

Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya

Abstract

This paper makes a case for entrenchment of an ecocentric approach in environmental management in Kenya. The main argument is that while sustainable development agenda and its mainly anthropocentric approach is important for the improvement of livelihoods of communities around the world, there is a need for the human race to take care of the earth and its resources mainly because of its own ecological health and not merely because it is the source of the resources necessary for meeting human needs. All the other living species deserve to have the earth maintained in its natural status independent of human beings.

1. Introduction

Much of the debates revolving around sustainable development agenda have evolved around how environmental and natural resources can be harnessed in a way that puts man in the middle of such activities, that is, an anthropocentric approach. An anthropocentric approach focuses mainly on meeting the need of human beings at the expense of a system that values the environment and ecological health, that is, an ecocentric approach. The 2030 Agenda on Sustainable Development focuses mainly on building on the Millennium Development Goals and complete what these did not achieve. They seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.¹

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.² 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.³

While a human rights approach to environmental conservation and protection is useful in meeting the needs of human beings which mainly rely on natural resources, there is the risk of an overemphasis on anthropocentric approach at the expense of an ecocentric approach that puts a greater emphasis on environment and ecological health. This paper discusses Kenya's approach to environmental conservation and protection and makes a case for a more ecocentric approach. The same is based on a hypothesis that the current approach focuses more on meeting the needs of human beings, a human rights approach, and offers little in terms of an ecocentric approach.

¹ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, Preamble.

² Fisher, A.D., 'A Human Rights Based Approach to the Environment and Climate Change' A GI-ESCR Practitioner's Guide, March 2014.

³ Ibid.

2. Ecocentric Approaches in Environmental Management

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.⁴ The argument is 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”.⁵ This is a clear indication that ecological health becomes an issue worth considering mainly because its neglect will affect the earth’s ability to meet our needs not necessarily because of its intrinsic value as nature. This is a departure from the approach adopted in the *World Charter for Nature*⁶ whose principles include the recognition that all beings are interdependent and every form of life has value regardless of its worth to human beings. The *Charter* focuses more on environmental conservation rather than meeting the needs of human beings. Human needs are treated as a by-product of well-functioning natural and environmental systems. The *Charter* points out that mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients. Furthermore, civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity, and for rest and recreation.⁷

The *World Charter for Nature*⁸, in its preamble, also recognises that one of the reasons for the adoption of this charter was 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.⁹ General Principle 1 thereof is to the effect that nature should be respected and its essential processes should not be impaired.

Principle 2 of the *Stockholm Declaration*¹⁰ of 1972 is to the effect 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. Also important to this discussion is Principle 5 which provides that the non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

⁴ ‘Theories of Economic Development,’ p. 14. Available at www.springer.com/cda/content/document/cda_downloadaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406 [Accessed on 12/06/2019].

⁵ *Ibid.*

⁶ UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

⁷ *Ibid.*, Preamble.

⁸ UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

⁹ *Ibid.*, Preamble.

¹⁰ U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972), Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration of 1972), the United Nations Conference on the Human Environment, Stockholm, 5 to 16 June 1972.

Ecocentric approaches to environmental management explores such themes as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.¹¹

The ecocentric approach to environmental management and governance advocates for the conservation of the environment as a matter of right and not merely because of the benefits that accrue to the human beings.¹² Under the ecocentric approach, 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.¹³

Some scholars have rightly argued that we should give legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment—indeed, to the natural environment as a whole.¹⁴ The people to speak on behalf of these natural objects in the face degradation or pollution would arguably be the champions of an ecocentric approach.

Inspired by an ecocentric approach to conservation and management of environmental resources, in 2017 the New Zealand granted some human rights to a river. The local Māori tribe of Whanganui in the North Island had fought for the recognition of their river – the third-largest in New Zealand – as an ancestor for 140 years.¹⁵ The new status of the river means if someone abused or harmed it, the law now sees no differentiation between harming the tribe or harming the river because they are one and the same.¹⁶

Soon after the New Zealand decision, India followed suit by granting the Ganges River and its main tributary, Yamuna, considered sacred by more than 1 billion Indians, the same legal rights as people. A court in the northern Indian state of Uttarakhand ordered on that the Ganges and its main tributary, the Yamuna, be accorded the status of living human entities.¹⁷ In both cases, some officials were appointed to act as legal custodians responsible for conserving and protecting the rivers and their tributaries. Notably, in the case of New Zealand, some representatives from Māori tribe were

¹¹ See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers Limited, 2016).

¹² See generally, 'Species Extinction Is a Great Moral Wrong' (Elsevier Connect). Available at <<https://www.elsevier.com/connect/species-extinction-is-a-great-moral-wrong>> [Accessed on 13/6/2019].

¹³ See Carter, A., "Towards a multidimensional, environmentalist ethic," *Environmental Values* 20, no. 3 (2011): 347-374.

¹⁴ See generally, Stone, C.D., "Should Trees Have Standing--Toward Legal Rights for Natural Objects." *S. Cal. L. rev.* 45 (1972): 450; cf. Varner, G.E., "Do Species Have Standing?" *Environmental Ethics*, Volume 9, Issue 1, Spring 1987, pp. 57-72.

¹⁵ The Guardian, "New Zealand River Granted Same Legal Rights As Human Being," March 2017. Available at <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> [Accessed on 14/6/2019].

¹⁶ *Ibid.*

¹⁷ The Guardian, "Ganges and Yamuna rivers granted same legal rights as human beings," available at <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> [Accessed on 14/6/2019].

These two decisions are part of the evidence that it is possible to push for and fully incorporate ecocentric approaches to environmental conservation and management.

In Ecuador, the Constitution's enshrining nature's "right to integral respect"¹⁸ also adopts an ecocentric approach that can go a long way in achieving an ecocentric approach in environmental conservation under domestic laws. This is a departure from Kenya's Constitution which, while it recognises the integral role of environment as part of the heritage of the people of Kenya, it does not extend the same rights to nature as in Ecuador.

3. Environmental Management Approaches in Kenya: Prospects and Challenges

The 2030 Agenda on Sustainable Development is supposed to guide countries around the world in coming up with their sustainable development agenda. The Sustainable Development Goals (SDGs) ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection.¹⁹ 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. For instance, in September 2016, Kenya came up with its policy framework on achieving sustainable development. The launch of the SDGs in Kenya on 14th September 2016 was meant to create awareness among stakeholders and rally them behind implementation.²⁰ The implementation of these SDGs and their mainstreaming in the Kenyan development agenda focuses more on meeting the goals socio-economic development of its people, such as eradication of poverty, education for all, universal health, peace, which is basically an anthropocentric approach. Arguably, environmental and ecological health is treated as a by-product of the socio-economic development targeted activities and plans.

The mainly anthropocentric approach in environmental matters in Kenya is also evidenced by the various legal instruments that puts man at the centre of environment. For instance, the *Environmental Management and Coordination Act (EMCA)*²¹, 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.²²

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 resources²³, 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;

¹⁸ Tanasescu, M., "The Rights of Nature in Ecuador: The Making of an Idea," *International Journal of Environmental Studies* 70, no. 6 (2013): 846-861.

¹⁹ 2030 Agenda on Sustainable Development.

²⁰ Sustainable development Goals Knowledge Platform, Voluntary National Review 2017, available at <https://sustainabledevelopment.un.org/memberstates/kenya> [Accessed on 12/6/2019].

²¹ Environmental Management and Coordination Act (EMCA), Act No. 8 of 1999, Laws of Kenya; See also Environmental Management and Coordination (Amendment) Act, 2015).

²² Environmental Management and Coordination Act (EMCA), Act No. 8 of 1999, Laws of Kenya; See also Environmental Management and Coordination (Amendment) Act, 2015), s.2.

²³ 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).

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.²⁴

Environmental management and governance in the country mainly focuses on achieving sustainable development, where development is interpreted as having 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.²⁵

It is thus evident that while there are attempts aimed at conserving the environment, much of the efforts seems to be directed at anthropocentric approach that seeks to meet the needs of human beings and the general developmental needs of the country.

4. Entrenching the Ecocentric Approach in Environmental Management in Kenya

The anthropocentric approach mostly adopted by most of the existing legal instruments in Kenya and indeed much of the sustainable development agenda debates create the false impression that the environment should only be protected for the convenience of human beings.²⁶ However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives. There is a need for more emphasis while coming up with laws to ensure that there are measures that are geared towards protecting the aspects of nature whose benefits are not obvious to the human beings, if at all.

Some of the challenges that the country is experiencing such as degradation of natural forests and dwindling water catchment areas would become a thing of the past if people understand that the earth has intrinsic value and right to be protected from climate change and degradation. If human beings view themselves as part of the nature, and not merely as conquerors of the nature with a right to use or even plunder the earth resources, then respect for the environment is likely to

²⁴ Constitution of Kenya, Article 69(1).

²⁵ 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 http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf [Accessed on 12/06/2019].

²⁶ They focus on eliminating poverty and other social ills afflicting the human society in Kenya.

increase as well as entrenchment of environmental ethics where people take care of the environment without necessarily doing it as a reaction to laws on environment in the country.²⁷ It is important that the country integrates both anthropocentric and ecocentric approaches to environmental conservation and protection. However, a bigger emphasis should be placed on the ecocentric approach as the current trends in the country have been concentrating more on an anthropocentric approach with little or no regard for an ecocentric approach. 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.²⁸

As already pointed out, this approach is envisaged in the *World Charter for Nature*²⁹ which calls for respect for the Earth and life in all its diversity in recognition of the fact that all beings are interdependent and every form of life has value regardless of its worth to human beings.³⁰ For instance, without the bees, pollination of plants would be almost impossible, and without plants animal lives would be jeopardized. A sustained and secure environment is also useful for the regeneration of resources. The Charter calls for rights with responsibilities and states that there should be care for the community of life with understanding, compassion, and love.³¹

These organisms may not talk for themselves and it is important that human beings take them into consideration when exploiting environmental and natural resources. They should be a voice for the voiceless. There is an increased need for the policy makers and legislators to ensure that any laws, plans, policies and other legal instruments are geared more towards ensuring that environmental conservation and management efforts reflect ecocentric approaches. Communities should also be sensitized more on the need to ensure that all aspects of the environment and nature in general are taken care of regardless of any potential benefits that are likely to accrue to them. In addition, they ought to be made conscious of the fact that there are many living organisms that rely on nature for their survival away from the human needs. This is the only way that the challenges of wanton destruction of forests, rivers and other aspects of the environment currently being experienced in the country will be stopped.

5. Conclusion

It is imperative that human beings recognise that nature and all its aspects need protection away from their usual tying to satisfaction of human needs purely on the basis of their own health. Ecological health is important even when not tied to human needs. The current laws and policies in Kenya and the sustainable development debate revolves mostly around an anthropocentric approach. There is a need to ensure that these laws reflect an ecocentric approach as much as they do with anthropocentric approach, if not more. The Mother Nature has rights on its own and these rights can best be safeguarded only when ecocentric approaches feature more in the environmental laws of Kenya and the globe at large.

²⁷ Ojomo, P.A., "Environmental Ethics: An African Understanding," *African Journal of Environmental Science and Technology* 5, no. 8 (2011): 572-578.

²⁸ See generally, Oksanen M, 'Should Trees Have Standing? Law, Morality, and the Environment' 174.

²⁹ UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

³⁰ *World Charter for Nature*, Principle 1.

³¹ *Ibid*, Principle 2.

Attaining Gender Equity for Inclusive Development in Kenya

Abstract

This paper critically examines the concept of gender equity and the role it plays in achievement of inclusive development in Kenya. Gender equity is an ideal that is yet to be realized. The author argues that the country's efforts towards achieving sustainable development require the concerted efforts of both men and women. This is because the two groups have different but complementary needs that inclusive national development must address. If this is to be achieved effectively, then there is need for evaluating the role of gender equity in the development discourse. This discussion makes a case for enhanced role of gender equity for the realisation of meaningful and participatory national development through proposing ways of promoting empowering both gender for the same.

1. Introduction

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.¹ However, gender equity is an ideal that is yet to be fully realized owing to various factors that are discussed below. 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.

Arguably, this cannot be achieved without the cooperation of both gender. This paper makes both a legal and moral argument in support of the need for full participation of both gender in the sustainable development efforts. Thus, the author does not only advocate for the empowerment of females and males as an end in itself but as a means of ensuring that there is cooperation between them in achieving inclusive development in Kenya.

2. Gender Equity and Equality

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").² It has also been defined as a social construct that ascribes different qualities and rights to women and men regardless of

¹ 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 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.

²United 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> [Accessed on 03/04/2015].

individual competence or desires.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 equity is used to denote the equivalence in life outcomes for women and men, recognising their different needs and interests, and requiring a redistribution of power and resources.⁵ According to the European Commission, gender equity entails the provision of fairness and justice in the distribution of benefits and responsibilities between women and men, while recognising that women and men have different needs and power and that these differences should be identified and addressed in a manner that rectifies the imbalances between the sexes.⁶ Equity is generally regarded as a state of fairness and justness and it requires that the specific needs of particular groups are considered separately and acted upon accordingly.⁷

From the foregoing, it is noteworthy that gender equity strives towards ensuring that the different gender are not only included in development but also that their special needs that may be attributed to inevitable differences are also adequately addressed. Equity is thus important since it ensures that even where both gender are afforded equal opportunities, the enjoyment and benefit accruing from those opportunities effectively addresses the needs and desires of each group.

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.⁸

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

³ 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 [Accessed on 03/04/2015].

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 [Accessed on 03/04/2015].

⁵ H. Reeves and S. Baden, “Gender and Development: Concepts and Definitions,” Prepared for the Department for International Development (DFID) for its gender mainstreaming intranet resource. Institute of Development Studies, Report No 55, February 2000, p. 10.

⁶ European Commission, Gender equality – glossary, available at http://ec.europa.eu/justice/gender-equality/glossary/index_en.htm[Accessed on 19/05/2015].

⁷ NSW Health Department, ‘Gender Equity in Healthcare,’ State Health Publication No: (HSP) 000015, April 2000. p.2. Available at http://www0.health.nsw.gov.au/pubs/2000/pdf/gender_equity.pdf [Accessed on 19/05/2015]; See also Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS), “What is Gender Equity?” Available at <http://www.caaws.ca/gender-equity-101/what-is-gender-equity/> [Accessed on 19/05/2015].

⁸ R. Strickland and N. Duvvury, “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].

antithesis of equality of men and women in their human dignity, autonomy and equal protection.⁹ Gender equality is 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.¹⁰ It is also used to refer to the equal participation of women and men in decision-making, equal ability to exercise their human rights, equal access to and control of resources and the benefits of development, and equal opportunities in employment and in all other aspects of their livelihoods.¹¹

It is noteworthy that gender equity has been defined differently in diverse contexts. However, this paper adopts a definition that describes it as the presence of a gender perspective in decision-making of all kinds and those women's interests are given the same consideration as men's in terms of rights and the allocation of resources to fully address their specific needs and desires.¹² In the Kenyan context, this definition encompasses what the Bill of Rights in the Constitution of Kenya 2010 provides for.¹³ The Constitution provides for equality of all persons and prohibits any form of discrimination on any ground, including sex.¹⁴ It provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms.¹⁵ Further, it states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.¹⁶

The Constitution envisages a situation where women and men participate equally and competitively in national development. It is important to note that the national values and 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.¹⁷ 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.¹⁸ 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.

⁹ N. Baraza, 'Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?' Kenya Law Reform Vol. II [2008-2010] page 1. <http://www.kenyalaw.org/klr/index.php?id=874> Accessed on 15/05/2015].

¹⁰ 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> [Accessed on 1/04/2015]

¹¹FAO Training Guide, "Gender and Climate Change Research in Agriculture and Food Security for Rural Development," 2nd Ed., 2013.p.9. Available at <http://www.fao.org/docrep/015/md280e/md280e.pdf>

¹² G. J. Latham, op cit, p. 17.

¹³ Chapter 4 (Articles 19-59).

¹⁴ Article 27(4).

¹⁵ Article 27 (2).

¹⁶ Article 27 (3).

¹⁷ Article 10 (1).

¹⁸ Article 10(2) (b) (c).

Gender equality is seen as a shared vision of social justice and human rights and one that requires concerted efforts from all to achieve.¹⁹ 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.

3. International Framework on Gender Equity and Equality

3.1 Universal Declaration of Human Rights, 1948

The *Universal Declaration of Human Rights*, 1948(UDHR) recognizes that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.²⁰ Further, it provides that all are equal before the law and are entitled without any discrimination to equal protection of the law.²¹ The Universal Declaration of Human Rights acknowledges that men and women are not the same but insists on their right to be equal before the law and treated without discrimination.²² To this end, the Declaration recognises the important role of equity in ensuring that all persons are not only afforded equal opportunities but are also able to take advantage of such opportunities in a fair manner.

The Declaration thus requires that all persons, men and women, should enjoy the human rights equally and also demands that all should be protected by law from any form of discrimination. In light of the foregoing, the current Constitution of Kenya provides for equality of all persons and non-discrimination on any ground as well as equal protection of the law.²³

The Declaration is important not only for pushing for the promotion of the rights of all persons but also for correction of any violation of the said rights.²⁴ The UDHR thus forms the benchmark against which many laws on human rights around the world are pegged. The universal acceptance of its values and principles means that every state, Kenya included, should work towards achieving the ideal world of equity and equality as contemplated in the Declaration. It is noteworthy that the Declaration recognises the equal dignity of all human beings, both men and women. Arguably, this is one of the main ways of ensuring that both men and women can meaningfully pursue the aspirations of freedom, justice and peace in the world. This is in fact captured in the Constitution of Kenya which 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.²⁵ The focus is therefore on the humanity as a whole where efforts go towards ensuring that all persons are fully empowered to realise their potential and consequently promote national development.

¹⁹See generally, Beijing Declaration and Plat form for Action Beijing+5 Political Declaration and Outcome, United Nations 1995.

²⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Preamble. Article 1 thereof also emphasizes on equality of all.

²¹ Article 7.

²² Article 2

²³ Article 27.

²⁴ For instance, Article 22(1) of the Constitution of Kenya gives every person 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; See also Article 70 thereof.

²⁵ Constitution of Kenya, Article 19(2).

3.2 1995 United Nations World Conference in Beijing

The Governments participating in the Fourth World Conference on Women in Beijing China declared *inter alia*, that women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace.²⁶ They went further to state that equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy.²⁷ It is noteworthy that this Conference came at a time when women were still oppressed and its outcome has gone a long way in boosting the empowerment efforts for the female gender. It is however worth mentioning that the Conference was not all about women but it was an effort towards achieving gender equity. This is reflected in their deliberations as captured above where the participants stated that equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy. The outcome of the Conference should therefore not be seen as an effort towards emancipation of one gender at the expense of the other but should be used to promote gender equity for inclusive national development.

3.3 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The *Convention*²⁸ notes in its Preamble that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

Further, it requires 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 *inter alia*: 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.²⁹ The Convention is thus an effort towards ensuring that women and men participate meaningfully and productively in the national development discourse.

The Convention thus advocates for the active participation of both men and women in an equal manner in the political, social, economic and cultural life of their countries. The Convention arguably provides the basis for realizing equity between women and men through ensuring women's equal access to, and equal opportunities in, political and public life -- including the right

²⁶United Nations, Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, A/CONF.177/20/Rev.1. para. 13 Annex I.

²⁷ Para. 15.

²⁸ 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.

²⁹ Article 2 (a).

to vote and to stand for election -- as well as education, health and employment.³⁰ To this end, Kenya has performed impressively as far as framework laws are concerned, considering that the principles of non-discrimination, social equity and equality, amongst others feature prominently in the Constitution. The Constitution also obligates the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.³¹ What is now required is ensuring that this is actually done and it does not remain in text, so as to ensure that both men and women meaningfully participate in national development and especially in realizing the country's development blueprint, Vision 2030.

3.4 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The *Convention on Economic, Social and Cultural Rights*³² was adopted in 1966, but it entered into force 1976. It commits states parties to promote and protect a wide range of economic, social and cultural rights, including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress. It obliges states parties to respect and ensure that all individuals subject to their jurisdiction enjoy all the rights included in the ICESCR, without discrimination.

ICESCR provides a framework for creating gender sensitive indicators for measuring government accountability for commitments adopted under the ICESCR, and the extent to which women's full participation is reflected in decision making in the legal, political, economic, social, and familial spheres. Article 3 of the ICESCR promotes equal rights to men and women. The Covenant thus promotes gender equity and inclusive enjoyment of the human rights. The Constitution of Kenya reflects the spirit of this Covenant as it provides for economic and social rights of all persons.³³ Indeed, it goes further to state that the state should 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.³⁴

4. Regional Framework Gender Equity and Equality

4.1 The African Charter on Human and Peoples' Rights

The *African Charter on Human and Peoples' Rights* (Charter)³⁵ guarantees that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.³⁶ In its Preamble, the Charter *inter alia* reaffirmed, in light of the Charter of the Organization of African Unity, that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.

³⁰ Articles 10 & 11.

³¹ Article 21(2). Article 43 provides for economic and social rights of every person in Kenya.

³² UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

³³ Article 43.

³⁴ Article 20(5) (b).

³⁵ 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.

³⁶ Article 22(1).

The Charter also reiterates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the 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.³⁷ This provision thus prohibits any form of discrimination on either men or women in all spheres of life. The Charter also guarantees every individual's right to receive information and the right to express and disseminate their opinions within the law.³⁸ In the context of this discussion, this right would include the right to receive and share information which would facilitate participation of all persons in sustainable development efforts. As such, in a bid to achieve gender equity for an all inclusive approach to national development, states should also promote other rights which would facilitate enjoyment of the foregoing rights and this would include ensuring that all the citizens are empowered.

The Charter further guarantees every individual's right to work under equitable and satisfactory conditions, and receive equal pay for equal work.³⁹ It has been acknowledged that poverty hampers achievement of sustainable development. One of the ways of addressing poverty is economic empowerment of both women and men which can be done by way of promoting the right to work for all in order to give them a source of income.⁴⁰ It is also important to note that all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States have the duty, individually or collectively, to ensure the exercise of the right to development.⁴¹ Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.⁴² Gender equity comes in to ensure that all benefit fairly in exploitation of the available opportunities.

4.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)

The Maputo Protocol⁴³ reaffirms in its Preamble the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development.

The Protocol provides that States Parties should combat all forms of discrimination against women through appropriate legislative, institutional and other measures.⁴⁴ In this regard, it requires that they should integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life.⁴⁵ Further, as a corrective measure, it obligates States Parties to commit themselves to modify the social and cultural patterns of conduct

³⁷ Article 2.

³⁸ Article 9.

³⁹ Article 15.

⁴⁰ Article 41(1) of the Constitution of Kenya guarantees every person's right to fair labour practices.

⁴¹ Constitution of Kenya, Article 22.

⁴² Constitution of Kenya, Article 27(3).

⁴³ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

⁴⁴ Article 2(1).

⁴⁵ Article 2(1) (c).

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. The Protocol reaffirms that women and men are equal before the law and should have the right to equal protection and benefit of the law.⁴⁶

In addition to the foregoing, the Protocol states that States Parties are to take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that *inter alia*, women are equal partners with men at all levels of development and implementation of State policies and development programmes.⁴⁷ In a move that reflects the foregoing, the Constitution of Kenya provides that 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.⁴⁸ Indeed, it goes further to state that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.⁴⁹ These provisions create opportunity for the country to adopt international's best practices for realisation of gender equity and also mobilising all persons to promote gender equity for inclusive national development in Kenya.

With regard to Right to Sustainable Development, the Protocol provides that women have the right to fully enjoy their right to sustainable development.⁵⁰ To facilitate this, the Protocol provides for several measures. It requires the States Parties to introduce the gender perspective in the national development planning procedures. They are also to ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes. They are also to promote women's access to and control over productive resources such as land and guarantee their right to property. Further, they are to promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women. In addition to the foregoing, they are to take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes. The Protocol also requires States Parties to ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.⁵¹

Further, the Protocol requires that women should have the right to live in a healthy and sustainable environment.⁵² In order to facilitate this, the Protocol requires that States Parties should take all appropriate measures to *inter alia*, ensure greater participation of women in the planning,

⁴⁶ Article 8. This is also captured under Article 27 of the current Constitution of Kenya.

⁴⁷ Article 9(1) (c).

⁴⁸ Constitution of Kenya, Article 21(3).

⁴⁹ Constitution of Kenya, Article 21(4).

⁵⁰ Article 19.

⁵¹ *Ibid.*

⁵² Article 18(1).

management and preservation of the environment and the sustainable use of natural resources at all levels.⁵³

In Kenya, this can be achieved through full implementation of the values and principles of governance in development matters in the country. If properly effected, the Maputo Protocol can go a long way in ensuring gender equity for inclusive development.

4.3 Declaration on Gender Equality in Africa

The *Declaration*⁵⁴ in its preamble takes cognizance of the adverse impact of gender inequality on the economic growth of Africa and the fact that African women bear a disproportionate burden of poverty. It also affirms the fact that extreme poverty cannot be addressed without concerted efforts to improve women's access to resources and that access to resources increases the level of spending, especially on food and children's education. The Declaration advocates for women's literacy and improved girls' education as this spins off a wide range of benefits including improving the welfare of the family and the quality of the labour force, increasing the tax base, and boosting levels of agricultural output. The overall benefit would be the realisation of all inclusive and beneficial development for all.

In order to achieve the foregoing, the participating states agreed to carry out a number of initiatives which included but not limited to strengthening the gender machineries in their countries and provide them with enough human and financial resources to enable them to carry out their responsibility of promoting and tracking gender equality. The Constitution of Kenya adopts this recommendation especially with regard to social and economic rights. It provides that in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, it is the responsibility of the State to show that the resources are not available.⁵⁵ States are thus expected to demonstrate their genuine efforts towards achieving these rights for all persons.

5. Sustainable Development

Sustainable Development was defined by the *Brundtland Commission* as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁵⁶ It has been observed that sustainable development, although a widely used phrase and idea, has many different meanings and therefore provokes many different responses. 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.⁵⁷ A key feature of sustainable development is that it comprises three elements: Environment, Society and Economy.⁵⁸ There are different approaches to sustainability and sustainable

⁵³ Article 18(2).

⁵⁴ Adopted at the Third Ordinary Session of AU Assembly in Addis Ababa, Ethiopia, from 6-8 July 2004.

⁵⁵ Constitution of Kenya, Article 20(5) (a).

⁵⁶ Our Common Future, Report of the World Commission on Environment and Development, 1987 (Brundtland Report).

⁵⁷ B. Hopwood, et al, "Sustainable development: mapping different approaches." Sustainable Development Volume 13, Issue 1, pp.38–52, February 2005.p.39. Available at doi: 10.1002/sd.244 [Accessed on 3/04/2015].

⁵⁸ Shell Livewire, "Elements of Sustainable Development: Environment, Society and Economy," available at

development which include environmental sustainability, economic sustainability, and social sustainability.

Although reference has been made to the other elements of sustainability due to their intertwining nature, this discussion mainly focuses on the social aspect. Gender equity is a fundamental element of sustainable development. A socially sustainable system must achieve fairness in distribution and opportunity, adequate provision of social services including health and education, gender equity, and political accountability and participation.⁵⁹ This argument is concerned with the social component of sustainable development with a view to ensuring that both men and women are empowered and effectively participate in the achievement of all the other aspects of sustainable development. 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.

5.1 Rio+20 - The United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, June 2012

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.⁶⁰ According to the Rio+20 outcome document,⁶¹ 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 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.⁶²

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 will build upon the Millennium Development Goals and converge with the post 2015 development agenda.⁶³ Further, the sustainable development goals focus on inequalities, economic

<http://shell-livewire.org/business-library/employing-people/management/sustainable-development/Sustainable-development/> [Accessed on 3/04/2015].

⁵⁹J.M. Harris, "Sustainability and Sustainable Development," International Society for Ecological Economics

Internet Encyclopaedia of Ecological Economics, February 2003, p. 1.

Available at <http://www.isecoeco.org/pdf/susdev.pdf> [Accessed on 20/04/2015].

⁶⁰ United Nations Conference on Sustainable Development, available at <http://www.uncsd2012.org/about.html> [Accessed on 17/05/2015].

⁶¹ The Rio+20 Outcome Document, The Future We Want (Resolution 66/288, July 2012).

⁶² United Nations Department of Economic and Social Affairs, Division for Sustainable Development.

⁶³ United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> [Accessed on 20/05/2015].

growth, decent jobs, cities and human settlements, industrialization, energy, climate change, sustainable consumption and production, peace, justice and institutions.⁶⁴

Indeed, it has been affirmed 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.⁶⁵ This is an all-inclusive approach that does not create any distinction between male and female but focuses on humanity as a whole.

5.2 2002 World Summit on Sustainable Development

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).

It has been contended that 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. Economic, social, and cultural conditions, efforts, and values are deemed to be resources that also need to be preserved for future generations. It has been opined that sustainable development, as defined in the *Brundtland Commission* Report, includes human development.⁶⁶ 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 Summit thus helped demonstrate the link between sustainable development and social development and showing that they must be mutually inclusive if development is to be considered effective. 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 on the affected parties in order to come up with effective mechanisms that will not only reflect and address the needs of all but will also facilitate participation of all. This is also important as it helps generate social acceptance of the government's policies.

5.3 UN Conference on Environment and Development, Agenda 21

The Agenda 21⁶⁷ 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

⁶⁴ 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.

⁶⁵ United Nations, "Open Working Group proposal for Sustainable Development Goals," op cit.

⁶⁶ V. Costantini and S. Monni, "Measuring Human and Sustainable Development: an integrated approach for European Countries," Working paper n. 41, 2004. p. 8.

Available at <http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf> [Accessed on 15/04/2015]

⁶⁷ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

in the decision making policies, especially those on sustainable development then the Government efforts would either fail or prove inadequate. This recognition of the important roles of various groups is important as it creates a chance for the government to appreciate and address the needs of these groups be they males or females.

5.4 Rio Declaration on Environment and Development

The United Nations Conference on Environment and Development, met at Rio de Janeiro from 3 to 14 June 1992, to reaffirm the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and sought to build upon it.⁶⁸ They agreed on a number of Principles on environment and development. Principle 1 thereof states 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 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.

This implies that both should equally participate in sustainable development discourse. As a demonstration of this point, Principle 5 calls for all States and all people to cooperate in the essential task of eradicating poverty 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. It therefore seeks to improve the living standards of all persons without marginalization of men or women. Instead, it requires all to cooperate in efforts towards achieving sustainable development through such means as addressing the problem of poverty. This is affirmed in Principle 20 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 agitates 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.

5.5 Declaration on the Right to Development

The Declaration⁶⁹ 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.⁷⁰ It is noteworthy that the foregoing statement does not discriminate against women or men and it contemplates the equal and active and meaningful participation of *all*

⁶⁸ UN General Assembly, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, United Nations publication. A/CONF.151/26 (Vol. I).

⁶⁹ A/RES/41/128

⁷⁰ Article 1.

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.⁷¹ 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.

6. Gender and Development-The Interface

The term 'development' is perceived differently by different people and countries and thus defined differently. It has been argued that in addition to improvements in incomes and output, it typically involves radical changes in institutional, social, and administrative structures as well as in popular attitudes and, in many cases, even customs and beliefs.⁷² If this assertion is anything to go by, then development would also include attitudes towards gender and particularly stereotyped roles of men and women in any society. Any tangible development should also strive towards achieving gender parity in a given society. 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.⁷³

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.⁷⁴ 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.⁷⁵ 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

⁷¹ Article 8(1).

⁷² M. Todaro, 'Economic Development' chapter 3, (2000, 7th ed.)

⁷³ UNDP, Gender equality, available at <http://www.africa.undp.org/content/undp/en/home/ourwork/gender-equality/overview.html> [Accessed on 02/04/2015].

⁷⁴ Ibid.

⁷⁵ 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].

changes in institutional, social, and administrative structures as well as in popular attitudes and, in many cases, even customs and beliefs.⁷⁶

The dimensions of development are extremely diverse, including economic, social, political, legal and institutional structures, technology in various forms, the environment, religion, the arts and culture.⁷⁷ Development has been described as the upward movement of the entire social system, which encloses, besides the so-called economic factors, all non-economic factors, including all sorts of consumption by various groups of people; consumption provided collectively; educational and health facilities and levels; the distribution of power in society; and more generally economic, social, and political stratification.”⁷⁸

The *1987 Brundtland 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.

Thus, despite the differences in status or any other ground, the focus is on achieving some level playing ground for all in the form of gender equity, that appreciates the contribution of every man and woman in development of the country and ultimately satisfying the needs of every person. 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.⁷⁹ 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.⁸⁰

Food and Agricultural Organisation (FAO) affirms that women manifest an impressive resilience and multifaceted array of talents, but they also face a range of constraints – particularly in their access to productive resources such as land, inputs, training and financial services – which prevent them from becoming equally competitive economic players, capable of creating better lives for themselves and their families, and contributing fully to the growth of their communities and countries.⁸¹ Gender equity approach can address these challenges thus enabling men and women to participate equitably, competitively and meaningfully in the development agenda.

⁷⁶M. Todaro, ‘Economic Development’ chapter 3, op cit.

⁷⁷Sumner, ‘What is ‘Development’?’ p. 11, available at http://www.sagepub.com/upm-data/18296_5070_Sumner_Ch01.pdf

⁷⁸ G. Myrdal, ‘What Is Development?’ *Journal of Economic Issues*, Vol. 8, No. 4 (Dec., 1974), pp. 729-736, pp. 729-730. Association for Evolutionary Economics, Available at <http://www.jstor.org/stable/4224356>

⁷⁹ H. Reeves and S. Baden, “Gender and Development: Concepts and Definitions,” op cit, p.10.

⁸⁰Ibid.

⁸¹ Food and Agriculture Organization of the United Nations, “FAO Policy on Gender Equality: Attaining Food Security Goals in Agriculture and Rural Development,” Rome, 2013. op cit p. v.

The centrality of equity in sustainable development can be best understood when one looks at the Kenyan constitution which provides that the State should ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.⁸² Understandably, the equity referred to means that it is not only the intergenerational that is pursued but also intragenerational equity. These components, namely intergenerational and intragenerational equity are part of sustainable development as popularly defined. To explore intragenerational equity, under which gender equity arguably falls, this paper conceptualizes sustainable development in terms of the satisfaction of economic, social, and security needs of both men and women now and in the future without undermining the natural resource base and environmental quality on which life depends on.⁸³ It has been argued that for development to be sustainable, the environment should be protected, people's economic situation improved, and social equity achieved.⁸⁴ It is important to point out that the discussion herein mainly concentrates on the social equity aspect of sustainable development.

7. Barriers to Gender Equity for Inclusive Development in Kenya

7.1 Uneven access to resources

With regard to protection of vulnerable groups, *Agenda 21* provides that the general objectives of protecting vulnerable groups are to ensure that all such individuals should be allowed to develop to their full potential (including healthy physical, mental and spiritual development); to ensure that young people can develop, establish and maintain healthy lives; to allow women to perform their key role in society; and to support indigenous people through educational, economic and technical opportunities.⁸⁵

With restrained or limited access to resources including land based resources, it is hard or even impossible for women to participate actively and qualitatively in national development and ultimately sustainable development. The net effect is that women are denied the chance due to lack of capacity and resources to participate in national development. Further, left with limited resources with which to perform their critical role in society, they essentially become part of the problem instead of the solution in the fight against poverty. They are consequently relegated to a dependent position instead of becoming partners in the development efforts.⁸⁶

7.2 Poverty

Poverty eradication has been marked as the greatest global challenge facing the world today and an indispensable requirement for sustainable development.⁸⁷ The Rio+20⁸⁸ outcome reiterated the

⁸² K. Muigua & F. Kariuki, "Sustainable Development and Equity in the Kenyan Context," p.4. Available at <http://www.kmco.co.ke/attachments/article/104/A%20Paper%20on%20Sustainable%20Development%20and%20Equity%20in%20the%20Kenyan%20Context.pdf>

⁸³Ibid.

⁸⁴ Chapter 7, "The Sociology of Sustainable Development," p. 225.

⁸⁵ Agenda 21, Objective 6.23

⁸⁶ For instance, a recent study established that in the ongoing coal mining deliberations in Mui, Kitui Kenya, women have been left out and are often not consulted. Daily Nation Newspaper, 19 May 2015.

⁸⁷ United Nations, "Open Working Group proposal for Sustainable Development Goals," available at <https://sustainabledevelopment.un.org/sdgsproposal> [Accessed on 15/04/2015]

⁸⁸ United Nations Conference on Sustainable Development (UNCSD) (Rio 2012, Rio+20 or Earth Summit 2012).

commitment to freeing humanity from poverty and hunger as a matter of urgency.⁸⁹ Problems of environment and development are closely linked; degradation of ecosystem services harms poor people.⁹⁰ Indeed, among the poor there are those marginalised groups who suffer most thus adding to their misery. The Constitution of Kenya 2010 classifies women among the marginalised groups of people who may need affirmative action.⁹¹ It has been argued that the lifestyles of women and men are rooted *inter alia* in economic conditions, power positions and gender, which inform people's perceptions of what welfare represents – and which in turn determine what people can and wish to consume.⁹² It is also observed that the gender disparities in economic power-sharing are an important contributing factor to the poverty of women.⁹³ It has also been documented that the heavy burden of poverty falls disproportionately on women especially female-headed households whose proportion is increasing.⁹⁴ The contribution of rural women in Africa is critical in development. With poverty abounding amongst the economically challenged women, the role of women in achieving sustainability and sustainable development is thus undermined and even defeated.

It has been recognized that women make crucial contributions in agriculture and rural enterprises and they play a key role in rural economies, where the fight against hunger and poverty is most pressing, as this is where the large majority of the world's poor live.⁹⁵ They are also central to family food security and nutrition, as they are generally responsible for food selection and preparation and for the care and feeding of children.⁹⁶

7.3 Lack of Education

The right to education is a human right having major implications both for the individual as well as for social and economic development.⁹⁷ Indeed, it has rightly been pointed out that apart from its intrinsic value as a crucial development goal, education is also central to one's ability to respond to the opportunities that development presents.⁹⁸ The African [Banjul] Charter on Human and

⁸⁹ United Nations, "Open Working Group proposal for Sustainable Development Goals," op cit.

⁹⁰ W.M. Adams, "The Future of Sustainability: Re-thinking Environment and Development in the Twenty-first Century," The World Conservation Union Report of the IUCN Renowned Thinkers Meeting, 29-31 January 2006. p. 7. Available at http://cmsdata.iucn.org/downloads/iucn_future_of_sustainability.pdf [Accessed on 15/04/2015]

⁹¹ Constitution of Kenya 2010, Article 260.

⁹² G. J. Latham, op cit, p. 44.

⁹³ "Women and Poverty", The United Nations Fourth World Conference on Women, Beijing, China - September 1995, Action for Equality, Development and Peace.

Available at <http://www.un.org/womenwatch/daw/beijing/platform/poverty.htm> [Accessed on 15/04/2015]

⁹⁴ United Nations Economic Commission for Africa, 1990, Abuja Declaration on Participatory Development: The role of women in Africa in the 1990s. Chapter 3.25. Adopted by the Fifth Regional Conference on Women, held at Dakar from 16 to 23 November 1994, E/CN.6/1995/5/Add.2 Distr. GENERAL, 29 December 1994.

⁹⁵ Food and Agriculture Organization of the United Nations, "FAO Policy on Gender Equality: Attaining Food Security Goals in Agriculture and Rural Development," Rome, 2013. p. v.

Available at <http://www.fao.org/docrep/017/i3205e/i3205e.pdf> [Accessed on 12/05/2015].

⁹⁶ Ibid.

⁹⁷ United Nations, African Platform for Action, E/CN.6/1995/5/Add.2. Adopted by the Fifth Regional Conference on Women, held at Dakar from 16 to 23 November 1994. Chapter 3.30.

⁹⁸ D.A. Ghaida and S. Klasen, "The Costs of Missing the Millennium Development Goal on Gender Equity," Munich Economics Discussion paper 2003-01, p.2.

Available at http://www.ungei.org/infobycountry/files/univmunich_0301_klasen.pdf [Accessed on 16/05/2015]

Peoples' Rights guarantees every individual's right to education.⁹⁹ Further, it provides for every individual's right to freely, take part in the cultural life of their community.¹⁰⁰ This is especially significant considering that community participation in development is envisaged under Principle 22 of the Rio Principles which 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. States are to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

It has in fact been argued that failing to meet the goal of gender equity in education will not only hurt the girls who lose an opportunity for an education, but also impose societal costs in terms of lower growth, higher fertility, child mortality, and malnutrition.¹⁰¹ As such, promoting female education to close these gaps is not only intrinsically valuable for the girls who would benefit and would further an important aspect of gender equity in developing countries, but it would assist in the overall development of these countries as well.¹⁰² Education promotes realization of environmental justice for all persons. 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.¹⁰³

The *Aarhus Convention* 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").¹⁰⁴

It is important to note that it is not possible to enjoy the foregoing rights as envisaged by the *Aarhus Convention* without the basic education and knowledge.¹⁰⁵ Lack of basic education therefore means that women are left out in the sustainable development agenda and do not subsequently enjoy the right to environmental justice. *Aarhus Convention* is a powerful tool that can be used to promote citizenry education and consequently deal with the barrier of lack of or inadequate education. Its main pillars have been captured in the Bill of Rights in the Constitution of Kenya under the right

⁹⁹ Article 17(1).

¹⁰⁰ Article 17(2).

¹⁰¹ D.A. Ghaida and S. Klasen, "The Costs of Missing the Millennium Development Goal on Gender Equity," *op cit*, p.21.

¹⁰² *Ibid*, p.22.

¹⁰³ 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.

¹⁰⁴ Aarhus Convention, Articles 4, 5, 6 & 9. Although the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or 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.

¹⁰⁵ Articles 4 and 5 of the Convention concern environmental information.

to information,¹⁰⁶ right of access to justice¹⁰⁷ and obligations of state and individuals in relation to the environment.¹⁰⁸ Under these provisions both men and women can play a great and synergetic role in realisation of the national development agenda.

7.4 Negative Cultural Practices and Beliefs

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹⁰⁹ It goes further to state that every person has the right to use the language, and to participate in the cultural life, of the person's choice.¹¹⁰ It nevertheless provides that any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.¹¹¹ The Constitution also states that a person should not compel another person to perform, observe or undergo any cultural practice or rite.¹¹²

The foregoing provisions were enacted in recognition of the fact that some of the cultural practices are oppressive on one gender, mostly women, while elevating the other, in most if not all cases men. It is noteworthy that that due to various reasons which include negative cultural beliefs, women in some communities have not been able to fully enjoy the benefits of education as girls are kept away from classrooms.

It is noteworthy that many men still have the rather stereotyped culturally defined role of women as the children's caretaker. This is supported by many communities culture as well as some of the major religions which view one gender as superior to the other. Thus, most women especially within the poor population struggle to fend for their families by way of gathering fuel (mostly firewood) to prepare food for the whole family and also walk long distances to look for water particularly in arid and semi-arid areas.¹¹³ They mostly rely on resources that they do not control or own and more often than not they do not even have the means or incentive to improve them.¹¹⁴ Thus environmental degradation mostly affects these women who are not even given a chance to participate in deliberations on how best to achieve sustainability and sustainable development in Kenya. With women left out of the discourse, it then becomes harder for the country to achieve

¹⁰⁶ Constitution of Kenya, Article 35.

¹⁰⁷ Ibid, Article 48.

¹⁰⁸ Ibid, Article 69.

¹⁰⁹ Ibid, Article 11(1).

¹¹⁰ Ibid, Article 44(1).

¹¹¹ Ibid, Article 2(4).

¹¹² Ibid, Article 44(3).

¹¹³ IRIN, Kenya: Women Weighed Down by Culture, available at <http://m.irinnews.org/report/87063/kenya-women-weighed-down-by-culture#.VVutT9pRXFo> [Accessed on 19/05/2015].

¹¹⁴ See P. K. Mbote, "Women, Land Rights And The Environment: The Kenyan Experience," 49(3) Development

(2006), p. 43-48, available at <http://www.ielrc.org/content/a0605.pdf> [Accessed on 20/05/2015]; See also generally R.M. Dick, et al, "Property Rights for Poverty Reduction," 2020 FOCUS BRIEF on the World's Poor and Hungry People, October 2007.

Available at http://www.ifpri.org/sites/default/files/publications/beijingbrief_meinzendick2.pdf [Accessed on 20/05/2015]. It has also been documented that only 3% of women have title deeds in Kenya. UNDP-Kenya, Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch Towards 2015, UNDP-Kenya, Nairobi, 2010, p.33.

sustainable development since it is impossible to tell them to practice sustainable utilization of resources while some of them barely have access to basic resources for survival.

On the other hand, it has been observed that gender differences can, however, also result in men being disadvantaged in certain societies, although presently, in most parts of the world, it is above all women that are victims of discrimination.¹¹⁵ It is argued that although women are more likely to be disadvantaged and marginalised, the negative impact that gender inequality can have on men as well should not be ignored.¹¹⁶ For example, it has been observed that societal norms regarding the appropriate behaviour for men tend to put them under pressure as regards the need to provide materially for their family, and also deny them opportunities of being more nurturing towards their children and wife.¹¹⁷ Therefore, it is true to say that although women still suffer on a larger scale than men, both gender are susceptible to discrimination in the various spheres of development thus justifying the push for gender equity for inclusive national development.

8. Way Forward-Enhancing Role of Gender in Sustainable Development in Kenya

One of the national values and principles of governance as envisaged by the current Constitution of Kenya is sustainable development. Further, the country's national long-term development blueprint, *Vision 2030*,¹¹⁸ advocates for equality of citizens and states that Kenya shall be a nation that treats its women and men equally without discriminating any citizen on the basis of gender, race, tribe, religion or ancestral origin.¹¹⁹ 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.¹²⁰

Gender equality is an essential component of sustainable economic growth and poverty reduction.¹²¹ 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 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.¹²² The World Bank observes that greater gender

¹¹⁵ UNESCO, "Gender Equality and Equity," A summary review of UNESCO's accomplishments since the Fourth World Conference on Women (Beijing 1995), May, 2000. p.7.

Available at <http://unesdoc.unesco.org/images/0012/001211/121145e.pdf> [Accessed on 19/05/2015].

¹¹⁶ "Difference between Gender Equality and Gender Equity,"

available

at

http://vcampus.uom.ac.mu/soci1101/432_difference_between_gender_equality_and_gender_equity.html [Accessed on 19/05/2015].

¹¹⁷ Ibid. See also Daily Nation Newspaper Editorial, "Rescue the Boy Child," Tuesday, 10 May 2015, p.12.

¹¹⁸ Government of the Republic of Kenya, 2007.

¹¹⁹ Vision 2030, p. 22.

¹²⁰ 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).

¹²¹ 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].

¹²² Constitution of Kenya 2010, Article 43 (1).

equality can enhance productivity, improve development outcomes for the next generation, and make institutions more representative.¹²³

It is noteworthy that the foregoing rights affect both men and women and some arguably affect women more than men thus placing women in a strategic position that requires them to participate in decision making. It has been noted that equitable access to more and better jobs in rural areas enable rural women to become effective economic actors and engines of growth; as well as to produce or acquire the food, water, fuel and social services their families need.¹²⁴ Indeed, the quality of the care mothers are able to give to their children and other household members contributes to the health and productivity of whole families and communities and improves prospects for future generations.¹²⁵

Due to the central position occupied by women in society, the realization of these rights which mostly fall within the social sustainability pillar of sustainable development requires active participation of women in order to achieve effectiveness. It has been correctly argued that the realization of the right to food has a direct impact on the right to an adequate standard of living and the right to health, and presupposes the existence of a clean and safe environment conducive to the sustainable development of food resources.¹²⁶

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.¹²⁷

One of the ways of achieving sustainability as provided for by *Agenda 21*¹²⁸ is empowering communities. The Rio Conference participants agreed that sustainable development must be achieved at every level of society. Peoples' organizations, women's groups and non-governmental organizations are important sources of innovation and action at the local level and have a strong interest and proven ability to promote sustainable livelihoods.¹²⁹ As such, *Agenda 21* requires that Governments, in cooperation with appropriate international and non-governmental organizations, should support a community-driven approach to sustainability, which would include, *inter alia*:

¹²³ World Bank Group, World Development Report 2012: Gender Equality and Development, p. xx. Available at <http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf> [Accessed on 13/5/2015].

¹²⁴ Food and Agricultural Organization of the United Nations, et al, "Gender dimensions of agricultural and rural employment: Differentiated pathways out of poverty," op cit, p.x.

¹²⁵ Ibid.

¹²⁶ United Nations Non-Governmental Liaison Service (NGLS), "Human Rights Approaches to Sustainable Development," NGLS Roundup 90, May 2002. p.5. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 17/04/2015]

¹²⁷ Chapter 2: Development, Empowerment, and Participation, available at <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].

¹²⁸ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

¹²⁹ Ibid, Objective 3.7.

Empowering women through full participation in decision-making; and 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.¹³⁰

It also requires that Governments should, with the assistance of and in cooperation with appropriate international, non-governmental and local community organizations, establish measures that will directly or indirectly implement mechanisms for popular participation - particularly by poor people, especially women - in local community groups, to promote sustainable development.¹³¹ Education empowers individuals for full development of human personality, and participation in society through acquisition of knowledge, human values and skills. The right to education has close linkage with the right to development, and is a powerful tool in poverty reduction strategies.¹³² The right to education entails some basic elements without which it cannot be fully enjoyed. These include: availability of education - ensuring free and compulsory education for all children; accessibility of education - education accessible to anyone irrespective of race, gender, nationality, ethnic or social origin (elimination of discrimination); and acceptability of education - the quality of education should be guaranteed; adaptability of education - education that responds and adapts to the best interests of each child.¹³³

Governments' obligations on the right to education are thus defined along these elements.¹³⁴ With regard to availability, they are to ensure compulsory and free education for all children in the country. To guarantee accessibility, they are to eliminate exclusion from education based on any grounds of discrimination (race, colour, sex, language, religion, opinion, origin, economic status, birth, social status, minority or indigenous status, disability).¹³⁵ The education must also be acceptable in that governments must define the minimum standards for education, including the medium of instruction, contents and methods of teaching, and to ensure their observance in all educational institutions. In relation to adaptability, governments must design and implement education for children precluded from formal schooling.¹³⁶ This would include children belonging to nomadic pastoralists and others who may not be able to access formal institutions of learning for one reason or the other. Education is key in eradication of poverty in communities. This is especially so in the dire case of the pastoralist communities who entirely rely on environment for their livelihood. With education, it is possible to have these communities empowered to participate meaningfully in the development of their locality and this extends to enabling them actively

¹³⁰ Ibid.

¹³¹ Ibid, Objective 3.8(i).

¹³² UNESCO (2008), 'The Right to Education', p.2.

¹³³ Human Rights Education Associates, 'Right to Education', available at http://www.hrea.org/index.php?doc_id=402#top [Accessed on 14/05/2015].

¹³⁴ K.Tomasevski, 'Manual on rights-based education: global human rights requirements made simple'. Bangkok: UNESCO Bangkok, 2004. Collaborative project between the UN Special Rapporteur on the right to education

and UNESCO Asia and Pacific Regional Bureau for Education. p.8.

Available at

http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.hrea.org%2Ferc%2FLibrary%2Fmanual_rightsbased.pdf&external=N [Accessed on 14/05/2015].

¹³⁵ Ibid, p. iv.

¹³⁶ Ibid, p. v.

participate in reversing or mitigating the adverse effects on the environment in these areas.¹³⁷ Principles of public participation in governance and environmental democracy as envisaged in the current Constitution of Kenya becomes easier to implement.¹³⁸

Principle 8 of the *Rio Principles* states that to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. Further, Principle 10 thereof states that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual is to 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. In order to realise this, States are to facilitate and encourage public awareness and participation by making information widely available as well as provide effective access to judicial and administrative proceedings, including redress and remedy. Arguably, this can only be achieved with the active and meaningful participation of all community members including men and women. *The National Gender and Equality Commission Act, 2011*¹³⁹ establishes 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.¹⁴⁰ The Act seeks to achieve gender mainstreaming. Gender mainstreaming means 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 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.¹⁴¹ Its main aim is thus to facilitate realisation of a just and equitable society where both men and women are treated fairly and equally.

This Commission can indeed go a long way in promoting gender equality in the country and facilitating active participation of both men and women in the country's agenda on achieving sustainable development. The right to equality means that both men and women should be empowered to effectively participate in the country's development.

With regard to poverty eradication, the *Report of the Fourth World Conference on Women in Beijing China* states that eradication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in

¹³⁷ See A.Y. Abdi, Education, 'Conflict and Development: The Case of Northern Kenya', Chapter 5: Analysis -The Role of Education in enhancing Development in Northern Kenya, A dissertation submitted in partial fulfillment of the requirement for the degree of Masters of Arts (MA) in Education and International Development. Institute of Education, University of London, December 4, 2012. Available at <http://www.bsix.ac.uk/staff/research/ECD%20%20DissertationvFinalFinal.pdf> [Accessed on 16/05/2015].

¹³⁸ Article 69 of the Constitution obligates the State to inter alia encourage public participation in the management, protection and conservation of the environment. This obligation is reinforced by placing 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.

¹³⁹ Act No. 15 of 2011, Laws of Kenya.

¹⁴⁰ Preamble; s. 3.

¹⁴¹ National Gender and Equality Commission Act, 2011, s.2; s.8.

economic and social development, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development.¹⁴² The Conference also affirmed that there is need to encourage men to participate fully in all actions towards equality.¹⁴³ This is in recognition of the fact that gender equity requires the combined efforts of all persons if it is to be achieved.

The above is further supported by calls to ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets, as a means to further the advancement and empowerment of women and girls, including through the enhancement of their capacities to enjoy the benefits of equal access to these resources, *inter alia*, by means of international cooperation.¹⁴⁴ Under the current Constitution of Kenya, some of the Principles of land policy that should be upheld in order to ensure that land is held, used and managed in a manner that is equitable, efficient, productive and sustainable, include 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.¹⁴⁵ If fully implemented, these principles can go a long way in facilitating achievement of equitable access, use and control of natural resources by all persons for national development and self actualisation.

In a bid to ensure empowerment through education for active and meaningful participation of both gender, the *Beijing Conference* affirmed the need to promote people-centred sustainable development, including sustained economic growth, through the provision of basic education, life-long education, literacy and training, and primary health care for girls and women.¹⁴⁶ This is reinforced by goal four of the *Sustainable Development Goals* which calls for inclusive and equitable quality education and promote lifelong learning opportunities for all.¹⁴⁷ Further, goal eight requires states to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.¹⁴⁸ These goals are synergetic since it is arguably not possible to implement goal 8 without ensuring that goal four is achieved for purposes of capacity building. Kenya should not be left behind in implementation of these goals as they will go a long way in facilitating achievement of an equitable society.

There is need for affirmative action¹⁴⁹ where necessary to ensure gender equity for development in Kenya. It is significant that this is already provided for under Article 27 relating to equality and freedom from discrimination. It provides that to give full effect to the realisation of the rights guaranteed under the Article, the State should take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by

¹⁴²United Nations Report of the Fourth World Conference on Women Annex I, op cit, para. 16.

¹⁴³Ibid, para. 25.

¹⁴⁴Ibid, para. 35.

¹⁴⁵ Article 60(1).

¹⁴⁶Ibid, para. 27.

¹⁴⁷ United Nations Department of Economic and Social Affairs, "Open Working Group proposal for Sustainable Development Goals," available at <https://sustainabledevelopment.un.org/sdgsproposal> [Accessed on 20/05/2015].

¹⁴⁸ Ibid.

¹⁴⁹ Article 260 of the Constitution of Kenya defines "affirmative action" to include any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom

individuals or groups because of past discrimination.¹⁵⁰ Any measure taken under clause (6) should adequately provide for any benefits to be on the basis of genuine need.¹⁵¹ In addition to the measures contemplated in clause (6), the State is to take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.¹⁵² In particular, the State is to put in place affirmative action programmes designed to ensure that minorities and marginalised groups—participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; are provided special opportunities for access to employment; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.¹⁵³ These efforts should be geared towards ensuring that gender equity in national development matters becomes a reality in Kenya. There is however need to protect the boy child even as the girl child is uplifted. A balance should be struck so as to ensure that again the one gender is not empowered at the expense of the other because the main objective of affirmative action and all other efforts towards gender equity and equality is to facilitate fair participation of both gender in national development.

The foregoing efforts facilitate *inter alia* gender equity for all and this can give people greater opportunities for protecting their fundamental human rights and fully participate and contribute towards achievement of national goals in development.

9. Conclusion

It is not in dispute that gender inequality is one of the greatest problems of our time. Gender inequality remains embedded in the structures, instrumentalities and relations within the family, society, and the state. However, sustainable development in Kenya has to take cognizance of gender. Women and men are entitled to equity in the development agenda. Sustainable development will not be possible without the meaningful participation of both gender. Attaining gender equity for inclusive development in Kenya is possible. It is an ideal worth pursuing.

¹⁵⁰ Article 27(6).

¹⁵¹ Article 27(7).

¹⁵² Article 27(8); Article 81 of the Constitution provides that one of the general principles for the electoral system is that not more than two-thirds of the members of elective public bodies shall be of the same gender. Article 91(1)(f) goes further to state that one of the basic requirements for political parties is that they must respect and promote human rights and fundamental freedoms, and gender equality and equity. Under Article 175 which provides for principles of devolved government, County governments must ensure that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. Article 177(1) (b) provides that a county assembly consists of *inter alia* the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly is of the same gender. Under Article 197, County assembly should ensure that not more than two-thirds of the members of any county assembly or county executive committee are of the same gender. These provisions have been a subject of debate as to the mode of actualizing what has come to be known as the One Third Gender Rule. The Courts have even been invited to give their opinion on the matter as recorded in *The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate*[2012]eKLR. The argument has been whether it should be progressive realisation of the same or immediate implementation. What however remains clear is that there is need for the implementation of these provisions so as to create a level playing ground that enables men and women to participate fairly in the development agenda of the country.

¹⁵³ Article 56.

Realising the Right to Education for Environmental and Social Sustainability in Kenya

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 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

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.

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.

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

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.

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 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 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.

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 with the SDGs and breaks down

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.*

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-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.

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 and 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 pressures (thereby allowing space and opportunity for more sustainability solutions from all quarters).⁷³

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.

⁷³ Clune WH and Zehnder AJB, ‘The Three Pillars of Sustainability Framework: Approaches for Laws and Governance’ (2018) 9 *Journal of Environmental Protection* 211.

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 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

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.

⁷⁸ *Ibid*, 89.

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.

Redefining Development in Kenya-Reflections and Lessons from the Coronavirus disease (COVID-19) Pandemic

Abstract

Since the first case of Coronavirus disease (COVID-19) in the world was diagnosed in China some time in December 2019, and has since then become a global pandemic, the resultant economic and social effects have been far greater than anything the world has experienced recently. However, these effects are arguably far much greater felt within the Global South region as compared to the Global North. This paper offers some reflections and lessons to the African countries and Kenya in particular on the need to shift their development goals towards building a better future for their people as far as socio-economic development is concerned. African countries, which are technically beggars as they stand today, need to draw some important lessons from the pandemic and chart a new development path post-Covid-19.

1. Introduction

The first case of Coronavirus disease (COVID-19) in the world was diagnosed in China some time in December 2019, and since then it has become a global pandemic, declared a pandemic by the World Health Organization (WHO) on 11 March 2020, which has continued to spread across the world.¹ The disease has not only caused unprecedented health crisis but has also threatened to bring the global economy to its knees.² In addition to this, the pandemic has exposed the underbelly of African economies as far as development is concerned. It is evident from the reports that most if not all African countries are heavily relying on donor funds to not only fight the pandemic but also to ensure that their economies do not collapse. This has necessitated revisiting the old debate between the Global North and the Global South on what development means for them.

This paper starts on the premise that the Global South has for long relied on the Global North for not only defining what development should mean for them but also dictating how development projects in the Global South are implemented. The main reason for this is that it is the Global North donors and countries that fund these projects and thus retain the powers to dictate what and how these projects should be actualised.

This discourse is important because African countries, which are technically beggars as they stand today, need to learn some important lessons from the pandemic and chart a new development path post-Covid-19. Apart from their weak health systems, it is also arguable that the reason most of the affected African countries have not been able to call for total lockdown as has been the case in countries such as China, United Kingdom, Italy among others, is because their economies may not

¹ 'Coronavirus (COVID-19) Events as They Happen' <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> accessed 22 May 2020.

² Fernandes, N., "Economic effects of coronavirus outbreak (COVID-19) on the world economy." Available at SSRN 3557504 (2020); 'Complacency to Chaos: How Covid-19 Sent the World's Markets into Freefall | Business | The Guardian' <<https://www.theguardian.com/business/2020/mar/28/how-coronavirus-sent-global-markets-into-freefall>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/alex-awiti>, 'Covid-19 Triggers Unprecedented Global Economic Turmoil' (The Star) <<https://www.the-star.co.ke/opinion/columnists/2020-03-24-covid-19-triggers-unprecedented-global-economic-turmoil/>> accessed 22 May 2020.

survive a lockdown at this stage, especially without the donor funds. In addition, their people are too poor to remain indoors for months as most of them survive on wages and live hand to mouth.³ The existing socio-economic infrastructure and investments in the country cannot support the needs of the Kenyan population and this comes with greater risks of exposure Covid-19 for the general public. This paper proffers the hypothesis that there is hardly enough investment by the Government for socio economic development in the country.

The discourse revisits the widely discussed theme of development with a view to analysing the challenges that face the existing approaches to development, making them inappropriate for the Global South, especially Africa. The discussion highlights the existing definitions and approaches and how the same differ from the needs and circumstances existing within the third world, as far as development needs are concerned.

The phrase “Global South” is used to refer broadly to the regions of Latin America, Asia, Africa, and Oceania. It is one of a family of terms, including “Third World” and “Periphery,” that denote regions outside Europe and North America, mostly (though not all) low-income and often politically or culturally marginalized.⁴ Notably, the phrase ‘Global South’ is meant to mark a shift from a central focus on development or cultural difference toward an emphasis on geopolitical relations of power.⁵

This paper adopts the term ‘global south’ based on the hypothesis that development is greatly shaped by the power relations between the nations in the north and those in the south. Development is as much an economic as it is a political issue. No country can demand for political freedom when they cannot afford economic freedom.

2. Defining Development: Aspects and Theories of Development

The United Nations *Declaration on the Right to Development*⁶ recognises 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.⁷ The *Declaration* posits 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.⁸ Notably, the term ‘development’ is not defined in the

³ Central Bank of Kenya, Kenya National Bureau of Statistics and FSD Kenya, The 2019 Finaccess Household Survey— Financial Sector Deepening Kenya, April 3, 2019 <<https://fsdkenya.org/publication/finaccess2019/>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/amadala>, ‘51% of Kenyans Live Hand to Mouth - CBK Report’ (The Star) <<https://www.the-star.co.ke/business/2019-04-03-51-of-kenyans-live-hand-to-mouth-cbk-report/>> accessed 22 May 2020.

⁴ Dados, N. and Connell, R., "The global south." Contexts 11, no. 1 (2012): 12-13.

⁵ Ibid, p.12.

⁶ UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.

⁷ Ibid, Preamble.

⁸ Article 1.1, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.

Declaration and instead it takes a descriptive approach which entails outlining the various aspects of development.

Development takes many forms and thus defining the term must take into account the various elements of development. Some scholars have defined 'development' to mean a multi-dimensional process that involves major changes in social structures, popular attitudes, and national institutions, as well as economic growth, reduction of inequality, and eradication of absolute poverty.⁹ Some opine that 'development, then, is about: change for the better; continuing processes; collectivities of people; growth and prosperity; interrelationships.¹⁰ The components of development are considered to be as follows: Growth, in the economy; Equity in the distribution of society's resources to meet human needs; Participation in decisions about how these resources will be applied.¹¹

The international agenda which began to focus on development beginning in the second half of the twentieth century was reinforced by the belief the understanding that economic growth did not necessarily lead to a rise in the level and quality of life for populations all over the world; there was a need to place an emphasis on specific policies that would channel resources and enable social and economic mobility for various layers of the population.¹² Indeed, this view has solidified over the years considering that it forms the foundation upon which the sustainable development agenda is built.

The three essential dimensions of sustainable development agenda are: *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 avoid extreme sectoral imbalances that damage agricultural and/or industrial production; *Environmental*: an environmentally sustainable system must maintain a stable resource base and avoid over-exploitation of non-renewable resource systems, including maintenance of biodiversity, atmospheric stability and ecosystems services not always looked upon as economic resources; and *Social*: a socially sustainable system must achieve fairness in distribution and opportunity among all persons with adequate provision of such social services as health, education and gender equity. The social dimension focuses on reconciliation of environment and development, and governance related to provision of social services.¹³

⁹ Gabriel Antwi, 'The Theories of Development Studies', 2019, p.1. Available at https://www.researchgate.net/publication/331262291_THE_THEORIES_OF_DEVELOPMENT_STUDIES [Accessed on 15/5/2020].

¹⁰ Bown, L., What do we mean by Development?. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.4. Available at <https://developmenteducation.ie/media/documents/What.pdf> [Accessed on 15/5/2020].

¹¹ Bown, L., What do we mean by Development?. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.7. Available at <https://developmenteducation.ie/media/documents/What.pdf> [Accessed on 15/5/2020].

¹² 'What Is Development?' <<https://www.sid-israel.org/en/Development-Issues/What-is-Development>> accessed 19 May 2020.

¹³ Sanginga, P.C., Ochola, W.O. and Bekalo, I., "Natural resource management and development Nexus in Africa." *Managing Natural Resources for Development in Africa: A Resource Book* (2010): 11-43.

There are four main theories of development namely: modern; dependency; world-systems; and globalization.¹⁴ The proponents of modernisation theory argued that development involved the process of replicating the changes in social, economic and political systems that developed in western Europe and North America from the 17th century to the 19th century and have then spread to other countries and in the 19th and 20th centuries to the South American, Asian and African continents.¹⁵ This would largely be facilitated through colonisation.¹⁶ It was thus a case of the Global North not only imposing their influence upon the Global South but was also exercising their power and setting the development agenda which they would later fund through donor funding. Indeed, some have argued that the reason for the emergence of Modernisation Theory was the freedom of Third World countries from colonization and the strategies employed during the Cold War by Western countries in order to prevent these countries from being controlled by communists.¹⁷

While the support from the Global North especially in terms of the funds may be welcome to the Global South as it strives to achieve socio-economic development for its people, the downside to this is that over the years, the leaders in these developing countries have had little if any incentive to invest in their institutions and their people as they always have a fall back plan through asking for foreign and donor funds to cushion their economies against shocks such as the current Covid-19 pandemic.

The focus of the modernisation approach on replicating the development model of the now developed nations makes the policymakers in the developing nations lose focus of the real challenges afflicting their people as they compete to become like the developed world in terms of infrastructural development. It must be appreciated that this theory envisages development as a phased process and different regions of the world must thus realise that they are at different phases of development. The leaders fail to acknowledge that as they seek to modernise the infrastructural systems in the country, the African countries are still struggling with poverty, hunger, disease, illiteracy, inequalities, corruption and other social ills.¹⁸

The Dependency Theory seeks to improve the Modernisation Theory by combining elements from a neo-Marxist theory and adopting a “revolution of under developed nations’ model”.¹⁹ The theory focuses on the totality of society and social system periphery, which highlights the differences between imperialistic countries in the first world and underdeveloped countries.²⁰ Dependency

¹⁴ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90.

¹⁵ 'The Basic Characteristics of Modernization. 1966' (2006), in: Themenportal Europäische Geschichte, 2006, <<http://www.europa.clio-online.de/quelle/id/q63-28279>> accessed 22 May 2020;

¹⁶ *Ibid.*

¹⁷ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, at p.79.

¹⁸ Handley, G., Higgins, K. and Sharma, B., *Poverty and poverty reduction in sub-Saharan Africa: An overview of the issues*. Overseas Development Institute, 2009;

¹⁹ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, p. 81.

²⁰ *Ibid.*, p.81.

Theory explains these differences by focusing on regions and structural conditions in different nation states.²¹

Three main characteristics of dependency theory are summarised as follows: First, the international system is seen as the sum of two sets of states: *dominant* and *dependent*; Second, dependency theory holds that *external forces* are critical in terms of economic activity of dependent states; Third, relationships, based on strongly historical patterns and dynamics (i.e., *internationalization of capitalism*), between dominant and dependent states are a vibrant process, with exchanges taking place between the states playing a considerable role in the reinforcement of patterns of inequality.²² Dependency theory is a mixture of various theories, including world systems theory, historical structure theory, and neo-Marxist theory.²³ Some commentators have pointed out the following limitations of the dependency theory: the theory significantly failed to explain the rise of the newly industrialized countries of East Asia (Hong Kong, South Korea, Taiwan, and Singapore), as well as those of Southeast Asia (Indonesia, Malaysia, and Thailand); the theory also presumes that all developing countries share the same traits; and finally, dependency theory is limited in its analytical ability when applied to sectors beyond manufacturing.²⁴

The World Systems Theory uses other levels of quantitative analysis, though it admits that there is no set of processes in World Systems Theory that is applicable to all economies.²⁵ World Systems Theory argues that international trade specialization and transfer of resources from less developed countries to developed countries (known as “core” countries) prevents development in less developed countries by making them rely on core countries and by encouraging peripheralization.²⁶ In other words, wealth is taken from semi-periphery or periphery zones to economies in the core countries.²⁷

Globalisation is a theory of development that uses a global mechanism of greater integration with particular emphasis on the sphere of economic transactions. It is a US- and Europe-centric positive model of development whose feature is the spread of capitalism around the globe.²⁸

Notably, these main theories revolve around the impact of the Global North’s policies and systems on the Global South. The bottom line is that the development agenda of the developing countries in the South seem to be inherently tied to that of the developing nations.

3. Need for Contextualised Development for the Global South: Prospects and Challenges

Some commentators have rightly pointed out that encouragement of growth and increase in wealth without safeguards over distribution of wealth leads to poverty for those who are excluded. In this

²¹ Ibid, p. 81.

²² Scott Romaniuk, ‘Dependency Theory’ in, Joseph, P., ed., The SAGE encyclopedia of war: social science perspectives. Sage Publications, 2016.

²³ Ibid.

²⁴ Scott Romaniuk, ‘Dependency Theory’ in, Joseph, P., ed., The SAGE encyclopedia of war: social science perspectives. Sage Publications, 2016., p. 4.

²⁵ Shareia, B.F., "Theories of development." International Journal of Language and Linguistics 2, no. 1 (2015): 78-90, p. 82.

²⁶ Ibid, p.82.

²⁷ Ibid, p. 82.

²⁸ Shareia, B.F., "Theories of development." International Journal of Language and Linguistics 2, no. 1 (2015): 78-90, p. 83.

respect, poverty, seen as human distress, becomes more dramatically noticeable in societies where there has been a rise in wealth for some but a widening gap between those who have benefited and those who have not.²⁹

Notably, while the Western concept of development largely relies on Gross National Product (hereafter GNP) or Gross Domestic Product (GDP) per capita on which, for example, the World Bank bases its typology of development with occasional citation of other measures of development such as caloric intake, access to portable water, infant and maternal mortality, life expectancy, literacy, and so as representative measures of human development, as distinguished from measures of economic development, some scholars have rightly challenged this approach.³⁰ While it is acknowledged that none of these measures of the development of humanity can be improved without a certain level of economic well-being relative to the society in which one lives, exclusive reliance on economic quantities such as GNP per capita, however, as standards for the economic development of countries exclude, or at least supersede, these more broadly humanitarian issues.³¹ Furthermore, economic measures of wealth generally overlook the environmental costs of growth and the social costs incurred by families and communities as well as discrediting the benefits that accrue from non-monetary sources and social networks.³²

3.1 Response to Covid 19:

Notably, in most developing countries especially within the urban poor living in slums and other informal settlements, the call for social distancing, self-isolation and other restrictive measures by the Government that are meant to curb the spread of Covid-19 remain difficult if not impossible to implement. This is due to the fact that for them it is a tough call to balance between the risk of contracting and spreading disease or putting up with hunger and possible death. Thus, for them it is a catch-22 situation. Poverty and lack of basic necessities have therefore made it harder to implement the Government's directives on combating Covid-19 among these poor and vulnerable groups of people in the country. It is not enough that the Government is receiving donor funding from donors to fight the pandemic; the systemic challenges of poverty, hunger, disease, illiteracy and corruption, among others still pose a greater challenge to combating Covid-19 in the country and the African continent at large. The pandemic has affirmed that it is difficult if not impossible to contain a poverty-stricken populace even in the greatest external danger. Their first instinct is to fight hunger, which is the most basic survival need.

Kenya's development blueprint, Vision 2030 was launched by the Grand Coalition Government in July 2008. It was the first national long-term development vision and its aim was to transform Kenya into a newly industrialising, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. The three key pillars of this vision are: a sustained average economic growth rate of 10% p.a.; just, cohesive and equitable social development in a clean and secure environment; and an issue-based, people-centred, results-

²⁹ Bown, L., What do we mean by Development?. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.11.

³⁰ Debra Straussfogel, 'Redefining Development as Humane and Sustainable' (1997) 87, *Annals of the Association of American Geographers*, 280, at p.281.

³¹ *Ibid*, p. 281.

³² *Ibid*, p. 281.

oriented and accountable democracy.³³ This is what is supposed to guide the country's development agenda and any investments are supposed should be geared towards achieving this.

The World Bank observes that 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. However, 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.³⁴ Indeed, Covid-19 has demonstrated the extent to which Kenya's economy is vulnerable to external shocks. While data from the World Bank and the United Nations may paint a positive picture of development in a country, the reality on the ground may be different. Some commentators have even suggested that

“the questions to ask about a country's development are three: What has been happening to poverty? What has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels, then beyond doubt this has been a period of development for the country concerned.”³⁵

Kenya still struggles with giving positive feedback on the three questions and the situation becomes dire when we look at the rural areas as well as the urban informal settlements where there are high levels of poverty. Despite some positive reports on notable improvements, there still exist inequalities in Kenya, as far as access to social, economic and political opportunities are concerned.³⁶ In September 2018, the United Nations' human development index, which is the index used by the United Nations to measure the progress of a country, ranked Kenya as one of the countries still lagging behind as far as human development is concerned as it was ranked position 142 out of 189.³⁷ Again, according to the UNDP's *Human Development Report 2019*³⁸ titled “Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century”, as at 2018, 38.7 per cent of Kenya's population or 19.2 million people were poor while an additional 34.9 per cent or 17.3 million people were classified as vulnerable. Even more

³³ ‘National Development Plan in Kenya’

<<http://www.commonwealthgovernance.org/countries/africa/kenya/national-development-plan/>> accessed 15 May 2020.

³⁴ ‘Overview’ (World Bank) <<https://www.worldbank.org/en/country/kenya/overview>> accessed 15 May 2020.

³⁵ Seers, Dudley, ‘The meaning of development’ in *International Development Review*, Dec 1969, Reproduced Lehmann, 1979.

³⁶ ‘Kenya: Extreme Inequality in Numbers’ (Oxfam International, 20 October 2019) <<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 22 May 2020; Stefania Ilinca and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 *International Journal for Equity in Health* 196; ‘Overview’ (World Bank) <<https://www.worldbank.org/en/country/kenya/overview>> accessed 22 May 2020; ‘Kenya Lags behind in Human Development, UN Report Reveals - Daily Nation’ <<https://www.nation.co.ke/news/diaspora/Kenya-lags-behind-in-human-development--UN-report-reveals--/2107720-4760978-98afngz/index.html>> accessed 22 May 2020.

³⁷ ‘Kenya Lags behind in Human Development’ (Daily Nation) <<https://www.nation.co.ke/news/diaspora/Kenya-lags-behind-in-human-development--UN-report-reveals--/2107720-4760978-98afngz/index.html>> accessed 21 May 2020.

³⁸ Conceição, P. "Human development report 2019." *Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century*. New York, UNDP (2019). Available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf> [Accessed on 16/5/2020].

worrisome is the 2019 survey report released by the Central Bank of Kenya to the effect that about 51 per cent of Kenyans are living hand to mouth, a rise from 34.3 per cent in 2016.³⁹ The implication of these statistics is that this huge percentage risks hunger in case they are completely contained within their houses. Arguably, fighting poverty is the first step towards a healthy nation and attaining economic freedom. As things stand, Kenya's economy and indeed most of other African countries are highly dependent on the generosity of the Bretton woods institutions and other foreign donors. After the Covid-19 pandemic is over, it would therefore be impossible if not outright hilarious for these African countries to warn the developed countries to keep off their domestic issues as far as decision-making processes on development are concerned. It is a classic case of he who pays the piper calls the tune.

The Covid-19 pandemic has proved that no matter how industrialized a country becomes, as long as they have not invested in their people through socio-economic and human development, they are truly not independent. The ongoing Covid-19 pandemic has exposed the challenges that are still facing the country and the African continent at large.⁴⁰ The economies have been hit hard and it is expected that the effect will be felt for longer.⁴¹

Most African countries have resorted to giving out food handouts in form of care packages and monthly stipends to the section of their population that is considered poor and vulnerable and the funds to do this have originated from donors.⁴² This was reflected by the World Bank Vice President for Africa's comments that they are "rallying all possible resources to help countries meet people's immediate health and survival needs while also safeguarding livelihoods and jobs in the longer term – including calling for a standstill on official bilateral debt service payments

³⁹ Central Bank of Kenya, Kenya National Bureau of Statistics and FSD Kenya, The 2019 Finaccess Household Survey– Financial Sector Deepening Kenya, April 3, 2019 <<https://fsdkenya.org/publication/finaccess2019/>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/amadala>, '51% of Kenyans Live Hand to Mouth - CBK Report' (The Star) <<https://www.the-star.co.ke/business/2019-04-03-51-of-kenyans-live-hand-to-mouth-cbk-report/>> accessed 22 May 2020.

⁴⁰ Damian Zane, "'Without Food, We'll Die inside Our Homes'" BBC News (28 April 2020) <<https://www.bbc.com/news/world-africa-52426040>> accessed 22 May 2020; 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'COVID-19 (Coronavirus) Drives Sub-Saharan Africa Toward First Recession in 25 Years' (World Bank) <<https://www.worldbank.org/en/news/press-release/2020/04/09/covid-19-coronavirus-drives-sub-saharan-africa-toward-first-recession-in-25-years>> accessed 22 May 2020.

⁴¹ Union, African. "Impact of the Coronavirus Covid-19 on the African Economy." Addis Ababa: African Union (2020); Ozili, P.K. "COVID-19 in Africa: socioeconomic impact, policy response and opportunities." Policy Response and Opportunities (April 13, 2020) (2020); Bong, C.L., Brasher, C., Chikumba, E., McDougall, R., Mellin-Olsen, J. and Enright, A., "The COVID-19 Pandemic: Effects on Low-and Middle-Income Countries." Anesthesia and Analgesia (2020); Gilbert, M., Pullano, G., Pinotti, F., Valdano, E., Poletto, C., Boëlle, P.Y., d'Ortenzio, E., Yazdanpanah, Y., Eholie, S.P., Altmann, M. and Gutierrez, B., "Preparedness and vulnerability of African countries against importations of COVID-19: a modelling study." The Lancet 395, no. 10227 (2020): 871-877;

⁴² Ibid; See also 'Grants Not Loans Needed in Africa to Fight' <<https://www.theafricareport.com/25870/fighting-covid19-in-africas-most-vulnerable-states-needs-grants-not-loans/>> accessed 22 May 2020; Andrew Mizner, 'ALB - African Law and Business' (ALB Legal and Business Issues from Africa) <<https://iclg.com/alb/11307-african-countries-receive-imf-support-for-covid-19>> accessed 22 May 2020.

which would free up funds for strengthening health systems to deal with COVID 19 and save lives, social safety nets to save livelihoods and help workers who lose jobs, support to small and medium enterprises, and food security.”⁴³ The April edition of *Africa’s Pulse*, the World Bank’s twice-yearly economic update for the region, recommended that African policymakers pay attention to saving lives and protecting livelihoods by focusing on strengthening health systems and taking quick actions to minimize disruptions in food supply chains. They also recommend implementing social protection programs, including cash transfers, food distribution and fee waivers, to support citizens, especially those working in the informal sector.⁴⁴ In line with this, Kenya’s new scheme, known as the *Covid-19 Support Stipend* which was launched by President Uhuru Kenyatta targets only the most poor and vulnerable.

While the initiative is well meaning, it is not clear if the same will be sustained for long should the pandemic continue for longer. It is also worth pointing out that those considered to be poor and vulnerable are largely being picked based on their income. However, it is also true that a good number of the major town dwellers especially in Nairobi and Mombasa are on salaries and wages and with the continued layoffs at workplaces, it is expected that more people will join this category of the vulnerable. Indeed, this is not unique to Kenya as it is estimated that 85% of the continent’s urban dwellers do not receive a regular wage.⁴⁵

This leaves the Government with the hard question as to whether the targeted bracket of people will be expanded. What qualifies or disqualifies one from being eligible to receive the government grants? It is not to be forgotten that the Horn of Africa is still suffering an unprecedented locust invasion and subsequent crop failures.⁴⁶ The implication of this invasion is that even after the coronavirus pandemic is over, the affected communities and to some extent the whole country will have to fight hunger and famine that will continue ravaging the country.

With the slowed down economic activities, many people have been left at the mercy of relying on aid and handouts. Indeed, even the Government has been relying on aid from donor countries and organisations in order to take care of its people. While this may not only be limited to Kenya, it is evident that the situation is mostly common with the African countries.⁴⁷

⁴³ ‘COVID-19 (Coronavirus) Drives Sub-Saharan Africa Toward First Recession in 25 Years’ (World Bank) <<https://www.worldbank.org/en/news/press-release/2020/04/09/covid-19-coronavirus-drives-sub-saharan-africa-toward-first-recession-in-25-years>> accessed 22 May 2020.

⁴⁴ Ibid.

⁴⁵ ‘Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.’ (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁴⁶ ‘Locust Plague Devastates Crops in Horn of Africa - Reuters’ <<https://www.reuters.com/article/us-africa-locusts/locust-plague-devastates-crops-in-horn-of-africa-idUSKBN1ZG1GC>> accessed 22 May 2020; Nathaniel Gronewold News E&E, ‘Unprecedented & “Locust Invasion Approaches Full-Blown Crisis’ (Scientific American) <<https://www.scientificamerican.com/article/unprecedented-locust-invasion-approaches-full-blown-crisis/>> accessed 22 May 2020; ‘East Africa’s Plague of Locusts and the Bizarre Climate Science behind It’ <<https://www.nationalgeographic.com/science/2020/02/locust-plague-climate-science-east-africa/>> accessed 22 May 2020.

⁴⁷ ‘Grants Not Loans Needed in Africa to Fight’ (The Africa Report.com, 9 April 2020) <<https://www.theafricareport.com/25870/fighting-covid19-in-africas-most-vulnerable-states-needs-grants-not-loans/>> accessed 22 May 2020.

Questions have arisen as to whether, with the rising cases of coronavirus pandemic, donors will continue giving donations to the developing countries, mostly in the global south or they will focus on their own people who are also affected.⁴⁸ It has been observed that with countries focusing on their own outbreaks and economic turmoil, they could hesitate to contribute more abroad, potentially allowing the virus to take hold in vulnerable communities.⁴⁹ This is an eye opener for the Global South countries as far as over-reliance on donor funding and aid is concerned. Indeed, some African commentators have rightly pointed out that COVID-19 has changed the world especially in relation to donor aid. It is feared that it could lead to significant setbacks in the fight against poverty as developed countries turn inwards, thus changing the nature of aid as we know it.⁵⁰ African countries are therefore encouraged to consider this as an opportunity to reset their priorities, where the African countries learn to own their problems and invest in their homegrown lasting solutions.⁵¹

The mismanagement and/or non-priority utilisation of funds is evident across Africa in terms of Africa's infrastructural deficit, now badly exposed by coronavirus.⁵² Reports show that Africa has the lowest number of doctors per capita in the world, with the likes of Uganda limited to just 1 doctor per 10,000 people.⁵³ It is even surprising that these countries still export doctors or allow brain drain due to poor pay and poor working conditions, losing them to the developed world countries despite the shortage and the dire need for their services at home, due to a high disease

⁴⁸ 'Will the Coronavirus Endanger Foreign Aid?' (Council on Foreign Relations) <<https://www.cfr.org/in-brief/coronavirus-endanger-foreign-aid-WHO>> accessed 22 May 2020.

⁴⁹ Ibid.

⁵⁰ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵¹ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵² 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵³ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'Medical Doctors (per 10 000 Population)' <<https://www.who.int/data/maternal-newborn-child-adolescent/monitor>> accessed 22 May 2020; 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'Lowest Physicians Density Worldwide by Country 2016' (Statista) <<https://www.statista.com/statistics/280151/countries-with-the-lowest-physicians-density-worldwide/>> accessed 22 May 2020; abairdqz, 'Africa Has about One Doctor for Every 5000 People' (Quartz) <<https://qz.com/520230/africa-has-about-one-doctor-for-every-5000-people/>> accessed 22 May 2020.

burden and already fragile health systems.⁵⁴ At the same time, they still import doctors from countries such as Cuba⁵⁵, Kenya, Uganda and South Africa being some of the examples.⁵⁶ The sad reality is that while these foreign doctors were expected to facilitate knowledge, skills and technology transfer, and have indeed impacted positively on the recipient countries' health sector, the host countries have not done much to facilitate this by way of investing in the relevant infrastructure.⁵⁷

The statistics paint a grim picture of African countries' priorities as far as development is concerned especially in consideration of the fact the greatest threat to Africa is not posed by the pandemic itself; it is posed by careless African leaders, abdicating the responsibility for development and care for their citizens.⁵⁸

Political leaders and policymakers must take up the challenge and review their priorities when it comes to investments for national development. They must start paying serious attention to socio-economic and human development through such initiatives as inadequate investment in education and health for inclusive growth and meaningful participation of groups vulnerable to poverty.

4. Redefining Development in Kenya- Adopting a Customised Global South Perspective on Development

Historically, the less developed countries have not defined what development means for their societies and are indeed considered as less developed based on the criteria delineated by the so called developed countries; instead, the values of the more developed countries are imposed on those societies which, from the eurocentric perspective, do not possess all the requisite development criteria. These criteria, therefore, become the measures of development denoting

⁵⁴'Diagnosing Africa's Medical Brain Drain | Africa Renewal' <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/diagnosing-africa%E2%80%99s-medical-brain-drain>> accessed 22 May 2020; Olayinka Stephen Ilesanmi Ibadan University of, 'As Nigeria's Health Infrastructure Crumbles, Doctors Have Become a Key Export' (Quartz Africa) <<https://qz.com/africa/1657343/why-nigerias-doctors-are-leaving-in-droves/>> accessed 22 May 2020; Robbert J Duvivier, Vanessa C Burch and John R Boulet, 'A Comparison of Physician Emigration from Africa to the United States of America between 2005 and 2015' (2017) 15 Human Resources for Health 41; Alon Mwesigwa, 'Uganda Crippled by Medical Brain Drain' The Guardian (10 February 2015) <<https://www.theguardian.com/global-development/2015/feb/10/uganda-crippled-medical-brain-drain-doctors>> accessed 22 May 2020; Akhenaten Benjamin Siankam Tankwanchi, Çağlar Özden and Sten H Vermund, 'Physician Emigration from Sub-Saharan Africa to the United States: Analysis of the 2011 AMA Physician Masterfile' (2013) 10 PLOS Medicine e1001513.

⁵⁵ 'How Doctors Became Cuba's Biggest Export' (Time) <<https://time.com/5467742/cuba-doctors-export-brazil/>> accessed 22 May 2020.

⁵⁶ 20/1/2020, 'When Cuban Doctors Leave...' (Daily Nation) <<https://www.nation.co.ke/health/when-cubans-leave/3476990-5424908-cv5o0n/index.html>> accessed 22 May 2020; Reuters, 'Cuba Sends Doctors to South Africa to Combat Coronavirus' (TheStandard) <<https://www.standardmedia.co.ke/article/2001369161/cuba-sends-doctors-to-south-africa-to-combat-coronavirus>> accessed 22 May 2020; 'How Doctors Became Cuba's Biggest Export' (Time) <<https://time.com/5467742/cuba-doctors-export-brazil/>> accessed 22 May 2020.

⁵⁷ 20/1/2020, 'When Cuban Doctors Leave...' (Daily Nation) <<https://www.nation.co.ke/health/when-cubans-leave/3476990-5424908-cv5o0n/index.html>> accessed 22 May 2020.

⁵⁸ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

progress toward desired goals.⁵⁹ This has often led to underdevelopment or white elephant projects at the expense of people-centred development that would actually impact on the livelihoods of their people. Development in Kenya and other African countries should focus on poverty eradication, economic empowerment of people, eliminating illiteracy, strengthening democratic and governance processes and institutions and fighting corruption.

Poverty eradication, sustainable economic growth and environmental sustainability are considered to be the key pillars of development plans in most African countries.⁶⁰ In addition, there is consensus that natural resources, especially those of land, soil, water, forest, plant and animal diversity, vegetation, renewable energy sources, climate change and ecosystems services are fundamental for improving livelihoods and achieving sustainable development in Africa.⁶¹ As already pointed out, one of the components of development is participation in decisions about how these resources will be applied. It is therefore arguable that it is not enough in an African country that its natural resources are utilised for what is considered to be national development but the targeted populace must also be included in making such decisions. Appropriation of available resources must be done in a way that takes into account the views of those expected to benefit. As already agreed that the development needs of each country differ from the rest, it is also when it comes to the regional parts of the country. What may be pressing for the residents of Nairobi may not be a priority or even a need at all for people living in the Western part of the country.

As an attempt to enhance Kenya's economic development, President Uhuru Kenyatta during his inauguration speech for the second term, unveiled the Big Four Agenda on food security, affordable housing, manufacturing and affordable healthcare. Kenya's current development plans are aligned towards these priorities in which the government plans to create 1.3 million jobs in the manufacturing sector by 2022 in order to pave the way for Kenya's future: moving from a lower middle-income to an upper middle-income economy by the year 2030.⁶²

Some commentators have however argued that while all the four agenda items are undoubtedly important pillars in enabling the achievement of SDGs, whether they do end up supporting the attainment of SDGs or not will so much depend on the economic strategy chosen; policy choices embedded in such a strategy; as well as the ways and means of implementation.⁶³ They also observe that an economic growth path that is widening inequalities leaves experts worried whether all these notable efforts would help the country meet its stated Vision 2030 and global ambitions.⁶⁴

⁵⁹ Debra Straussfogel, 'Redefining Development as Humane and Sustainable' (1997) 87, *Annals of the Association of American Geographers*, 280, at p.280.

⁶⁰ Sanginga, P.C., Ochola, W.O. and Bekalo, I., "Natural resource management and development Nexus in Africa." *Managing Natural Resources for Development in Africa: A Resource Book* (2010): 11-43, at p.11. Available at <https://www.idrc.ca/sites/default/files/openebooks/506-9/index.html> [Accessed on 17/5/2020].

⁶¹ *Ibid*, p.11.

⁶² 'Linking Local Aspirations to Global Frameworks for Sustainable Development | KCIC' <<http://www.kenyacic.org/blog/linking-local-aspirations-global-frameworks-sustainable-development>> accessed 21 May 2020.

⁶³ 'Linking Local Aspirations to Global Frameworks for Sustainable Development | KCIC' <<http://www.kenyacic.org/blog/linking-local-aspirations-global-frameworks-sustainable-development>> accessed 21 May 2020.

⁶⁴ 'Linking Local Aspirations to Global Frameworks for Sustainable Development | KCIC' <<http://www.kenyacic.org/blog/linking-local-aspirations-global-frameworks-sustainable-development>> accessed 21 May 2020.

It is evident that Kenya is still ravaged by poverty and there is need to relook into what the decision making organs and agencies consider to be poverty. As one commentator has argued, policy makers and governments should look at other dimensions of poverty beyond income because income does not speak to what people can do, or how they can improve their own situation.⁶⁵ Interventions must be targeted to the type of poverty they are meant to fix – and to unexpected groups that may not seem to be poor at first glance.⁶⁶ Arguably, generalized approaches to poverty eradication may not achieve lasting outcomes since some poor groups may be left out of empowerment programmes only for them to fall further into the poverty at a later time, thus counteracting the government's efforts to comprehensively address poverty.

The pandemic lays bare Africa's challenges and inadequacies of its development agenda. The 'investments' meant to boost development over the years were clearly not well thought out. The socio-economic development agenda of the African countries has been neglected. This is closely connected to the human development, which again, has been neglected for many years. Human development heavily relies on the socio-economic development agenda and if any lasting results are to be realised, then the two must go hand in hand. The basic objective of human development should be enlarging people's choices by creating an enabling environment for people to enjoy long, healthy and creative lives, to be educated, and to enjoy a decent standard of living, political freedom, guaranteed human rights and self-respect.⁶⁷

Arguably, the African Continent should be looking at COVID-19 as an opportunity to reset their politics, policies and economies and in response to this, if donors want to be partners to African countries in the long-term, they should reset theirs too.⁶⁸ Africa should learn to be self-reliant and move away from the begging mentality that has not only made it become excessively dependent on the generosity of others, but has also made it vulnerable to changes of circumstance such as the current global economic meltdown due to corona virus pandemic.⁶⁹

There is a need for these countries especially those in the South to revisit and redefine what they consider development. This may not be as easy as it sounds. It has been pointed out by some scholars that the Global North donors' influence on the agenda setting of Global South recipients cannot be ignored.⁷⁰ Indeed, it has been concluded through past evaluations of project aid that it led to: (i) a high administrative burden on recipients due to multiple reporting and accounting requirements; (ii) inefficient spending dictated by donor priorities and procurement arrangements; (iii) highly unpredictable funding levels; (iv) undermining of state systems through parallel structures and staffing; (v) corrosion of democratic accountability through

⁶⁵ 'Redefining Poverty in Kenya's Fishing Villages' <<https://rethink.earth/redefining-poverty-in-kenyas-fishing-villages/>> accessed 22 May 2020.

⁶⁶ Ibid.

⁶⁷ Kiriti, T. and Tisdell, C.A., Gender inequality, poverty and human development in Kenya: Main indicators, trends and limitations. No. 1745-2016-141001. 2003, p. 1.

⁶⁸ Ibid.

⁶⁹ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷⁰ Bradley, M., "Whose agenda? Power, policies, and priorities in North-South research partnerships," *Putting Knowledge to Work: Collaborating, influencing and learning for international development* (2017): 37-70.

mechanisms to satisfy donor rather than domestic accountability; (vi) difficulties in ensuring sustainability; and (vii) openness to corruption.⁷¹

It is thus known that when funds are available to a country, there are certain terms and conditions on how the same should be utilised, sometimes to promote the interests of the donor organisations and/or countries. For instance, it has rightly been pointed out that while Africa receives more than \$60 billion every year in aid, much of this is not spent on Africans themselves, of course, but on services from donors, such as Western management consultants. Around one-fifth of total bilateral aid in 2012, for example, went back to donor countries or took the form of debt relief.⁷² In addition, much aid, too, is wasted by going to regimes that lack the governance or policies to further development. Rather than using it for the benefit of their populations, this much-needed funding is used instead to shore up political power.⁷³

With such outcomes, it is arguable that the solutions for the Global South will not be found within donor funding. The political leaders and policymakers from the African countries must therefore reconsider their approaches to the development agenda in their countries and focus more on approaches that directly benefit their people.

While the Global South encompasses developing countries across different continents including Africa and Asia, African countries seem to be lagging behind other Global South regions as far as taking charge of their development agenda is concerned. While the donors set the agenda in Africa, this is not the case in most Asian countries. For example, it has been observed that in much of Asia, countries took ownership of their own development, setting priorities and leading donors, unlike in Africa, where the countries are led by our donors. As a result, many externally-funded roads, railways and ports – especially in the case of China – are motivated by vanity or opportunities for individual profit rather than their benefits for citizens.⁷⁴ The positive steps in Asia are further reflected in improvement in human development, where the 2018 UN report on human development noted that South Asia was the fastest growing region over 1990–2017, at 45.3 percent, followed by East Asia and the Pacific at 41.8 percent and Sub-Saharan Africa at 34.9 percent.⁷⁵

Kenya and the African continent need to take charge of their development agenda and truly focus on what will benefit their people. They must ask themselves whether every development project they are carrying out is for selfish interests or for the common good of their people.

⁷¹ Handley, G., Higgins, K. and Sharma, B., Poverty and poverty reduction in sub-Saharan Africa: An overview of the issues. Overseas Development Institute, 2009, p. 23.

⁷² 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷³ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷⁴ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (African Arguments, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷⁵ UNDP, UNDP. "Human development indices and indicators: 2018 statistical update." (2018): 22-25, at p.22.

Lawmakers and policymakers need to ensure that they put in place governance structures that will uplift the lives of citizens through promoting good governance and holding accountable those charged with utilising public funds. As expected of law in its role to promote development, the Constitution of Kenya 2010 outlines the 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 the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁷⁶ These values 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.⁷⁷

These values and principles of governance are geared towards creating a socially just society where all persons equally and equitably enjoy high socio-economic and human development benefits. The inclusion of sustainable development as one of the national values and principles of governance also speaks volumes as to the path that national development agenda is expected to take. It is a path that is supposed to empower the citizens socially, economically and politically (giving them a voice) while at the same time meeting their basic needs in a sustainable way for the good of the current and future generations.⁷⁸

This is also reflected under Article 43 of the Constitution which guarantees the rights of every person 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. Faced with the threat

⁷⁶ Art. 10(2) (d), Constitution of Kenya.

⁷⁷ See Art. 10(1), Constitution of Kenya 2010.

⁷⁸ See also Art. 42-Right to 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 Art. 69; and to have obligations relating to the environment fulfilled under Art. 70.

Article 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.

Article 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. 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.

of Covid-19, locusts' invasion and raging floods across the country, these should serve as a wakeup call for the National and County Governments on what really matters for their people. The county governance system was introduced to take development nearer to the people. This also meant that such development should be implemented with closer and frequent consultation and participation of all the affected groups of people. As already pointed out, there have been instances where a large chunk of donor funds is directed towards administrative activities, for both local and the foreign human resource activities, leaving a barely enough percentage to go towards the actual projects. This is a trap that even the national and county governments have often found themselves in. Their primary focus should be to ensure the implementation of Article 43 of the Constitution of Kenya 2010 on socio-economic rights. While infrastructural development across the country is important, the socio-economic rights of communities deserve equal if not more attention. One cannot negotiate or consult with a hungry person on the best types of roads to put up within the counties. That is not to say that the infrastructural development activities are not important, but they do not fall within the definition of basic needs of human beings.

The various socio-economic rights as outlined under Article 43 may currently be at different stages of realisation by the national and county governments for the different regions and counties. The aspirations and social realities of the different regions may also mean differing priorities. For these reasons, it may be beyond the scope of this paper to offer recommendations on the best way forward on realising the same. However, as held in various domestic court cases, these social and economic rights should be progressively realised. Lady Justice Mumbi Ngugi, J. held in *Mitubell Welfare Society vs. The Attorney General & 2 Others, Petition No. 164 of 2011* that;⁷⁹

"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."

It was also acknowledged in *Isaac Kipyego Cherop v State Ministry of Water & 142 others [2017] eKLR, Petition 348 of 2015*, that “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 import of this is that the real development should mainly be geared towards making tangible and lasting investments for the realisation of the socio-economic rights as guaranteed under Article 43 of the Constitution. It is the high time that the political leaders and policy makers realised that

⁷⁹ See also In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR, Advisory Opinions Application 2 of 2012 .

the solutions to most of the challenges facing their people during this period of the Covid-19 pandemic will not be solved by the foreign aid and donations but by conscious homegrown solutions developed through people-centred investments. The national development agenda such as the Vision 2030 and other development initiatives should guide their expenditure. Corruption should also be firmly dealt with as it is also a huge threat to achieving these aspirations.

The concept of development in the country as we know it must be revisited so as to ensure that it captures the aspirations of the local people since what they feel about it also matters. Development should offer them the freedom from the shackles of poverty, hunger, illiteracy and other social ills.⁸⁰ The concept of development is both objective and subjective and the policymakers must thus always bear this in mind when coming up with development projects and programmes. The Development programmes, plans and projects must start working towards empowering people so that they can stand on their own. The country must start investing in its own people and also work towards building wealth that would not only cushion the national economy against internal and external shocks such as the current pandemic but also cushion the public against abject poverty and the extreme levels of vulnerability. While it may certainly not be feasible for the country to immediately stop their reliance on foreign aid, such funds must be redirected towards building a solid economy that will take the country towards self-reliance in future. The country must aggressively start the aspirational journey towards economic and social freedom of its people in the near future.

5. Conclusion

The Covid-19 pandemic has devastated economies and lives across the world. However, it is arguable that there is no other region that has been hit harder by these adverse effects than the Global South and especially the African continent. This paper urges that the political leaders and policy makers in the African continent and especially Kenya need to learn from the pandemic and focus on redefining their priorities when it comes to development agenda. They must not compete with the developed world in getting to the so called mass consumption stage of development as envisaged by the modernisation theory before they ensure that their people have access to the most basic human rights to food, shelter, education and health. They must acknowledge that development is context-based and differs from country to country. The development agenda of a country must be informed by their local aspirations and the international agenda should only be used to facilitate realisation of the domestic agenda.

We must change our choices as a country and ensure that the period post-covid-19 will mark a new beginning-point towards building a better economy and spurring growth and development that focuses on the local problems of the people. There is certainly a need to reflect on and redefine the concept of development in Kenya. The Covid-19 pandemic has taught us lessons that we cannot ignore.

⁸⁰ Sen, A., *Development as freedom*. Oxford Paperbacks, 2001; Sen, A., "The concept of development." *Handbook of development economics* 1 (1988): 9-26; Giri, A.K., "Rethinking human well-being: a dialogue with Amartya Sen." *Journal of International Development: The Journal of the Development Studies Association* 12, no. 7 (2000): 1003-1018.

Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice

Abstract

Environmental justice is an ideal that can be achieved. Management of natural resources needs to be undertaken in a fair, inclusive and equitable way. However, this has not always been the case. There has been gaps in the law, practice and the available conflict management mechanisms. This paper explores the role that Alternative Dispute resolution mechanisms (ADR) can play in management of natural resource conflicts in the context of biodiversity, in order to achieve Environmental Justice and ensure equitable sharing of benefits accruing from natural resources. Although negotiation and mediation have prominently featured in the discussion, other conflict management mechanisms and their merits are also analysed in the context of natural resource conflicts. This is because, the various mechanisms have differing advantages and disadvantages owing to their distinctive nature. As such, the author makes a case for an integrated approach to natural resource conflict management.

1. Introduction

This paper explores how Alternative Dispute Resolution Mechanisms (ADR), and especially negotiation and mediation, can be employed as effective tools for conflicts management and empowerment of people for participation in natural resource governance matters to improve the socio-economic aspects of communities through enhanced Environmental Justice and equitable sharing of accruing benefits.

The author argues that if the aspirations of the Kenyan people are to be met, then it has to be in a secure and peaceful environment and one that allows people to make decisions regarding their own affairs and are able to access justice. Such an environment would be based on the values of human rights protection, equality, freedom, democracy, social justice and the rule of law as envisaged in the preamble to the current Constitution of Kenya 2010.¹ For people to participate fairly and effectively, they need to be empowered, while ensuring that the participatory mechanisms that are used are not only effective but also accommodative in ensuring that the people get a voice in the whole process.

Empowerment in this context is understood to mean a multi-dimensional social process that helps people gain control over their own lives, through fostering power (that is, the capacity to implement) in people, for use in their own lives, their communities, and in their society, by acting on issues that they define as important.² It is also seen as a social-action process that promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.³

¹ Preamble, Constitution of Kenya, (Government Printer, Nairobi 2010).

² Nanette P.N. & Czuba, C.E., "Empowerment: What Is It?" *Journal of Extension*, Vol. 37, No. 5, October 1999, Commentary, 5COM1.

³ Wallerstein, N., "Powerlessness, empowerment and health: Implications for health promotion programs." *American Journal of Health Promotion*, 6(3), 197-205 (As quoted in Lord, J. and Hutchison, P., "The Process of Empowerment: Implications for Theory and Practice." *Canadian Journal of Community Mental Health*, 12:1, Spring 1993, pp. 5-22 at p. 4.)

It is the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.⁴

An empowered people are capable of appreciating all the aspects of governance, and specifically natural resource governance, and where there is conflict they can effectively participate in the process of finding solutions for justice and peace. The current Constitution of Kenya contemplates a situation where people will not only participate in governance matters through representative leadership but also get to actively voice their own views.⁵

2. Access to Justice and Rule of Law

Access to justice is an essential component of rule of law. Rule of law has been touted as the foundation for both justice and security.⁶ A comprehensive system of rule of law should be inclusive in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that rule of law is measured against the international law in terms of standards of judicial protection.⁷ Therefore, without the rule of law, access to justice becomes a mirage.

Realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. It has correctly been noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.⁸

In some instances, non-governmental organisations have come to the aid of some few communities in assisting them access justice through the judicial system. Access to courts is often difficult for the Kenyans due to the problems of high court fees, illiteracy, and geographical location of the courts, amongst many other hindrances.⁹ Notably, the Constitution creates various avenues for enhancing access to justice in Kenya. There are now several provisions specifically providing for access justice, public participation, ADR and traditional dispute resolution mechanisms and the overhaul of the judicial system.¹⁰

⁴ World Bank, Chapter 2. What Is Empowerment? p.11. Available at <http://siteresources.worldbank.org/INTEMPowerment/Resources/486312-1095094954594/draft2.pdf> [Accessed on 12/12/2015].

⁵ Art. 10

⁶ United Nations Development Programme, 'Access to Justice and Rule of Law.' Available at http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/ [Accessed on 12/12/2015]

⁷ Dag Hammarskjöld Foundation, 'Rule of Law and Equal Access to Justice', p.1, Discussion Paper, January 2013. Available at http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf [Accessed on 13/12/2015]

⁸ The Hendrick Hudson Lincoln-Douglas Philosophical Handbook, Version 4.0 (including a few Frenchmen), p. 4, Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 13/12/2015].

⁹ The Danish Institute for Human Rights, "Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors." A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011. Available at http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihl_study_final.pdf [Accessed on 13/12/2015].

¹⁰ See Chapter 10, Constitution of Kenya 2010.

It has been contended that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.¹¹ Arguably, negotiation and mediation are capable of affording the people the much required voice for participation and natural resource-related conflicts management. Effective environmental rule of law should have the ultimate goal of achieving environmental justice for the people.

3. Natural Resource Management and Conflicts

Wherever there is extraction of natural resources, conflicts are bound to arise. Natural resources play a key role in triggering and sustaining conflicts.¹² For instance, it has been argued that, Africa's recent economic, political, environmental, and epidemiological crises have rendered livelihoods more vulnerable, reinforcing the value of land, as people seek it for security.¹³ Land and resource disputes, it is asserted, run the danger of generating more and deeper divisions, undermining the foundations of society, and reducing its ability to deal with larger-scale political and social conflicts in a peaceful manner.¹⁴

It is, therefore, necessary to have mechanisms that are efficacious to manage those conflicts. Conflicts are tensions that arise out of the various competing interests in respect of the natural resource in question. They must be managed effectively and in ways that leave the parties feeling that justice has been done to them. People evaluate both their own experience and views about the general operation of the legal system against a guide of fair procedures that involves neutrality, transparency, and respect for rights, issues that also form the basis for the rule of law.¹⁵

Procedural justice in general legal language is used to refer to the fairness of a process by which a decision is reached. In contrast, procedural justice in psychology entails the *subjective* assessments by individuals of the fairness of a decision making process.¹⁶ Justice must demonstrate *inter alia* fairness, affordability, flexibility, rule of law, equality of opportunity, even-handedness, procedural efficacy, party satisfaction, non-discrimination and human dignity. Any process used in facilitating access to justice must be able to rise above parties' power imbalances to ensure that the right of access to justice is enjoyed by all and not dependent on the parties' social status.

It is also noteworthy that conflicts may be culture-specific. For instance, it has been observed that although African's natural resource and land disputes are clearly economic and, increasingly, class-based conflicts, they are not solely reducible to these dimensions alone. These conflicts occur within a sociocultural context, shaping and being shaped by it.¹⁷ It therefore, follows that any

¹¹ United Nations Development Programme, 'Access to Justice and Rule of Law.' Op cit.

¹² Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". Africa Institute of South Africa Policy Brief, p.2.

¹³ Castro, A.P., 'Developing Local Capacity for Management of Natural Resource Conflicts in Africa: A Review of Key Issues, Approaches, and Outcomes,' Paper prepared for SANREM-CRSP, Final Draft, April 2005, P.7.

¹⁴ Ibid, p. 8.

¹⁵ Blumoff, R.H. & Tyler, T.R., 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', Journal of Dispute Resolution, Vol. 2011, Issue 1 [2011], Art. 2, p. 3.

¹⁶ Ibid, p.3.

¹⁷ Castro, A.P., 'Developing Local Capacity for Management of Natural Resource Conflicts in Africa: A Review of Key Issues, Approaches, and Outcomes,' op cit. p.8.

approaches that are employed in dealing with such conflicts must take into account the underlying socio-cultural factors that either gave rise to the conflict or contributed in fuelling such conflict.

4. Natural Resource Management and Environmental Justice

Environmental justice is defined to refer to equity in the distribution of environmental benefits and in the prevention and reduction of environmental burdens across all communities.¹⁸ It is also defined as the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.¹⁹

According to the *1st Africa Colloquium on Environmental Rule of Law, Nairobi Statement*,²⁰ the participants were of the opinion that the realization of sustainable development in Africa and the prosperity of its people hinges on the sustainable management of its unique and rich natural resources.²¹ They opined that leveraging of these resources towards achieving food security, industrialization, energy sufficiency and socially inclusive economic growth in an environmentally sustainable manner will create equal opportunities for all and eliminate poverty for the benefit of present and future generations.²² This affirms the important role that effective management of natural resources plays to facilitate social and economic development.

In order to further advance the development and implementation of environmental rule of law in the region, the participants in the colloquium were of the opinion that it is necessary to, inter alia: emphasize that advancing environmental rule of law, including information disclosure, public participation, implementable and enforceable laws, implementation and accountability mechanisms, including coordination of roles, and environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution, is critical for Africa's future.²³ According to them, it provides a predictable, dependable and solid foundation for improved environmental governance across the continent. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be ineffective, arbitrary, subjective and unpredictable.²⁴

Though the Statement is not a negotiated document, but rather a reflection of the views of the participants, these suggestions offer an insight on achieving environmental rule of law for the African people and what governments should do in the quest for justice for the people. Access to justice in Kenya especially for the poor and marginalised groups of persons is still a mirage. This is due to the fact that access to justice is not just about presence of formal courts in a country but also entails the opening up of those 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

¹⁸ Purifoy, D.M., 'Food Policy Councils: Integrating Food Justice and Environmental Justice,' Duke Environmental Law & Policy Forum, Vol. XXIV, pp. 375-398, p. 375.

¹⁹ United States Environmental Protection Agency, 'What is Environmental Justice?' Available at <http://www3.epa.gov/environmentaljustice/> [Accessed on 13/12/2015].

²⁰ 1st Africa Colloquium on Environmental Rule of Law, Nairobi, Kenya, 16 October 2015.

²¹ Ibid, p. 1.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

legal rights and intimidation by the law and legal institutions.²⁵ Arguably, this has not yet been achieved in our country and the result is a poor people who are often condemned to a life of misery without any viable recourse to alleviate the injustices.

Access to justice has two dimensions to it namely: procedural access (fair hearing before an impartial tribunal) and substantive justice (fair and just remedy for a violation of one's rights).²⁶ It is difficult for Kenyans to seek redress from the formal court system. The end result is that these disadvantaged people harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been the causes of ethnic or clan animosity in Kenya.²⁷ This, thus, calls for legal empowerment of the people for access to environmental justice. Legal empowerment of the poor seeks to establish the rule of law and ensure equal and equitable access to justice and tackle the root causes of exclusion, vulnerability and poverty.²⁸ Strengthening the rule of law is also seen as an important contributor to the legal empowerment of the poor.²⁹

Further, legal empowerment is also hailed as capable of promoting a participatory approach to development as well as recognizing the importance of engaging civil society and community-based organizations to ensure that the poor and the marginalized have identity and voice.³⁰ Such an approach, it is believed, can strengthen democratic governance and accountability, which, in turn, can play a critical role in the achievement of the internationally agreed development goals, including the Millennium Development Goals (MDGs).³¹ It is however, noteworthy that MDGs have been replaced by the sustainable development goals (SDGs) as developed during the United Nations Summit in New York on September 25-27, 2015.³²

5. Anchoring Environmental Justice and Environmental Rule of Law in the Legal and Institutional Framework

The *Universal Declaration of Human Rights of 1948* (UDHR)³³ provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.³⁴ Further, it provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.³⁵ Also important is the provision that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination

²⁵ Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 09/03/ 2015).

²⁶ Global Alliance against Traffic in Women (GAATW), op. cit.

²⁷ See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

²⁸ UN General Assembly, Legal empowerment of the poor and eradication of poverty: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/142, para. 5.

²⁹ Ibid, para. 3.

³⁰ Ibid, Para. 4.

³¹ Ibid, para. 4.

³² Transforming our world: the 2030 Agenda for Sustainable Development, adopted by the United Nations General Assembly at the UN Summit on September 25-27, 2015 in New York, A/RES/70/1.

³³ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

³⁴ Art. 7.

³⁵ Art. 8.

of his rights and obligations and of any criminal charge against him.³⁶ These provisions are meant to promote the right of all persons to access justice.

The objective of Millennium Development Goal 7 is concerned with ensuring environmental sustainability. It requires adherence to the rule of law and a strong legal and institutional framework. The Rule of law is also one of the goals as enumerated in the Sustainable Development Goals (SDGs).³⁷ The SDGs build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015. Goal 16 thereof, provides for promotion of just, peaceful and inclusive societies. It states that peace, stability, human rights and effective governance based on the rule of law are important conduits for sustainable development. It further states that high levels of armed violence and insecurity have a destructive impact on a country's development, affecting economic growth and often resulting in long standing grievances among communities that can last for generations. Sexual violence, crime, exploitation and torture are also prevalent where there is conflict or no rule of law, and countries must take measures to protect those who are most at risk. The Sustainable Development Goals (SDGs) aim to significantly reduce all forms of violence, and work with governments and communities to find lasting solutions to conflict and insecurity. Strengthening the rule of law and promoting human rights is key to this process, as is reducing the flow of illicit arms and strengthening the participation of developing countries in the institutions of global governance.³⁸

The *African (Banjul) Charter on Human and Peoples' Rights*³⁹ provides in its preamble that it was adopted in consideration of the Charter of the Organization of African Unity, stipulation that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples".

According to the UNEP, environmental rule of law integrates the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance.⁴⁰ It prioritizes environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.⁴¹ It is therefore important that the environmental rule of law be entrenched in the environmental governance framework in the country so as to create a conducive environment for the realisation of access to environmental justice for all.

Under the East African Community Treaty – 1999, the objectives of the Community are to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and

³⁶ Art. 10.

³⁷ Transforming our world: the 2030 Agenda for Sustainable Development.

³⁸ Goal 16.

³⁹ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁴⁰ Unep, 'Environmental Rule of Law: Critical to Sustainable Development,' Issue Brief, May 2015, available at <http://www.unep.org/delc/Portals/24151/Documents/issue-brief-environmental-justice-sdgs.pdf> [Accessed on 12/12/2015].

⁴¹ Ibid.

legal and judicial affairs, for their mutual benefit.⁴²For these purposes, and as subsequently provided in particular provisions of this Treaty, the Community is to ensure *inter alia*: the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States; and the promotion of peace, security, and stability within, and good neighbourliness among, the Partner States.⁴³

The fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States include *inter alia*: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; and peaceful settlement of disputes.⁴⁴ The Treaty confers the East Africa Court of Justice (EACJ)⁴⁵ jurisdiction to hear and determine any matter *inter alia*: arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned. The EACJ acts as the main institutional instrument for settling disputes among members of the East African Community, namely Kenya, Tanzania, Uganda, Rwanda, and Burundi. EACJ thus demonstrates concerted efforts towards averting natural resource based conflicts in East African community.

The Protocol on Environment and Natural Resources Management provides for the cooperation in Environment and natural resources management.⁴⁶ More specifically, under article 13 related to the management of water resources, the protocol has these provisions: The partner States are to develop, harmonize and adopt common national policies, laws and programmes relating to the management and sustainable use of water resources and are to utilize water resources, including shared water resources, in an equitable and rational manner. From these provisions, it is clear that ADR mechanisms may play an important role in resolving any disagreements that arise from the exploitation of the resources.

6. Environmental Justice and the role of the Judiciary

The *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*, declares that an independent judiciary and judicial process are vital for the implementation, development and enforcement of environmental law, and members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and

⁴²Article 5.

⁴³Article 5.3.

⁴⁴Article 6.

⁴⁵A legal case was filed in EACJ in December 2010 by the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, 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 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. See Serengeti Legal Defense Fund, available at <http://www.savetheserengeti.org/serengeti-legal-defense-fund/>

⁴⁶Chapter Three.

national environmental law.⁴⁷ It affirms that judges, public prosecutors and auditors have the responsibility to emphasize the necessity of law to achieve sustainable development and can help make institutions effective.⁴⁸

The Declaration further calls on States to cooperate to build and support the capacity of courts and tribunals as well as prosecutors, auditors and other related stakeholders at the national, sub-regional and regional levels to implement environmental law and to facilitate exchanges of best practices in order to achieve environmental sustainability by encouraging relevant institutions, such as judicial institutes, to provide continuing education.⁴⁹

This demonstrates that Courts and the judicial system as a whole do still have an important role to play in the realisation of environmental justice for all, through enforcement of environmental law. Environmental law is deemed essential for the protection of natural resources and ecosystems and reflects the humankind's best hope for the future of the planet.⁵⁰

Under the constitution of Kenya, the State is obligated to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and it should not impede access to justice.⁵¹ Courts are the State machinery for access to justice and must therefore be bound by this constitutional requirement. Effective national environmental governance complements efforts to improve international mechanisms for environmental protection.⁵²

The content and scope of this right has been said to be far reaching, infinite and encompasses *inter alia*, the recognition of rights, public awareness, understanding and knowledge of the law, protection of those rights, the equal access by all to judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication of claims within the judicial mechanism; easy availability of information pertinent to ones rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims; and timely enforcement of judicial decisions.⁵³ Access to justice has further been enhanced by the recognition of public interest litigation in environmental matters which overcomes the limitations on showing *locus standi*.

With regard to environmental and natural resource management, courts have restated their important role in the quest for sustainable development. For instance, in the cases of *Waweru v Republic* (2007)⁵⁴ and *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014]

⁴⁷ Ibid, Declaration No. I.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Article 48 of the Constitution of Kenya 2010.

⁵² Fulton, S., & Benjamin, A., 'Effective National Environmental Governance – A Key to Sustainable Development,' p.2. Available at http://inece.org/conference/9/papers/Fulton-Benjamin_US-Brazil_Final.pdf [Accessed on 13/12/2015].

⁵³ <http://kenyanjurist.blogspot.com/2011/07/kituo-cha-sheria-and-access-to-justice.html>.

⁵⁴ AHRLR 149 (KeHC 2006), High Court of Kenya at Nairobi, misc. civ application No. 118 Of 2004, 2 March 2006.

eKLR⁵⁵ courts have taken the active role of promoting environmental protection and averting potential natural resource based conflicts.⁵⁶ In the case of *Waweru v Republic*, 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 had a role in promoting sustainable development. Further, Article 22(1) of the constitution 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.

In the Ugandan case of *Greenwatch Vs Attorney General and Another Misc. Cause N. 140/2002*, where an action was taken against the Attorney General and NEMA under Article 50 of the Constitution for *inter alia* failing or neglecting their duties towards the promotion or preservation of the environment. It was held that the state owes that duty to all Ugandans and any concerned Ugandan has right of action against the Government of the Republic of Uganda and against NEMA for failing in its statutory duty.

All over the world, the Judiciary remains a crucial partner for promoting environmental law enforcement and compliance, as well as for shaping the content of legal principles and norms.⁵⁷ For instance, where the other proposed approaches to public participation do not fully satisfy the valid interests and genuine needs of a certain group or stakeholders, these people have the opportunity to challenge both the decision-making process and its outcomes through administrative appeals and litigation.⁵⁸ The Kenyan Environment and Land Court is 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.⁵⁹ 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.⁶⁰

⁵⁵ ELC Suit No. 825 of 2012.

⁵⁶ The Court directed that the Government of Kenya, the Kenya Power and Lighting Company Limited, and the Kenya Electricity Transmission Company Limited should forthwith take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed, utilized and conserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia (including its parastatals) relating to the purchase of electricity.

⁵⁷ 3rd South Asia Judicial Roundtable On Environmental Justice For Sustainable Green Development 8th & 9th August 2014, Colombo, Sri Lanka, Background Paper, p. 4.

Available at <http://www.asianjudges.org/wp-content/uploads/2014/08/Background-Paper-3rd-RT-Sri-Lanka-FINAL.pdf> [Accessed on 13/12/2015].

⁵⁸ Harder J., 'Environmental Mediation: The Promise and the Challenge,' *Environs*, VoL.19, No. I, December 1995, p. 30.

⁵⁹ Environment and Land Court Act, 2011, S. 13(3).

⁶⁰ *Ibid*, S. 20.

The foregoing demonstrate that courts play an important role and must therefore be actively involved in the promotion and protection of the right to environmental justice. The first way is through supporting and enforcing the outcome of ADR mechanisms and secondly, by way of safeguarding the rights of persons where they are called upon to do so, for instance under Article 70 of the Constitution.

7. Alternative Dispute Resolution Mechanisms: Overview

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers however the term, ‘*alternative dispute resolution*’ is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.⁶¹ Article 33 of the *Charter of the United Nations* which outlines these conflict management mechanisms in clear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute shall, 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.⁶²

Some conflict management mechanisms are resolution mechanisms while others are settlement mechanisms. Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible. Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.⁶³ 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.⁶⁴ Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party’s guarantee runs out.⁶⁵ Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people’s perceptions, personal satisfaction and emotions).

Mediation, negotiation and the traditional dispute resolution mechanisms, on the other hand, are resolution mechanisms which mean they are informal, voluntary, allow party autonomy, expeditious and their outcomes are mutually satisfying. Conflict resolution refers to a process where the outcome is based on mutual problem-sharing with the conflicting parties cooperating in order to redefine their conflict and their relationship.⁶⁶

⁶¹ P. Fenn, P., “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp. 50-52.

⁶² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

⁶³ 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.

⁶⁴ Baylis, C., and Carroll, R., “Power Issues in Mediation”, *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

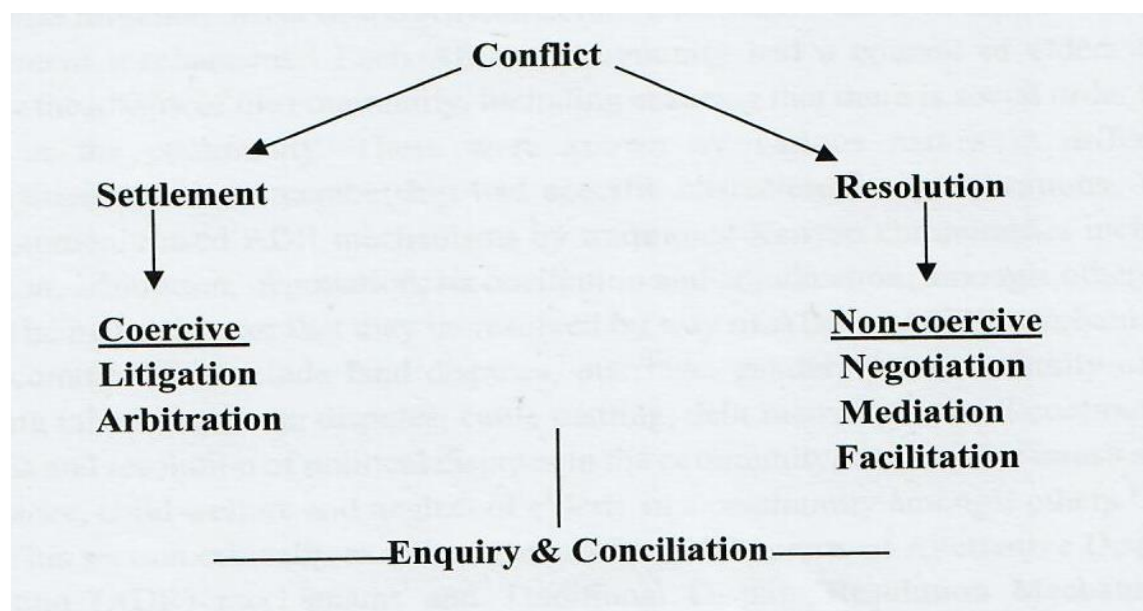
⁶⁵ Bloomfield, D., “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, *op. cit.* p. 153.

⁶⁶ *Ibid*, p. 153.

Alternative dispute resolution mechanisms such as mediation, negotiation and conciliation allow maximum party autonomy and are flexible, informal and leave room for parties to find their own lasting solutions to their problems.⁶⁷ These advantages make resolution potentially superior to settlement. Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.

It is, therefore, arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, it is important to point out that these mechanisms should not exclusively be used but instead there should be synergetic application of the two approaches. Each of them has success stories where they have been effectively applied to achieve the desired outcome. For realisation of justice, there is need to ensure that the two are engaged effectively where applicable.

Fig.1.1



***Source:** The author

Figure 1.1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

⁶⁷ Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.10.

8. Natural Resource Management and Alternative Dispute Resolution Mechanisms

The *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability* declares that environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law predicated on, inter alia: Fair, clear and implementable environmental laws; public participation in decision-making and access to justice and information in accordance with Principle 10 of the Rio Declaration including exploring the potential value of borrowing provisions from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in this regard; accountability and integrity of institutions and decision makers, including through the active engagement of environmental auditing and enforcement institutions; and accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication and innovative environmental procedures and remedies.⁶⁸

Also noteworthy, from the Declaration, is the affirmation that justice, including participatory decision-making and the protection of vulnerable groups from disproportionate negative environmental impacts must be seen as an intrinsic element of environmental sustainability.⁶⁹ It is therefore clear that access to justice through effective conflict management mechanisms must be part of effective natural resource management for sustainable development.⁷⁰

The criteria for determining procedural fairness has been identified as: First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story (i.e., an opportunity for voice); second, people care about the consideration that they receive from the decision maker, that is, they receive assurance that the decision maker has listened to them and understood and cared about what they had to say; Third, people watch for signs that the decision maker is trying to treat them in an even-handed and fair manner; and finally, people value a process that accords them dignity and respect.⁷¹

In environmental conflicts, ADR mechanisms such as, mediation, encourage public participation and “environmental democracy” in the management of environmental resources. Conflict management mechanisms such as mediation encourage “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempt to bring all parties on board.⁷² Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management. Public participation is a tenet of sound environmental governance and is envisaged in the Constitution. Mediation in the informal context leads to a resolution (court-annexed mediation as envisaged under the Civil

⁶⁸ Declaration No. II.

⁶⁹ Ibid.

⁷⁰ United Nations Environment Programme, ‘Rule of Environmental Law Essential for Sustainable Development, Inter-American Congress Concludes’ (UNEP News Centre, Thu, Apr 2, 2015). Available at <http://www.unep.org/newscentre/Default.aspx?DocumentID=26802&ArticleID=34886&l=en>

⁷¹ Welsh, N.A., ‘Perceptions of Fairness in Negotiation’ *Marquette Law Review*, Vol. 84, 2004, p. 753 at pp.763-764.; See also generally, Rottman, D. B., ‘How to Enhance Public Perceptions of the Courts and Increase Community Collaboration’ *NACM’S 2010-2015 National Agenda Priorities*, Available at http://www.proceduralfairness.org/Resources/~/_/media/Microsites/Files/proceduralfairness/Rottman%20from%20Fall%202011%20CourtExpress.ashx [Accessed on 13/12/2015]

⁷² Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit, p.10.

Procedure Act, Cap. 21 is a settlement process) and in environmental management it involves parties' participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues.

As such 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. Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are thus effective to the extent that they will be expeditious and cost-effective compared to litigation.⁷³

Traditional dispute resolution mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result to mutually satisfying outcomes. They are thus arguably appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts. This way less disputes will get to the courts and this will lead to a reduction of backlog of cases. Traditional dispute resolution mechanisms include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. In light of Article 159 (2) (c) and in relevant cases, the ADR mechanisms should be used in resolving certain community disputes such as those involving use and access to natural resources among the communities in Kenya, for enhanced access to environmental justice.

9. Opportunities for ADR in Natural Resource Related Conflict management

For the constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis added).⁷⁴ The United Nations observes that measures to improve access to justice should focus on developing low-cost justice delivery models, taking into account the cost of legal services and legal remedies, capacity and willingness of the poor to pay for such services, congestions in the court system, the incentives of the judiciary and law enforcement agencies and the efficacy of informal and alternative dispute resolution mechanisms.⁷⁵ ADR mechanisms offer a promise in resolving natural resource related conflicts and communities' empowerment for environmental justice in Kenya.

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles since they have advantages that would guarantee that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that encumber the court system. Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most

⁷³ Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

⁷⁴ See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability*, (University of Colorado, Boulder, July 2003).

⁷⁵ UN General Assembly, *Legal empowerment of the poor and eradication of poverty: report of the Secretary-General*, 13 July 2009, A/64/133, Report of the Secretary-General.

Kenyan communities which are also protected by the Constitution.⁷⁶ In Africa, there is the problem of the imposed Eurocentric law. The definition of the rule of law must be expanded to include those notions of justice that are held dear and respected by communities in Africa and Kenya. It must include the tenets of customary law and traditional justice systems.

These mechanisms aim at maintaining a harmonious society. They aim at resolution rather than settlement. The mechanisms that are acceptable to these communities must be utilised fully so as to achieve the rule of law. The use of ADR mechanisms are part of the rule of law envisaged in the Constitution of Kenya 2010. Indeed, customary law is recognised as part of the law of Kenya.⁷⁷ Litigation may however come in handy, for instance, where an expeditious remedy in the form of an injunction is necessary. Where violent conflicts abound, the use of sanctions may help bring parties to the table, for possible negotiation. Litigation is also associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).⁷⁸ Thus, there are instances where a settlement mechanism may be applied in tandem with the conflict resolution mechanisms for the best results.

9.1 Access to Justice through Negotiation

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It is as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.⁷⁹ The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation thus allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

9.2 Mediation

Mediation is defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.¹³⁹ Within this definition mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.⁸⁰ Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

⁷⁶ Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Available at <http://www.kmco.co.ke/attachments/article/149/Empowering%20the%20Kenyan%20People%20through%20Alternative%20Dispute%20Resolution%20Mechanisms.pdfv>

⁷⁷ See Art. 2(4); Art. 60; Art. 159(2)(c);

⁷⁸ Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> [Accessed on 13/12/2015].

⁷⁹ Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm [Accessed on 13/12/2015].

⁸⁰ Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).

a. Mediation in the political process

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.⁸¹

b. Mediation in the legal process

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.⁸²

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.⁸³ In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.⁸⁴

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis ours), thus making mediation a viable process for the actualization of the right of access to justice.

One criticism however is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his or her concerns or interests at the expense of the other.⁸⁵ Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other

⁸¹ See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, Unpublished, University of Nairobi.

⁸² Ibid, Chapter4; See also sec.59A, B, C& D of the Civil Procedure Act on Court annexed mediation in Kenya; See also Mediation (Pilot Project) Rules, 2015.

⁸³ Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' Utah Law Review, (2009) [NO. 3] op. cit. PP. 802-803].

⁸⁴ Ibid.

⁸⁵ See generally, Fiss, O., "Against Settlement" 93 Yale Law Journal, 1073 (1984).

party's disadvantage.⁸⁶ Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information.

9.3 Conflict Management via Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes. Conciliation is recognised by a number of international legal instruments as a means to management of natural resource based conflicts.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.⁸⁷ This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.⁸⁸

A conciliator who is more knowledgeable than the parties can help parties achieve their interests by proposing solutions, based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

9.4 Conflict Management through Arbitration

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.⁸⁹ Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the ADR mechanisms to facilitate access to justice. The problem that arises with the use of arbitration in

⁸⁶ Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, page 3, Effectius Newsletter, Issue 13, (2011)

⁸⁷ Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, Op cit. p. 49

⁸⁸ Article 6 (4) of the Model law states that —The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002).

Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html [Accessed on 15/12/2015]

⁸⁹ Farooq Khan, Alternative Dispute Resolution, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

natural resource related conflicts is that due to its private nature, coupled with the provisions of the Arbitration Act, 1995,⁹⁰ there is the likelihood of ousting the jurisdiction of the court by way of enforcing the requirement of non-interference in the arbitration process.⁹¹ Arguably, arbitration is not suitable in environmental matters, since the court needs to maintain a supervisory role in the natural resource conflicts management, especially where a foreign investor is involved and the rights of the communities are likely to be violated.

9.5 Conflict Management through Med-Arb

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.⁹² This is likely to make the process faster and cheaper for them thus facilitating access to justice. Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.⁹³

9.6 Conflict Management through Arb-Med

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. Arb-med can be used to achieve justice where it emerges that the relationship between the parties needs to be preserved and that there are underlying issues that need to be addressed before any acceptable outcome can be achieved. Mediation, a resolution mechanism is better suited to achieve this as opposed to arbitration, a settlement process. Arb-med can be applied in the management of natural resource conflicts for environmental justice.

9.7 Adjudication and Conflict Management

Adjudication is defined under the Chartered Institute of Arbitrators (CIArb) (K) *Adjudication Rules* as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a

⁹⁰ Art. 10.

⁹¹ For instance, an arbitration clause that refers matters to the International Centre for the Settlement of Investment Disputes (ICSID) ousts the jurisdiction of the national courts. ICSID awards do not require national courts for enforcement. ; S. 10 of the Arbitration Act 1995 limits court's intervention.

⁹²Mediation-Arbitration (Med-Arb),

Available at <http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm> [Accessed on 15/12/2015]

⁹³ Sussman, E., *Developing an Effective Med-Arb/Arb-Med Process*, NYSBA New York Dispute Resolution Lawyer, Spring 2009, Vol. 2, No. 1, p. 73,

Available at <http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf> [Accessed on 15/12/2015]

construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction disputes that need to be settled within some very strict time schedules. Due to the limited time frames, adjudication can be an effective tool of actualizing access to justice for disputants who are in need of addressing the dispute in the shortest time possible and resuming business to mitigate any economic or business losses.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and that it does not enhance relationships between the parties.⁹⁴ However, in future it may be possible to have a framework within which to settle environmental disputes through adjudication.

10. Fair and Equitable Sharing of Resources for Peace and Sustainable Development

10.1 The Nagoya Protocol in the Kenyan Legal Framework

The *UN Convention on Biological Diversity (CBD)* has 3 main objectives namely: the conservation of biological diversity; the sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.⁹⁵ The CBD recognises the sovereign right of states over their natural resources in areas within their jurisdiction. The *Nagoya Protocol*,⁹⁶ is a supplementary agreement to the Convention on Biological Diversity. It provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources.⁹⁷

10.2 Use of and Access to Genetic Resources and Traditional Knowledge

It is noteworthy that the Constitution of Kenya 2010 gives “natural resources” a broad definition which means the physical non-human factors and components, whether renewable or non-renewable, including, inter alia, forests, *biodiversity and genetic resources* (emphasis added).⁹⁸ In recognition of importance of traditional knowledge, the Constitution goes further to provide that the State should: 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

⁹⁴ K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal Of Professional Issues In Engineering Education And Practice*, ASCE / APRIL 2007, pp 143-147 at P. 143, Available at http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation_ [Accessed on 15/12/2015]

⁹⁵ Art. 1, 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

⁹⁶ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity,

⁹⁷ CBD Secretariat, ‘About the Nagoya Protocol,’ available at <https://www.cbd.int/abs/about/> [Accessed on 13/12/2015].

⁹⁸ Art. 260.

development of the nation; and promote the intellectual property rights of the people of Kenya.⁹⁹ Indeed, the Parliament is required to enact legislation to—ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics.¹⁰⁰

Parliament has since developed some Bills as contemplated in the Constitution. For instance, one of the proposed laws in response to the Constitution and the Nagoya Protocol requirements is *the Protection of Traditional Knowledge and Traditional Cultural Expressions Bill*, 2015, is a Bill that is undergoing internal review & stakeholder consultations, developed in line with the foregoing.¹⁰¹ The proposed law seeks to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; to give effect to Article 11, 40(5) and 69 of the Constitution; and for connected purposes. The Bill's purpose is, inter alia: protect holders of traditional knowledge against any infringement of their rights; protect traditional knowledge and traditional cultural expressions against misappropriation, misuse and unlawful exploitation beyond their traditional context; promote sustainable utilization of traditional knowledge and traditional cultural expressions and ensure communities receive compensation and/or royalties for the use of their cultures and cultural heritage; and promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge and traditional cultural expressions.¹⁰²

With regard to natural resource related conflict management, the proposed legislation has several provisions that recognise the importance of ADR in such disputes. The Bill provides that the National Competent Authority¹⁰³ may, in the case of a dispute where there is no agreement between the parties, refer the matter for determination through alternative dispute resolution mechanisms.¹⁰⁴ Further, an authorization to exploit traditional knowledge and traditional cultural expressions must be granted by the holders of traditional knowledge and traditional cultural expressions or where the holders so wish, from the National Competent Authority, on the request and behalf of the holders.¹⁰⁵ However, where the National Competent Authority is to grant an authorization under subsection (1)— it should not grant the authorization before undertaking appropriate consultations with the relevant communities, in accordance with their traditional processes for decision-making and public affairs management. The authorization should also comply with the scope of protection provided for the traditional knowledge or traditional cultural expressions concerned and shall provide for the equitable sharing of the benefits arising from their use; and the uncertainties or disputes relating to the determination of the communities should be involved shall be resolved, in so far as is possible, in accordance with customary laws and protocols of the communities involved.¹⁰⁶

⁹⁹ Art. 11(2).

¹⁰⁰ Art. 11(3).

¹⁰¹ Commission for the Implementation of the Constitution.

¹⁰² Clause 2, the Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2015.

¹⁰³ The proposed National Competent Authority is to be established under clause

¹⁰⁴ Clause 10 (3).

¹⁰⁵ Clause 24(1).

¹⁰⁶ Clause 24(2).

The *Natural Resources (Benefit Sharing) Bill*, 2014, 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.¹⁰⁷ The law, is to apply with respect to the exploitation of petroleum; natural gas; minerals; forest resources, water resources; wildlife resources; and fishery resources.¹⁰⁸ The functions of the Benefit Sharing Authority, will be, 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; and oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement.¹⁰⁹

The Benefit Sharing law can go a long way in boosting the quest for environmental justice for the Kenyan, as far as natural resource management is concerned. Arguably, the first step towards preventing or eliminating natural resource-related conflicts is to promote equitable sharing of accruing benefits in natural resources exploitation. People who feel that they are fairly and meaningfully involved in decision-making and benefit sharing are more likely to coexist peacefully. Procedural justice is used to mean the perception of the fairness of the procedure. Procedural justice is distinguished from distributive justice, which refers to the perception that there has been a fair apportionment of outcomes, or the perception of the fairness of the outcome.¹¹⁰ The *Universal Declaration of Human Rights* (UDHR 1948)¹¹¹ affirms in its Preamble that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Where communities feel that their livelihoods and genuine needs are taken care of, they have no need to engage in conflict in the search for resources to meet their needs, since conflict is often triggered by scarcity of resources. They feel that they are being treated fairly and justly, that is, as far as environmental justice is concerned, they have their needs taken care of in participatory processes.

Thus, it is more prudent for the State to protect the resources for the sake of meeting the needs of the people for while ensuring that the benefits that accrue thereof are fairly and equitably shared amongst the entitled communities. However, these benefits, as observed in various international and local environmental instruments, need not be in monetary terms. Article 5 of the Nagoya Protocol provides that in accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization must be shared in a fair and equitable way with the Party providing such resources, that is, the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing should be upon mutually agreed terms.¹¹²

¹⁰⁷ Preamble.

¹⁰⁸ Clause 3(1), *Natural Resources (Benefit Sharing) Bill*, 2014.

¹⁰⁹ *Ibid*, Clause 6(1).

¹¹⁰ Howieson, J., 'Procedural justice in mediation: an empirical study and a practical example,' *ADR Bulletin*, Vol. 5, No. 7 [2002], Art. 1, p.1.

¹¹¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹¹² Art. 5(1).

Each Party to the Protocol¹¹³ must take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.¹¹⁴ Noteworthy is the Nagoya Protocol provision that benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Annex.¹¹⁵ Arguably, the non-monetary benefits accruing from natural resources exploitation may be more effective in improving the lives of the people as compared to the monetary gains since the former leave a lasting mark on the lives of the community and even affect future generations.

Monetary gains, on the other hand, are more prone to misappropriation or embezzlement by a small group of elite, thus leaving the community worse off. Where the concerned community is involved in benefit sharing negotiations, they are more likely to settle for non-monetary but more meaningful benefits. Negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others, and deciding whether to reach an agreement or end negotiations.¹¹⁶

Negotiations by the elected representatives on behalf of the community may not always bear much fruit in the quest for environmental justice and benefit sharing for the community. This creates an opportunity for the ADR mechanisms to help communities address such issues and even negotiate for the best deal, as far as the types of possible benefits are concerned. They ought to be assured, at least through active participation where need be, that their resources will benefit them.

¹¹³ Kenya signed the Protocol on 1/02/2012, ratified it on the 7/04/2014 and became a party on 12/10/2014.

¹¹⁴ Art. 5(2).

¹¹⁵ According to the Annex, Monetary benefits 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. Non-monetary benefits, on the other hand, may include, but not be limited to: sharing of research and development results; collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the Party providing genetic resources; participation in product development; collaboration, cooperation and contribution in education and training; admittance to ex situ facilities of genetic resources and to databases; transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on 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; strengthening capacities for technology transfer; institutional capacity-building; human and material resources to strengthen the capacities for the administration and enforcement of access regulations; training related to genetic resources with the full participation of countries providing genetic resources, and where possible, in such countries; access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; contributions to the local economy; research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in the Party providing genetic resources; institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities; food and livelihood security benefits; social recognition; and joint ownership of relevant intellectual property rights.

¹¹⁶ Welsh, N.A., 'Perceptions of Fairness in Negotiation,' *op. cit.* at p.753.

The Constitution of Kenya provides that the obligations of the State in respect of the environment include, inter alia, to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; 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; and utilise the environment and natural resources for the benefit of the people of Kenya.¹¹⁷

These provisions are in line with the Nagoya Protocol, whose main objective is the fair and equitable sharing of the benefits arising from 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, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

10.3 Addressing Climate Change for peace and Sustainable Development

Competition for scarce resources, such as fresh water, land or fishing grounds, brought about by changes in climate, has the added potential to cause conflict over resources with impacts on the achievement of the Millennium Development Goals, and on human migration.¹¹⁸ For example, it has been observed that in Africa increased pressure on resources related to food and water insecurity can deepen tensions between communities and ethnic groups resulting in violence and war.¹¹⁹ This is well illustrated by the situation in the Northern parts of Kenya, where resource scarcity arising from climate change and consequent overexploitation of the available resources, has led to frequent inter-clan and ethnic natural resource conflicts.¹²⁰

The MDGs, under Goal 7 required countries to ensure environmental sustainability. Essentially, under this, they were required to deal with the alterations and possible irreversible damage in the quality and productivity of ecosystems and natural resources; address the problem of decrease in biodiversity and worsening of existing environmental degradation; and take measures to reverse the alterations in ecosystem-human interfaces and interactions which lead to loss of biodiversity and loss of basic support systems for the livelihood of many people, particularly in Africa.¹²¹ Arguably, any measures aimed at dealing with these problems requires the active participation of communities. This is because there are those activities by such communities that directly contribute to environmental degradation and ultimately climate change. Getting solutions to the resultant conflicts that may arise out of the fight for the scarce resources requires the communities to sit at

¹¹⁷ Art. 69(1), Constitution of Kenya.

¹¹⁸ United Nations Framework Convention on Climate Change, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries,' (Information Services of the UNFCCC secretariat, 2007), p.42. Available at <http://unfccc.int/resource/docs/publications/impacts.pdf> [Accessed on 16/12/2015].

¹¹⁹ Ibid.

¹²⁰ See Doti, T., 'Climate variability, pastoralists' vulnerability and options: The case of the Borana of Northern Kenya,' in Mwiturubani, D.A. & Wyk, JAV (eds), *Climate Change and Natural Resources Conflicts in Africa*, Monograph 170, (Institute for Security Studies) available at <https://www.issafrica.org/uploads/Mono170.pdf> [Accessed on 16/12/2015].

¹²¹ United Nations Framework Convention on Climate Change, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries,' op cit., p. 43.

the table together and identify their needs and interests and how the same can be satisfied without putting undue pressure on the environment.

This, therefore, calls for action on climate change to curb environmental degradation. During the 21st session of the Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC), Parties acknowledged that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.¹²² This is a firm acknowledgement of the usefulness of ADR and TDR mechanisms in not only providing a tool for conflict management but also community participation in climate change efforts.

The recently adopted document, *Transforming our world: the 2030 Agenda for Sustainable Development*,¹²³ commonly referred to as *Sustainable development Goals (SDGs)*, and which are meant to build on and advance the gains made by MDGs, seeks to strengthen universal peace in larger freedom and recognizes that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.¹²⁴ As already noted, development cannot take place in a conflict situation. As such, this objective can only be achieved through mechanisms that incorporate effective conflict management strategies. The SDGs seeks to foster peaceful, just and inclusive societies which are free from fear and violence and also affirms that there can be no sustainable development without peace and no peace without sustainable development.¹²⁵

The participating State parties in the UN Summit resolved that they must 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 statebuilding.¹²⁶ The use of ADR mechanisms hold the potential to achieve these goals in the new agenda. Through the use of ADR, such as mediation, women are afforded an opportunity to play a role in peacebuilding and helps in building peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights. There is need to exploit these mechanisms in the quest for environmental justice for social and economic development in the country. The mechanisms that are acceptable to these communities must be utilised fully so as to achieve the rule of law, including environmental rule of law.

¹²² Art. 7 (5), Conference of the Parties, Adoption Of The Paris Agreement, Conference of the Parties Twenty-first session Paris, 30 November to 11 December 2015, FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

¹²³ *Transforming our world: the 2030 Agenda for Sustainable Development*, adopted by the United Nations General Assembly at the UN Summit on September 25-27, 2015 in New York, A/RES/70/1.

¹²⁴ *Ibid*, Preamble.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*.

11. Capacity-Building, Education and Training and Public Awareness

Sustainable development must be based on effective rule of law and governance at all levels. Under the SDGs and particularly what has been dubbed, the new agenda, it has been affirmed that sustainable development cannot be realized without peace and security; and that peace and security will be at risk without sustainable development.¹²⁷ 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.¹²⁸

The realisation of peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights requires promotion of meaningful citizen participation and/or to effectively resolve conflicts. There is need for capacity building through education, training and even creating awareness amongst the communities so as to give them the required capacity to contribute. Collaboration between educational, training and research institutions would greatly help in building such capacity in a way that puts into consideration the genuine needs and interests of the affected community or group of people. They ought to be empowered to enable them participate effectively in ADR. The ADR institutions should also be promoted and supported to improve their capacity in addressing the arising conflicts. Effective and meaningful participation in governance matters, as required under Article 10 of the constitution, calls for empowerment of the people. Such empowerment will be useful for enhancing accountability, fairness and responsibilities amongst leaders since people will be aware of their rights and thus demand them through the various available channels, including the court system.

Capacity building should also be in the form of financial resources. Putting up the relevant structures for the use of ADR may require funds and the Government, through the relevant arm, may be required to assist in sourcing such funds. Capacity-building may also necessitate an overhaul of the current institutions as established under Environment (Conservation and Management) Act, 1999. There may require support to build and strengthen environmental and sectoral institutions that have the capacity to incorporate and make use of ADR mechanisms so that they can address the complexities of addressing and coordinating the planning and implementation of action with the participation of communities and other locally set up initiatives for effective management of natural resource conflicts.

12. Conclusion

ADR and Traditional dispute resolution mechanisms have been effective in managing conflicts where they have been used. Their relevance in the conflict discourse has been recognized in the constitution.¹²⁹ They are mechanisms that enhance access to justice. Some like mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will be a paradigm shift in the policy on resolution of conflicts towards enhancing

¹²⁷ Ibid, New Agenda No. 35.

¹²⁸ Ibid.

¹²⁹ Article 159(2) (c) of the Constitution of Kenya 2010 provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of inter alia promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise ADR mechanisms in the context of natural resource management, is needed. It should be realized that most of the disputes reaching the courts can be resolved without resort to court if members of the public are involved in decision-making and resolution of their own disputes using ADR and traditional conflict resolution mechanisms. This is especially so where natural resource-related conflicts are involved, unless the same are intractable and violent conflicts, where the coercive mechanisms, such as court system, may come in handy. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation. Effective management of natural resource conflicts in Kenya is a necessary ingredient in the quest for Environmental Justice.

Securing Our Destiny through Effective Management of the Environment

1. Role of Law in Environmental Management and Governance

Abstract

This paper covers the theme of effective management of the environment. It is informed by the need to manage the environment using an integrated approach in order to achieve a clean and healthy environment, environmental justice and dignity for the human beings and the environment itself. The paper is divided into 12 sections covering areas such as: the Role of Law in Environmental Management and Governance; Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya; Role of Corporations in Environmental Conservation and Sustainable Development in Kenya; Achieving Environmental Security for Sustainable Development in Kenya; The Extractives Industry and Environmental Management in Kenya: the (Dis) Connect; Harnessing the Blue Economy: Challenges and Opportunities for Kenya; Environmental and Natural Resources and Equitable Benefit Sharing in Kenya; Adopting an Integrated Approach to Environmental Management and Conservation for Sustainable Development in Kenya; Environmental Liability Regime in Kenya and Sustainable Development; Managing Environmental and Land Related Conflicts Through Traditional Dispute Resolution Mechanisms; Effective Environmental Management and Governance for Peace Building in Kenya and Environmental Justice.

The sections cover the challenges facing environmental management in Kenya and the opportunities available towards better governance. The paper offers some tangible recommendations that hopefully will result in effective management of the environment using an integrated approach that involves all stakeholders and cuts across regions, disciplines and ecosystems. It is an approach that balances development with ecological sustainability.

1.1 Introduction

This paper discusses the general environmental governance and management practices and makes recommendations on how the environmental law frameworks in Kenya can be reviewed to make them more inclusive. Environmental management as used in this section, and the paper in general, includes the protection, conservation and sustainable components of the environment.¹ Environmental governance on the other hand comprises the rules, practices, policies and institutions that shape how humans interact with the environment.² The paper thus looks at the role of law in both concepts.

The main argument is that the law should be a means to an end and it should be no different for the environmental laws in Kenya as far as meeting the socio-economic needs of the people is concerned. This is because, as it has been argued by some authors, the law is meant to dictate the structure, boundaries, rules, and processes within which governmental action takes place.³ This

¹ Sec. 2, Environmental (Management and Coordination) Act, No. 8 of 1999, Laws of Kenya.

² United Nations Environment Programme, "Environmental Governance," p. 2. Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 13/1/2020].

³ Barbara A Cosens, et. al, 'The Role of Law in Adaptive Governance' (2017)

section advocates for laws that strike a balance between anthropocentric and ecocentric approaches in environmental governance and management.

The current Constitution of Kenya recognises this role of law by dint of Article 10 of the Constitution which spells out the national values and principles of governance which should bind all persons and state organs when making, interpreting or implementing any law.⁴ Even courts have affirmed that ‘*while interpreting the Constitution, they are to consider these national values and principles of governance. These principles include participation of the people as well as good governance, integrity, transparency and accountability. These values are supposed to be in the DNA of public officers and are to be applied when making decisions in the course of their duties*’.⁵

The law is meant to not only ensure that the environment is properly managed in light of the sustainable development agenda but also that it guarantees and protects the environmental rights of the citizens. This is in line with the court’s role in safeguarding the rule of law, as affirmed in the case of *Johnson Kamau Njuguna & another v Director of Public Prosecutions [2018] eKLR*.⁶

Notably, in determining environmental disputes at any stage, Kenyan courts are to be guided by the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the Environment (Management and Coordination) Act, 1999 (EMCA) as well as the broad environmental principles set out in Section 3 of the EMCA.⁷ These are important tools in the interpretation of the law and adjudication of environmental disputes and these ought to be construed in a manner that promotes the letter and spirit of the above constitutional underpinnings and general principles in Section 3 of the EMCA.⁸

1.2 Environmental Governance: Meaning and Scope

Environmental governance comprises the rules, practices, policies and institutions that shape how humans interact with the environment.⁹ Environmental governance has been defined as the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes.¹⁰

One scholar has convincingly argued that environmental governance is best understood as the establishment, reaffirmation or change of institutions to resolve conflicts over environmental

22 Ecology and society: a journal of integrative science for resilience and sustainability 1.

⁴ Article 10, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

⁵ Para. 56, *John Kabukuru Kibicho & another v County Government of Nakuru & 2 others [2016] eKLR*, petition No. 13 of 2016.

⁶ *Johnson Kamau Njuguna & another v Director of Public Prosecutions [2018] eKLR*, Judicial Review 9 of 2018, para. 17; See also Constitution of Kenya 2010, Articles 20, 22 & 23.

⁷ Sec. 3 (5), Environment (Management and Coordination) Act, No. 8 of 1999, Laws of Kenya.

⁸ Para. 23, *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, petition No. 32 of 2017.

⁹ United Nations Environment Programme, “Environmental governance,” available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 13/1/2020].

¹⁰ Lemos, M. C., & Agrawal, A., "Environmental governance," *Annu. Rev. Environ. Resour.*, 31 (2006): 297-325.

resources.¹¹ In this broader context, conflict refers to a conflict of interest, not necessarily to an open conflict, between involved parties.

It has been suggested that good governance includes: *Participation; Rule of law; Transparency; Responsiveness; Consensus oriented; Equity and inclusiveness; Effectiveness and efficiency; and Accountability*.¹² Good environmental governance takes into account the role of all actors that impact the environment, including governments, Non-Governmental Organisations (NGOs), the private sector and civil society, who must all cooperate to achieve effective governance that can help us move towards a more sustainable future.¹³

It is against these definitions of the term ‘governance’ that this section seeks to discuss what the law making process and its implementation should entail, especially in respect of environmental governance laws in Kenya.

1.3 Place of Law in General Governance Matters

Some scholars have conceptualised the link between law and governance in general terms.¹⁴ A good example of this link is to be found under the current Constitution of Kenya which provides for national values and principles of governance which must 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.¹⁵ The Constitution also declares the Republic of Kenya to be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.¹⁶ It is thus evident that the law plays an important role in governance matters by not only setting up the relevant governance institutions but also setting out the *modus operandi* for such institutions.

Notably, the Constitution of Kenya recognises both formal and informal systems of law.¹⁷ Despite this qualification, it is clear that the definition of law in the context of Kenya includes customary law and applies in a pluralistic way.

The Constitution thus creates room for pluralistic operation of formal and informal laws in Kenya in governance matters, albeit with certain qualifications as stated.

¹¹ Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *Ecological economics*, 63, no. 1 (2007): 93-103, at p.94.

¹² United Nations, Introduction to Environmental Governance, 2017. Available at <https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf> [Accessed on 13/1/2020].

¹³ United Nations Environment Programme, "Environmental governance," available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 13/1/2020].

¹⁴ Bell, C., "Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions," Briefing Paper 4, (The Political Settlements Programme Consortium, 2015), pp.1-2. Available at http://www.politicalsettlements.org/wpcontent/uploads/2017/09/2015_BP_4_Bell_Governance-and-Law.pdf [Accessed on 26/5/2019].

¹⁵ Constitution of Kenya 2010, Art. 10(1).

¹⁶ Constitution of Kenya 2010, Article 4(2).

¹⁷ Art. 2(4), Constitution of Kenya 2010.

1.4 Environmental Governance in Kenya: Prospects and Challenges in the Legal and Institutional Frameworks

1.4.1 Environmental Governance in Kenya: Legal and Institutional Frameworks

The Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment as including but not limited to the duty to:¹⁸ ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources¹⁹. Notably, the Constitution of Kenya also 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.²⁰ 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 and governance matters.

The Court, in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR²¹, stated that in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the EMCA. In this regard, Articles 42, 69 and 70 of the Constitution and the broad environmental principles set out in Section 3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes. Invariably, the environmental governance legal framework and any other relevant legislative instrument [substantive or subsidiary], ought to be construed in a manner that promotes the letter and spirit of the above constitutional underpinnings and general principles in Section 3 of the EMCA.²²

1.4.2 Need for Revisiting the Formal and State-Centered Governance Solutions?

This section seeks to re-evaluate the effectiveness of the enforcement power of the state as against solutions or approaches based on voluntary cooperation within the environmental governance framework in Kenya.

Some scholars have observed that institutions resolve environmental conflicts by striking a particular balance between conflicting interests by either establishing, reaffirming or redefining entitlements in environmental resources.²³ In other words, they seek to strike a balance between anthropocentric and ecocentric approaches to environmental governance. An anthropocentric approach to environmental governance would focus on poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation,

¹⁸ Constitution of Kenya, Art. 69(1).

¹⁹ 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 (Art. 260).

²⁰ Constitution of Kenya, Art. 69(2).

²¹ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR, Petition 32 of 2017.

²² *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others*, para. 23.

²³ Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," op cit., at p.95.

gender equity, access to information and conflicts management, amongst others.²⁴ Ecocentric approaches dwell on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.²⁵ Conflicts over natural resources and environmental crimes intensify the problems. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits.²⁶

The Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR²⁷, pointed out that a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests.²⁸ This is an affirmation of the fact that courts, in collaboration with other stakeholders in the environmental governance matters, also have a role to play.

The State should 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. Customary approaches to environmental governance can be incorporated into the formal environmental governance frameworks as a tool for facilitating participation of communities. As already pointed out, the law should include both formal and customary approaches to governance.

1.5 Achieving Sustainable Development in Kenya through Effective Environmental Governance: Revisiting the Role of Law in Environmental Governance

Environmental rule of law is central to sustainable development. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance. It highlights environmental sustainability by connecting it with fundamental rights and obligations. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations.²⁹

²⁴ See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

²⁵ *Ibid.*

²⁶ 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 13/1/2020].

²⁷ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR, Petition 32 of 2017.

²⁸ *Ibid.*, para. 22.

²⁹ 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 13/1/2020].

In addition, it is contended that natural resources that are managed sustainably, transparently, and on the basis of the rule of law can be the engine for sustainable development as well as a platform for peace and justice. The rule of law in environmental matters is essential for equity in terms of the advancement of the Sustainable Development Goals (SDGs), the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights.³⁰

Arguably, environmental governance structures should be used as means to an end, to wit, realisation of social justice for the people of Kenya. Legitimate environmental decisions have to reflect both distributive and procedural justice concerns. This is especially so when people have broader concerns than their narrowly construed economic welfare. In the context of pluralism, distributive justice matters in a broad sense of whose interests and values will be realized by the establishment, change or affirmation of environmental governance institutions.³¹

Procedural justice plays a role in justifying decisions to those whose interests and values are sacrificed to realize some other interests and values. It can also facilitate learning and transformation of values and motivations of involved actors. Therefore, governance solutions do more than specify entitlements: they also provide for participation and avail conflict resolution to involved actors.³²

Increasing environmental pressures from climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, contribute to poverty and to growing social inequalities.³³

There is need for greater cooperation between state and private-sector actors in environment-related decision making and enforcement processes. 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.

The main custodian of the Constitutional rights and the law in general are the national courts and tribunals, as envisaged under the Constitution.³⁴ Of utmost importance under the environmental law are the environmental rights. The next section discusses the role of national courts in safeguarding these rights.

1.6 The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal

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.³⁵ In addition, it also spells out and guarantees the

³⁰ Ibid.

³¹ Paavola, J., "Institutions and environmental governance: A reconceptualization," *Ecological economics*, vol.63, no. 1 (2007): 93-103 at p.98.

³² Ibid., p. 97.

³³ United Nations, "Environmental Rule of Law", *op. cit.*

³⁴ Articles 20, 22, 23, Constitution of Kenya 2010.

³⁵ Preamble, Constitution of Kenya, (Government Printer, 2010).

right of every person to a clean and healthy environment and the need to have the same respected and protected.³⁶

Notably, scholars have pointed out that there is ‘considerable evidence that national courts are increasingly willing to apply international environmental obligations’³⁷. It is in light of this that this section discusses the place of national courts in the pursuit of environmental justice and protection of environmental rights in Kenya.

1.6.1 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. 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.³⁸ 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 to the environment are not violated, by way of litigation.³⁹ This is also captured in the various statutes such as the *Environmental Management and Co-ordination Act*.⁴⁰ The Constitution also recognises the right of every person to a clean and healthy environment.⁴¹

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*⁴², 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.⁴³ 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.⁴⁴

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 applicable in Kenya relating to environment and land.⁴⁵ The Court is also empowered to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or

³⁶ Art. 42, Constitution of Kenya 2010.

³⁷ Sands, P. and Peel, J., *Principles of international environmental law*, Cambridge University Press, 2012, p.47.

³⁸ Art. 69(2), Constitution of Kenya.

³⁹ See also Art. 70 (1), Constitution of Kenya, 2010.

⁴⁰ No. 8 of 1999, Laws of Kenya, s. 3(3); See also *Environmental Management and Co-ordination (Amendment) Act*, No. 5 of 2015, Laws of Kenya, (s. 3).

⁴¹ Art. 42, Constitution of Kenya, 2010.

⁴² No. 19 of 2011, Laws of Kenya. See S. 4 thereof.

⁴³ *Ibid*, Preamble.

⁴⁴ *Ibid*, S. 3(1).

⁴⁵ *Ibid*, S. 13(1).

fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.⁴⁶

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.

1.6.2 The Role of Courts in Safeguarding Environmental Rights in Kenya: Prospects and Challenges

1.6.2.1 Pre-Constitution 2010 Era

EMCA was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and related matters.⁴⁷ 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.⁴⁸

Part XII,⁴⁹ 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.⁵⁰ NET is charged with hearing appeals arising from administrative decisions of committees mandated to enforce environmental standards.⁵¹

Notably, dispute management procedures under EMCA require the active participation of NEMA, being the implementing agency, with any grievances being addressed by NET Tribunal 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*⁵² in the following words:

72. 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....

1.6.2.2 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.

⁴⁶ Ibid, S. 13(3).

⁴⁷ Ibid, Preamble.

⁴⁸ EMCA, S. 3(5).

⁴⁹ SS. 125-136, No. 8 of 1999.

⁵⁰ S. 125, No. 8 of 1999.

⁵¹ S. 126, No. 8 of 1999.

⁵² *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR*, Petition No. 53 of 2012.

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.⁵³ 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.⁵⁴ 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 is 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.

1.6.3 Enhancing the Role of Courts in Safeguarding Environmental Rights in Kenya

1.6.3.1 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, 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.⁵⁵

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’, and in some instances, it has taken court’s intervention⁵⁶ to delineate the right.⁵⁷ Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.⁵⁸ 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

⁵³S. 18.

⁵⁴ 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> [Accessed on 13/1/2020].

⁵⁵ 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.

⁵⁶ See *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd*, Misc. Cause No. 181 of 2004 (High Court of Uganda).

⁵⁷ 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.

⁵⁸S. 20, Environment and Land Court Act, 2011.

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.

1.6.3.2 Public Interest Litigation

Courts should continually support and encourage public interest litigation geared towards protection of environmental rights and enhancing environmental justice in Kenya. The Constitution provides 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.⁵⁹ Further, constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22, 23 and 48 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] eKLR*⁶⁰ where the Court reiterated that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.⁶¹

These provisions have been applied in other significant cases too.⁶² 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*⁶³ where the place of public litigation in constitutional matters was summarised in the following words: "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."

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*⁶⁴.

1.6.3.3 National Courts and Sustainable Development

Access to justice is one of the pillars of the *Agenda 2030 on Sustainable Development Goals (SDGs)*.⁶⁵ 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

⁵⁹ Art. 70 (1) Constitution of Kenya, 2010.

⁶⁰ *Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR*, Environment and Land 273 of 2013.

⁶¹ *Ibid*, para. 26.

⁶² *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, Reference No. 9 of 2010.

⁶³ *Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR*, Petition 429 of 2017.

⁶⁴ *Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR*, Miscellaneous Application 388 of 2017.

⁶⁵ 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.

formed part of the framework of international and national environmental law and health law.⁶⁶ For instance, the *Environmental Management and Co-ordination (Amendment) Act, 2015*⁶⁷ 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).⁶⁸ Such an approach can boost the State's efforts in sustainable development.

In *Peter K. Waweru v Republic*,⁶⁹ 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....'.⁷⁰

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) eKLR*⁷¹ where the Court reiterated the constitutional role of the State on ensuring sustainable development and every person's right to a clean and healthy environment.

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. 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.⁷²

1.7 Conclusion

It is imperative for the policy makers and legislators to bear in mind the end game of any intended law or policy as far as environmental governance is concerned. Achieving social justice should be one of the direct results of implementing environmental laws and policies on governance.

The law should be a tool for achieving social justice for the people and environmental governance laws should not be any different. There is indeed a need to revisit the role of law in environmental governance in Kenya. Formal laws and also customary law practices and norms should be utilised in participatory governance for sustainable development.

⁶⁶ 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 13/1/2020].

⁶⁷ Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.

⁶⁸ S. 31, Environmental Management and Co-ordination (Amendment) Act, 2015.

⁶⁹ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

⁷⁰ Peter K. Waweru v Republic, p.14.

⁷¹ Patrick Musimba –vs- National Land Commission & 4 Others (2016) eKLR, Petition 613 of 2014.

⁷² 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 13/1/2020].

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.⁷³

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.

2. Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya

2.1 Introduction

The previous section has critically discussed the role of law in promoting sustainable environmental management as well as the role of courts in implementing the same. This section discusses the constitutional provisions covering the policy, legal and institutional framework on natural resources and environmental management in Kenya. It seeks to examine where the opportunities exist under the constitutional framework but the required implementation tools are either non-existent or underdeveloped. The author offers suggestions on some of the most plausible ways of effectively implementing these provisions.

2.2 Constitution of Kenya 2010 and Natural Resource and Environmental Management

The Constitution of Kenya provides for obligations meant to ensure sustainable management of natural resources and the environment, which lie against both the State and individual persons.⁷⁴ This section briefly looks at these functions as encapsulated by the Constitution.

2.2.1 State Obligations in Environmental and Natural Resources Governance

Constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.⁷⁵ This approach can be argued to have been informed by the adoption of a human rights approach to environmental matters. The link between human rights and the environment may have first been established by the *Stockholm Declaration* in 1972.⁷⁶ It has also 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.

⁷³ Art. 10(2) (d), Constitution of Kenya.

⁷⁴ Art. 69, Constitution of Kenya 2010.

⁷⁵ 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 14/1/2020]; 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.

⁷⁶ UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

It is against this background that the Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment.⁷⁷ The courts have affirmed that although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it was fairly possible to do so without violating the meaning of the words used.⁷⁸ 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.

2.2.2 Obligations of Citizens in Environment and Natural Resources Management: Co-managers or Mere Spectators?

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.⁷⁹ The duty is only limited to cooperation with the state and personal initiative that falls outside of statutory requirements may only be construed. Thus, it is the State and its organs that are to take initiative in management and the rest are only expected to offer support and follow any direction given.

The Constitution has gone 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 role of ensuring that their rights in relation to the environment are not violated, by way of litigation.⁸⁰

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.⁸¹ A good example is the *Environmental Management and Co-ordination Act 1999 (EMCA)*, which, while it provides for consultations, the same are mainly meant to be between the state agencies charged with environmental governance. 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.

The *Agenda 21*⁸² under section 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.

⁷⁷ Art. 69(1) Constitution of Kenya 2010.

⁷⁸ Para. 18, *Republic v Kenya Forest Service Ex-parte Clement Kariuki & 2 others* [2013] eKLR, Judicial Review Case 285 of 2012.

⁷⁹ See also para. 53, *Milimani Splendor Management Limited v National Environment Management Authority & 4 others* [2019] eKLR, Petition 61 of 2018.

⁸⁰ Art. 22(1), Constitution of Kenya 2010.

⁸¹ See Principle 10 of the Rio Declaration; UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or Aarhus Convention, Articles 4, 5, 6 & 9.

⁸² United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

The *Rio Declaration* also largely adopts an anthropocentric approach to environmental conservation and sustainable development in general.

While the Constitution of Kenya has not been very clear on the specific role of communities as far as environmental governance is concerned, it has however addressed the right of communities to seek legal redress. The right to seek legal redress is also guaranteed under s. 3(3) of the *Environmental Management and Co-ordination Act*.⁸³ The State should ensure that communities play a key role in these efforts and thus, there is need to align these laws with the current Constitution.

2.3 Policy, Legal and Institutional Framework on Natural Resource and Environmental Management in Kenya: The Disconnect

Policies and laws on natural resources and environment in Kenya should be aligned to reflect the requirements and spirit of the Constitution. This section examines the extent to which select existing legislation on natural resources such as land, water, forests, minerals and wildlife reflect the spirit of Article 69 and the Constitution in general as far as resource management is concerned.

2.3.1 Resource Management Approaches

It is arguable that some of the current laws on natural resources management in Kenya still suffer from adopting approaches that defeat any efforts aimed at achieving sustainable development. This section briefly interrogates some of these laws and the specific approaches that they adopt.

(i) Wildlife, Biodiversity and Forest Management Approaches

The *Forest Act, 2005*⁸⁴ was enacted, as an attempt to provide for involvement of local communities living around any forest in the management of those forests.⁸⁵ 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)⁸⁶, and the formation of Community Forest Associations (CFAs)⁸⁷.

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.⁸⁸ 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 notable that the Act did not specifically spell out how communities are to be involved in decision-making processes.

⁸³ No. 8 of 1999, Laws of Kenya; See also Environmental Management and Co-ordination (Amendment) Act, 2015 (s. 3).

⁸⁴ No. 7 of 2005, Laws of Kenya (repealed).

⁸⁵ Part IV, SS. 45-48.

⁸⁶ S.4, No. 7 of 2005.

⁸⁷ No. 7 of 2005, S. 45.

⁸⁸ Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

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 2014* also identifies key issues and challenges in the forestry sector which needs to be addressed. It also 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.⁸⁹ Therefore, the need to enact supporting legislation following the promulgation of the Constitution was 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 needed to take into account emerging issues and best practices at global, regional and national level.⁹⁰

The Forest Act 2005 was repealed by the *Forest Conservation and Management Act, 2016*⁹¹ which did not change much in terms of actualisation of the requirements on public consultation and participation. The provisions on public consultation in the *Forest Conservation and Management Act, 2016* are contained in a schedule⁹². The statute provides that where the law requires public consultation, the relevant entity should publish a notice in relation to the proposed action in the Kenya gazette, newspapers and local radio stations.⁹³

One way of implementing the constitutional obligations on the state to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities is to incorporate it with the scientific knowledge and involving these communities and helping them appreciate all the foregoing principles of natural resource management for realisation of sustainable development agenda. These principles are both international and cultural.

The *Environmental Management and Co-ordination (Amendment) Act, 2015*⁹⁴ 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 shall provide incentives to promote community conservation.⁹⁵ This is an important clause that can promote forests conservation through the use of incentives. The incentives can be in the form of benefits that accrue

⁸⁹ Ibid, para. 2.1.1.

⁹⁰ Ibid, para. 2.1.2.

⁹¹ Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

⁹² Second Schedule, s.34, Provisions for Public Consultation.

⁹³ Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, op cit, p.7.

⁹⁴ No. 5 of 2015, Laws of Kenya.

⁹⁵ S. 31, Environmental Management and Co-ordination (Amendment) Act, 2015.

to the community from the forests resources. However, this calls for their active involvement in the management through continuous collaboration and consultations with state agencies.

With regard to wildlife biodiversity, it has been observed that many of the regions with abundant and diverse wildlife communities remaining in East Africa are occupied by pastoralists.⁹⁶ 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.⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰

Wildlife is required to contribute directly and indirectly to the local and national economy through revenue generation and wealth creation.¹⁰¹ 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 or persons. Communities consider the presence of wildlife on their land as a burden rather than an opportunity for gaining benefits.¹⁰²

The *Wildlife Conservation and Management Act, 2013*¹⁰³ 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.¹⁰⁴ The Act affirms that benefits of wildlife

⁹⁶ 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].

⁹⁷ Ibid.

⁹⁸ Ibid, p. 74.

⁹⁹ Republic of Kenya: Ministry of Forestry and Wildlife, National Wildlife Conservation and Management Policy, 2012, p. 1.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

¹⁰⁴ Ibid, Preamble.

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.¹⁰⁵ The Act provides for consumptive wildlife use activities, which include, game farming, ranching, live capture, research involving off-take, cropping and culling.¹⁰⁶ However, hunting is prohibited as a form of consumptive utilization.¹⁰⁷

The Act also provides for non-consumptive utilization of wildlife. A general permit may be issued by the Cabinet Secretary for non-consumptive wildlife user rights, including - wildlife-based tourism; commercial photography and filming; educational purposes; research purposes; cultural purposes; and religious purposes.¹⁰⁸ 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.¹⁰⁹

Also significant is the provision that every person has the right to practice wildlife conservation and management as a form of gainful land use.¹¹⁰ Further, every person has the right to reasonable access to wildlife resources and shall be entitled to enjoy the benefits accruing there-from without undue hindrance.¹¹¹ However, utilisation and exploitation of wildlife resources by any person whether individual land owner or in a conservation area, and wherever else should be practised in a manner that is sustainable and in accordance with regulations made under this Act.¹¹²

The *Wildlife Conservation and Management Act* requires the Cabinet Secretary, in consultation with the land owner, the National Land Commission, the Commission on Revenue Allocation and in liaison with the Service, to formulate regulations and guidelines on access and benefit sharing.¹¹³ In a bid to curb human-wildlife conflict, the Act provides that in furtherance of the spirit mutual co-existence in the framework of human – wildlife conflict, every decision and determination on the matter of conservation and management of the wildlife resource should not be exercised in a manner prejudicial to the rights and privileges of communities living adjacent to conservation and protected areas: Provided that in the parties should have due regard for the provisions of the appropriate and enabling laws, including laws on devolution and land management.¹¹⁴ Where animals enter community's areas of living, only authorised officers may kill them where there is

¹⁰⁵ Ibid, s.4.

¹⁰⁶ Ibid, s.80 (3).

¹⁰⁷ Ibid, s. 97 & s. 98; See also Eighth Schedule to the Act.

¹⁰⁸ Ibid, s. 80.

¹⁰⁹ Ibid, s.7 (e) (f).

¹¹⁰ Ibid, s. 70(1).

¹¹¹ Ibid, s. 71(1).

¹¹² Ibid, s. 72(1).

¹¹³ Ibid, s. 73; See also s. 76(1)-The Cabinet Secretary shall, upon advice by the Service, in consultation with the Commission on Revenue Allocation, formulate guidelines regarding incentives and benefit sharing, and the nature and manner in which the same shall be distributed.

¹¹⁴ Ibid, s. 75(1).

potential risk of injury, and any unauthorized persons who may kill a rogue animal, unless for self defence, may be prosecuted.¹¹⁵

The 2013 Act provides for County Wildlife Conservation Committees, Community Wildlife Associations and Wildlife Managers and community conservancies as institutions of promoting community participation. As far as regulation is concerned, the Act does away with an autonomous regulatory agency and instead gives powers of wildlife regulation and licensing to the Cabinet Secretary in charge of wildlife. The various institutions are mostly to advise the Cabinet secretary who then makes the final decision. It is therefore clear that the Act does not create clear channels for the communities to participate in decision making. The approach adopted is also broadly protectionist and does little to bring a change of attitude by local communities regarding wildlife diversity. While the Policy framework seems to acknowledge the importance of community inclusion, there is little evidence in the Act that the same was considered during deliberations to formulate the law.

If the affirmations in the Wildlife Policy are anything to go by, then the protectionist approaches adopted in management and conservation of biological diversity are not justified and do little to achieve the desired objectives of sustainable development. It has been suggested that there is need to adopt a more active participatory approach which is mainly informed by two additional principles: putting resources under local control; and giving local communities a decisive voice and representation through their own local institutions, which means participation in making decisions that affect them.¹¹⁶ These principles, it has been contended, intend to increase trust and confidence and strengthen leadership capabilities at the community level.¹¹⁷ While it may not be necessarily important to devolve control and ownership, there is need for more active and quality community participation in decision-making processes.

2.4 Implementing the Constitutional Obligations of the State in Respect of the Environment

It has been observed that the management regimes of public forests (and perhaps even other natural resources in Kenya), whether they are protectionist oriented or incentive-based are important in determining outcomes of conservation and sustainable use.¹¹⁸ 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

¹¹⁵ Ibid, ss. 77-78.

¹¹⁶ See Songorwa, A.N., et al, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature,' op cit. p. 607; See also Colchester, M., 'Sustaining the Forests: The Community-Based Approach in South and South-East Asia,' (United Nations Research Institute For Social Development, 1992). Available at [http://www.unrisd.org/80256B3C005BCCF9%2F\(httpAuxPages\)%2F53024E4A3BAA768480256B67005B6396%2Ffile%2Fdp35.pdf](http://www.unrisd.org/80256B3C005BCCF9%2F(httpAuxPages)%2F53024E4A3BAA768480256B67005B6396%2Ffile%2Fdp35.pdf) [Accessed on 28/07/2016].

¹¹⁷ Ibid.

¹¹⁸ 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.

of human impact.¹¹⁹ Broadly, this approach viewed development objectives of local communities as being in direct conflict with the objectives of biodiversity conservation.¹²⁰

It is for this reason that this section explores measures that may facilitate securing the dream of sustainable exploitation, utilisation, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits. This is in recognition of the fact that the Constitution contemplates adoption of measures that not only promote sustainable management of resources but also actively and meaningfully engage communities in such efforts.

2.4.1 Sustainable and Inclusive Approaches to Environmental Management

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.¹²¹ 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.¹²² 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.¹²³

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.¹²⁴ 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.¹²⁵ There is however, hope in Kenya after the recently developed Draft National Land Use Policy 2016¹²⁶ whose overall goal is to provide legal, administrative,

¹¹⁹ Ibid, p. 146.

¹²⁰ Ibid.

¹²¹ 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.

¹²² Ibid.

¹²³ 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 14/1/2020]; See also Kiss, A., 'Making Biodiversity Conservation A Land Use Priority,' available at <http://www2.gsu.edu/~wwwcec/special/AgiBookSection2002.pdf> [Accessed on 14/1/2020]

¹²⁴ Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' African Journals Online, op cit at p.78.

¹²⁵ 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 14/1/2020]

¹²⁶ Developed by the Ministry of Lands and Physical Planning, Kenya, May 2016.

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.¹²⁷

The various sectoral laws and policies must be designed in way that protects the environment from degradation, and also involves communities in such measures, first through decision-making, and then encouraging active participation, whether through incentives or otherwise.

2.4.2 Achieving Ten Percentage Forest Cover

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.¹²⁸

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.¹²⁹

Principle 8(a) of the *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (the Forest Principles of the United Nations Conference on Environment and Development (UNCED)¹³⁰ provide that efforts should be undertaken towards the greening of the world. Furthermore,

*Draft National Forest Policy, 2015*¹³¹ 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.¹³² The overall goal of the Policy is sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.¹³³

¹²⁷ Ibid, para. 1.4.

¹²⁸ 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 14/1/2020].

¹²⁹ Ibid.

¹³⁰ 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).

¹³¹ Forest Policy, 2015 (Government Printer, Nairobi, 2015).

¹³² Ibid, para. 1.1.9.

¹³³ Para. 3.1.

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.¹³⁴ 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.

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.¹³⁵

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.¹³⁶ 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.¹³⁷ 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.¹³⁸

The *Forest Conservation and Management Act, 2016* 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.¹³⁹ Among the guiding principles of the Act are: 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.¹⁴⁰

¹³⁴ Para. 4.5.

¹³⁵ Draft National Land Use Policy 2016, para. 3.8.3.

¹³⁶ 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 14/1/2020].

¹³⁷ Ibid.

¹³⁸ 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).

¹³⁹ Forest Conservation and Management Act, 2016(Government Printer, Nairobi, 2016), sec. 3.

¹⁴⁰ Ibid, Sec. 5.

The *Forest Conservation and Management Act, 2016* notably retains provisions for formation and registration a community forest association in accordance with the provisions of the Societies Act.¹⁴¹ The management agreement between the Kenya Forest Service and the community forest association is meant to give such communities some forest user rights.¹⁴² Such forest user rights may, with the approval of the Director-General, be assigned either partly or all under a management agreement to a suitably qualified agent on mutually agreed terms.¹⁴³

The Forest Conservation and Management Act, 2016 also provides that subject to Article 66¹⁴⁴ of the Constitution, investors in forests must share the benefits of their investment with local communities by applying various options including but not limited to infrastructure, education and social amenities.¹⁴⁵ This provision is in recognition of the fact that "benefits" mean quantifiable and non-quantifiable goods and services provided by forest ecosystems.¹⁴⁶ 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. The *National Climate Change Response Strategy 2010* (NCCRS)¹⁴⁷, 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 REDD mechanism, to implement sustainable forest management approaches.¹⁴⁸ These efforts and initiatives should be supported as they demonstrate Kenya's commitment to climate change mitigation, a positive step towards attaining sustainable development.

The Bali Principles of Climate Justice of 2002 (Bali Principles)¹⁴⁹ 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.

¹⁴¹ Ibid, Sec. 47(1).

¹⁴² Ibid, Sec. 48.

¹⁴³ Ibid, Sec. 49.

¹⁴⁴ Art. 66(1)- The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

¹⁴⁵ Ibid, sec. 52.

¹⁴⁶ Ibid, sec. 2. 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, Regulation 20 (1).

¹⁴⁷ See para. 4.2.5.2, Government of Kenya, 2010.

¹⁴⁸ The REDD Desk, REDD in Kenya, available at <http://theredddesk.org/countries/kenya> [Accessed on 14/1/2020].

¹⁴⁹ Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 14/1/2020].

2.4.3. Realising the State's Role in Facilitating Equitable Benefit Sharing for Social Sustainability

The proposed legislation *Natural Resources (Benefit Sharing Bill)*¹⁵⁰ 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 proposed law is to apply with respect to petroleum and natural gas, among other natural resources. The proposed law provides for guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.¹⁵¹ The proposed legislation seeks to set up a Benefit Sharing Authority which will be mandated to coordinate the preparation of benefit sharing agreements between local communities and affected organizations, among other functions.¹⁵²

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.

There is also the *Community Land Act, 2016*¹⁵³ was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.¹⁵⁴ Section 36 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.

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.¹⁵⁵ 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.

There is need to ensure that any model that is put in place guarantees a fair and equitable benefit-sharing, with 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.¹⁵⁶

¹⁵⁰ 2018 (Government Printer, Nairobi, 2018).

¹⁵¹ Ibid, Clause 4.

¹⁵² Clause 6, *Natural Resources (Benefit Sharing Bill)*, 2018.

¹⁵³ *Community Land Act*, No. 27 of 2016, Laws of Kenya.

¹⁵⁴ Preamble, *Community Land Act*, No. 27 of 2016 (Government Printer, Nairobi, 2015).

¹⁵⁵ 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 14/1/2020].

¹⁵⁶ See generally, Jonge, B.D., 'What is Fair and Equitable Benefit-sharing?' *Journal of Agricultural and Environmental Ethics*, Vol. 24, 2011, pp.127–146.

2.4.4 Empowerment and Public Participation for Effective Natural Resources Management

It has been observed that an emphasis on responsibilities rather than rights echoes language from the Stockholm Declaration and subsequent instruments that emphasize the duty of each person to protect and improve the environment for present and future generations.¹⁵⁷ This, it is arguable, calls for empowerment of the citizenry to enable them carry out their duties towards environmental management effectively. The fact that the Constitution of Kenya¹⁵⁸ and EMCA¹⁵⁹ 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*¹⁶⁰ the Learned Judge observed that affirmed that 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.¹⁶¹

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, which guarantees the right to information.¹⁶²

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.¹⁶³ 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.¹⁶⁴

The Constitution provides for the role of devolved governance system in the management of natural resources and the environment. The Fourth Schedule to the Constitution¹⁶⁵ provides for the distribution of functions between the National Government and the County Governments.

¹⁵⁷ Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' op cit. p. 3.

¹⁵⁸ For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)).

¹⁵⁹ S.3 (4) A person proceeding under subsection (3) of this section 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.

¹⁶⁰ [2013] eKLR, Environment and Land No. 273 of 2013.

¹⁶¹ Paras 25 & 28.

¹⁶² Art. 35(1), Constitution of Kenya 2010; Access to Information Act, 2015.

¹⁶³ United Nations Development Programme, Decentralized Governance of Natural Resources, available at <http://web.undp.org/drylands/decentralized-governance.html> [Accessed on 14/1/2020].

¹⁶⁴ Ibid.

¹⁶⁵ (Article 185 (2), 186 (1) and 187 (2)), Constitution of Kenya.

Agenda 21 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.¹⁶⁶

Thus, it is important to ensure that 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 in nature.

2.4.5 Establishment of systems of 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. EMCA 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.¹⁶⁷

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.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰

The mandatory requirements for Environmental Impact Assessment, Strategic Environmental Assessment¹⁷¹ and Strategic Environmental and Social Assessment (SESA) also present viable

¹⁶⁶ Agenda 21, clause 3.7(d).

¹⁶⁷ FAO, 'Environmental Impact Assessment (EIA) and Environmental Auditing (EA),' available at <http://www.fao.org/docrep/005/v9933e/v9933e02.htm> [Accessed on 14/1/2020].

¹⁶⁸ Regulation 16, Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003.

¹⁶⁹ 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.

¹⁷⁰ *Ibid*, p. 6.

¹⁷¹ "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

channels through which communities can actively participate in sustainable development agenda in the country.¹⁷²

These exercises should not be just a matter of formality and paper work.¹⁷³ 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.

2.4.6 Judicial Activism

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.¹⁷⁴

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.

2.5 Conclusion

The existing policies, legal and institutional frameworks, as already 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 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.

The Constitution 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 need to put in place a framework that clearly defines the role of various stakeholders.

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.

¹⁷² 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).

¹⁷³ 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 14/1/2020]; 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 14/1/2020].

¹⁷⁴ 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 14/1/2020].

Role of Corporations in Environmental Conservation and Sustainable Development in Kenya

1. Introduction

The vast majority of economic activities around the world are organized through corporations.¹ Corporations have often faced the dilemma of striking a balance between economic development and environmental conservation.² In Kenya, it has been observed that corporate bodies are involved in acts and omissions which violate the right to a clean and healthy environment such as pollution and non-compliance with statutory obligations including undertaking environmental impact assessments and audits.³ The main concern of corporates engaged in such acts is their economic growth and they engage in acts of pollution to save costs through acts and omissions such as failure to treat effluent before discharging into water bodies.⁴ However, with the increased environmental challenges such as climate change, the acts and omissions of corporations can no longer go unregulated.

The concept of environmental liability has emerged at both the national and global level to curb against environmental damage by corporations. Further, corporate governance principles such as corporate social responsibility require corporations to consider the social consequences of their economic actions in decision making.⁵ It has been argued that the concept of environmental governance is an important aspect of corporate social and environmental responsibility.⁶

This section discusses the concept of corporate environmental compliance in Kenya and proposes solutions on how the same can be enhanced to promote sustainable development. In light of the provisions of the Constitution of Kenya, 2010 and EMCA the environmental regime in Kenya has been strengthened and corporations now face both civil and criminal liability for acts and omissions related to the environment. It delves into corporate environmental compliance challenges in Kenya and highlights how they affect the right to a clean and healthy environment in addition to other human rights before suggesting how corporations can tackle these challenges.

2. Legal and Institutional Framework for Corporate Environmental Compliance

2.1 International Legal Framework

The international framework on corporate environmental compliance is based on a number of treaties, standards and principles aimed at facilitating enforcement and compliance with environmental laws and regulations. While such treaties, principles and standards generally bind states, they are directly applicable to corporations since a state can control the activities of a

¹Rauterberg, G, 'The Corporation's Place in Society' available at http://michiganlawreview.org/wp-content/uploads/2016/04/114MichLRev.913_Rauterberg.pdf [Accessed on 14/1/2020].

²Sozinova, A et al, 'Economic Environmental Activities of Russian Corporations' *International Journal of Economics and Financial Issues*, Volume 6, Issue 1, 2016, p. 52-56.

³ Kamweti D et al, 'Nature and Extent of Environmental Crime in Kenya' available at <https://www.files.ethz.ch/isn/111770/M166FULL.pdf> [Accessed on 14/1/2020].

⁴ Ibid.

⁵ Buckley, P 'Can Corporations Contribute directly to society or only through regulated behaviour' *Journal of the British Academy*, 6 (sl), p. 323-374.

⁶ MSV. Prasad, 'Corporate Environmental Governance: A Perception of Indian Stakeholder', available at https://ecoinsee.org/conference/conf_papers/conf_paper_18.pdf, [Accessed on 14/1/2020].

corporation within its jurisdiction in compliance with its obligations under international law especially on environmental matters.

The *United Nations Framework Convention on Climate Change, Paris Agreement 2015*⁷, is an Agreement aimed at strengthening the global response to the threat of climate change in the context of sustainable development. The Agreement contains provisions aimed at holding the rise in global temperature levels and controlling greenhouse gas emissions.⁸ It is noteworthy that most corporations especially those in industrial goods production release greenhouse gases that may adversely affect the ozone layer and this makes them bound by this legal instrument.

*The Montreal Protocol*⁹ is an international Treaty which aims to regulate the production and use of chemicals that contribute to the depletion of ozone layer. It sets limits on the production of chlorofluorocarbons (CFCs) and related substances that may lead to the depletion of the ozone layer. Again, some corporations may release chemicals that may adversely affect the ozone layer.

*The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment*¹⁰ contains provisions on compensation for damage to victims of environmental liability and requires member states to adopt laws that provide for liability and compensation to victims of environmental damage such as pollution. This has been captured in Kenya under the Environmental Management and Co-ordination Act, 1999¹¹ which imposes both civil and criminal liability for environmental damage.

*The Rio Declaration on Environment and Development*¹² captures several principles aimed at protecting the integrity of the global environment and developmental system. These include sustainable development, public participation, inter and intra generational equity, precautionary principle and the polluter pays principle.

ISO 14000 entails a number of standards developed by the International Organization for Standardization to help organizations take a proactive approach to managing environmental issues.¹³ The standards challenge organizations to undertake a number of activities related to environmental governance which include taking stock of their impacts on the environment, establishing objectives and targets towards environmental management, committing to effective and reliable solutions such as prevention pollution and taking personal responsibility for conduct

⁷ Paris Agreement, United Nations, 2015, available at https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf [Accessed on 14/1/2020].

⁸ Ibid, Art. 2.

⁹ Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987).

¹⁰ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, available at <https://legal.un.org/avl/ha/dunche/dunche.html> [Accessed on 14/1/2020].

¹¹ Act No. 8 of 1999, Laws of Kenya.

¹² The United Nations Conference on Environment and Development, Rio Declaration 1992, Available http://www.unesco.org/education/pdf/RIO_E.PDF [Accessed on 14/1/2020].

¹³ Environmental Management: The ISO 14000 family of International Standards, available at https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/theiso14000family_2009.pdf [Accessed on 14/1/2020].

related to the environment.¹⁴ The existence of such standards is important since it allows organisations to gauge their environmental efforts against the generally accepted international criteria.

2.2 National Legal Framework

a. Constitution of Kenya, 2010

The Constitution of Kenya accords every person the right to a clean and healthy environment¹⁵, which includes the right to have the environment protected for the benefit of present and future generations through measures contemplated in article 69; and to have obligations relating to the environment fulfilled under Article 70. These Constitutional provisions bind both the state and every person. Corporations thus have environmental obligations under the Constitution since they are artificial persons. Breach of these obligations could result in enforcement of environmental rights against the corporation and sanctions such as compensation for any victim of a violation of the right to a clean and healthy environment under Article 70 (2) (c).

b. Environmental Management and Co-ordination Act (EMCA), 1999

The *Environmental (Management and Co-ordination) Act, 1999* (EMCA) is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment.¹⁶ The Act entitles every person to a clean and healthy environment and requires every person to cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.¹⁷ EMCA also stipulates several measures for protection and conservation of the environmental subsectors including rivers, lakes, seas, wetlands, mountain areas, forests, biological resource and the ozone layer.¹⁸

These provisions bind both the state and individuals and their violation could result in commission of environmental offences set out under the Act. When these offences are committed, *by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence* (emphasis added).¹⁹

To aid in environmental protection and conservation, the Act lists several environmental management tools such as *Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA), Strategic Environmental and Social Assessment (SESA), Environmental Audits and Monitoring* (emphasis added).

¹⁴ Ibid.

¹⁵ Art. 42, Constitution of Kenya 2010, (Government Printer, 2010, Nairobi).

¹⁶ Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, Government Printer, Nairobi.

¹⁷ Ibid, s. 3 (2A).

¹⁸ Ibid, Part V.

¹⁹ Ibid, s. 135.

c. Companies Act, 2015

The *Companies Act, 2015* calls upon directors while discharging the duty to promote the success of a company to have regard to the impact of the operations of the company on the community and the environment.²⁰ The Act further mandates directors while preparing their reports to include information about environmental matters and take into account the impact of the business of the company on the environment.²¹

d. Climate Change Act, 2016

The *Climate Change Act, 2016* provides a regulatory framework for enhanced response to climate change and puts in place measures and mechanisms aimed at achieving low carbon climate development.²² The Act applies in all sectors of the economy and requires measures to be taken towards mainstreaming climate change responses in development planning, providing incentives and obligations for private sector contribution in achieving low carbon climate development and promotion of low carbon technologies.²³ *It also imposes climate change duties upon private entities which may also be required to prepare reports on the status of performance of such obligations (emphasis added).*²⁴ The Act empowers the National Environmental Management Authority (NEMA) to monitor, investigate and report whether public and private entities are in compliance with their duties under the Act.²⁵

e. Water Act, 2016

This is an Act of Parliament to provide for the regulation, management and development of water resources.²⁶ It enshrines the right to clean and healthy water and contains provisions that seek to curb contamination and pollution of water sources and establishes institutions to enforce the Act. Despite enactment of the Act, there are still many cases of pollution of water bodies some which are perpetrated by corporations through discharge of untreated wastes. Enforcement and compliance with the Act is necessary in attainment of the right to clean and healthy water.

f. Sectoral Regulations

In addition to these legal instruments, there are several sectoral regulations which govern environmental compliance in Kenya. *The Environmental (Impact Assessment and Audit) Regulations, 2003*²⁷ provide for a system governing the Environmental Impact Assessment process and environmental audits. *The Air Quality Regulations 2014*²⁸ provide for prevention, control and abatement of air pollution to ensure clean and healthy ambient air. The regulations further provide for establishment of *emission standards* for various sources *including industries* as outlined in the Environmental Management and Coordination Act, 1999 (emphasis added).

²⁰ Companies Act, No. 17 of 2015 (Government Printer, 2015, Nairobi), s. 143 (1) (d).

²¹ Ibid, s. 655 (4) (b).

²² Climate Change Act, No. 11 of 2016, Laws of Kenya (Government Printer, 2016, Nairobi).

²³ Ibid, s. 3.

²⁴ Ibid, s. 16.

²⁵ Ibid, s. 17.

²⁶ Water Act, No. 43 of 2016, (Government Printer, 2016, Nairobi).

²⁷ The Environmental (Impact Assessment and Audit) Regulations, Legal Notice No. 101 (June 13, 2003),

²⁸ Environment Management And Co-ordination (Air Quality) Regulations, available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171 [Accessed on 14/1/2020].

*The Water Quality Regulations 2006*²⁹ provides for the right to clean and healthy water and obligates every person to refrain *from acts and omission that may cause water pollution (emphasis added)*. The *Waste Management Regulations 2006*³⁰ provide a system to govern management of wastes including industrial and hazardous wastes.

g. Environmental Compliance Requirements under EMCA

Environmental compliance *entails adherence to environmental laws, standards, regulations and other requirements*. The need for *environmental compliance is important among corporations due to the potential of environmental liability as a result of non-compliance (emphasis added)*.³¹ Corporations thus have to adhere to the various environmental laws, regulations and standards set out under EMCA and other environmental sectoral laws. EMCA sets out various environmental management tools such as Environmental Impact Assessment (EIA), Environmental Audits, Strategic Environmental Assessment (SEA) and Strategic Environmental and Social Assessment (SESA).

h. Environmental Impact Assessment

Since most development activities and projects in Kenya are undertaken by companies, EIA becomes an important aspect of the corporate governance discourse. It has been argued that *EIA can be a powerful tool for keeping the corporates including Multinational Corporations (MNCs) operating in the country in check (emphasis added)*.³²

The need for EIA is so important that the Environmental (Impact Assessment and Audit) Regulations, 2003 makes it mandatory to conduct an EIA study and have it approved before undertaking a project likely to have environmental effects.³³ The Regulations require a proponent to prepare a Project Report that covers *inter alia*; the nature of the project, activities to be undertaken during construction of the project and the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project.³⁴

Failure to comply with EIA requirements under EMCA has seen instances where projects have been halted. In *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, the Applicant was issued with a mining license without complying with the EIA requirements under EMCA. In cancelling the license, the Environment and Land Court decided that:

²⁹ Legal Notice No. 120 (September 4, 2006), Environment Management and Co-ordination Water Quality Regulations, 2006.

³⁰ Legal Notice, No. 121 (September 4, 2006), Environmental Management and Co-Ordination (Waste Management) Regulations, 2006.

³¹ Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' available at <https://www.google.com/search?client=firefox-b-d&q=environmental+compliance> [Accessed on 14/1/2020].

³² Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

³³ The Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No.101 (June 13, 2003), Government Printer, Nairobi.

³⁴ Ibid, Regulation 7.

‘To the extent that the Commissioner for mines was not furnished with a NEMA Licence as required under the EMCA Act and the Regulations made thereunder my view is he could not issue a valid Mining Licence and the Licence he issued to the Applicant on 7th March 2013 was null and void and of no legal effect.’³⁵

It is important for corporations to comply with EIA requirements under EMCA in order to minimise the environmental impacts of their projects and promote sustainable development.

Strategic Environmental Assessment (SEA)

*EMCA requires all entities, including corporations, to undertake preparations for SEAs at their own expense and submit them to NEMA for approval.*³⁶ *It has been observed that the object of SEA is to enhance environmental protection and promote sustainable development through contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.*³⁷

Environmental Audits and Monitoring

*The requirement for environmental audits and monitoring has been enshrined under the Constitution of Kenya as part of the obligations in respect of the environment.*³⁸ *Environmental audits and monitoring act as follow up tools to determine the extent to which activities being undertaken conform to the environmental impact assessment study report issues in respect of the particular project.*

The aim of this process is to guard against deviation from the study report which could have detrimental effects on the environment. NEMA is mandated under EMCA to undertake environmental audits of all activities that are likely to have *significant effect on the environment and in consultation with lead agencies, monitor all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts (emphasis added).*³⁹

i. Public Participation

The principle of Public participation has become essential under the current Constitutional dispensation in Kenya. It is enshrined under the Constitution as one of the national values and principles that binds all persons (including corporations) in the implementation of policy

³⁵ Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/109485> [Accessed on 14/1/2020]; See also Save Lamu & 5 Others v NEMA & another, Tribunal Appeal No. NET 196 of 2016, where the license was cancelled on account of lack of public participation.

³⁶ EMCA, s. 57 A (3).

³⁷ Environmental protection Agency, ‘Strategic Environmental Assessment,’ Available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> [Accessed on 14/1/2020]; See also Muigua, K, ‘Legal Aspects of Strategic Environmental Assessment (SEA) and Environmental Management,’ available at <http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf> [Accessed on 14/1/2020].

³⁸ Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.

³⁹ EMCA, s. 68 & 69.

decisions.⁴⁰ The principle is fundamental in environmental governance and all policies, plans and processes related to the environment are to be subjected to public participation. In *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, the court recognized the importance of this principle and observed that, ‘One of the environmental governance principles emphasized by the legal framework is the principle of public participation in the development of policies, plans and processes for the management of the environment and natural resources.’⁴¹

This principle has also been captured under EMCA. The Act requires the Environment and Land Court in exercising jurisdiction conferred upon it by the Act to be guided by principles of sustainable development including participation of the people in the development of policies, plans and processes for the management of the environment.⁴²

j. Sustainable Development

Sustainable development has been enshrined as one of the national values and principles under the Constitution.⁴³ The principle has also been captured under EMCA and includes public participation, inter and intra generational equity, polluter pays principle, precautionary principle *inter alia*.⁴⁴ The Sustainable Development Goals (SDGs) by the United Nations member states in 2015 are a universal call of action towards targets such as ending poverty and protecting the planet.⁴⁵ The SDGs set various targets such as sustainable management of water and sanitation for all, attainment of affordable and clean energy, promotion of inclusive and sustainable industrialization and taking action to combat climate change.⁴⁶ Corporations can assist towards promoting sustainable development through compliance with the targets set out under the SDGs.

3. Challenges Related To Corporate Environmental Compliance in Kenya

3.1 Environmental Pollution

EMCA defines pollution as ‘the direct or indirect alteration of any part of the environment through discharge, emission or deposition of wastes’.⁴⁷ Environmental pollution has also been defined as ‘any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life’.⁴⁸ *Environmental pollution occurs in various forms including water pollution, air pollution,*

⁴⁰ Constitution of Kenya, 2010, Art. 10.

⁴¹ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, available at <http://kenyalaw.org/caselaw/cases/view/140427> [Accessed on 14/1/2020].

⁴² EMCA, s. 3 (5) (a).

⁴³ Constitution of Kenya, 2010, Art. 10 (2) (d).

⁴⁴ EMCA, s. 3 (5).

⁴⁵ Sustainable Development Goals, available at https://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf [Accessed on 14/1/2020].

⁴⁶ *Ibid*.

⁴⁷ EMCA, s. 2, Government Printer, Nairobi.

⁴⁸ Coker, A.O, "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> [Accessed on 14/1/2020].

noise pollution and land pollution (emphasis added).⁴⁹ Environmental pollution has become a major challenge across the world due to the rapid economic development to cater for the rising human population.⁵⁰

The problem of pollution especially by manufacturing industries is well documented in Kenya. It has been pointed out that a number of manufacturing industries discharge untreated effluent into rivers resulting in high pollution levels in the Nairobi and Ngong Rivers.⁵¹ According to the National Environment Management Authority (NEMA), many factories in the country have been contravening provisions of the *Water Quality Regulations, 2006* by either discharging untreated effluent into a public sewer or discharging into the environment without an effluent discharge license.⁵² These incidences of pollution have recently been highlighted by the media resulting in crackdown by the National Environment Management Authority (NEMA) against the perpetrators.⁵³

In addition to water pollution through discharge of effluent, other forms of environmental pollution by corporations have also been reported in Kenya.⁵⁴ Further, studies have also indicated that this has contributed to soil pollution in the area.⁵⁵

Despite the existence of laws and regulations to curb against pollution such as the Water Quality Regulations, Waste Management Regulations and Air Quality Regulations, the problem of pollution has persisted in the country. This calls for concerted efforts involving both the regulatory agencies such NEMA and corporations to enhance effective environmental compliance.

3.2 Human Rights Violation

It has been noted that environmental rights are intertwined with other human rights especially the economic and social rights.⁵⁶ The Constitution enshrines these rights which include the right to health, accessible and adequate housing, right to food, clean water and the right to education.⁵⁷

⁴⁹ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013.

⁵⁰ Muigua K, 'Safeguarding the Environment through Effective Pollution Control in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf> [Accessed on 14/1/2020].

⁵¹ National Environment Management Authority (NEMA), 'Environment, People and Development' available at <http://www.nema.go.ke/images/Docs/Regulations/KenyaSoECh1.pdf> [Accessed on 14/1/2020].

⁵² National Environment Management Authority, 'Factories Closed, Owners Arrested for Polluting the Environment' available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454 [Accessed on 14/1/2020].

⁵³ Onyango, L, 'Kenya Regulator Shuts Down 4 Firms for Polluting Nairobi River' *The East African*, 27th August, 2010, available at <https://www.theeastafrican.co.ke/scienceandhealth/firms-shut-down-for-polluting-Nairobi-River/3073694-5250300-xrqj6bz/index.html> [Accessed on 14/1/2020].

⁵⁴ Consumer Federation of Kenya, 'Lead Poisoning in Owino Uhuru Slums in Mombasa-Kenya' available at <https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf> [Accessed on 14/1/2020].

⁵⁵ Caravanos, 'Conflicting Conclusions or Competing Methodologies? Documenting Soil Lead Pollution in Owino Uhuru, Kenya' *Journal of Health & Pollution*, Vol. 9, No. 21, March 2019.

⁵⁶ Muigua, K and Kariuki, F, 'Safeguarding Environmental Rights in Kenya' available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/90689/Muigua_Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf?sequence=1&isAllowed=y [Accessed on 14/1/2020].

⁵⁷ Art. 43, Constitution of Kenya, 2010.

Realization of the economic and social rights is largely dependent on the quality of the environment which is a basic condition of life, indispensable to the promotion of human dignity, welfare and the fulfilment of other human rights.⁵⁸ Thus, acts and omissions by corporations related to the environment are likely to have impact on the realization of socio-economic rights enshrined in the Constitution. Where water sources are polluted due to effluent discharge from industries, the rights to clean water and health are likely to be compromised. Further, soil pollution is likely to affect the right to food due to its effect on agricultural activities. The right to housing may be affected in instances where people are displaced to cater for economic activities by corporations such as mining. The link between environmental rights and other human rights was succinctly captured by the High Court of Kenya in *Peter K. Waweru –v- Republic*⁵⁹.

Corporations therefore have a role to play in the attainment of socio-economic rights in Kenya through environmental compliance.

3.4 Environmental Liability by Corporations in Kenya

3.4.1 Civil Liability

Civil liability against corporations for environmental breaches occurs in the form of compensation and damages aimed at bringing the property or person affected by such acts as far as possible to the condition they were before the breaches occurred.⁶⁰ Civil remedies for environmental protection can be classified according to their intended function which could be preventive, compensatory, reparatory or natural restitution.⁶¹ In addition to enshrining the right to clean and healthy environment, the Constitution sets out obligations in respect of the environment.⁶² Breach of these obligations may result in enforcement of environmental rights under article 70 of the Constitution which empowers the Environment and Land Court to grant civil remedies such as compensation to the victim or orders of injunction to prevent, stop or discontinue any act or omission that is harmful to the environment. In addition to these remedies, EMCA provides for environmental restoration orders, conservation orders, and easements as part of civil remedies for environmental breaches.⁶³

Consequently, corporations in Kenya found liable for environmental breaches have been imposed with civil consequences.⁶⁴ Civil liability for environmental breaches by corporations follows common law principles such as the strict liability rule. The rule was laid down in the case of *Rylands vs Fletcher*⁶⁵ which imposes strict liability on the owner of land for damage caused by the

⁵⁸ Patricia Birnie & Alan Boyle, *International Law and the Environment*, Op. Cit.; See also Philippe Sands, *Principles of International Environmental Law*, 2 ed. (Cambridge: Cambridge University Press, 2003) and Phillippe Cullet, "Definition of an Environmental Right in a Human Rights Context".

⁵⁹ Peter K. Waweru –v- Republic, (2006) 1 KLR (E&L) 677 at 691.

⁶⁰ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

⁶¹ Muigua, K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

⁶² Constitution of Kenya, 2010, Art. 42 & 69, Op Cit.

⁶³ EMCA, Part IX (Sec. 108-116).

⁶⁴ John Mutungu Waititu –vs- China Wuyi (Kenya) Co. Ltd, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR.

⁶⁵ *Rylands vs Fletcher* [1861-73] ALL ER REP 1.

escape of substances to his or her neighbour's land. Courts in Kenya have applied the strict liability rule and imposed civil liability on corporations for actions that have resulted in damage to the adjacent lands.⁶⁶ Corporations therefore have to guard against instances of environmental damage since their actions can give rise to civil liability.

3.4.2 Criminal Liability

EMCA stipulates various environmental offences which including offences related to *inspection*, offences *related to Environmental Impact Assessment*, offences related to records and *standards and offences related to hazardous wastes (emphasis added)*.⁶⁷ The Act also prescribes penalties for these offences.⁶⁸ The Act also empowers environmental inspectors appointed under the Act, subject to the Constitution and section 29 of the Office of the Director of Prosecution Act, *to institute and undertake criminal proceedings* against any person before a court of competent jurisdiction (other than a court martial) in respect of any *offence alleged to have been committed by that person under EMCA (emphasis added)*.⁶⁹

Corporates need to be aware of the legal provisions in regard to civil and criminal liability and comply accordingly to avoid incurring liability.

3.5 Environmental Compliance and Corporate Social Responsibility: The Role of Company Secretary as the Compliance Officer

In recent years, the world has experienced awareness in the area of environmentalism.⁷⁰ Companies want to reduce pollution, engage in cleaner production, conserve the environment and generally engage in environmentally responsible corporate behaviour.⁷¹ Some companies even go to the extent of incorporating environmental goals into their vision and mission statements.⁷² Ideas such as conservation, pollution control, recycling waste, public awareness and education, use of cleaner fuels and the use of Environmental Impact Assessment and Audits have found their way into the management principles of corporations.⁷³ The Company Secretary who is a member of the

⁶⁶ *Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited*, High Court of Kenya at Nakuru, Civil Suit No. 144 of 2009 (2016) eKLR.

⁶⁷ EMCA, s. 137-146.

⁶⁸ *Ibid.*

⁶⁹ EMCA, s. 118 (b).

⁷⁰ 'Awareness and Action for Environment Protection - Service Européen Pour l'action Extérieure' <https://eeas.europa.eu/topics/climate-environment-energy/63659/awareness-and-action-environment-protection_fr> [Accessed on 11/1/2020].

⁷¹ Marcia Narine Weldon, 'Corporate Governance, Compliance, Social Responsibility, and Enterprise Risk Management in the Trump/Pence Era' (2018) 19 *Transactions: The Tennessee Journal of Business Law* 14.

⁷² Marie Pavláková Dočekalová and Alena Kocmanová, 'Comparison of Sustainable Environmental, Social, and Corporate Governance Value Added Models for Investors Decision Making' (2018) 10 *Sustainability* 649; Philip Mirvis, Bradley Googins and Sylvia Kinnicutt, 'Vision, Mission, Values' (2010) 39 *Organizational Dynamics* 316.

⁷³ Raimi, L., "Who is Responsible? Mainstreaming Corporate Social Responsibility into Ecological Sustainability in the Niger Delta Region of Nigeria." *Development* 9, no. 3 (2019); Borland, H., Ambrosini, V., Lindgreen, A., & Vanhamme, J., "Building theory at the intersection of ecological sustainability and strategic management." *Journal of Business Ethics* 135, no. 2 (2016): 293-307; Dahlmann, F., Stubbs, W., Griggs, D., & Morrell, K., 'Corporate Actors, the UN Sustainable Development Goals and Earth System Governance: A Research Agenda' (2019) 6 *The Anthropocene Review* 167; Christian Voegtlin and Andreas Georg Scherer, 'Responsible Innovation and the Innovation of Responsibility: Governing Sustainable Development in a Globalized World' (2017) 143 *Journal of Business Ethics* 227.

management finds herself engaged in environmental issues at both policy and operational levels.⁷⁴ The survival of the corporate body may well depend on how environmental issues are handled.⁷⁵ The Company Secretary may find herself engaged in issues of environmental compliance as a matter of law. There is thus a need for knowledge of what the law requires in this. Indeed, it has been observed that many private firms across the world have adopted different forms of private environmental governance to improve their environmental footprints, going beyond mere compliance with rules of traditional environmental law.⁷⁶ As already pointed out in another section, the current Constitution of Kenya 2010 outlines the national values and principles of governance which must guide all persons makes or implements public policy decisions. These values and principles include among others, sustainable development.⁷⁷ This is affirmed under the Companies Act, 2015⁷⁸ which provides that a director of a company should act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to, inter alia — the impact of the operations of the company on the community and the environment.⁷⁹

In addition to the foregoing statutory requirements on environmental reporting, corporations are also notably bound by the provisions of EMCA depending on the various projects or activities that they are involved in.

Under the Environmental Management and Coordination Act, *when an offence under the Act is committed by a body corporate, the body Corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act shall be guilty of an offence* (emphasis added). A Company Secretary is increasingly being viewed as an officer of the company. The law thus imposes a duty on the Company Secretary to ensure compliance with environmental law, rules and regulations.⁸⁰

The penalties under EMCA are harsh and can include imprisonment and fines that ran into hundreds of thousands of shillings.⁸¹ Offences under EMCA relate among other things, failing to

⁷⁴ Trevor D. Wilmshurst, Geoffrey R. Frost, "Corporate environmental reporting: A test of legitimacy theory", *Accounting, Auditing & Accountability Journal*, Vol. 13 Issue: 1, 2000, pp.10-26; Y Sumiani, Y Haslinda and Glen Lehman, 'Environmental Reporting in a Developing Country: A Case Study on Status and Implementation in Malaysia' (2007) 15 *Journal of cleaner production* 895;

⁷⁵ Beate Sjaafjell, 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board' (2018) 23 *Deakin Law Review* 41.

⁷⁶ Light, S.E., "The Law of the Corporation as Environmental Law." *Stanford Law Review* 71, no. 1 (2019), p.139.

⁷⁷ Constitution of Kenya 2010, Article 10.

⁷⁸ Companies Act, No. 17 of 2015, Laws of Kenya.

⁷⁹ Sec. 143(1), Companies Act, 2015; See also Sec. 655 (1); Sec. 655 (4) (b); Sec. 655 (6) (b).

⁸⁰ 'Role of the Company Secretary'

<http://aicd.companydirectors.com.au/resources/all-sectors/roles-duties-and-responsibilities/role-of-the-company-secretary?no_redirect=true> accessed 11 January 2020; Lee, J., "From 'Housekeeping' to 'Gatekeeping': The Enhanced Role of the Company Secretary in the Governance System." Available at SSRN 2733180 (2015); Dr Bob Tricker, 'The Significance of the Company Secretary' 60; Lee, J., "The corporate governance officer as a transformed role of the company secretary: An international comparison," *SCJ Int'l L. & Bus.* 14 (2017): 107.

⁸¹ S 138.

submit to inspection⁸², offences relating to Environmental Impact Assessment⁸³; offences relating to records⁸⁴; offences relating to standards⁸⁵; offences relating to hazardous waste⁸⁶; offences relating to pollution⁸⁷; and offences relating to restoration orders⁸⁸. The Act imputes personal liability even where the offence complained of was committed on account of another person (corporate body)⁸⁹; it is thus possible for a Company Secretary to be personally liable for environmental offences committed by the Company. The role of the Company Secretary in Environmental Compliance is thus a statutory one.⁹⁰ The imposition of liability on the directors and officers of a corporation is meant to act as a disincentive to ensure that they establish corporate mechanisms for environmental compliance, and thus avoid passing the cost of non-compliance to consumers and the general public.⁹¹

A Company Secretary as an officer of the company must then logically ensure that where an Environmental Impact Assessment is required to be prepared, the same has been prepared in accordance with the law⁹². Similarly, where an Environmental Audit is required to be carried out, the Company Secretary should ensure that it is prepared in accordance with the requirements of EMCA or the regulations made thereunder.⁹³ It also follows that the Company Secretary being an Officer of the Company has a duty to ensure compliance with standards set out under EMCA. If he/she does not do so, then liability in criminal law attaches.⁹⁴ Similarly, a Company Secretary should ensure that hazardous waste and other chemicals and radioactive materials are handled properly to avoid liability.⁹⁵

3.6 Way Forward

3.6.1 Enhanced Corporate Environmental Compliance

Environmental compliance by corporate organizations is mandatory under EMCA. The foregoing discussion has demonstrated that breach of environmental compliance may result in civil and criminal sanctions upon an organization. This relates to the sanctions that may be imposed for breach of environmental compliance requirements such as damages or closure of the corporation.

⁸² Sec. 137, EMCA.

⁸³ Sec. 138, EMCA.

⁸⁴ Sec. 139, EMCA.

⁸⁵ Sec. 140, EMCA.

⁸⁶ Sec. 141, EMCA.

⁸⁷ Sec. 142, EMCA.

⁸⁸ Sec. 143, EMCA.

⁸⁹ Sec. 145, EMCA.

Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council Of Nairobi [2013] eKLR, JR Case 251 of 2011.

⁹¹ Lord, R., Goldberg, S., Brunnée, J., & Rajamani, L. (Eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012), pp. 315-316.

⁹² Sec s 58 (7) EMCA; See also Sec. 43, Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.

⁹³ Sec. 68 (3), EMCA.

⁹⁴ Sec. 140, EMCA.

⁹⁵ Sec. 141, EMCA.

As already pointed out, officers of corporations such as directors and company secretaries have to ensure that all environmental laws, regulations and policies are adhered to. Breach of this duty may result in both civil and criminal liability under EMCA.⁹⁶

3.6.2 Adhering to Principles of Sustainable Development

Sustainable development is enshrined as one of the national principles under the Constitution and binds all persons including corporations.⁹⁷ Sustainable development is also captured under EMCA and incorporates the principles of public participation, international co-operation, inter and intra generational equity, polluter pays principle and the precautionary principle.⁹⁸

Corporations should therefore adhere to the principles of sustainable development to ensure that their economic activities meet the needs of both the present and future generations.

3.6.3 Corporate Social and Environmental Responsibility

Related to sustainable development is the idea of Corporate Social Responsibility (CSR). However, while sustainable development is a legal requirement, CSR is a voluntary undertaking. CSR has been defined as a transparent business practice based on ethical values, legal requirements compliance and respect for the community, people and the environment within which the business operates.⁹⁹

It has been argued that CSR contributes to the economic success of an organization since it meets the needs of stakeholders who are critical to its existence.¹⁰⁰ According to proponents of CSR, a firm's success is dependent on how it is able to safeguard relationship with stakeholders such as employees, communities and customers since socially responsible helps it gain support from such stakeholders.¹⁰¹ In Kenya, studies have shown that *corporations that have undertaken CSR initiatives such as environmental conservation programs have witnessed success in areas such as sales and market share (emphasis added)*.¹⁰² Corporations should therefore pursue corporate environmental responsibilities such as environmental conservation programmes which may include clean up exercises, restoration activities, tree planting exercises and environmental awareness campaigns. These activities have the ability to contribute to the economic growth of an organization.

3.6.4 Environmental Insurance

Environmental Insurance can be used as a tool for environmental management. This however is yet to be popularized in Kenya and EMCA does not have provisions on environmental insurance.

⁹⁶ EMCA, s. 145 (1).

⁹⁷ Art. 10 (2) (d), Constitution of Kenya, 2010.

⁹⁸ EMCA, s. 3 (5).

⁹⁹ Arora, R., & Richa, G. D. (2013). 'Corporate Social Responsibility–Issues and Challenges in India.' *International Journal of Research in Finance & Marketing*, 3 (2).

¹⁰⁰ Freeman. E, and Velamuri. R, 'A New Approach to CSR: Company Stakeholder Responsibility' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186223 [Accessed on 14/1/2020].

¹⁰¹ Ibid.

¹⁰² Mwancha. Y, and Ouma. C, 'Effects of Social Responsibility Initiatives on Performance of Safaricom Kenya Limited' *International Journal of Innovative Research & Development*, Volume 6, Issue 8, August 2017.

It has however been suggested that environmental insurance can be popularized in the country for both medium and large corporations to shield them against environmental liability which could turn out to be too costly.¹⁰³ Some insurance providers have packages on environmental liability covering environmental damage and clean-up costs for pollution.¹⁰⁴ It is therefore important to popularize environmental insurance in the country since *some cases of environmental liability may not be foreseen by a corporation and could arise due to natural acts (emphasis added)*. However, the strict liability rule imposes liability on the corporation even where such acts could not be foreseen. Through environmental insurance, it may be possible to shield a corporation from cases of environmental liability.

3.7 Regulating Grant of Concessions for Corporate Accountability and Transparency

3.7.1 Introduction

The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*¹⁰⁵ was enacted in 2016 to give effect to Article 71 of the Constitution of Kenya and for connected purposes.¹⁰⁶ Article 71 of the Constitution provides that a transaction is subject to ratification by Parliament if it—involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation¹⁰⁷ of any natural resource of Kenya; and is entered into on or after the effective date.¹⁰⁸ This Act was thus enacted in 2016 in line with the constitutional requirement that Parliament should enact legislation providing for the classes of transactions subject to ratification under clause (1).¹⁰⁹

This provision is similar to the one found in the Constitution of Ghana¹¹⁰ which was hailed as a step forward in safeguarding the country's resources against arbitrary grant of concessions to foreign companies by the country's leadership including chiefs especially during the colonial period.¹¹¹ This may not be very far from the reality in Kenya especially in such cases as the Lake Magadi soda ash mining concessions and the infamous Maasai community land disinheritance by the colonial masters.¹¹² Kenya has also suffered other instances of skewed contracts whose resultant activities have been characterised by past reported and unreported cases of non-disclosure

¹⁰³ Muigua, K. 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

¹⁰⁴ <https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability> [Accessed on 11/1/2020].

¹⁰⁵ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, No. 41 of 2016, Laws of Kenya.

¹⁰⁶ Ibid, Preamble.

¹⁰⁷ Notably, section 2 of the Act interprets "exploitation" to mean an activity that confers or is aimed at conferring a benefit on the beneficiary of the grant of the concession or right but does not include an activity that is exploratory in nature.

¹⁰⁸ Article 71(1), Constitution of Kenya 2010.

¹⁰⁹ Article 71(2), Constitution of Kenya 2010.

¹¹⁰ Article 268.

¹¹¹ Wouters, J., Ninio, A., Doherty, T., & Cisse', H. (Eds.), *The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*, The World Bank, 2015, p. 158.

¹¹² Kamau, J., "Magadi saga exposes the ugly side of capitalism," *Daily Nation*, Sunday April 21 2019. Available at <https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html> [11/1/2020].

and non-declaration of income by the mining companies in the country.¹¹³ Hence, the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016* was a welcome move by the Parliament of Kenya.

This section offers a critical appraisal of the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act* with a view to proposing some recommendations on how the Act can be used in ensuring that the natural resources are exploited and used in a way that benefits communities and the country at large.

3.7.2 Overview of the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016

This Act applies to any transaction entered into on or after the effective date which, under Article 71 of the Constitution, is subject to ratification by Parliament on account of the fact that the transaction- involves the grant of a right or concession by or on behalf of any person to another person for the exploitation of a natural resource of Kenya; and falls within the class of transactions designated as subject to ratification by section 4 of this Act.¹¹⁴

The Act also applies to any transaction involving the - national government, county government, state organ and all county government entities; and grant of a right or a concession by a private person in cases in which such transaction is required by this Act to be ratified by Parliament.¹¹⁵ This clarification is important to reign in on county governments which, in an attempt to diversify their sources of income and possibly power struggles, may enter into exploitation agreements with foreigners or even worse, frustrate any investors with operations in their counties. The County governments must however be involved in the process. For instance, in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*¹¹⁶, the Court affirmed that an issue involving prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the County Government – even if the primary activity is assigned to the National Government in our scheme of devolution.¹¹⁷

It can therefore be said that the Parliament is to come in later on in the process after the due process as per the Constitution and other statutory requirements has been complied with. Section 4 of the Act provides that the classes of transactions set out in the schedule are subject to ratification by Parliament pursuant to Article 71 of the Constitution.¹¹⁸ The Act spells out the transactions relating to natural resources, which are subject to the Act.¹¹⁹

¹¹³ Sanga, B., “Auditor General reveals how mining companies under-declare tax dues,” 25th Aug 2016. Available at

<https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues> [Accessed on 11/1/2020].

¹¹⁴ Sec. 3(1), *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*.

¹¹⁵ *Ibid*, sec. 3(2).

¹¹⁶ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

¹¹⁷ *Ibid*, para. 104.

¹¹⁸ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 4 (1).

¹¹⁹ Schedule [Section 4(1), 4(2)(e)].

The Act, however, exempts some transactions from ratification by Parliament.¹²⁰ While this exemption is well meaning, there is potential for abuse or confusion. For instance, where the Act exempts the grant of a concession or right to exploit a natural resource through a permit, licence or other authorization issued in accordance with the requirements of national or county government legislation from such ratification, what measures will be put in place to determine the seriousness of the transaction in question and the ramifications of such exemption? This, coupled with the exemption of the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract, are both likely to be used for personal gains especially in light of the rampant corruption in the country's governance structures. Would Parliament be compromised to classify a particular transaction as qualifying under these two exemptions for purposes of bypassing the Act's provisions? Again, how will grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract be qualified against the constitutional provisions that vest all minerals and mineral oils as defined by law in the government of Kenya?¹²¹ How are the private persons to either benefit from the exploitation or the ones to grant the concession to be determined to prevent abuse? Is it possible for a private person to use the Parliament through insider lobbying to access or get a particular transaction for exploitation of a particular resource? These are some of the questions that may arise in light of the listed exemptions.

A transaction, which under this Act, is subject to ratification by Parliament, shall only be effective once it is ratified, and where Parliament has declined to ratify any transaction under this Act, the transaction shall be null and void.¹²² The Act spells out certain relevant considerations in deciding whether or not to ratify an agreement: 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.¹²³

These considerations, if fully upheld may be useful in giving the ratification process some credence. However, this is based on the assumption that Parliament is above reproach as far as following due process and putting into consideration the general public's interests is concerned.

Notably, the Cabinet Secretary responsible for the transaction that is subject to ratification may, pursuant to Article 35 of the Constitution, grant a request that the agreement or portions of it ought not to be publicly disclosed on account of commercial confidentiality, national security or other public interest considerations.¹²⁴ While this may be a useful safeguard for purposes of commercial confidentiality, there is need for Parliament and other stakeholders to ensure that the same is not abused to hide or deny the public access to useful information.

¹²⁰ Ibid, sec. 4 (2).

¹²¹ Constitution of Kenya 2010, Article 62 (1) (f) (3).

¹²² Ibid, sec. 7.

¹²³ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, sec. 9.

¹²⁴ Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016, sec. 13 (1).

Arguably, any such non-disclosure should also be done in line with the mining regulations as envisaged under the Mining Act 2016, as already discussed elsewhere in this paper. It is assumed that these regulations and other relevant statutory requirements are to be complied with before the agreements reach the ratification stage in order to avoid any foul play as far as due process is concerned. These Regulations, among others under different statutes dealing with natural resources exploitation¹²⁵, are meant to ensure that the benefits flowing from such exploitation get to benefit the communities and the economy in general. Notably, there are still complaints from communities about either lack of involvement or lack of direct benefits such as employment benefits.¹²⁶ They have been feeling marginalised and sometimes outright ignored as far as benefit sharing is concerned.¹²⁷ The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016* was thus meant to include the Parliament in ensuring that natural resources are exploited in a responsible manner that benefits concerned communities and the people of Kenya in general.

3.7.3 Making Natural Resources Work for the People: Challenges and Prospects

It is noteworthy that the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act* outlines some of the relevant considerations in deciding whether or not to ratify an agreement as including: 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.¹²⁸

Apart from these considerations, it is worth pointing out that the Constitution has also laid out some 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.¹²⁹

It is noteworthy that natural resources' exploitation and all the related activities are meant to benefit the country as well as communities that live in the areas where these resources are to be found. The Constitution of Kenya 2010 makes provisions on "natural resources" which means the physical non-human factors and components, whether renewable or non-renewable, including—

¹²⁵ For instance, see Mining Act, No. 12 of 2016, Petroleum Act, No. 2 of 2019, Forests Management and Conservation Act, No. 34 of 2016, Water Act, No. 43 of 2016.

¹²⁶ Cordaid, "Oil Exploration in Kenya: Success Requires Consultation," Assessment Of Community Perceptions Of Oil Exploration In Turkana County, Kenya, Report, August, 2019; Etyang, H., "No oil will leave Turkana without security and jobs, protesters say," The Star, 27 June, 2018. Available at <https://www.the-star.co.ke/news/2018-06-27-no-oil-will-leave-turkana-without-security-and-jobs-protesters-say/> [Accessed on 11/1/2020].

¹²⁷ See generally, Schilling, J., Locham, R., & Scheffran, J., "A local to global perspective on oil and wind exploitation, resource governance and conflict in Northern Kenya." *Conflict, Security & Development* 18, no. 6 (2018): 571-600; see also Mwakio, P., "Mvurya: Public participation in mineral resource exploitation mandatory," Standard Digital, 22nd May, 2019. Available at <https://www.standardmedia.co.ke/business/article/2001326660/mvurya-public-participation-in-mineral-resource-exploitation-mandatory> [Accessed on 11/1/2020].

¹²⁸ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 9.

¹²⁹ Article 10(1), Constitution of Kenya 2010.

rocks, minerals, fossil fuels and other sources of energy.¹³⁰ While the Act may not require ratification of all the transactions involving exploitation of different resources, it is important to note that there are other legal provisions that seek to safeguard the interests of the country and the general public as far as benefit sharing is concerned and should therefore be upheld in entering these agreements.

While the Act is well meaning in its mandate, there are notably some earlier exploitation agreements that were entered into before the enactment of the Act and were not revised in line with the Act.¹³¹ The Act specifically provides that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.¹³²

The implication of this provision is that there may have been some important transactions that greatly affect communities but do not get the chance to undergo the ratification process. As a result, the communities feel sidelined as far as decision-making is concerned and the environment also gets to suffer. While there are notably other statutory provisions in place to take care of some of these issues, there is the risk of complacency in some government organs and agencies which may mean that due process may not have been followed.

There are still some complaints from some Kenyan communities about how natural resources exploitation activities within their localities are carried out and the lack of inclusion in decision-making and benefit sharing.¹³³ For instance, the oil and gas mining activities in the Turkana region have been facing serious challenges from the locals who have been complaining about inadequate consultations, inadequate benefits and a general feeling of marginalization from the Government and the contractors.¹³⁴ There have also been complaints from other natural resources exploitation about environmental degradation which directly affects the livelihoods of the communities living with such areas.¹³⁵

¹³⁰ See Article 260; and Section Five of the Constitution of Kenya.

¹³¹ For instance, the agreements on exploitation of the oil and gas in Turkana; Titanium mining in Kwale, among others.

¹³² Sec. 16, Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016.

¹³³ 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 11/1/2020].

¹³⁴ Johannes, E. M., Zulu, L. C., & Kalipeni, E., "Oil discovery in Turkana County, Kenya: a source of conflict or development?" *African Geographical Review* 34, no. 2 (2015): 142-164; Mkutu Agade, K., "Ungoverned Space and the Oil Find in Turkana, Kenya," *The Round Table* 103, no. 5 (2014): 497-515; Enns, C., & Bersaglio, B., "Pastoralism in the time of oil: Youth perspectives on the oil industry and the future of pastoralism in Turkana, Kenya." *The Extractive Industries and Society* 3, no. 1 (2016): 160-170; Enns, C., "Experiments in governance and citizenship in Kenya's resource frontier," PhD diss., University of Waterloo, 2016. Available at <https://core.ac.uk/download/pdf/144149828.pdf> [Accessed on 11/1/2020]; See also Parliament of Kenya, the Senate, The Hansard, Wednesday, 27th March, 2019, Petitions: Iron Ore Mining In Kishushe Area, Taita-Taveta County, available at <http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2027th%20March%202019.pdf> [Accessed on 11/1/2020].

¹³⁵ 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,

There is scarce information on the existing ratifications since 2016 because, although the Act provides that the Cabinet Secretary shall establish and maintain a central register of agreements relating to natural resources and other transactions which have been ratified as per the Act as well as ensuring that on an annual basis, they publish a report on the summary of the transactions submitted under this Act and the status of ratification of transactions, there are no publicly available reports or published summary of such reports. The effect of such laxity on the part of the Ministry is violation of the right to information which is useful for public participation in decision-making processes and any potential pursuit of their other rights in case of perceived violation.

Environmental laws and regulations and other laws that govern natural resources exploitation are meant to ensure that due process and other legal requirements are met but there are still instances where exploitation agreements are still challenged in courts and other forums for alleged failure to abide by the law.¹³⁶ In order to bring the existing contracts or agreements especially in the extractives industry in line with the law on ratification of agreements, there may be a need to consider incorporating periodic contract review mechanisms. Such reviews would also be in line with international best practices, such as the principles of Extractive Industries Transparency Initiative (EITI)¹³⁷ which set the global standard to promote the open and accountable management of oil, gas and mineral resources.¹³⁸ Through reviews, there may be demonstrated accountability and transparency which is important for the contractors, the government and the communities at large.¹³⁹ Periodic contract review mechanisms, which are provisions in contracts that formally require parties to meet at particular intervals to review the terms of the contract, are mechanisms that may facilitate the process of negotiating contractual changes to accommodate changing circumstances over the term of extractive industries contracts.¹⁴⁰

September, 2017 Available at <http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf> [Accessed on 11/1/2020]; See also Schilling, J., Locham, R., Weinzierl, T., Vivekananda, J., & Scheffran, J., "The nexus of oil, conflict, and climate change vulnerability of pastoral communities in northwest Kenya," *Earth System Dynamics* 6, no. 2 (2015): 703-717.

¹³⁶See Parliament of Kenya, the Senate, The Hansard, Wednesday, 27th March, 2019, Petitions: Iron Ore Mining in Kishushe Area, Taita-Taveta County, available at

[http://www.parliament.go.ke/sites/default/files/2019-](http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2C%2027th%20March%2C%202019.pdf)

[04/Wednesday%2C%2027th%20March%2C%202019.pdf](http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2C%2027th%20March%2C%202019.pdf) [Accessed on 11/1/2020]; See also Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); Okiya Omtatah Okoiti v Kenya Power and Lighting Company & 10 others [2018] eKLR, Petition No. 14 of 2017.

¹³⁷See Muigua, K., "Promoting Open and Accountable Management of Extractives in Kenya: Implementing the Extractives Industries Transparency Initiative," August, 2019. Available at <http://kmco.co.ke/wp-content/uploads/2019/08/Implementing-the-Extractives-Industries-Transparency-Initiative-in-Kenya-Kariuki-Muigua-15th-August-2019.pdf> [Accessed on 11/1/2020].

¹³⁸ Extractives Industries Transparency Initiative, "Who we are," available at <https://eiti.org/who-we-are> [Accessed on 11/1/2020].

¹³⁹Haufler, V., "Disclosure as governance: The extractive industries transparency initiative and resource management in the developing world." *Global Environmental Politics*, vol.10, no. 3 (2010): 53-73; See also African Union, "Africa mining vision," AU, Addis Ababa (2009).

¹⁴⁰ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *Journal of Sustainable Development Law and Policy (The)*, Vol.7, no. 1 (2016): 116-136, p. 116; Lax, D. A., & Sebenius, J. K., *Insecure contracts and resource development*, Division of Research, Graduate School of Business Administration, Harvard University, 1981.

Some countries such as Tanzania have sought to renegotiate their extractives exploitation contracts where it was deemed necessary. The Tanzanian government enacted laws that introduced changes in the exploitation of natural resources in the country's mining sector to ensure that Tanzania's natural resources are exploited to benefit the citizens.¹⁴¹ Some of the laws such as the Natural Wealth and Resources Contracts (*Review and Re-negotiation of Unconscionable Terms*) Act, 2017¹⁴² are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.¹⁴³ The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 is meant to give powers to parliament to direct the Government to re-negotiate and rectify any term that seem to bear questionable circumstances in the contracts.

The provision for renegotiation in Tanzania is a notable departure from Kenya's position which is that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.¹⁴⁴ The question that arises is whether, where such a transaction is later rendered unconscionable due to the prevailing circumstances, is there any legal framework to facilitate renegotiation as is the case in Tanzania.

While statutory annual reporting requirements under different laws may seem like a cure for this, it is worth pointing out that there is hardly any mechanism in place to ensure that such reporting is done, and where the Cabinet Secretary in question fails to follow up or raise queries on such reporting, the lack or failure of contractors to report will most likely go unreported and unnoticed.¹⁴⁵ It may thus be necessary to consider going the Tanzanian way; putting in place a separate law to govern such matters. It has rightly been pointed out that provided that the parties take advantage of the opportunity to renegotiate terms, the contract terms and conditions can be readjusted before the parties are so desperate and frustrated that the investor decides to stop work or the Government decides to terminate permits and concessions.¹⁴⁶

¹⁴¹ "Tanzania seeks to reform mining sector for citizens' benefit," The East African, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 11/1/2020].

¹⁴² Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No.6 of 2017, Laws of Tanzania. Available at <https://tanzlii.org/tz/legislation/act/2017/6-0> [Accessed on 11/1/2020].

¹⁴³"Tanzania seeks to reform mining sector for citizens' benefit," The East African, Saturday July 1 2017, available at <https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html> [Accessed on 11/1/2020].

¹⁴⁴ Sec. 16, Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016.

¹⁴⁵ Stuesson, A., & Zobel, T., "The Extractive Industries Transparency Initiative (EITI) in Uganda: who will take the lead when the government falters?" The Extractive Industries and Society, Vol.2, no. 1 (2015): 33-45.

¹⁴⁶ Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," op cit., p. 117; Smith, D. N., & Wells, L. T., "Conflict avoidance and concession agreements," Harvard International Law Journal 17 (1976): 51.

3.8 Conclusion

The Constitution of Kenya 2010 calls for concerted efforts of all persons in governance matters including in natural resources governance and management.¹⁴⁷ Sound environmental governance and natural resources management ought to consider these values and principles.¹⁴⁸ The Parliament of Kenya is afforded an opportunity to determine how natural resources exploitation is carried out through ratification of agreements. It is important that the Parliament not only considers the ability of the contractor in question to deliver but must also consider the country's development policies and must also remember the affected communities in certain areas with a view to ensuring that the resources in question get to benefit them especially in light of the fact that they may bear the brunt of most of the adverse environmental degradation. A good example would be the people living in Turkana region where oil and gas exploration and exploitation activities are ongoing.

The people living in Mui Basin region will also bear the brunt of the adverse effects of coal mining.¹⁴⁹ Laws are meant to protect the interests of the people and the Parliament must as such ensure that any ratification of agreements that they carry out are geared towards this. Existing agreements should also be reviewed accordingly to ensure that the considerations set out under existing laws and specifically the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*.

It is important that the policy and legal framework and all the relevant actors work towards enhancing benefits from natural resources exploitation. Natural resources exploitation should contribute to the realisation of the sustainable development goals.¹⁵⁰ Corporate environmental compliance remains a central theme in the environmental governance debate in Kenya. In case of violation of these rules, both civil and criminal liability may be imposed upon the corporation. Corporations can therefore ensure environmental compliance by *adhering to environmental laws, rules and regulations, promoting sustainable development, engaging in Corporate Social Responsibility activities and taking up environmental liability insurance* (emphasis added). Corporate Environmental Compliance is thus vital in the quest for attainment of sustainable development.

4. Realising Environmental Democracy in Kenya for Effective Environmental Management

4.1 Introduction

This section critically examines the concept of environmental democracy in light of the current Constitution of Kenya 2010 and the existing framework on facilitating enjoyment of environmental democracy by 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 section proffers

¹⁴⁷Article 10(1), Constitution of Kenya 2010.

¹⁴⁸Prno, J., & Slocombe, D. S., "Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories," *Resources policy*, Vol.37, no. 3 (2012): 346-357.

¹⁴⁹Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

¹⁵⁰UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

recommendations on the practical ways through which this right can be actualized based on the existing legal, institutional and policy frameworks.

Over the years, environmental democracy has been incorporated as one of the important aspects of environmental governance and management both in the international and national environmental law discourse. While most national legal instruments on environmental governance do not expressly refer to the concept of environmental democracy as such, the same is incorporated within the provisions, both constitutional and statutory. Indeed, it has been pointed out that the global trend toward adopting environmental rights within national constitutions has been largely regarded as a positive development for both human rights and the natural environment.¹⁵¹

The section traces environmental democracy within the constitutional and main statutory framework on environment law in Kenya. It also offers a post 2010 Constitution perspective on the extent to which the concept of environmental democracy has been embraced and incorporated into the environmental policies and laws in the country.¹⁵² The author ultimately makes a case for environmental democracy as a means to an end in promoting and realisation of environmental rights for Kenyan communities, for peace and development, in the context of sustainable development.

4.2 Need for Environmental Democracy as an Environmental Right

4.2.1 The Concept of Environmental Democracy

The concept of environmental governance has been defined as encompassing the relationships and interactions among government and non-government structures, procedures and conventions, where power and responsibility are exercised in making environmental decisions.¹⁵³ Furthermore, it concerns how the decisions are made, with a particular emphasis on the need for citizens, interest groups, and communities generally, to participate and have their voices heard.¹⁵⁴ Principles such as inclusivity, representation, accountability, efficiency, and effectiveness, as well as social equity and justice, are believed to be the foundations of good governance.¹⁵⁵

‘Environmental democracy is rooted in the idea that meaningful public participation is critical to ensure that land and natural resource decisions adequately and equitably address citizens’ interests.¹⁵⁶ In addition, at its core, environmental democracy involves three mutually reinforcing rights: the right to freely access information on environmental quality and problems; the right to

¹⁵¹ See Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *Global Environmental Politics* Early Access (2018): 99-121 at 99.

¹⁵² See a pre-Constitution 2010 discussion on the same topic, Muigua, K & Musyimi, P.N., "Enhancing Environmental Democracy in Kenya" (2008). Available at

http://www.kmco.co.ke/attachments/article/81/072_Envtal_Dem_Kenya.pdf [Accessed on 15/1/2020].

¹⁵³ Jeffery, Michael I, "Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice," *Journal of South Pacific Law* 9, no. 2 (2005).

¹⁵⁴ *Ibid.*

¹⁵⁵ "Part II: State of the environment," 54. Available at

https://www.environment.gov.za/sites/default/files/docs/part2_environmental_governance.pdf [Accessed on 15/1/2020].

¹⁵⁶ Environmental Democracy Index, 'Background and Methodology: Environmental Democracy Background,' available at

http://environmentaldemocracyindex.org/about/background_and_methodology [Accessed on 15/1/2020].

participate meaningfully in decision-making; and the right to seek enforcement of environmental laws or compensation for harm.¹⁵⁷

Democratic participation of citizenry in political processes is considered as one of the tenets of an open and just society around the world.¹⁵⁸ It has also been opined that 'participatory democracy seems at first glance to be wholly congenial with the spirit of science, which places its emphasis on free inquiry, open access to information, and informed critical debate'.¹⁵⁹ The main argument is that 'increasing knowledge and increasing participation - in the sense of larger numbers of voices at the table - do not by themselves automatically tell us how to act or how to make good decisions....because participation and science together often produce irreducible discord and confusion.'¹⁶⁰

Environmental democracy is pegged on the right and ability of the public to freely access relevant and timely information, provide input and scrutiny into decision making, and to challenge decisions made by public or private actors which may harm the environment or violate their rights before an accessible, independent, and fair legal authority.¹⁶¹ Environmental democracy is therefore an important element in effective environmental governance.

States make attempts to address environmental changes experienced at the national level by adopting environmental policy innovations whose origins lie at the global level, including environmental institutions, instruments, laws, and policies.¹⁶² Principle 10 of the *1992 Rio Declaration on Environment and Development*¹⁶³ envisages the various elements of environmental governance where it provides that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.'¹⁶⁴

Although not directly applicable to Kenya, the *Aarhus Convention*¹⁶⁵ offers significant pointers on effective environmental governance. The Convention provides for: the right of everyone to receive environmental information that is held by public authorities ("access to environmental

¹⁵⁷ Ibid.

¹⁵⁸ See Jasanoff, Sheila, "The dilemma of environmental democracy," *Issues in Science and Technology* 13, no. 1 (1996): 63-70 at 64; See also Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *Global Environmental Politics Early Access* (2018): 99-121 at 102.

¹⁵⁹ Jasanoff, Sheila, "The dilemma of environmental democracy," *op cit.*, at 64.

¹⁶⁰ Ibid, at 65.

¹⁶¹ Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.2. Available at http://environmentaldemocracyindex.org/sites/default/files/files/EDI_Technical%20Note%20Final%207_9_15.pdf [Accessed on 15/1/2020].

¹⁶² Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *op cit.* at 99.

¹⁶³ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992) Annex I, Rio Declaration on Environment and Development the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I). Adopted in Rio de Janeiro, Brazil on 14 June 1992.

¹⁶⁴ Rio Declaration on Environment and Development the United Nations Conference on Environment and Development.

¹⁶⁵ United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 1998.

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").¹⁶⁶

It has been argued that 'participation is central to the notion of environmental democracy, and that participation in environmental governance enhances the likelihood that government agencies will be held accountable to the public; infuses local knowledge into decision-making processes; increases popular support for policies; and produces higher-quality planning outcomes, environmental decisions, and conservation efforts'.¹⁶⁷

4.2.2 Environmental Democracy as an Empowerment Tool for Achieving Sustainable Development

The concept of sustainability provides the nexus of economic, social, and environmental spheres of life.¹⁶⁸ Sustainable Development Goal (SDGs) 16 aims 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'.¹⁶⁹ The SDGs also seek to promote participation of local communities in natural resource management.¹⁷⁰ The environmental democracy rights of access to information, public participation, and access to justice in environmental matters are promoted as key drivers of informed, accountable decision making and citizen empowerment.¹⁷¹

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to access and influence decision-making processes on various levels (household, community, national, global) in order to ensure the proper representation of one's interests (also described as getting a —voice); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.¹⁷²

It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because

¹⁶⁶ European Commission, The Aarhus Convention: What is the Aarhus Convention? Available at <http://ec.europa.eu/environment/aarhus/> [Accessed on 15/1/2020].

¹⁶⁷ Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 102.

¹⁶⁸ Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 104; See also Fisher, Joshua & Kristen Rucki, "Re-conceptualizing the Science of Sustainability: A Dynamical Systems Approach to Understanding the Nexus of Conflict, Development and the Environment," *Sustainable Development* 25, no. 4 (2017): 267-275.

¹⁶⁹ 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.

¹⁷⁰ Ibid, Goal 6b.

¹⁷¹ Worker, Jesse & De Silva, Lalanath, The Environmental Democracy Index, (World Resources Institute, Technical Note Working Paper, June 2015), p.1.

¹⁷² Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online*, Vol. 2, No 1, 2009, p.121.

it is the correct thing that you have this empowerment.¹⁷³ Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.¹⁷⁴

It is important to point out that while policy and legal framework is necessary, it cannot alone guarantee achievement of environmental justice for communities.

Indeed, the place of public participation has been justified as important in getting the public's views on scientific and technological issues.¹⁷⁵ Sustainable development needs to draw upon the best knowledge available from the relevant scientific and stakeholder communities.¹⁷⁶ Public participation, as observed above, is important as it provides a forum whereby the scientific information and values of the publics and the agency can be integrated so that the final decision is viewed as both desirable and feasible by the broadest portion of society.¹⁷⁷

Environmental democracy presents an opportunity to entrench a culture of environmental justice for communities through formal and informal approaches.

4.3 Status of Environmental Democracy in Kenya

As already pointed out, environmental democracy includes the following: the rights of access to information, public participation and access to justice in environmental matters. These are mainly promoted through various concepts such as transparency, accountability and inclusiveness in environmental governance.

The Constitution of Kenya 2010 envisages the national values and principles of governance, including environmental governance matters. The relevant values and principles in this context include: democracy and participation of the people; equity; social justice; inclusiveness; equality; non-discrimination and protection of the marginalised; good governance; integrity; transparency and accountability; and sustainable development.¹⁷⁸

The Constitution of Kenya 2010 guarantees the right of every citizen to: access information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom.¹⁷⁹ The State is however obligated to publish and publicise any important information affecting the nation.¹⁸⁰ These constitutional provisions are buttressed by the

¹⁷³ The Hendrick Hudson Lincoln-Douglas Philosophical Handbook, Version 4.0 (including a few Frenchmen), p. 4. Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 15/1/2020].

¹⁷⁴ Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement', *Political Geography*, (Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, pp. 393–406.

¹⁷⁵ Petts, J. and Brooks, C., "Expert Conceptualisations of the Role of Lay Knowledge in Environmental Decision making: Challenges for Deliberative Democracy," *Environment and Planning A*, 38, 2006, pp.1045-1059 at pp.1045-46.

¹⁷⁶ Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 4. Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 15/1/2020].

¹⁷⁷ *Ibid*, p.4.

¹⁷⁸ Article 10(2), Constitution of Kenya 2010.

¹⁷⁹ Article 35(1), Constitution of Kenya 2010.

Article 35(3), Constitution of Kenya 2010.

*Access to Information Act, 2016*¹⁸¹ which 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.

The *Environment and Land Court Act, 2011* provides that ‘in exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—the principles of sustainable development, including—the principle of public participation in the development of policies, plans and processes for the management of the environment and land’ and the national values and principles of governance under Article 10(2) of the Constitution.¹⁸²

Under Article 69 (1) (d) of the Constitution, which deals with the environment and natural resources, the State is obligated to “encourage public participation in the management, protection and conservation of the environment.”

There is an attempt by Parliament to statutorily entrench public participation through the proposed *Public Participation (No. 2) Act, 2019*¹⁸³ which seeks to provide a general framework for effective public participation; to give effect to the constitutional principles of democracy and participation of the people under Articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) of the Constitution; and for connected purposes.¹⁸⁴

The development of a law on public participation is a step in the right direction in enhancing environmental democracy in Kenya. One of the pillars underpinning the devolved system of governance in Kenya is public participation as envisaged under Article 174(c) of the Constitution of Kenya which outlines one of the objects of devolution as “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”. Indeed, the Fourth Schedule to the Constitution, in Part 2(14), states that the functions and powers of the County government include: “*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.*”¹⁸⁵

In The Matter of the National Land Commission [2015] eKLR, the Supreme Court was of the opinion that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy.¹⁸⁶

¹⁸¹ Access to Information Act, No. 31 of 2016, Laws of Kenya.

¹⁸² Section 18, Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

¹⁸³ Public Participation (No. 2) Act, 2019, Nairobi, 11th October, 2019), Kenya Gazette Supplement No. 170 (National Assembly Bills No. 71).

¹⁸⁴ Preamble, Public Participation (No. 2) Act, 2019.

¹⁸⁵ See also County Public Participation Guidelines 2016.

¹⁸⁶ *In The Matter of the National Land Commission [2015] eKLR*, para. 21; See also Muigwa, K., et al, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

Environmental democracy is a means to an end; the aim is to achieve environmental justice.¹⁸⁷ Despite the foregoing constitutional and statutory provisions guaranteeing public participation, access to information and access to justice in environmental matters, Kenya still lags behind as far as environmental democracy is concerned. There arises a challenge regarding the implementation of the environmental rights as guaranteed under the Constitution and the other statutes. The Constitution 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’.¹⁸⁸

Communities are still suffering in the hands of foreign and local investors and complacent state agencies who fail to uphold the rule of law in environmental governance matters.¹⁸⁹ The next section looks at how communities and other stakeholders can employ more meaningful and practical approaches for realisation of environmental democracy for the Kenyan people.

4.4 Realising Environmental Democracy in Kenya

Enhanced environmental democracy for the Kenyan people is one of the ways through which the internationally and constitutionally guaranteed environmental rights can be achieved. The associated rights of access to information, access to public participation, and access to justice (the three “access rights”) are considered practical means of ensuring that decisions by governments consider sustainable development concerns and the interests of the poor.¹⁹⁰ There are diverse ways through which these rights can be promoted and realised, ranging from formal to informal mechanisms. It has been documented that ‘that where environmental policy incorporates procedural rights, environmental protection efforts are more robust’.¹⁹¹

In addition, ‘achieving environmental justice requires that vulnerable communities have opportunities to participate meaningfully in decision-making processes’.¹⁹² Equipping underrepresented groups with environmental information and avenues for influencing policy decisions is also believed to strengthen the values and practices associated with democracy’.¹⁹³ Different forms of participatory processes have also been suggested as a way of improving environmental governance.¹⁹⁴

¹⁸⁷ The 2030 Agenda for Sustainable Development 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. (Para. 16) (https://cic.nyu.edu/sites/default/files/publication_sdg16_roadmap_discussion_paper_07mar17.pdf [Accessed on 15/1/2020].).

¹⁸⁸ Article 22(1), Constitution of Kenya 2010.

¹⁸⁹ 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

15/1/2020]; 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.

¹⁹⁰ World Resources Institute, “The Access Initiative (TAI),” available at <http://www.wri.org/our-work/project/access-initiative-tai/commissions> [Accessed on 15/1/2020].

¹⁹¹ Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *op cit.* at 100.

¹⁹² *Ibid.*, at 100.

¹⁹³ *Ibid.*, at 100.

¹⁹⁴ *Ibid.*, at 102.

This section proffers suggestions on how environmental democracy can meaningfully be realised for the benefit of all. While this section is not exhaustive on the possible ways of doing this, it offers some of the most viable means through which environmental democracy as a facilitative right can be achieved.

4.4.1 Mobilising Communities/Citizenry through Demonstrations, Picketing and Petitions

The Constitution of Kenya 2010 guarantees that ‘every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities’.¹⁹⁵ Courts have also commented on this right and affirmed its importance in expressing personal views as part of a democratic society.¹⁹⁶

When done within the confines of law, assemblies, demonstrations, picketing and petitions can be effective channels of realizing environmental democracy for the general public and affected communities in cases of environmental justice.¹⁹⁷ These channels are especially useful in instances where there are challenges in accessing courts for public litigation either due to limited resources or lack of courthouses. This channel has successfully been used in other jurisdictions with satisfactory results..¹⁹⁸

Petitions to the Parliament, with proper guidance, can also provide a good channel for communities especially those suffering injustices to communicate their concerns and problems to the Parliament for discussion and possibly policy and legal responses.¹⁹⁹ It is, therefore, important to sensitise communities on the important role that demonstrations and picketing can play in enhancing environmental justice by giving a voice to the unheard communities.

4.4.2 Role of Media, Civil Society in Environmental Governance

Scholars have suggested that the civil society can play a major role in global environmental governance including: collecting, disseminating, and analysing information; providing input to agenda-setting and policy development processes; performing operational functions; assessing environmental conditions and monitoring compliance with environmental agreements; and advocating environmental justice.²⁰⁰

Regarding the place of media in environmental governance, it has been documented that countries with a larger newspaper circulation have better environmental responsiveness, on average, despite controlling for the extent of environmental regulation, the availability of information on environmental outcomes, and the level of economic development measured as GDP per capita.²⁰¹

¹⁹⁵ Article 37, Constitution of Kenya 2010.

Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others [2016] eKLR, Petition 169 of 2016.

¹⁹⁷ Ibid.

¹⁹⁸ Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 65.

¹⁹⁹ Article 118 (1), Constitution of Kenya 2010.

²⁰⁰ See Gemmill, Barbara & Abimbola Bamidele-Izu, "The role of NGOs and civil society in global environmental governance," *Global environmental governance: Options and opportunities* (2002): 77-100 at 77; 83.

²⁰¹ Dyck, Alexander & Zingales, Luigi, "The Corporate Governance Role of the Media," August, 2002, p.5. Available at

<http://faculty.chicagobooth.edu/finance/papers/corporate%20governance.pdf> [Accessed on 11/1/2020].

Furthermore, public opinion pressure generated by an active press is also essential to efforts by private sector organizations to use self-regulation to improve corporate governance.²⁰²

An improved working relationship between the government and non-state actors aimed at enhancing the contributions from civil society participation need to be enhanced through a strengthened, more formalized structure for engagement.²⁰³

4.4.3 Streamlining Access to Environmental Information

Ensuring access to information on environmental matters has been touted as one of the ways that enhance the capacity of citizens to check abuses that public or private actors commit.²⁰⁴ Empowered communities also find it easier to hold to account those who flout environmental laws, be they government entities, private institutions or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors. It has rightly been asserted that informed with basic facts about the quality of their environment, citizens can become active participants in identifying and resolving issues at both local and national levels.²⁰⁵

Dissemination of information and knowledge in meaningful forms can enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

4.4.4 Enhanced Public Participation

Effective participation in decision-making processes by local communities is believed to be one of the ways through which they can articulate and effectively enforce their common interest.²⁰⁶ The need for a broader conceptualisation of public participation was canvassed in the case of *Thuku Kirori & 4 Others v. County Government of Murang'a*²⁰⁷ where the Court held that *the participation of the public in affairs that concern them should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals who are out to rip maximum profits out of services for which they are neither registered nor qualified to offer; the ultimate goal for public engagement as envisaged in the constitution is for the larger public benefit*²⁰⁸(emphasis added).

Notably, natural resource related conflicts in Kenya are still prevalent and a cause of much concern. 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

²⁰² Ibid, at 11.

²⁰³ Gemmill, Barbara & Abimbola Bamidele-Izu, "The role of NGOs and civil society in global environmental governance," *Global environmental governance: Options and opportunities* (2002): 77-100 at 96.

²⁰⁴ Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *op cit.* at 103.

²⁰⁵ Hazen, S., "Environmental democracy," *Our Planet* 8.6-March 1997, *op cit.*

²⁰⁶ GH, Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* para. 20.

²⁰⁷ Petition No. 1 of 2014; [2014] eKLR.

²⁰⁸ See also in the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference No. 2 of 2014, Para. 340.

through public participation. Competition for scarce resources may lead to a ‘survival of the fittest’ situation.²⁰⁹

Lack of environmental democracy and environmental justice aggravates the situation since the affected groups are neither involved nor supplied with information regarding the resources. The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy.²¹⁰ Environmental justice ensures equitable treatment of people in ensuring access to and sharing of environmental resources and justice in environmental matters.²¹¹

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the Constitution.²¹² 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.²¹³

4.4.5 Entrenching Environmental Ethics

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. It calls for active participation of all. Kenyans have a role to play in achieving sustainable development agenda. There is therefore a need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same. The citizenry should practise preventive measures. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources.

There is 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.

²⁰⁹ See generally, “Section 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-Section-5-EN.pdf> [Accessed on 15/1/2020].

²¹⁰ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), p. 332.

²¹¹ United States Environmental Protection Agency, ‘Environmental Justice Analysis’, available at <http://www.epa.gov/sustainability/analytics/environmental-justice.htm> [Accessed on 15/1/2020].

²¹² See Art. 60(1) (g); Art. 159.

²¹³ 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 [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 15/1/2020].

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 environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.²¹⁴

Apart from inclusion in decision-making and governance matters, these communities should be empowered economically and socially in a way that ensures that they have a diversified source of livelihood in order to insulate them against climate change and other adverse environmental factors. This is also a way of ensuring that pressure on available environmental resources is minimised and subsequently reduce or prevent emergence of inter-ethnic conflicts.

4.4.6 Proactive Role of Courts in Environmental Justice

The judiciary is considered a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance amongst environmental, social and developmental considerations through its judgments and declarations.²¹⁵ The *Rio Declaration* in principle 10 emphasises the importance of courts by stating that: “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 and remedy, shall be provided (emphasis added).²¹⁶

Section 3 (5) of *Environment (Management and Coordination) Act 1999*²¹⁷ (EMCA) provides that “in exercising the jurisdiction conferred upon the Court under subsection 3, the High Court shall be guided by the principles of sustainable development. Courts have a role to play in promoting sustainable development agenda. This has also been affirmed through various cases. For instance, in *Mohamed Ali Baadi & 9 Others v Attorney General* [2018] eKLR, the Court observed that there is a narrow class of cases where the exhaustion doctrine in environmental-related controversies does not mandatorily oust the jurisdiction of the court as the first port of call, especially where the alternative fora do not provide an accessible, affordable, timely and effective remedy. The court was also of the opinion that the precautionary principle allows the court to intervene where it is necessary to do so in order to avert a violation of environmental governance principles. This approach envisages intervention by the Courts to step in and protect the environment without necessarily looking for immediate proof of likely violation of principles of environmental governance.

In the case of *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR, the Court rightly stated that “Besides the above general guiding principles, a court seized of an environmental dispute, whether

²¹⁴ 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 15/1/2020].

²¹⁵ Gupta, K.S., The role of judiciary in promoting sustainable development: Need of specialized environment court in India. *Journal of Sustainable Development*, Vol. 4, No.2, 2011, p.249-253 at p. 249.

²¹⁶ United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

²¹⁷ No. 8 of 1999, Laws of Kenya.

at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests”.²¹⁸

The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws and principles of environmental law, including promotion of sustainable development, are interpreted and applied fairly, efficiently, and effectively.²¹⁹

4.5 Conclusion

Environmental democracy, while not expressly acknowledged or recognised as one of the environmental rights, is a crucial component of the procedural rights associated with realisation of environmental rights, especially environmental justice. It is an important link in actualizing and providing a channel through which the general environmental rights may be realised by all, regardless of their social standing.

Getting a platform to voice their environmental related concerns is important for affected persons or communities. Enhanced environmental democracy can potentially afford them this platform. Thus, environmental democracy is an important component of procedural justice in environmental justice that must be cultivated for the sake of securing a brighter future for realization of environmental rights for all.

Democratic engagement in environmental governance is essential to achieving a healthy flourishing environment, which can support both nature and the health and wellbeing of society. Environmental democracy can be a driver of change towards achieving human rights in the environmental sphere.

5. The Sustainable Management of the Extractives Industry in Kenya: The (Dis) Connect

5.1 Introduction

This section critically discusses the regulatory framework governing the extractives industry in Kenya. It highlights the prospects of the existing laws in enhancing the sector's returns and contribution to the national development agenda. The extractives sector is an area that comes with a lot of hopes for the public worldwide, with the expectations that their governments will use these resources to make their lives as well as the national economy better. These expectations may however need to be managed through ensuring that the said groups of people have the relevant information on the available resources and how the same are to be utilised.

²¹⁸ Para 22, Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR.

²¹⁹ 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 15/1/2020].

One of the most efficient ways of managing these expectations is through promoting open, accountable and transparent governance of the extractives sector as well as how the revenues accrued are utilised. Where such openness and transparency in management of extractives lack, there has been negative effects on the socio-economic development in what is commonly referred to as the resource curse. Unmet expectations have often resulted in conflicts. It is for these reasons that the international community have often attempted to come up with best practices in form of guidelines to help nation states to put in place and implement measures that promote open, accountable and transparent governance of the extractives sector.

The section also discusses some of the loopholes that must be addressed by Kenya's policy makers and other stakeholders in order to realise the full benefits of the new laws, if any. One of the most common initiatives geared towards this is the Extractive Industries Transparency Initiative (EITI) which is meant to promote the open and accountable management of oil, gas and mineral resources. This section discusses how Kenya, with its nascent extractives sector can adopt and implement the EITI standard in ensuring open and accountable management of oil, gas and mineral resources.

The extractive industry mainly includes oil, gas and mining. The main argument is that implementation of the EITI standard alongside the domestic laws governing the sector can ensure that Kenya escapes the resource curse that has bedeviled other countries that have seen the sector becoming a source of agony instead of development as anticipated. Notably, these principles also form part of the national values and principles of governance enunciated under the current Constitution of Kenya 2010 and it is therefore argued that the EITI initiative and the principles therein ought to be implemented in a complementary manner.

Kenya's mining subsector and the extractives in general can be considered relatively small considering that its current contribution to the national Gross Domestic Product (GDP) is much smaller than the expected potential.²²⁰ However, there have been improved hopes of higher incomes from this sector especially with the discovery of various mineral deposits in various parts of the country.²²¹ These mineral resources come with great hopes of boosting the country's development agenda.²²²

²²⁰ KPMG, "Analysis of Mining Act 2016," July 2016, p. 1. Available at <https://assets.kpmg/content/dam/kpmg/ke/pdf/kpmg-mining-act-2016-analysis.pdf> [Accessed on 16/1/2020].

²²¹ Scola Kamau and Christine Mungai, "Kenya's \$100 billion hidden mineral deposits," *The East African*, Saturday July 20 2013. Available at <https://www.theeastafrican.co.ke/news/Kenya-hits-USD100-billion-rare-earth-jackpot-/2558-1920964-ma895tz/index.html> [Accessed on 16/1/2020].

Mrima Hill, in the coastal county of Kwale, has one of the top five rare earth deposits in the world. The area also has niobium deposits estimated to be worth \$35 billion.

²²² 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 on 16/1/2020]; Chimboza, R., "More should and can be done to start taking mining sector seriously," *Daily Nation*, Tuesday October 4 2016.

5.2 Legal and Institutional Framework on Kenya's Extractives Industry: Gaps and Prospects

The main legal instrument that lays out the core governance principles for the natural resources exploitation in the country is the Constitution of Kenya 2010.²²³

Countries preparing to join the EITI are encouraged to identify potential barriers to systematic disclosures from the outset, for instance by conducting a systematic disclosure feasibility study or addressing opportunities for systematic disclosures as part of the preparations for becoming an EITI implementing country.²²⁴

Notably, Kenya made a commitment in 2015 to: (a) join EITI, making it a part of a global multi-stakeholder program designed to increase the transparency of the financial windfall many resource-rich governments receive from developing their oil, gas and minerals. Kenya pledged to establish a government focal point for EITI implementations within six months; and (b) adopt a “transparent policy and legislative framework” for the oil and gas sector, including the adoption of a transparent process for licensing (or awarding) oil and gas blocks as well as publication of contracts between oil companies and the government.²²⁵

Despite this commitment, Kenya is currently neither compliant nor a candidate country.²²⁶ Becoming a member would require some self-introspection first to identify the existing gaps and challenges as far as the regulatory framework is concerned. The oil discovery in Turkana County led to stakeholders in the extractives sector calling for a comprehensive and consolidated legislative framework to help track revenue from the sector and enable Kenyans to understand its contribution to the economy.²²⁷ It is noteworthy that Kenya is a resource-rich country and the recent discovery of new sources of crude oil and natural gas increases the urgency for developing a transparent extractives policy.²²⁸

The Mining Act 2016²²⁹ is to apply to the minerals specified in the First Schedule²³⁰. Notably, the Act does not apply to petroleum and hydrocarbon gases²³¹. The Mining Act thus covers only a section of the extractives industry since the extractive industry involves the development and exploitation of oil, gas, and mining resources.

²²³ See Articles 10; 60, 69, Constitution of Kenya 2010.

²²⁴ EITI International Secretariat, “The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources,” Edition 1, 17 June 2019, p.8.

²²⁵ Gary, I., “Amidst the flurry of President Obama’s visit, Kenya commits to a transparent oil boom,” Oxfam America, August 21, 2015. Available at <https://politicsofpoverty.oxfamamerica.org/2015/08/amidst-the-flurry-of-president-obamas-visit-kenya-commits-to-a-transparent-oil-boom/> [Accessed on 16/1/2020].

²²⁶ EITI, “Base Titanium,” available at <https://eiti.org/supporter/base-titanium> [Accessed on 16/1/2020].

²²⁷ Open Government Partnership, “Kenya: Publish Oil and Gas Contracts (KE0013),” available at <https://www.opengovpartnership.org/members/kenya/commitments/KE0013/> [Accessed on 16/1/2020].

²²⁸ Ibid.

²²⁹ Mining Act, No. 12 of 2016, Laws of Kenya.

²³⁰ The classification of minerals under first schedule includes: A. Construction and Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Minerals.

²³¹ These fall under the domain of the Energy Act, No. 1 of 2019, Laws of Kenya; and Petroleum Act, No. 2 of 2019, Laws of Kenya.

The Mining Act has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits²³²; structures for negotiating mineral agreements²³³; terms and conditions for minimum activity and work programs, structure for payments²³⁴; and artisanal and small scale mining operations²³⁵. Previously, these have been the subject of several court matters hence the need to settle the same by way of substantive statutory provisions.²³⁶

As far as the matters falling within the purview of the EITI are concerned, the Mining Act empowers the Cabinet Secretary to make regulations, and he has since made the regulations discussed earlier in this section.

5.2.1 Kenya's Extractives Industry: The Policy, Legislative and Institutional Framework

The Government of Kenya has a ministry dedicated to the development of the extractives sector²³⁷, as part of the efforts to improve resource exploitation in the country, and this is the Ministry of Mining and Petroleum²³⁸. The concerned Ministry undertakes various functions aimed at enhancing growth of the mining sector in the country as guided by the *Executive Order No. 2 of 2013*²³⁹. The mandate of the Ministry of Mining and Petroleum includes: Minerals Exploration and mining policy and Management; Inventory and mapping of mineral resources; Mining and minerals development; oil and gas development; Policies on the management of quarrying and mining of rocks and industrial minerals; Management of health and safety in mines; Policy around extractive industry; Resource Surveys and remote sensing; and Maintenance of geological data (research, collection, collation, analysis).²⁴⁰

The Mining sector in Kenya is mainly governed by the Constitution of Kenya 2010, the Mining Act 2016 and numerous Regulations made under the Act to promote proper administration and implementation of the Act. The oil and gas sector is principally governed by the Petroleum Act, 2019²⁴¹ which was enacted to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes.²⁴²

²³² Part ix—Surface Rights Compensation and Disputes (sections 151-157).

²³³ Part VII—Mineral Agreements (sections 117-142).

²³⁴ Part XII—Financial Provisions (sections 182-190).

²³⁵ Act, 2016, Sections 92-100.

²³⁶ See for instance, *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* [2001] eKLR, Civil Case 97 of 2001; *Tom Mboya Odege v Cabinet Secretary, Ministry of Petroleum and Mining & 3 others* [2019] eKLR, Environment and Land Petition 2 of 2018; *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR, Civil Appeal 105 of 2015.

²³⁷ Ministry of Mining, Available at <http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 16/1/2020].

²³⁸ <https://www.petroleumandmining.go.ke/> [Accessed on 16/1/2020].

Republic of Kenya, Executive Order No.2 of 2013 – Organization of the Government of Kenya, May 2013.

²⁴⁰ <http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 16/1/2020].

²⁴¹ Petroleum Act, Act No. 2 of 2019, Laws of Kenya.

²⁴² *Ibid*, Preamble.

The 2019 Petroleum Act came into effect on 28 March 2019, repealing the Petroleum (Exploration and Production) Act of 1984. The Act is to apply to all upstream, midstream and downstream petroleum operations being carried out in Kenya.²⁴³

a. Constitution of Kenya 2010

The Constitution of Kenya 2010 makes provisions on “natural resources” which means the physical non-human factors and components, whether renewable or non-renewable, including — *rocks, minerals, fossil fuels and other sources of energy*.²⁴⁴

Article 60 of the Constitution provides for the principles of land policy which include sustainable and productive management of land resources. Under Article 62 (1) (f) of the Constitution “all minerals and mineral oils as defined by law” are classified as public land and by Article 62 (3) they are vested in and are held by the national government in trust for the people of Kenya.

The Constitution also outlines the obligations of the State in respect of the environment.²⁴⁵ The Constitution further spells out the national values and principles of governance which 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.²⁴⁶ This includes any decision-making or implementation of any law affecting the mining sector.²⁴⁷ The Constitution thus provides some overarching principles that should guide the implementation of any laws governing the mining sector.

b. Mining and Minerals Policy, Sessional Paper No. 7 of 2016

The *Mining and Minerals Policy, Sessional Paper No. 7 of 2016* was informed by the lack of predictability and certainty hence low investment in the mining sector, thus necessitating the need for policy framework to provide a clear guidance for sustainable mineral resources development.²⁴⁸

The Policy was therefore put in place to address gaps that have existed in the mining sector, form the basis for review of the outdated Mining Act of 1940 and align the industry’s strategic direction with African Mining Vision, Vision 2030 and Constitutional Provisions. The overall goal of the Mining and Minerals Policy is to set out frameworks, principles, and strategies to provide for exploration and exploitation of mineral resources for socio-economic development.²⁴⁹

c. Mining Act, 2016

To realise the vision of hope and growth in the mining sector, the *Mining Act 2016*²⁵⁰ was enacted to give effect to Articles 60, 62b (1) (f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any

²⁴³ Sec. 3, Petroleum Act, 2019.

²⁴⁴ See Article 260; and Section Five of the Constitution of Kenya 2010.

²⁴⁵ Constitution of Kenya, Art. 69.

²⁴⁶ Article 10(1), Constitution of Kenya.

²⁴⁷ For instance, see *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR, Civil Appeal 105 of 2015.

²⁴⁸ Republic of Kenya, Mining and Minerals Policy, Sessional Paper No. 7 of 2016, p. 1.

²⁴⁹ *Ibid*, p.7.

²⁵⁰ Mining Act, No. 12 of 2016, Laws of Kenya.

dealings in minerals and for related purposes.²⁵¹ The Act came about as a result and part of implementation of the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*.

Notably, the Cabinet Secretary is empowered under the Act to make Regulations necessary or convenient for the proper administration and implementation of this Act.²⁵² As a result of this, the Cabinet Secretary responsible has since made some mining Regulations under the Act.

This section focuses generally on these Regulations and how the same can help in promotion and realisation of the country's dream of a vibrant mining sector that not only promotes national development but one that also benefits the local communities.

The Act is to apply to the minerals specified in the First Schedule²⁵³. Notably, the Act does not apply to petroleum and hydrocarbon gases²⁵⁴. The Act establishes a state mining corporation which shall be the investment arm of the national government in respect of minerals.²⁵⁵ The Act also establishes the Mineral Rights Board whose functions include advising and giving recommendations, in writing, to the Cabinet Secretary on matters relating to mining activities and agreements.²⁵⁶ In order to ease access to services, there is also established under the Act the Directorate of Mines; and the Directorate of Geological Survey, each directorate headed by a director.²⁵⁷

The *Mining Act, 2016* has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits²⁵⁸; structures for negotiating mineral agreements²⁵⁹; terms and conditions for minimum activity and work programs, structure for payments²⁶⁰; and artisanal and small scale mining operations²⁶¹.

To operationalize some of these provisions, the Cabinet Secretary in charge of mining has since made Regulations covering the areas and matters in question. The next section casts a critical look at these Regulations.

²⁵¹ Ibid, preamble.

²⁵² Mining Act, 2016, sec. 223.

²⁵³ The classification of minerals under first schedule includes: A. Construction And Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Minerals.

²⁵⁴ These fall under the domain of the Energy Act, No. 1 of 2019, Laws of Kenya; and Petroleum Act, No. 2 of 2019, Laws of Kenya.

²⁵⁵ Mining Act, 2016, Sec. 22(1).

²⁵⁶ Ibid, secs. 30 & 31.

²⁵⁷ Mining Act, 2016, Sec. 17.

²⁵⁸ Part ix—Surface Rights Compensation and Disputes (sections 151-157).

²⁵⁹ Part Vii—Mineral Agreements (sections 117-142).

²⁶⁰ Part Xii—Financial Provisions (sections 182-190).

²⁶¹ Mining Act, 2016, Sections 92-100.

d. Mining Regulations and Guidelines

i. Mining (Dealings in Minerals) Regulations, 2017

The *Mining (Dealings in Minerals) Regulations, 2017*²⁶² were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 100 and 223 (l) of the Mining Act, 2016. Section 100 of the Act deals with the sale of minerals won by an artisanal miner. These Regulations are to apply to- the export of a mineral by a holder of a mining right, among others.²⁶³ However, these Regulations are not to apply to the export and import of rough diamonds.²⁶⁴

There have been numerous reported and unreported cases of illegal dealings in extraction and/or sale of minerals in the country. These Regulations were meant to curb this illegal business.²⁶⁵

The Regulations, alongside the *Mining Act 2016*, were expected to provide more transparency and credibility for investors in solving issues affecting the mining sector in the country.²⁶⁶ The Regulations have however achieved little, if anything, in curbing illegal trading in minerals. This is exemplified by the continued reports of smuggling of gold and other precious stones in and of the country.²⁶⁷ Traders still find a way of bypassing these rules to continue with the illegal trading in raw mineral resources. Transparency in declaration of revenues is still lacking as far as mineral extraction and other dealings in Kenya are concerned. It is estimated that Africa is losing over \$60 billion annually due to the illicit mineral trade.²⁶⁸ This is because, amongst other factors, most minerals and precious stones from the region are exported in raw form to processing centres in Asia, notably Hong Kong.²⁶⁹

It is therefore unlikely that these Regulations alone, without the support of other security institutions across the region, will curb the illegal dealings in trade. There is a need to ensure that the taxation and royalties regime is regularized and that the same is friendly not only to the multinationals but also the artisanal miners in the country as an incentive to discourage them from dealing with illegal traders in and outside the country.

²⁶² Legal Notice No. 88, Kenya Subsidiary Legislation, 2017. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN88_2017.pdf [Accessed on 16/1/2020].

²⁶³ Mining (Dealings in Minerals) Regulations, 2017, Regulation 3(1).

²⁶⁴ Ibid, Regulation 3(2).

²⁶⁵ Mining (Dealings in Minerals) Regulations, 2017, Regulation 9(5).

²⁶⁶ Ali, S., "Govt to make Nairobi a mineral trade hub," Citizen Digital, September 26, 2016. Available at <https://citizentv.co.ke/business/govt-to-make-nairobi-a-mineral-trade-hub-142856/> [Accessed on 16/1/2020].

²⁶⁷ Otieno, R., "Government red tape killing mining sector, claims lobby," Standard Digital, 17th April, 2019. Available at

<https://www.standardmedia.co.ke/business/article/2001321316/government-red-tape-killing-mining-sector-lobby> [Accessed on 8/7/2019]; Mnyamwezi, R., "Petroleum CS Munyes exposes minerals smuggling cartels," Standard Digital, 21st August, 2018. Available at <https://www.standardmedia.co.ke/article/2001292787/kenya-losing-billions-to-minerals-smuggling-cartels> [Accessed on 16/1/2020].

²⁶⁸ Senelwa, K., "Nairobi to process gold and gemstones at value addition centre," The East African, Monday February 20 2017. Available at <https://www.theeastafrican.co.ke/business/Nairobi-to-process-gold-and-gemstones/2560-3820176-n8dw6hz/index.html> [Accessed on 16/1/2020].

²⁶⁹ Ibid.

e. Mining (Licence and Permit) Regulations, 2017

The *Mining (Licence and Permit) Regulations, 2017*²⁷⁰ were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 12 (3), 153 (3) and 223 (2), (c), (d), (g), (j), (k) and (1) of the Mining Act, 2016. These Regulations are to apply to all mineral rights.²⁷¹

The *Mining (licence and permit) Regulations 2017* (Clause 4) provides that all applications for mineral rights shall be made through the On Line Mining Cadastre (OMC) in order for them to be considered for grant.²⁷² Having an online application forum is a positive step towards establishing transparency as far as the application process is concerned so that regardless of whether one is a foreign or local investor, there is certainty on the process of seeking mining licenses and permits.

It is a commendable step that these Regulations seek to regulate, inter alia, small-scale mining or artisanal mining operations in line with the Mining Act 2016, by granting permits.²⁷³ However, there is a need to ensure that the same are not used as a political tool in awarding permits for corrupt dealings in artisanal mining activities.

In addition, while the artisanal miners may smoothly get licences and permits (which will cost money to apply), there may be a funding challenge. It has been observed that acute cash shortage caused by poor linkages with the financial sectors of the economy is one of the biggest impediments to the growth of the artisanal and small-scale mining sector.²⁷⁴ This is mainly attributed to the fact that being a nascent, capital intense and high-risk sector, it is difficult for local banks to finance it. However, government intervention can go a long way in addressing the funding challenge.

It is therefore not enough to regulate licensing and permits relating to mining activities in the country, there is a need to create a level playing ground for the artisanal miners by creating a funding kitty to help them competitively carry out these mining activities. Such a kitty would be similar to those in other African countries whose artisanal and small scale mining sectors are doing well such as 2017 Nigeria's Ministry of Solid Minerals and Steel Development and the Bank of Industry of Nigeria's N5 billion fund to provide loans and bring the sector under a structured system; and Zimbabwe's gold fund introduced in 2016 through the Reserve Bank of Zimbabwe.²⁷⁵

²⁷⁰ Mining (Licence and Permit) Regulations, 2017, Legislative Supplement No. 40, Legal Notice No. 87, Laws of Kenya. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN87_2017.pdf [Accessed on 16/1/2020].

²⁷¹ Mining (Licence and Permit) Regulations, 2017, Regulation 3.

²⁷² Mining (Licence and Permit) Regulations, 2017, Regulation 4.

²⁷³ Part ix — Artisanal Mining Permit.

²⁷⁴ Komu, J., "Fund artisanal and small-scale mining," March 26, 2019. Available at <https://www.the-star.co.ke/opinion/columnists/2019-03-26-fund-artisanal-and-small-scale-mining/> [Accessed on 16/1/2020].

²⁷⁵ Ibid.

f. Mining (Work Programmes and Exploration Reports) Guidelines, 2017

The *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*²⁷⁶ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 221 (1)²⁷⁷ of the Mining Act, 2016. These Guidelines -provide guidance to applicants for, and holders of, reconnaissance licences, prospecting licences, prospecting permits and retention licences on how to prepare work programmes and exploration reports; and are to assist the Director of Geological Surveys to review work programmes and exploration reports that shall be submitted by applicants for or holders of mineral rights.²⁷⁸

While these reports would go a long way in enhancing the right of access to information for the local people as far as the activities of the mining companies are concerned, there is no evidence of any such reports being made public since 2017 or even any being filed with the government agencies at all. There is therefore lacking in transparency and accountability from the mining companies in the country. As such, there is a need to ensure that these Regulations are not only enforced but also such reports should be made available to the public in light of the right of access to information as guaranteed under Article 35 of the Constitution of Kenya 2010 and Access to Information Act, 2016²⁷⁹.

g. Mining (State Participation) Regulations, 2017

The *Mining (State Participation) Regulations, 2017*²⁸⁰ were enacted by the Cabinet Secretary in exercise of Section 48(4)²⁸¹ of the Mining Act, 2016. The purpose of these Regulations is to provide for State participation in prospecting or mining operations carried out by a holder of a mineral right.²⁸²

These Regulations are to apply to all applicants and holders of any mineral right-which entitles the State to a ten percent free carried interest; where the State acquires any additional interest that may be agreed with the holder of a mining licence; and where the State enters into an agreement to participate in prospecting operations or activities under a prospecting licence held by a holder other than the National Mining Corporation.²⁸³

In line with the Mining Act 2016, the Regulations reiterate that the National Mining Corporation shall on behalf of the State, be the investment arm of the National Government in respect of all prospecting or mining operations.²⁸⁴ The direct interest and participation of the government, albeit through the National Mining Corporation is a positive step towards ensuring that the mining

²⁷⁶ Mining (Work Programmes and Exploration Reports) Guidelines, 2017, Legal Notice No. 85 of 2017, Laws of Kenya. Available at

http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN85_2017.pdf [Accessed on 16/1/2020].

²⁷⁷ 221. (1) The Cabinet Secretary may publish and disseminate manuals, codes or guidelines relating to large scale and small scale operations, including in relation to environmental matters.

²⁷⁸ Clause 3, Mining (Work Programmes and Exploration Reports) Guidelines, 2017.

²⁷⁹ Access to Information Act, No. 31 of 2016, Laws of Kenya.

²⁸⁰ Mining (State Participation) Regulations, 2017, Legal Notice No. 84 of 2017, Laws of Kenya.

²⁸¹ (4) The Cabinet Secretary shall make regulations to provide for state participation in mining or prospecting operations between the Government and the holder of a mineral right.

²⁸² Mining (State Participation) Regulations, 2017, Regulation 3.

²⁸³ Ibid, Regulation 4.

²⁸⁴ Ibid, Regulation 5 (1).

companies declare all the deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities. There has been past reported cases of non-disclosure and non-declaration by the mining companies in the country and this requires the government to have its own watchdog on the ground to curb the vice, hence the need for this Corporation.²⁸⁵ The Corporation is also useful in promoting capacity building in the sector as far as exploration of minerals in the country is concerned.

The direct interest and participation of the government, albeit through the National Mining Corporation is a positive step towards ensuring that the mining companies declare all the deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities. This will hopefully do away with such situations as the soda ash mining in Lake Magadi where the poverty and lack of investments in Magadi, after 100 years of exploitation of trona worth trillions of shillings, has been attributed to the lack of transparency in the governance of natural resources, corruption, and illegal outflows.²⁸⁶

h. Mining (Use of Local Goods and Services) Regulations, 2017

The *Mining (Use of Local Goods and Services) Regulations, 2017*²⁸⁷ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 223(l) of the Mining Act, 2016. The purpose of these Regulations is 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; and achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain; among others.²⁸⁸

The Regulations require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to- materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.²⁸⁹ Except as otherwise provided in the Act or under these Regulations, an application for a licence should not be granted unless, the applicant has submitted a procurement plan for the purchase of goods and services in Kenya to the Cabinet Secretary.²⁹⁰ The plan, if approved, shall form part of the conditions or obligations under the licence.²⁹¹

²⁸⁵ Sanga, B., "Auditor General reveals how mining companies under-declare tax dues," 25th Aug 2016. Available at

<https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues> [Accessed on 16/1/2020].

²⁸⁶ Kamau, J., "Magadi saga exposes the ugly side of capitalism," Daily Nation, Sunday April 21 2019. Available at <https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html> [Accessed on 16/1/2020].

²⁸⁷ Mining (Use of Local Goods and Services) Regulations, 2017, Legal Notice No. 83 of 2017, Laws of Kenya.

²⁸⁸ Ibid, Regulation 3.

²⁸⁹ Ibid, Regulation 5.

²⁹⁰ Ibid, Regulation 6(1).

²⁹¹ Ibid, Regulation 6(4).

The mining sector in the country is expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. One way of alleviating poverty in any mining region would be empowering the local people through creating markets for the locally produced goods and services.²⁹² However, there is likely to arise a challenge in getting the mining sector players, both local and foreign, to abide by these rules. They are likely to bypass them on grounds of equality in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.

Considering that there are many factors (such as supply and demand, cost of raw materials, machinery, amongst others) that may influence the production cost of goods and services which may ultimately push up the price of these goods and services or worse compromise their quality, it is likely that the companies in question may use such loopholes to source for the same either from their home countries (for foreigners) or other cheaper and better quality goods from foreign countries for the locals. There are no public records or any other form of evidence thus far to indicate if the companies have complied with these Regulations or if indeed the Government, through the relevant ministry has sought to ensure compliance.

Implementing these Regulations may therefore call for the Government and other stakeholders to first address these challenges before local traders, service providers and communities can benefit from the legal framework.

i. Mining (Employment and Training) Regulations, 2017

The *Mining (Employment and Training) Regulations, 2017*²⁹³ were enacted by the Cabinet Secretary in exercise of powers conferred by sections 46(3)²⁹⁴ and 223(1) of the Mining Act, 2016. The purpose of these Regulations is 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.²⁹⁵

These Regulations shall apply to all applicants and holders, of any licence for- reconnaissance, prospecting and mining; cutting, polishing, processing, refining and smelting of a mineral; a large-scale mineral right which is valid after the coming into force of the Act and these Regulations; and mine support services.²⁹⁶ An application for any licence shall not be granted by the Cabinet

²⁹² See generally, Musawenkosi, N., "Does mining alleviate or exacerbate poverty: Are local community grievances really 'Much Ado about Nothing'?" PhD diss., University of Cape Town, 2017. Available at https://open.uct.ac.za/bitstream/handle/11427/24930/thesis_com_2017_nxele_musawenkosi.pdf?sequence=1&isAllowed=y [Accessed on 16/1/2020]; Pegg, S., "Mining and poverty reduction: Transforming rhetoric into reality," *Journal of cleaner production*, Vol.14, no. 3-4 (2006): 376-387.

²⁹³ Mining (Employment and Training) Regulations, 2017, Legal Notice No. 82, Laws of Kenya.

²⁹⁴ (3) The Cabinet Secretary shall make regulations to provide for the replacement of expatriates, the number of years such expatriates shall serve and provide for collaboration and linkage with universities and research institutions to train citizens.

²⁹⁵ Mining (Employment and Training) Regulations, 2017, Regulation 3.

²⁹⁶ *Ibid*, Regulation 4.

Secretary-unless the applicant has submitted a plan outlining the proposals for the employment and training of Kenyans.²⁹⁷

While these Regulations are well meaning and geared towards ensuring that the mining sector creates jobs, employment and results in specialized training for the Kenyan people, it is based on the assumption that locals have some base knowledge that can be built on to achieve the level of expertise required in the execution of the corresponding duties within the industry. Exclusive reliance on the foreigners to create expertise through technology transfer may not yield the desired results.

There is need for the government to do much more through the local institutions of higher learning through sponsoring courses to build capacity and even having the students/professionals taking such courses leaving the country for specialized training and to gain experience. Such candidates would then be ripe to learn more through any exchange and technology transfer programmes set up under the Mining (*Employment and Training*) Regulations, 2017. There is a need to ensure that the jobs offered are not only menial in nature since, left unsupervised, the foreign companies may not be willing to place local experts in critical positions within the entire mining value chain as required by the law. The Government must offer technical and financial support to its people in order to uplift them to levels where they can competitively take up key positions in the mining sector and specifically represent the interests of the Government and the country at large within these companies.

The lack of proper guidelines or failure to implement any existing regulations and guidelines can lead to conflicts as has been witnessed in other African countries such as the Democratic Republic of Congo, where the locals feel sidelined as far as mining benefits sharing is concerned.²⁹⁸ For instance, there have been queries on how to manage expectations of the local people living within the mining areas in order to avert possible conflicts in future.²⁹⁹ There is a need for ensuring that the constitutional principles of public participation, inclusive decision-making, environmental protection and conservation, respect for human rights and respect for occupational health and safety are taken into account when engaging investors in the mining sector in order to avoid any potential conflicts as well as ensuring that these natural resources benefit communities as well.³⁰⁰

²⁹⁷ Ibid, Regulation 5 (1).

²⁹⁸ Matthysen, K., Montejano, A. Z., & International Peace Information Service (Antwerp), 'Conflict Minerals' initiatives in DR Congo: Perceptions of local mining communities. Antwerp: International Peace Information Service, 2013. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/20131112_HU.pdf [Accessed on 16/1/2020]; Zalan, K., "Tracing conflict gold in the Democratic Republic of the Congo," Public Radio International, June 23, 2017. Available at <https://www.pri.org/stories/2017-06-23/tracing-conflict-gold-democratic-republic-congo> [Accessed on 16/1/2020]; BSR, "Conflict Minerals and the Democratic Republic of Congo: Responsible Action in Supply Chains, Government Engagement and Capacity Building," May 2010. Available at https://www.bsr.org/reports/BSR_Conflict_Minerals_and_the_DRC.pdf [Accessed on 16/1/2020].

²⁹⁹ 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 16/1/2020]; Mulehi, A., "How it looks to live near mining sites – Kwale," (Natural Resources Alliance of Kenya, Oct 17, 2018). Available at <https://kenra.or.ke/how-it-looks-like-to-live-near-mining-sites-kwale/> [Accessed on 16/1/2020].

³⁰⁰ Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited [2001] eKLR, Civil Case 97 of 2001; Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015]

In addition, there are no publicly accessible records to indicate the level of compliance for the existing mining companies in the country. Accountability and transparency are listed under Article 10(2) (c) of the Constitution, as “national values and principles of governance”.

j. Mining (Use of Assets) Regulations, 2017

The *Mining (Use of Assets) Regulations, 2017*³⁰¹ were enacted by the Cabinet Secretary in exercise of the powers conferred by Section 149(6)³⁰² of the Mining Act, 2016. These Regulations shall apply to holders of mining licences requiring them to maintain a complete, up to date and accurate register of all its immovable and movable assets.³⁰³

These regulations, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the mining companies as they seek to promote accountability and transparency on the income and expenses incurred by these companies. 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. They can however work well where the authorities involved work with different stakeholders such as the revenue collecting agencies to get the actual figures.

5.3 Regulating the Extractives Industry in Kenya: Challenges and Prospects

5.3.1 The Mining Sector in Kenya

It is estimated that Africa hosts 30% of the earth’s mineral reserves, including 40% of gold, 60% of cobalt, and 70% of platinum deposits, and produce about 30% of the world’s gold, 70% of the world’s platinum, 28% of the world’s palladium, and 16% of the world’s bauxite.³⁰⁴ In addition, Africa also produces (yearly, in thousand metric tons) 205,056 of hard coal, 67,308 of nickel-bearing ores, and 29,174 of iron bearing ores, as well as 595,507 kg of gold-bearing ores.³⁰⁵ The extractive or mining industries generally have long been touted as key to anchor ‘development’ or ‘economic growth’ to alleviate poverty in developing countries.³⁰⁶

Despite this, African countries have largely exhibited low levels of development and poor standards of living.³⁰⁷ This has been attributed to various factors including exploitative

eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014.

³⁰¹ Mining (Use of Assets) Regulations, 2017, Legal Notice No. 80 of 2017, Laws of Kenya.

³⁰² The Cabinet Secretary shall prescribe Regulations on the use of the assets.

³⁰³ Mining (Use of Assets) Regulations, 2017, Regulations 3 & 4.

³⁰⁴ Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya’s Nascent Mining Industry: A Call for Legislation," In Social Responsibility, IntechOpen, 2018, pp. 61-81, at p.63. Available at <https://www.intechopen.com/books/social-responsibility/mining-conflicts-and-corporate-social-responsibility-in-kenya-s-nascent-mining-industry-a-call-for-l> [Accessed on 16/1/2020].

³⁰⁵ Ibid, p.63.

³⁰⁶ Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," Law Env't & Dev. J., 9 (2013): 31, at p.33.

³⁰⁷ African Union, Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision, p. 2. Available at <https://repository.uneca.org/bitstream/handle/10855/23538/b11580379.pdf?sequence=1> [Accessed on 16/1/2020].

multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements, with the result that the Continent has received inadequate returns for its mineral wealth.³⁰⁸

At the continental level, the *Africa Mining Vision*³⁰⁹ is expected to address most of these challenges if not all. Despite this Vision document, most of the African countries still struggle with making the mineral resources work for them, in uplifting the lives of their people.³¹⁰

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.³¹¹

Notably, GDP from Mining in Kenya is estimated to have increased to 12527 KES Million in the fourth quarter of 2018 from 12313 KES Million in the third quarter of 2018. GDP from Mining in Kenya averaged 8963.05 KES Million from 2009 until 2018, reaching an all-time high of 12906 KES Million in the first quarter of 2018 and a record low of 4195 KES Million in the first quarter of 2009.³¹² According to the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, as at 2016, the sector was contributing 0.8 percent to gross domestic product (GDP) per annum. The

³⁰⁸ Ibid, p.2; Ezekwe sili, O.K., "Harnessing Africa's natural resources to fight poverty," Daily Nation, Wednesday April 15 2009. Available at

<https://www.nation.co.ke/oped/opinion/440808-560566-gnl8o6z/index.html> [Accessed on 16/1/2020].

³⁰⁹ 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 16/1/2020].

³¹⁰ 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%20alastair_fraser_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed on 16/1/2020]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.* 9 (2013): 31.

³¹¹ 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 on 16/1/2020]; 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 16/1/2020]; 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 16/1/2020]; 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 16/1/2020].

³¹² Trading Economics, "Kenya GDP from Mining," available at <https://tradingeconomics.com/kenya/gdp-from-mining> [Accessed on 16/1/2020].

contribution to GDP was expected to increase to three (3) percent by 2017 and ten (10) percent by 2030 according to the Medium Term Plan (MTP) II (2013-2017).³¹³

While these statistics paint a hopeful picture with the figures increasing over the last ten years, there is still a lot of room for not only growth in these figures but also positive contribution of the mining sector to the lives of the ordinary citizens especially those to be found within the localities where such mining takes place. Indeed, the discovery of such minerals as the titanium deposits products in the Coastal region gives hope to the expectation of a brighter future for the sector and country at large.³¹⁴ Reserves for Titanium and Niobium, both found in the Coast region, are projected to be worth Sh9 trillion, and Sh3.8 trillion for the estimated 750 million barrels, according to Tullow Oil's 2017 projections.³¹⁵

As already stated, there are Regulations that were made by the Cabinet Secretary seeking to ensure that the mining activities do not only go on smoothly but also that they benefit the local communities even as they contribute to the national development agenda. These Regulations are meant to streamline the mining sector in the country by ensuring that some of the main provisions in the Mining Act 2016 are fully and efficiently implemented. Notably, some of these Regulations such as the *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017* are meant to directly empower the local communities by promoting job creation and market for locally produced goods.

While these Regulations mean well for the local communities and local industries, a lot still needs to be done to ensure that the environment favours the implementation of such Regulations. For instance, the Regulations on use of local goods and services require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to- materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: *provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.*³¹⁶ This proviso stands to defeat the purpose of these Regulations because, as it may be proved through statistics, there are many factors of production that may, and have indeed, been making locally produced goods more expensive when compared to imported ones. Thus, as long as investors can prove that they can source such goods and/or services at more competitive prices or those with better quality, they will easily bypass the requirements of these Regulations. The manufacturing sector and other factors affecting the local production of goods and services may thus need to be fixed before these Regulations can effectively be implemented.

³¹³ Republic of Kenya, Mining and Minerals Policy, Sessional Paper No. 7 of 2016, p. 1. Available at http://www.mining.go.ke/images/PUBLISHED_MINING_POLICY_-_Parliament_final_.pdf [Accessed on 16/1/2020].

³¹⁴ Michira, M., "The billions buried under Kenyan soil," 2nd May, 2017. Available at <https://www.standardmedia.co.ke/business/article/2001238312/the-billions-buried-under-kenyan-soil> [Accessed on 16/1/2020].

³¹⁵ Ibid.

³¹⁶ Mining (Use of Local Goods and Services) Regulations, 2017, Regulation 5.

Unless capacity is built across all stages of mineral extraction right from minerals agreements' negotiations all the way to the actual extraction of these resources, then Africa, including Kenya, will continue to lag behind in development despite its rich deposits in minerals.

5.3.2 Oil and Gas sector in Kenya

Kenya's oil and gas sector is a nascent one with the actual discovery of oil and gas reserves having been made only in the year 2012 after many years of exploration.³¹⁷ The UK-based Tullow Oil, in partnership with Africa Oil, a Canadian oil and gas company, made discoveries in two separate blocks of the Lokichar Basin in the sparsely populated northern interior.³¹⁸

The oil and gas sector is mainly governed by the Petroleum Act, 2019³¹⁹ which was enacted to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes.³²⁰ The 2019 Act came into effect on 28 March 2019, repealing the Petroleum (Exploration and Production) Act of 1984. The Act is to apply to all upstream, midstream and downstream petroleum operations being carried out in Kenya.³²¹

The Act empowers the Cabinet Secretary to negotiate, award and execute a petroleum agreement, on behalf of the national government, in the form prescribed in the Schedule to the Act.³²² The Act requires the contractor to submit to the Authority reports on— all geological, geochemical, geophysical surveys, drilling, completion and production data and any other information in accordance with the petroleum agreement and regulations made under this Act; the rates and volume of petroleum produced, its composition including test production and the recovery of petroleum in connection with formation testing; the volumes and other results of production monitoring as well as monitoring procedure; and the use, injection, venting and flaring of natural gas or petroleum which information shall be based on metering.³²³ However, information obtained under section 45 relating to any matter shall not be published or otherwise disclosed to a third party without prior consent in writing from the person from whom the information was obtained.³²⁴

Under the Act, it is the duty of every contractor to furnish the Cabinet Secretary and the Authority as the case may be at such times and in such form and manner, such information as the Cabinet Secretary and the Authority may in writing require.³²⁵ A person who refuses to furnish the information requested under section 47 or who makes a false statement or a statement which he

³¹⁷ National Oil, "Wells Drilled," available at <https://nationaloil.co.ke/wells-drilled/> [Accessed on 16/1/2020].

³¹⁸ Oxford business Group, "Kenya sees increased oil and gas reserves, and a shift in energy consumption," available at <https://oxfordbusinessgroup.com/overview/supply-and-demand-market-factors-seem-rise-tandem-increased-reserve-findings-and-growing-domestic> [Accessed on 16/1/2020].

³¹⁹ Petroleum Act, Act No. 2 of 2019, Laws of Kenya.

³²⁰ *Ibid*, Preamble.

³²¹ Sec. 3, Petroleum Act, 2019.

³²² Sec. 18, Petroleum Act, 2019.

³²³ Sec. 45, Petroleum Act, 2019.

³²⁴ *Ibid*, Sec. 46.

³²⁵ *Ibid*, Sec. 47.

has reason to believe is untrue, to the Cabinet Secretary, and to the Authority, as required under this Act, commits an offence and shall, on conviction, be liable to a fine of not less than twenty million shillings or to a term of imprisonment of not less than five years or both.³²⁶

The disclosure of information is a requirement for all stages namely upstream, midstream and downstream. The *Petroleum Act 2019* also has local content requirements on petroleum operations meant to create jobs and requiring the procurement of locally available goods and services.³²⁷ However, the cost of such local content should be at the prevailing market rate. This is aimed at encouraging the procurement of local content, while ensuring that projects remain fiscally viable.

The Act provides that the contractor shall comply with financial and fiscal obligations in the implementation of the petroleum agreement under this Act and any other written law.³²⁸ They are to pay to the National Government all taxes, relevant fees and levies in such manner as may be prescribed by both the petroleum agreement and any other relevant laws.³²⁹

The Act also provides for revenue sharing among the National Government, county governments and the local communities.³³⁰ The *Petroleum Act, 2019* also includes a Model Production Sharing Contract ("Model PSC")³³¹ to be used by the Cabinet Secretary when entering into a petroleum agreement.³³² The Act defines the specific minimum contents of the model PSC.³³³ Notably, some of the provisions in this Act seek to address issues similar to those that fall under the concern of EITI.

5.4 Promoting Open and Accountable Management of Extractives in Kenya: Implementing the Extractives Industries Transparency Initiative

5.4.1 Introduction

Extractive Industries is a term that is often used to describe nonrenewable resources, such as oil, gas and minerals.³³⁴ It is estimated that Africa alone is home to about 30% of the world's mineral reserves, 10% of the world's oil, and 8% of the world's natural gas.³³⁵ Over the years, and with the recognition of the potentially positive and negative effects of the extractives, there has been an

³²⁶ Ibid, Sec. 48.

³²⁷ Ibid, Sec. 50.

³²⁸ Ibid, Sec. 53(1).

³²⁹ Sec. 53(2), Petroleum Act, 2019.

³³⁰ Sec. 57 & 58, Petroleum Act, 2019.

³³¹ https://www.ketraco.co.ke/opencms/export/sites/ketraco/learn/maps/Legal_Documents/Model_PSC_2015.pdf [Accessed on 16/1/2020].

³³² Schedule to the Act.

³³³ Ibid.

³³⁴ United Nations Interagency Framework Team for Preventive Action, "Extractive Industries and Conflict," Toolkit and Guidance For Preventing And Managing Land And Natural Resources Conflict, 2012, p.6. Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf [Accessed on 16/1/2020].

³³⁵ The World Bank, "Extractive Industries: Overview," available at <https://www.worldbank.org/en/topic/extractiveindustries/overview> [Accessed on 16/1/2020].

evolution at the international level to establish hard and soft rules to govern the impacts of the extractive industries.³³⁶

The extractives sector comes with not only high hopes for the average citizen in a country but also emergence of groups of people and cartels that seek to exclusively benefit from such resources at the expense of everyone else. This may lead to conflicts due to the secrecy surrounding their extraction and lack of accountability from the government and companies involved in the extraction activities.³³⁷ Some of the identified main drivers of extractive industries- related conflicts causes are: poor engagement of communities and stakeholders; inadequate benefit-sharing; excessive impact on the economy, society and the environment; mismanagement of funds and financing war; inadequate institutional and legal framework; and Unwillingness to address the natural resources question in peace agreements.³³⁸

In the last few years, Kenya has joined the list of countries with oil and gas extractives after the discovery of oil and gas deposits in the Turkana region.³³⁹ Apart from the oil and gas resources, the other notable mining activities in the country include: Soda ash; magnesite; fluorspar; titanium; diatomite; gold; and carbon dioxide, among others.³⁴⁰

This section seeks to appraise Kenya's extractives industry against the Extractives Industries Transparency Initiative with the aim of determining how far the country has gone in achieving the ideals promoted by the initiative.

5.4.2 Extractives Industries Transparency Initiative: Background and Overview

The Extractive Industries Transparency Initiative (EITI) is considered as an international hallmark of the efforts to promote better extractive-sector management and improved societal development in natural resource-rich countries.³⁴¹

This is meant to strengthen public and corporate governance, promote understanding of natural resource management, and provide the data to inform reforms for greater transparency and accountability in the extractives sector.³⁴² Currently, there are about 52 implementing countries, and the EITI is supported by a coalition of government, companies, and civil society.³⁴³

³³⁶ Van Alstine, J., "Transparency in resource governance: The pitfalls and potential of "new oil" in Sub-Saharan Africa," *Global Environmental Politics* 14, no. 1 (2014): 20-39, at p. 20.

³³⁷ United Nations Interagency Framework Team for Preventive Action, "Extractive Industries and Conflict," Toolkit and Guidance For Preventing And Managing Land And Natural Resources Conflict, 2012. Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf [Accessed on 16/1/2020].

³³⁸ Ibid, p.7.

³³⁹ Tullow Oil, "About Tullow in Kenya," available at <https://www.tulloil.com/operations/east-africa/kenya> [Accessed on 16/1/2020]; United Nations, "Greasing the wheels of Kenya's nascent oil and gas sector," 18 July, 2018, available at <https://www.unenvironment.org/news-and-stories/story/greasing-wheels-kenyas-nascent-oil-and-gas-sector> [Accessed on 16/1/2020].

³⁴⁰ Extractives Baraza, "Mining: History of Mining in Kenya," available at <https://extractives-baraza.com/resources/overview-of-kenyas-extractive-industry/mining/> [Accessed on 16/1/2020].

³⁴¹ Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

³⁴² Ibid.

³⁴³ Ibid.

Some authors have particularly recommended EITI for African countries involved in oil, gas and minerals extraction for the fact that the extractive industry sector and natural resources has been associated with a curse instead of a blessing for a lot of African countries and thus partly because of lack of transparency in the sector.³⁴⁴ Experience in countries such as Norway, Canada, Botswana and Ghana points to the fact that extractives can be effectively managed to contribute to sustainable economic growth. However, in other parts of the world including Nigeria, the Democratic Republic of Congo (DRC), South Sudan, and the Central African Republic (CAR), there is evidence to suggest that extractives if not well managed can be a curse leading to conflict.³⁴⁵

According to the proponents, to make sure that revenue from the industry contributes to sustainable development, there is need for a tool that tracks revenue collection and where such revenue goes. EITI is considered to be such a tool as it provides information to different stakeholders and citizens.³⁴⁶ This is because, availability of information on revenue transparency will help citizens appreciate how much money the government receives from the sector and how that money contributes to national budget and translating to service delivery.³⁴⁷

The EITI is based on a number of principles which were a result of a diverse group of countries, companies and civil society organisations who attended the Lancaster House Conference in London (2003) hosted by the Government of the United Kingdom. They agreed on a Statement of Principles to increase transparency over payments and revenues in the extractive sector.³⁴⁸

Of relevance to this section is the requirement that the government should issue an unequivocal public statement of its intention to implement the EITI. The statement must be made by the head of state or government, or an appropriately delegated government representative.³⁴⁹ It is not an easy task to achieve as noted in reference to the experience of other implementing jurisdictions. For instance, despite support and effort put into implementation of the EITI Standard, it has been noted that many participating countries are slow to fully implement it. Some countries, such as Guinea, the Democratic Republic of Congo (DRC), and Kazakhstan, took almost a decade after having officially committed to implementing the EITI Standard before becoming fully compliant members.³⁵⁰ In fact, in some countries, attempts at EITI implementation have totally failed. Such was the case in Bolivia where the interest failed even before the commitment stage since EITI was

³⁴⁴ Open Government Partnership, "Extractive Industry Transparency Initiative (EITI)," 18th June 2018. Available at <https://www.opengovpartnership.org/temp-commitments/05-extractive-industry-transparency-initiative-eiti/> [Accessed on 16/1/2020].

³⁴⁵ Oiro Omolo, M.W. & Mwabu, G., (eds), *A Primer to the Emerging Extractive sector in Kenya: resource bliss, Dilemma or Curse*, (Institute of Economic Affairs, November 2014), p.2. Available at www.ieakenya.or.ke/downloads.php?page=1487576975.pdf [Accessed on 16/1/2020].

³⁴⁶ Open Government Partnership, "Extractive Industry Transparency Initiative (EITI)," 18th June 2018.

³⁴⁷ *Ibid.*

³⁴⁸ EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.6. Available at https://eiti.org/sites/default/files/documents/eiti_standard2019_a4_en.pdf [Accessed on 16/1/2020].

³⁴⁹ *Ibid.*, p.9.

³⁵⁰ Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

seen as a neoliberal instrument and thus not in accord with the ideological position of the government.³⁵¹

5.4.3 Accountability and Transparency in Benefit Sharing: Avoiding the Resource Curse

5.4.3.1 The Natural Resources (Benefit Sharing) Bill, 2018

The *Natural Resources (Benefit Sharing) Bill, 2018*³⁵² seeks 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. The proposed legislation essentially seeks to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the national government, county governments and local communities and designates the Commission for Revenue Allocation to oversee the same.³⁵³

Notably, the legislation shall apply to the following natural resources— sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.³⁵⁴ The legislation, if enacted, will also amend the Mining Act 2016 by amending section 83 thereof in order to review the royalties payable.³⁵⁵

While the pending legislation will have a wide application and touching on the various types of natural resources, it is worth pointing out that the suggested amendment on the mining Act 2016 will have a huge bearing on the proceeds of mining activities in the country, if passed. The same seeks to ensure that all the interested stakeholders will have a share of the accruing benefits. The Bill has been pending for over five years due to the contentious issue of benefit sharing between national and county governments, amongst other issues.

The Benefit Sharing Bill addresses some important aspects and as pointed out in the *Africa Mining Vision 2009*, the state's ability to optimise the leasing (licensing) of its natural resource assets is concentrated at the outset (conclusion of the exploitation contract) as it is difficult to fundamentally renegotiate contracts at a later stage without sending negative signals to investors on the certainty of contracts, with resulting increased negative investment risk perceptions.³⁵⁶ The Mining Vision thus recommends that it is therefore important to identify all the critical resource linkages at the outset (in the resource exploitation contract/lease/license), even if the local economy is not yet in a position to take advantage of such opportunities.³⁵⁷

These are some of the issues that the country's legislative and institutional framework on extractives is trying to capture through enactment of laws and regulations. However, despite such efforts, implementation of these laws and regulations is doubtful. For instance, while there are

³⁵¹ Ibid.

³⁵² Kenya Gazette Supplement No.130 (Senate Bills No.31).

³⁵³ Memorandum of Objects and Reasons, Natural Resources (Benefit Sharing) Bill, 2018.

³⁵⁴ Clause 3, Natural Resources (Benefit Sharing) Bill, 2018.

³⁵⁵ Clause 19, Natural Resources (Benefit Sharing) Bill, 2018.

³⁵⁶ African Union, *Africa Mining Vision 2009*, p.17. Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf [Accessed on 16/1/2020].

³⁵⁷ Ibid.

regulations seeking to empower the local people on the extractives by equipping them with skills and expertise for technology transfer, there have been damning reports that the government agencies responsible for overseeing this are not carrying out their mandate.

Kenya's Petroleum Ministry is on the spot for failing to utilize millions of shillings set aside for training Kenyans on petroleum operations despite the country facing a severe skills shortage.³⁵⁸

Empirical studies by other scholars have concluded 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.³⁵⁹

This is even clearer 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.³⁶⁰ However, this does not mean that Nigeria is not an implementing country of EITI. In 2019, Nigeria was rated as having made satisfactory progress overall with implementing the EITI Standard.³⁶¹ Notably, the EITI Board points out that even if a country is found making satisfactory or meaningful progress, it does not indicate whether there is corruption in the country or not. It simply means that the country has put into practice significant aspects of all EITI Requirements and thus has sufficient mechanisms of public disclosure of natural resources.³⁶² EITI membership and implementation alone is not enough.

As already pointed out above, the issues affecting the extractives sector in Kenya are therefore 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.³⁶³

Such situations may have informed the provisions in the *Petroleum Act 2019* which provides under section 49 (5) that any contract is a public document and the Government shall have the right to publish and keep it publicly available. Despite this forward looking and commendable provision

³⁵⁸ Tubei, G., "Kenya's Petroleum Ministry is on the spot for failing to utilize millions meant for training Kenyans on Petroleum operations despite massive skills shortage," Business Insider, July 16, 2019. Available at <https://www.pulselive.co.ke/bi/finance/millions-meant-for-training-kenyans-on-petroleum-operations-gather-dust-in-local/384gf52> [Accessed on 16/1/2020].

³⁵⁹ 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].

³⁶⁰ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," Development Studies Research 5, no. 1 (2018): 106-121, p. 108.

³⁶¹ EITI, "The Board agreed that Nigeria has made satisfactory progress overall with implementing the EITI Standard," 27.02.2019; Reference: 2019-20/BP-42. Available at <https://eiti.org/BD/2019-20> [Accessed on 16/1/2020].

³⁶² EITI, "How We Work," <https://eiti.org/about/how-we-work#upholding-the-standard-internationally-validation>

³⁶³ Wahome, M., "Kenya denies IMF access to secret mining agreements," Business Daily, Sunday, July 21, 2013. Available at <https://www.businessdailyafrica.com/economy/Kenya-denies-IMF-access-to-secret-mining-agreements/3946234-1922406-qjn73nz/index.html> [Accessed on 16/1/2020]; Jamah, A., "Stakeholders blame 'secrecy clause' to graft in Kenya mining sector," Standard Digital, 19th Oct 2013. Available at <https://www.standardmedia.co.ke/article/2000095810/stakeholders-blame-secrecy-clause-to-graft-in-kenya-mining-sector>[Accessed on 16/1/2020].

on accountability and transparency, we are yet to see the publication of such contracts touching on oil and gas agreements in the country.³⁶⁴ It is estimated that so far, out of the 44 Production Sharing Contracts signed by the government of Kenya, only 10 have been publicised.³⁶⁵ In addition, as far as accessibility of information is concerned, it has been observed that the government of Kenya maintains an open data portal and has to some extent availed information on it on some of the on-going projects. However, key information regarding fiscal terms, negotiations and payments is missing on the sites.³⁶⁶ While there are many legal and regulatory framework covering contracts, exploration and production, it has rightly been pointed out that the legal framework on revenue collection, revenue allocation and social and economic spending is skeletal at best or is completely non-existent.³⁶⁷ In addition, the inclusion and involvement of civil societies, non-governmental organisations and other stakeholders in the transparency and accountability framework is also missing as part of independent oversight across the value chain.³⁶⁸

Transparency through public disclosure of the Production Sharing Agreements and other contracts that the government has signed with mining, oil and gas companies builds citizen confidence in the institutions overseeing the governance of the sector and assists in managing expectations.³⁶⁹ In addition, mining, oil and gas resources are owned by the citizens and are merely managed in trust by the government. Citizens, therefore, have a right to information regarding how their resources are managed.³⁷⁰ Transparency initiatives in the extractive industries have also made it possible for governments and citizens to engage in the governance of the sector where some governments such as Liberia, Sao Tome, Nigeria, Mongolia, and Ghana have used the EITI to either engage citizens in policy dialogue about resource utilization or governance issues of the extractive industries.³⁷¹

5.5 Kenya's Extractives Industry: Achieving the Dream

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.³⁷² 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

³⁶⁴ See generally, Odote, C., "Release information on all extractives," *Business Daily*, Sunday, June 30, 2019. Available at <https://www.businessdailyafrica.com/analysis/columnists/Release-information-on-all-extractives/4259356-5177330-vwfkao/index.html> [Accessed on 16/1/2020].

³⁶⁵ Kidunduhu, N., *Transparency keeps resource curse at bay*, *Business Daily*, Wednesday, August 7, 2019. Available at <https://www.businessdailyafrica.com/analysis/ideas/Transparency-keeps-resource-curse-at-bay/4259414-5227226-13y169t/index.html> [Accessed on 16/1/2020].

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ Makore, G., "Kenya's New Government and Imperatives for Extractives Governance Reform," *Oxfam*, Wednesday, Feb 14, 2018. Available at <https://kenya.oxfam.org/latest/blogs/kenya%E2%80%99s-new-government-and-imperatives-extractives-governance-reform> [Accessed on 16/1/2020].

³⁷⁰ *Ibid.*

³⁷¹ Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 109.

³⁷² 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.

of the 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.

In recognition of the fact that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent, the current legislation seeks to peg revenue sharing on the profits accrued.³⁷³ 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.³⁷⁴ The details of such deals remain few.

In a bid to achieve greater transparency, Kenya needs to reconsider its stand on the EITI. Adopting and enforcing the EITI principles on financial transparency may bring greater levels of practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure as well as the companies or contractors involved. In order for the communities and the public at large to experience positive impact from the proceeds of oil, gas and minerals in the country, there is a need for high standards of transparency and accountability in government operations and in the contractors' business. Contracts in the extractives sector are shrouded in mystery with most African countries usually being conned by multinationals involved in the exploration, exploitation and extraction of the resources, the first steps towards failure in tracking revenues.³⁷⁵

Thus, even as the country needs to embrace and implement the EITI standards, there is also a greater need to build capacity in its people who will be in charge of drafting and implementing the extractives industry contracts. The Government of Kenya has 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.³⁷⁶

Extractives industry has promoted socio-economic development in other African countries without falling into the trap of resource curse. For instance, Botswana, which is neither a member state nor an implementing country of EITI, 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

³⁷³ Petroleum Act 2019, sec. 36-39.

³⁷⁴ 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 on 16/1/2020].

³⁷⁵ Welimo, R., "Legal professionals trained on negotiating contracts in extractives industry," Kenya Broadcasting Corporation, August 5, 2019. Available at <https://www.kbc.co.ke/legal-professionals-trained-on-negotiating-contracts-in-extractives-industry/> [Accessed on 16/1/2020].

³⁷⁶ 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://kcspog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/> [Accessed on 16/1/2020]; Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

in the world at the time of independence in 1966 to an upper-middle income country.³⁷⁷ Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.³⁷⁸

Kenya can learn a lot from the case of Botswana and other countries that have managed to use their mineral resources to promote development through open, accountable and transparent management of the extractives.

5.6 Conclusion

Since minerals and hydrocarbons are finite resources, developing countries rich in these resources seek for strategies to harness the opportunities created with the extractive industries to support sustainable economic development.³⁷⁹ The EITI Requirements are minimum requirements and implementing countries are encouraged to go beyond them where stakeholders agree that this is appropriate.³⁸⁰

However, this should be implemented alongside the domestic laws governing the sector as they will come in handy in addressing the other issues such as promoting public participation and consultations³⁸¹, curbing corruption, promoting fair and equitable benefit sharing for conflict avoidance and security, sound environmental management and governance, empowering communities and enhancing the general welfare of all.

6. Making the Blue Economy Work-Tapping into the Blue Economy for Sustainable Development

6.1 Introduction

This section discusses these challenges and suggests ways through which Kenya's Blue Economy can be unlocked to boost national development agenda. Partly based on the recently concluded first ever Global Sustainable Blue Economy Conference held in Nairobi, Kenya in November 2018³⁸², this section explores ways in which Kenya can tap into its diverse blue resources, with the

³⁷⁷ Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

³⁷⁸ *Ibid*, p.61.

³⁷⁹ Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimizing Value Retention In Host Countries*, UNCTAD/SUC/2012/1 (New York and Geneva, 2012), p. 1. Available at https://unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf [Accessed on 16/1/2020].

³⁸⁰ EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.9.

³⁸¹ *Hassan and 4 others v KWS*, (1996) 1KLR (E&L) 214; *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*, HC Judicial Review No. 122 of 2011, [2012] eKLR; *Meza Galana and 3 others v AG and 2 Others*, HCCC No. 341 of 1993, [2007] eKLR; *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, Environment and Land Case 195 of 2014; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); *Tata Chemicals Magadi Limited v County Government of Kajiado & 2 others* [2019] eKLR, Petition 2 of 2019; *Lake Naivasha Friends of the Environment v AG and 2 others*, HC Petition No. 36 of 2011, [2012] eKLR.

³⁸² Conference on the Global Sustainable Blue Economy, held at the Kenyatta International Convention Centre, Nairobi from 26th to 28th November 2018. Available at <http://www.blueeconomyconference.go.ke/> [Accessed on 17/1/2020].

aim of drawing valuable lessons for Kenya and making recommendations on what the country can do to maximize on these outcomes and achieve sustainable livelihoods for its people and national economic development in general.³⁸³

The section critically analyses the challenges hampering harnessing of these resources, how they can be surmounted and recommends measures within the policy, legal and institutional framework to assist Kenya effectively harness these resources.

6.2 Blue Economy: The Definition and Scope

The World Bank defines ‘blue economy’ in the following terms: "sustainable use of ocean resources for economic growth, improved livelihoods, and jobs while preserving the health of ocean ecosystem."³⁸⁴ Thus, according to the World Bank, the “blue economy” concept seeks to promote economic growth, social inclusion, and the preservation or improvement of livelihoods while at the same time ensuring environmental sustainability of the oceans and coastal areas.³⁸⁵

Scholars have argued that the linkage between the *blue economy*, economic growth, and ocean and coastal resource conservation should be clarified by highlighting the following: The *blue economy* encompasses all economic activities with a direct dependence on the ocean or coastal and marine resources; it also includes marine education and research as well as activities of the public sector agencies with direct coastal and ocean responsibilities (e.g., national defense, coast guard, marine environmental protection, etc.); the ocean generates economic values that are not usually quantified, such as habitat for fish and marine life, carbon sequestration, shoreline protection, waste recycling and storing, and ocean processes that influence climate and biodiversity; and new activities are also evolving over the recent years, such as desalination, marine biotechnologies, ocean energy, and seabed mining.³⁸⁶

Despite the existence of these resources and their potential benefits to Kenya’s economy, harnessing them has been beset with major challenges, as discussed in the next section of this paper.

³⁸³ Guleid, M., “True value of the blue economy to Kenya,” Standard Digital, 29th Nov 2018. Available at <http://www.standardmedia.co.ke/article/2001304390/true-value-of-the-blue-economy-to-kenya> [Accessed on 17/1/2020].

³⁸⁴ The World Bank, Infographic: What is the Blue Economy? June 6, 2017, available at <http://www.worldbank.org/en/news/infographic/2017/06/06/blue-economy> [Accessed on 17/1/2020].

³⁸⁵ World Bank and United Nations Department of Economic and Social Affairs, *The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries*, World Bank, Washington DC, 2017, p.2. Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/26843/115545.pdf?sequence=1&isAllowed=y> [Accessed on 17/1/2020].

³⁸⁶ UNDP, “Leveraging the Blue Economy for Inclusive and Sustainable Growth,” Policy Brief, Issue No: 6/2018, April, 2018, op. cit., p.2; See also Report On The Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya, Prepared By SBEC Technical Documentation Review Committee At A Retreat Held At Lake Naivasha Simba Lodge, Kenya, December 5th – 9th 2018.

6.3 Towards a Sustainable Blue Economy for Economic and Social Development: Challenges and Prospects for Kenya

6.3.1 Achieving Sustainable Blue Economy in Kenya: Challenges

The Eastern Africa region faces challenges of illegal and unregulated fishing, piracy and armed robbery, maritime terrorism, illicit trade in crude oil, arms, drug and human trafficking and smuggling of contraband goods; degradation of marine ecosystems through discharge of oil, the dumping of toxic waste, illegal sand harvesting and the destruction of coral reefs and coastal forests.³⁸⁷ Kenya also suffers from fragmented management of the coastal zone, lack of capacity and technical know-how, lack of capital, minimal participation by citizens, incoherent benefit sharing regime and biodiversity loss, amongst others.³⁸⁸

Furthermore, Kenya is confronted with border disputes, the dispute with Somalia over the maritime boundary³⁸⁹, over a potentially lucrative triangular stretch of 100,000 square kilometers offshore territory that is about 370 kilometers from the coastline, believed to be home to huge oil and gas deposits.³⁹⁰ Through these challenges, Kenya loses resources to foreign exploitation due to lack of capacity and knowhow as well as degraded and dwindling resources within its internal waters, attributable to environmental degradation, as already highlighted. Notably, the country's marine fisheries are primarily exploited by foreign fishing vessels which rarely land or declare their catches in the country, thus depriving the country of much needed revenue and processing jobs.³⁹¹

Statistics have shown that fisheries, which Kenya has only focused on both for domestic and export markets, accounting for only about 0.5 per cent of the Gross Domestic Product (GDP) and generate employment for over two million Kenyans through fishing, boat building, equipment repair, fish processing, and other ancillary activities.³⁹² Despite this, the Kenya Maritime Authority (KMA) estimates the annual economic value of goods and services in the marine and coastal ecosystem of the *blue economy* in the Western Indian Ocean is over US\$22 billion with Kenya's share slightly over US\$4.4 billion (20%) with the tourism sector taking the lion's share of over US\$4.1 billion.³⁹³

Therefore, the full economic potential of marine resources has not been exploited, yet Kenya has a maritime territory of 230,000 square kilometers and a distance of 200 nautical miles offshore.³⁹⁴ Kenya has not yet invested in this potentially lucrative area thus occasioning loss of income and

³⁸⁷ UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," Policy Brief, Issue No: 6/2018, April, 2018, op. cit., p.5.

³⁸⁸ See United Nations, Kenya: Common Country Assessment, United Nations Development Assistance Framework for Kenya: 2018-2022, January 2018. Available at <http://ke.one.un.org/content/dam/kenya/docs/unct/Kenya%20Common%20Country%20Assessment%20%202018.pdf> [Accessed on 17/1/2020].

³⁸⁹ Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

³⁹⁰ UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," Policy Brief, Issue No: 6/2018, April, 2018, op. cit., p.5.

³⁹¹ USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," p.1. Available at https://www.agrilinks.org/sites/default/files/resource/files/kenya_file.pdf [Accessed on 17/1/2020].

³⁹² UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," Policy Brief, Issue No: 6/2018, April, 2018, op. cit., p.5.

³⁹³ Ibid, p.5.

³⁹⁴ Ibid, p.5.

opportunities for the Kenyan people. It is also a potential solution to the food insecurity problem in Kenya through maximizing on the seafood harvesting.³⁹⁵

For Kenya to benefit fully from these resources there must be conscious efforts aimed at tackling the highlighted challenges related to environmental sustainability, maritime security and inclusive development.

6.3.2 Tapping into the Blue Economy Resources: The Way Forward

There have been positive steps, albeit slow ones, in tapping into these vast resources. For instance, in the recent years, there have seen a shift in approach, where there has been an integrated approach as reflected in the renaming of the Department of Fisheries as the Department of Fisheries and Blue Economy in June 2016 and the establishment of a Blue Economy Implementation Committee in January 2017.³⁹⁶ During the Blue Economy Conference, there was emphasis on the need to improve the health of the oceans, seas, lakes, and rivers and the ecosystems which are under increased threats and in decline in many countries and regions across the globe.³⁹⁷

One of the challenges facing exploitation of the blue resources in Kenya is the lack of capital. Kenya can enter into mutually beneficial partnerships and networks for joint investments in projects, financing, technology development and transfer and capacity building, among others that will help it build capacity for exploitation of its resources. Funding mechanisms would not only build capacity for the experts but also facilitate the community's efforts to venture into this area of economy.

In addition to the foregoing, there is a need for conscious efforts aimed at curbing pollution of the water bodies. Farmers especially those in highlands should continually be sensitized on the need for cautious and minimal use of farming chemicals that are likely to adversely affect the water bodies and the living resources therein.

There is also a need for the various communities to be supported and sensitised on the need to venture into seafood business both as a source of food as well as a source of income.

6.4 Conclusion

Kenya can reap big from the Blue Economy. It can harness the blue economy resources to achieve sustainable development and specifically address questions of eradication of poverty, provision of food security and generally raise the people's standards of living.

³⁹⁵ USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," op. cit.

³⁹⁶ Benkenstein, A., "Prospects for the Kenyan Blue Economy," South African Institute of International Affairs, Policy Insights 62, July, 2018, p.1.

Available at https://saiia.org.za/wp-content/uploads/2018/07/saia_spi_62_benkestein_20180718.pdf [Accessed on 17/1/2020].

³⁹⁷ Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya, p.4.

7. Enhancing Benefit Sharing from Natural Resources Exploitation

7.1 Introduction

The role of government in establishing a framework to manage and invest revenues derived from oil, gas, and mining projects and indeed all natural resources is crucial to ensure that the sector contributes positively to the economy and livelihoods.³⁹⁸ Most private-sector investors realize that projects that are good for the host country and communities, and whose benefits are perceived to be shared reasonably, are less likely to face disruption, renegotiation, or even expropriation.³⁹⁹

Effective Natural Resources Management (NRM) contemplates the use, access of resources to preserve and conserve for the good of all generations.⁴⁰⁰ The NRM role is bestowed upon the state but with duty on cooperation from everyone to ensure that there is sound use of the natural resource.⁴⁰¹ Thus, it is necessary to take care of natural resources to ensure that the benefits that accrue undoubtedly serve the present and the generations to come.⁴⁰² The issue of benefit sharing has been a great challenge.⁴⁰³

This section reflects on equitable benefit sharing in the context of the emerging extractive industry in Kenya. The discourse thus goes beyond reliance on extractive industries to encourage communities on how best they can overcome the perennial problems of economic underdevelopment and consequently, poverty.

7.2 Extractive Industries Resources: The New Canaan for Kenya?

In the year 2012, the then Kenya's President Hon. Mwai Kibaki announced the discovery of oil in Turkana County.⁴⁰⁴ Expanding extractive industries, particularly in sub-Saharan Africa, is characterized by increasing levels of political, social, technical and environmental risk.⁴⁰⁵ Changes brought about by extractive investment can have negative social impacts, such as rapid urban growth, physical and economic displacement of communities, weakening of traditional social

³⁹⁸ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 11. Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+B enefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 21/01/2020].

³⁹⁹ Ibid.

⁴⁰⁰ Child, B., et al, *Zimbabwe's CAMPFIRE Programme: Natural Resource Management by the People*. (1997) IUCN-ROSA Environmental Issues Series No. 2

⁴⁰¹ See Article 69, Constitution of Kenya 2010.

⁴⁰² See United Nations, *World Economic and Social Survey 2013: Sustainable Development Challenges*, E/2013/50/Rev. 1, ST/ESA/344. Available at <https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [Accessed on 21/01/2020].; See also Kibert, C.J., 'The Ethics of Sustainability,' available at <http://rio20.net/wp-content/uploads/2012/01/Ethics-of-Sustainability-Textbook.pdf> [Accessed on 21/01/2020].

⁴⁰³ Ochola, O.W., et al (eds), *Managing Natural Resources for Development in Africa: A resource Book*. IDRC, 2010. Available at <http://www.gbv.de/dms/zbw/646005146.pdf> [Accessed on 21/01/2020].

⁴⁰⁴ Kagwe, W., 'Kenya strikes new oil well, doubles estimates,' *The Star*, 4 July 2013. Available at <http://allafrica.com/stories/201307040991.html> [Accessed on 21/01/2020].; Liloba, H., 'Kenya: Tullow Hits another Oil Field,' *East African Business Week* (Kampala), 9 July, 2013. Available at <http://allafrica.com/stories/201307100096.html> [Accessed on 21/01/2020].

⁴⁰⁵ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda*, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

structures, new conflicts, and even impoverishment.⁴⁰⁶ Sudan, Democratic Republic of Congo and Nigeria are just but few examples of African states that have gone on internal armed conflict because of their rich natural resources.⁴⁰⁷ In Democratic Republic of Congo, 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. Further, the illegal trade of minerals bars communities from benefiting from its resources.⁴⁰⁸

There is conflicting literature on the potential of extractive industries capacity to promote national development. It has been observed that proponents of resource-led development, argue that the inflow of foreign direct investment (FDI) into the country and a model of export based growth will provide jobs, economic growth and ultimately, poverty reduction.⁴⁰⁹ However, for many resource rich developing countries pursuing this model, the reality has been low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.⁴¹⁰

There have been renewed hopes of 'spurred economic growth and development' in Kenya as a result of the recently discovered oil resources in the country.⁴¹¹ Turkana County has been documented as one of the Counties with the highest level of poverty in Kenya.⁴¹² The distrust between local communities around the region against each other⁴¹³ has led to constant conflicts as well as cross border conflicts.⁴¹⁴ The conflict is largely sparked by livestock rustling, harsh climate

⁴⁰⁶ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 55.

⁴⁰⁷ Samndong, R.A. & Nhandumbo, 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 21/01/2020].

⁴⁰⁸ See 'Diamonds in Sierra Leone, A Resource Curse?' available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 22/05/2016]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' *Dissent Magazine*, Spring 2014, available at <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 21/01/2020].; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' *Investigative Field Report*, June 2013. Available at <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 21/01/2020].

⁴⁰⁹ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda*, op cit, p. 48.

⁴¹⁰ *Ibid*, p. 48.

⁴¹¹ See Institute for Human Rights and Business, 'Human Rights Risks and Responsibilities: Oil and Gas Exploration Companies in Kenya,' *Background Paper*, 2013. Available at http://www.americanbar.org/content/dam/aba/events/international_law/2015/06/Africa%20Forum/Security%201.authcheckdam.pdf [Accessed on 21/01/2020].

⁴¹² Turkana County –United Nations Joint Programme 2015-2018, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at <https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf> [Accessed on 21/01/2020].

⁴¹³ Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. <http://www.jstor.org/stable/25842144>. [Accessed on 21/01/2020].

⁴¹⁴ Johannes, E.M., et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

and boundary dispute. Due to low literacy levels,⁴¹⁵ other communities have subsequently been employed as locals had no skills for drilling and seismic work.⁴¹⁶

While there are prospects of 'real' development in the region, the foregoing averments in the international arena affirm that the expected development may not be realized or may not achieve the desired outcome for the country and specifically the locals.⁴¹⁷ Pegging hopes of development on the extractive resources only may mean that the region remains under-developed or undeveloped for longer as the oil may not turn out as expected. If anything, it may add to the above mentioned problems that characterise the region in question.⁴¹⁸ Failed economies result in conflicts,⁴¹⁹ as a result of natural resources bad governance or mismanagement.⁴²⁰

Skewed distributions of benefits from natural resources can fuel social exclusion and conflict, threatening sustainability.⁴²¹ For instance, in the case of Kenya, there have been reports that the Irish oil Firm Tullow, which was allocated the Lokichar Basin oil reserves, has so far incurred \$ 1.5 billion (Kenya Shillings 150 billion) in exploration costs and this amount is to be recovered once production begins.⁴²² This has led to the fears that in the absence of proper audits by Kenya, explorers such as Tullow Oil may inflate recoverable costs ultimately denying Kenyans the full benefits of their national resource.⁴²³ Kenya has in the past been advised that since it has a very short period within which it can maximize benefits from the oil sector before their depletion, it should continue to focus on key sectors such as agribusiness and service sectors.⁴²⁴

⁴¹⁵ Chikwanha, A.B., 'The Anatomy of Conflicts in the East African Community (EAC): Linking Security With Development,' Keynote speech to Development Policy Review Network-African Studies Institute, Leiden University, the Netherlands, 2007. Available at <https://www.issafrica.org/uploads/EACANNIE.PDF> [Accessed on 21/01/2020]; See also <http://opendata.go.ke/Education/Percentage-distribution-of-population-15years-by-/jbxify92> [Accessed on 21/01/2020].

⁴¹⁶ See Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation,' Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya, August 2015, p. 36. Available at https://www.cordaid.org/media/publications/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf [Accessed on 21/01/2020]. See also Turkana is the least educated, says report, Daily Nation November 25, 2013. Available at <http://www.nation.co.ke/news/Turkana-is-the-least-educated-says-report-/-/1056/2087018/-/vypnq1z/-/index.html> [Accessed on 21/01/2020].

; Kenya National Bureau of Statistics, Exploring Kenya's Inequality: Pulling Apart or Pooling Together?

⁴¹⁷ Sigam, C. & Garcia, L., Extractive Industries: Optimizing Value Retention in Host Countries, (UNCTAD, 2012). Available at http://unctad.xiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 21/01/2020]

⁴¹⁸ See Billion, P., Wars of Plunder: Conflicts, Profits and Politics, (New York: Columbia University Press, 2012.)

⁴¹⁹ Maphosa, S.B., Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa. ASIA Policy brief Number 74, 2012.

⁴²⁰ Billion, P., Wars of Plunder: Conflicts, Profits and Politics. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf> [Accessed on 21/01/2020].

⁴²¹ Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' World Development, Vol. 72, pp. 408–418, 2015, p. 408.

⁴²² Herbling, D., 'Tullow's Sh 150bn Exploration bill Raises Queries on Costing methods,' Business Daily, Monday, April 18, 2016 (Nation Media Group Publication No. 2331), pp. 1 & 4.

⁴²³ Ibid, p. 1.

⁴²⁴ Ibid, p. 4.

7.3 Benefit Sharing: Community Rights and Responsibilities

Equitable benefit sharing can be defined as the access to benefits that accrue from natural resources by stakeholders including indigenous communities.⁴²⁵ The international recognition of the right to benefit from natural resources wealth may be predicated upon such recognised rights of communities as the right to self-determination, right to development and the right of peoples to freely dispose of their wealth and natural resources.⁴²⁶

The principle of equitable benefit sharing is acknowledged in several international environmental and natural resources law instruments⁴²⁷ some of which are highlighted in this section. As a potentially major importer of oil in future,⁴²⁸ the discovery of oil is deemed as a major boost to the Kenyan economy.⁴²⁹ The economic value of oil is expected to be high and central to the development of the local community, though it has its benefits and challenges in equal measure.⁴³⁰ Indeed, it has been reported that the discovery of oil has facilitated infrastructural developments such as schools, health amenities and making the area easily accessible. Within two years of discovery, buildings were erected, human population was recorded at 500% growth in several towns within Turkana County.⁴³¹ This is an indication of the high hopes that have been pegged on the potential benefits that may accrue from this venture. Benefits may take either monetary or non-monetary forms and stakeholders should exploit both forms.

Capacity building within the community ensures that communities become less dependent on the immediate benefits accruing from commercial exploitation of the resources and instead have enduring sources of livelihoods. Research may go a long way in helping communities realise the other forms of investments or economic activities that may be viable within their localities. Thus, communities should not only seek to receive the monetary benefits but should also take advantage by acquiring the relevant skills and investing in businesses or venture that will help them in the long term even after the oil reserves are depleted.

7.4 Legal Framework on Benefit Sharing and Natural Resource Exploitation in Kenya

The Constitution also outlines the principles of land policy and provides that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and

⁴²⁵ Jonge, B., What is Fair and Equitable Benefit Sharing? *Journal on agricultural and environmental ethics*, vol. 24, issue 2, 2011.

⁴²⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1.

⁴²⁷ Convention on Biological Diversity; OECD Energy Charter Treaty 1994; Annex to the Nagoya Protocol on Access and Benefit-sharing; CISDL, 'The Principles of International Law Related to Sustainable Development,' available at <http://cisdl.org/tribunals/overview/principles/1.html> [Accessed on 21/01/2020].

⁴²⁸ The 2015 Economic Survey Report by Kenya National Bureau of Statistics.

⁴²⁹ <http://www.tradingeconomic.com/kenya/imports> [Accessed on 21/01/2020].

⁴³⁰ BBC (2012, March 26) Kenya oil discovery after Tullow Oil Drilling; The paradox of plenty is a fear that may hit the county in comparison to countries in Africa, those which are rich in minerals are the lowest in terms of development.

⁴³¹ Kenya County Fact Sheet, 2014; Kornet, J., 'Oil in the cradle of mankind - A glimpse of Africa's future,' available at

<http://www.frontiermarketscompendium.com/index.php/news-commentary/entry/oil-in-the-cradle-of-mankind-a-glimpse-of-africa-s-future> [Accessed on 21/01/2020].

in accordance with the laid down constitutional principles.⁴³² Land in Kenya is also classified as public, community or private.⁴³³ Also noteworthy is the provision that regardless of their location, the Constitution classifies all minerals and mineral oils as defined by law and all rivers, lakes and other water bodies as defined by an Act of Parliament as forming part of public land.⁴³⁴

The *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016*⁴³⁵ is meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.⁴³⁶ Notably and as already discussed in a previous section, the Act outlines the relevant considerations in deciding whether or not to ratify an agreement.⁴³⁷

The proposed legislation *Natural Resources (Benefit Sharing Bill), 2018*⁴³⁸ 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 Act applies with respect to petroleum and natural gas, among other natural resources. The Act provides for guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.⁴³⁹ The legislation proposes setting up a Benefit Sharing Authority which will be mandated to coordinate the preparation of benefit sharing agreements between local communities and affected organizations, and review and where appropriate determine the royalties payable to an affected organization engaged in natural resource exploitation, among other related functions.⁴⁴⁰

The *Environmental Management and Co-ordination (Amendment) Act, 2015*⁴⁴¹ 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 shall provide incentives to promote community conservation.⁴⁴² This is an important clause that can promote forests conservation through the use of incentives. The incentives can be in the form of benefits that accrue to the community from the forests resources. The Mining Act, 2016⁴⁴³ provides for accruing benefits in the form of financial and other benefaction to which communities in mining areas are entitled to receive from the proceeds of mining and related activities.

The *Petroleum Act, 2019*⁴⁴⁴ provides that the relationship between the Government and an exploration and production company is governed by a Production Sharing Contract (PSC).⁴⁴⁵ The

⁴³² Art. 60(1), Constitution of Kenya 2010.

⁴³³ Art. 61(2), Constitution of Kenya 2010.

⁴³⁴ Art. 62(1) (f) (i), Constitution of Kenya 2010.

⁴³⁵ Act No. 41 of 2016, Laws of Kenya.

⁴³⁶ See also S. 124A, Environment (Management and Coordination) Act, No.8 of 1999, Laws of Kenya.

⁴³⁷ Sec. 9, Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016.

⁴³⁸ Natural Resources (Benefit Sharing) Bill, 2018, 23rd October, 2018 (Government Printer, Nairobi, 2018), Kenya Gazette Supplement No.130 (Senate Bills No.31).

⁴³⁹ Clause 4, Natural Resources (Benefit Sharing Bill), 2018.

⁴⁴⁰ Clause 6, Natural Resources (Benefit Sharing Bill), 2018.

⁴⁴¹ No. 5 of 2015, Laws of Kenya.

⁴⁴² S. 31, Environmental Management and Co-ordination (Amendment) Act, 2015.

⁴⁴³ Mining Act, No. 12 of 2016, Laws of Kenya

⁴⁴⁴ Petroleum Act, No. 2 of 2019, Laws of Kenya.

⁴⁴⁵ Ibid, sec. 18.

PSC stipulates that the exploration and production company gets a share of the oil and gas produced and its share is in the form of oil barrels.⁴⁴⁶

Notably, the Act introduces the concept of “local content” which means the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.⁴⁴⁷ The local content plan should address- employment and training; research and development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; and succession plans for positions not held by Kenyans.⁴⁴⁸ The requirement on local content can go a long way in enhancing benefit sharing mechanism in the extractive industry in Kenya, an aspect that was missing or inadequate in the Kenyan framework.

The *National Sovereign Wealth Fund Bill, 2019* is a proposed legislation that seeks to establish the Kenya Sovereign Wealth Fund, to provide institutional arrangements for effective administration and efficient management of minerals and petroleum revenues, and for connected purposes and incidentals thereto.⁴⁴⁹ The purpose of the Fund shall be to — insulate expenditure under the budget estimates of the national government from fluctuations in resource revenues; provide finance for infrastructure development priorities to foster strong and inclusive growth and development; and build a savings base for future generations when minerals and petroleum resources are exhausted.⁴⁵⁰ This fund will be important in promoting intergenerational and intragenerational equity in natural resource benefits sharing.

The *Community Land Act, 2016* is meant to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.⁴⁵¹ The Act provides that every member of the community has the right to equal benefit from community land, where equality includes full and equal enjoyment of rights of use and access. This is a form of promoting benefit sharing as far as community land is concerned.⁴⁵²

The content of this provision, if fully implemented, is likely to impact positively on the community in ways that ensure that the community becomes self-sustaining as far as livelihood sustenance is concerned through both monetary and non-monetary forms of benefits.

⁴⁴⁶ See Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 248-251; Petroleum Act, 2019, Schedule.

⁴⁴⁷ Sec. 50(1), Petroleum Act, 2019.

⁴⁴⁸ Sec 50(3) Petroleum Act, 2019.

⁴⁴⁹ Preamble, National Sovereign Wealth Fund Bill, 2019.

⁴⁵⁰ National Sovereign Wealth Fund Bill, 2019, Clause 5.

⁴⁵¹ Preamble, Community Land Act, No. 27 of 2016, Laws of Kenya.

⁴⁵² Sec. 35, Community Land Act, 2016.

7.5 Lessons from Ghana: Catapulting National Development through Extractive Industries

Ghana is often considered a model of best practice, based on the government's distribution of a proportion of mining rents to mining affected communities.⁴⁵³ In Ghana's mining sector, the system devised to distribute mining wealth to local level is royalty, with royalty agreements being set at between 3% and 6%, provided directly to the government quarterly, which is the main source of revenue derived by gold mining.⁴⁵⁴ The mine revenue is paid to the Large Tax Unit of the Ghana Revenue Authority, which then dispenses the money into the Consolidated Fund. Of this sum, 80% is retained by the government and used for general budget support. 10% is dispensed into the Mineral Development Fund (MDF), which is ostensibly used to help fund public mining sector institutions and for funding ad-hoc flagship projects in mining communities.⁴⁵⁵

Decentralization of mining revenue in Ghana is legislated as compensation for mining-affected communities; it is not a dividend or admission that citizens in mining areas have economic rights to mineral deposits.⁴⁵⁶ It is however noteworthy that even in Ghana, it has been observed that as is the case in many countries, the relationship between industrial mining and communities in Ghana is complex and highly contested, because, despite macroeconomic growth fueled by the mining boom, Ghana remains a country with high rural poverty.⁴⁵⁷ There have even been instances of misappropriation of mineral benefits distributed through the grassroots leaders, namely, village chiefs who are supposed to ensure that the funds are invested well for the benefit of the communities.⁴⁵⁸ The result has been unending poverty despite the presence of resources. Ghana can offer good lessons in terms of models of division, while ensuring that Kenya does not fall into the same problem of misappropriation of funds. Local communities should be also supported and encouraged to diversify their sources of livelihood in a way that ensures sustainability in income and growth for both the communities and the country.

7.6 Nigeria: Resource Curse or Blessing?

There has been documented evidence from the vast majority of resource-rich countries, especially those endowed with depletable natural which suggests that resource riches can be a "curse" rather than a "blessing".⁴⁵⁹ One such country is Nigeria, one of the largest economies of the African continent and one of the leading oil producers in the world.⁴⁶⁰ It is estimated that oil accounts for more than 90 percent of the country's exports, 25 percent of the Gross Domestic Product (GDP), and 80 percent of government total revenues.⁴⁶¹ Notable is the observation that the oil boom of the 1970s led to the neglect of agriculture and other non-oil tax revenue sectors, expansion

⁴⁵³ Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' Resources Policy, vol. 40, 2014, pp.74–82, p. 74.

⁴⁵⁴ Ibid, p. 75; See S. 25, Minerals and Mining Act, 2006 (Act 703), Laws of Ghana.

⁴⁵⁵ Ibid, p. 75.

⁴⁵⁶ Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' op cit, p. 74; See also Ayee, J., et al, 'Political Economy of the Mining Sector in Ghana,' The World Bank Policy Research Working Paper 5730, July 2011. Available at <http://www.cmi.no/publications/file/4091-political-economy-of-the-mining-sector-in-ghana.pdf> [Accessed on 21/1/2020].

⁴⁵⁷ Ibid, p. 75.

⁴⁵⁸ Ibid.

⁴⁵⁹ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' Resources Policy, 38(2013), pp.181–195, p. 181.

⁴⁶⁰ See Agbaeze, E. K, 'Resolving Nigeria's dependency on oil – The derivation model,' Journal of African Studies and Development, Vol. 7(1), pp. 1-14, January 2015.

⁴⁶¹ Ibid, p. 3.

of the public sector, and deterioration in financial discipline and accountability.⁴⁶² While oil exports have fuelled real GDP growth of over 5 per cent a year in Nigeria, the official unemployment rate climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates are estimated to be as high as 60 per cent.⁴⁶³

The source of Nigeria's vast oil wealth is also a site of an ecological disaster that has destroyed livelihoods of farmers and fisher folk in the delta's inlets on a huge scale.⁴⁶⁴ This is because environmental damage not only affects health and wellbeing but also decimates livelihoods, such as fishing and agriculture that depend upon natural resources.⁴⁶⁵

Kenya should therefore avoid a scenario where oil exploration result in corruption, human rights abuse and environmental degradation which in turn affects the livelihoods of the people.

7.7 Opportunities: Making Natural Resources Wealth Count

Benefit-sharing mechanisms can be organized along two main axes: a *vertical axis* of benefit sharing across scales from national to local, and a *horizontal axis* of sharing within scales, including within and across communities, households and other local stakeholders.⁴⁶⁶ Free and prior informed consent of local communities and transparent and equitable benefit-sharing mechanisms can bring affected communities into the mainstream of a natural resource dominant development model.⁴⁶⁷ Understanding who the key stakeholders are, what their aspirations, concerns and expectations of a project are, and what drives these is important for judging the reasonableness of a benefit sharing settlement and its legitimacy and durability over time.⁴⁶⁸

The social and economic development is essential to enable a favourable living and working environment.⁴⁶⁹ Natural Resource Management plays a key role in the conservation of the environment. Human rights remain the obligation of the state to protect and may be done through inclusive decision making processes.⁴⁷⁰

⁴⁶² Ibid, p. 2.

⁴⁶³ Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' Africa Progress Report 2013, p. 31. Available at http://appcdn.acwupload.co.uk/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf [Accessed on 21/1/2020].

⁴⁶⁴ Ibid, p. 32; *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson, and Wiwa v. Shell Petroleum Development Company, Centre for Constitutional Rights, Wiwa et al v. Royal Dutch Petroleum et al.*, available at <http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> [Accessed on 21/1/2020].

⁴⁶⁵ Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' Africa Progress Report 2013, p. 33.

⁴⁶⁶ Ibid.

⁴⁶⁷ Talbott, K. & Thoumi, G., 'Common ground: balancing rights and responsibilities for natural resource investments and community development,' 3rd April 2015, available at <https://news.mongabay.com/2015/04/common-ground-balancing-rights-and-responsibilities-for-natural-resource-investments-and-community-development/> [Accessed on 21/1/2020]

⁴⁶⁸ Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 12.

⁴⁶⁹ Principle 8, UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

⁴⁷⁰ Aarhus Convention in Access to Information, Public participation in decision making and Access to Justice in Environmental Matters 1989 recognizes the nexus between human right and the environment as being essential in the well-being of human beings.

Therefore, while it is important for the state to promote the people's right to benefit from their natural resources as envisaged in international and national legal and human rights instruments, this should be done within the framework of achieving sustainable development. However, it is also important for the Kenyan people to look beyond oil resources in the country and invest in innovation to boost production in other areas such as livestock and agriculture production as well as innovative business investment in creative technologies.

7.7.1 Foundations and Trusts

The approaches taken by Kenya towards resource management, for instance, have been through Foundations, Trusts and Funds initiatives in the energy sector. FTF represent a wider range of financial and institutional framework that channel revenues to local communities. This mode of benefit sharing enable for the operation of government payment, compensation and community investment. The author suggests that they establish a systematic, professional formal approach to development. This has been successful in jurisdictions such as Senegal, Ghana, Australia and Canada.⁴⁷¹

7.7.2 Enhancing Local Accountability and Building Capacity

Communities with more control over access and better common property management regimes play stronger decision making roles.⁴⁷² They acknowledge that land-use decision making is inherently a multilevel process since numerous actors are involved both directly and indirectly representing multiple sectors with different roles, interests and incentives.⁴⁷³ Arguably, resource funds (RF) may provide, even to a limited degree, a track record of windfalls.⁴⁷⁴ It has also been suggested that through CSR and social investment strategies, extractive firms can provide local socio-economic development where the government is unable or unwilling to do so, and thus may help mitigate against the potentially harmful impacts of resource-led growth.⁴⁷⁵ Notably, the ideal goal is for private sector development interventions to supplement government service provision, to avoid a situation of dependency on the private sector, and not to impact the willingness or ability of the state to develop its capacity.⁴⁷⁶ However, due to the uncertainties that come with CSR, there may be a need for a framework that is anchored in law to shield it from the uncertainties that come with CSR arrangements. This also increases accountability not only to the local communities but also the government.

⁴⁷¹ Muigua K., et al, *Natural Resources and Access to Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

⁴⁷² Myrers, R., et al, 'Benefit sharing in context: a comparative analysis of 10 land-use change case study in Indonesia,' *Infobriefs*, No. 118, May 2015. Available at http://www.cifor.org/publications/pdf_files/infobrief/5585-infobrief.pdf [Accessed on 21/1/2020].

⁴⁷³ *Ibid*, p.1.

⁴⁷⁴ Tsani, S., *Natural resources, governance and institutional quality: The role of resource funds*, op cit, p. 190; cf. Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda*, op cit, p. 50.

⁴⁷⁵ Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda*, op cit, p. 50.

⁴⁷⁶ *Ibid*.

7.7.3 Achieving Right to environmental information

Environmental information comprises of information held by authorities, factors that affect the environment, research on the environment, health and safety measures⁴⁷⁷, and reports on the implementation of environmental legislation and so forth.⁴⁷⁸ Lack of environmental information regarding conservation and management becomes more technical in undertaking natural resource management.

As far as indigenous communities are concerned, their right to information should be upheld by ensuring that any information needed is received as soon as possible. Enabling access to environmental information forms basis to access environmental justice.⁴⁷⁹ Communities are also likely to understand the implications of extractive industries on their day to day lives as far as the environment is concerned.

Access to Information Act 2016⁴⁸⁰ was enacted to, inter alia, to give effect to Article 35 of the Constitution of Kenya on the right of access to information. The Act provides that subject to the Act and any other written law, every citizen has the right of access to information held by — (a) the State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.⁴⁸¹ The term ‘information’ is interpreted to include information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety.⁴⁸²

7.7.4 Devolution and Benefit Sharing

The 2010 Constitution requires that services be devolved and both the national and county governments ensure reasonable access to its services so far as it is appropriate.⁴⁸³ Ideally, local communities should be allowed to access natural resources for them to be able to uphold their responsibilities for future generations.⁴⁸⁴ Natural resources are a source of livelihood as they form part of their economic activity. If natural resources are accessed and well managed, they provide for raw materials which are then processed to get products that are sold and thereby generating income. Allowing communities to access natural resources will undoubtedly promote sustainable development.

It is important to make use of the devolved system to empower communities and build capacity through investing accrued benefits in sustainable development projects which will go beyond the lifespan of oil exploration and at the same time uplift the livelihoods of the local people. The County governments are in a better position to identify the most viable and sustainable projects.

⁴⁷⁷ Convention on Environment Impact Assessment in a Transboundary Context, 1991, calls for the establishment of EIA procedures that involves public participation.

⁴⁷⁸ http://www.citizensinformation.ie/en/environment/environmental_law/access_to_environmental_information.htm[Accessed on 21/1/2020].

⁴⁷⁹ Muigua, K., Natural Resources and Environmental justice in Kenya, op cit; See also Access to Information Act, No. 31 of 2016, Laws of Kenya; See also Art. 35 of the Constitution of Kenya 2010.

⁴⁸⁰ Access to Information Act, 2016, Laws of Kenya (Government Printer, Nairobi, 2016).

⁴⁸¹ Ibid, S. 4(1).

⁴⁸² Ibid, s.2.

⁴⁸³ Article 6, Constitution of Kenya, 2010.

⁴⁸⁴ Article 40, United Nations Declaration on the Right of the Indigenous people, 2007; see Joseph Letuya and 21 others v AG and 5 others ELC civil suit no 821 of 2012.

7.7.5 Public participation

Public participation allows individuals to express their views on key governmental policies and laws concerning conditions in their communities. Fostering public participation will mean that authorities dispense their constitutional and legislative obligation, positive deviation in terms of contribution and motivation. *In The Matter of the National Land Commission [2015] eKLR*,⁴⁸⁵ one of the issues that the Supreme Court of Kenya had to deal with was the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ observed that *public participation was a major pillar, and bedrock of democracy and good governance* (emphasis added).⁴⁸⁶

The Supreme Court's advisory opinion is an affirmation of the important role that the principle of public participation can play in enhancing people's appreciation of the management of natural resources in the country. Apart from enhancing people's role in management, public participation may promote co-existence among indigenous communities and allow investors to carry out their activities peacefully.⁴⁸⁷

7.7.6 Addressing Resource capture Phenomenon/Corruption

It has been argued that rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption.⁴⁸⁸ Corruption has been termed as a threat to protected human security.⁴⁸⁹ It calls for global effort to combat corruption.⁴⁹⁰ Resources have fostered corruption, undermined inclusive economic growth, incited armed conflict and damaged the environment.⁴⁹¹ For the governments managing significant resource rents, rent appropriation may be preferable when compared to the promotion of wealth creation policies.⁴⁹² The argument is based on the preposition that rent appropriation may dominate over wealth generation as it offers immediate economic and political gains. These gains appear quite appealing as they can, arguably, be highly personal, favouring the specific members of the ruling elite.⁴⁹³

⁴⁸⁵ Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

⁴⁸⁶ *Ibid*, para. 45.

⁴⁸⁷ See Yagoub, A.M., 'Public Participation in Natural Resource Management in Sudan'; Mohair, P., Public Participation and Natural resource Decision Making: the Case of RARE II Decisions, Utah Agricultural Experiment Station, Journal Paper No. 3282.

⁴⁸⁸ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 184.

⁴⁸⁹ Alao, A., *Natural Resource Management and Human Security in Africa*, in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010).

⁴⁹⁰ Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact*, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 21/1/2020].

⁴⁹¹ Aled, W., et al, *Corruption in Natural Resource Management: An introduction* (Bergen: Michelsen Institute, 2008). Available at <http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf> [Accessed on 21/1/2020].

⁴⁹² *Ibid*.

⁴⁹³ *Ibid*.

7.8 Conclusion

Effective management of these resources and equitable benefit sharing are essential.⁴⁹⁴ There is need for debate and consensus on how best to manage natural resources and the extractive industry so as to avoid the resource curse and alleviate poverty and promote development.

8. An Integrated Approach to Environmental Management and Conservation for Sustainable Development in Kenya

8.1 Introduction

Natural Resources and the environment in general are central to both the anthropocentric and ecocentric approaches to sustainable development agenda.⁴⁹⁵ Natural resources law represents a major and perhaps one of the most important regulatory regimes in most countries.⁴⁹⁶ One of the crucial issues addressed by natural resources law is how to avoid harm and serious damage to resources.⁴⁹⁷ Therefore, policymakers have a variety of approaches available when legislating to enable holistic protection and management of the environment and natural resources.⁴⁹⁸ These approaches include command and control, market-based approaches, incentives (taxation and subsidies) amongst others. Community Based Natural Resource Management (CBNRM) and traditional resource management institutions have also been used with some success in Kenya.⁴⁹⁹ Ecosystem-based approaches such as Integrated Water Resources Management (IWRM) or River basin management, integrated coastal zone management (ICZM) and integrated management of land and other resources are other approaches to NRM.⁵⁰⁰

Notably, the relationship between development and environment is central to the sustainable development concept.⁵⁰¹ At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted *the 2030 Agenda for Sustainable Development*, which includes a set

⁴⁹⁴ 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.

⁴⁹⁵ Helen Kopnina, 'Revisiting Education for Sustainable Development (ESD): Examining Anthropocentric Bias Through the Transition of Environmental Education to ESD' (2014) 22 *Sustainable Development* 73; Guido Montani, 'The Ecocentric Approach to Sustainable Development. Ecology, Economics and Politics' 36; Satish C Shastri, 'Environmental Ethics Anthropocentric To Eco-Centric Approach: A Paradigm Shift' (2013) 55 *Journal of the Indian Law Institute* 522; Louis Kotze 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.

⁴⁹⁶ Hutter, B.M, 'Socio-Legal Perspectives on Environmental Law: An Overview' in Hutter B.M. (ed), *A Reader in Environmental Law*, (Oxford University Press, 1999) 3, p.4.

⁴⁹⁷ Gunningham, N. & Sinclair, D., 'Designing Smart Regulation,' in Bridget M. Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999), p.305.

⁴⁹⁸ *Ibid*, p.305.

⁴⁹⁹ 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.

⁵⁰⁰ 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.

⁵⁰¹ 'Theories of Economic Development,' p. 14. Available at www.springer.com/cda/content/document/cda_downloadaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406 [Accessed on 21/01/2020].

of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁵⁰²

While various groups define sustainability differently, where some restrict it to environmental sustainability and others include broader issues affecting human life, the most common one sees sustainability as the requirement to maintain the capacity to provide non-declining well-being over time.⁵⁰³

It is therefore, in recognition of the central role of the environment in human wellbeing that this section explores the various approaches aimed at facilitating effective environmental governance that balances the foregoing aspects.

These approaches are to be applied as complementary tools in natural resource management. They are not mutually exclusive as they overlap with one another in their application.⁵⁰⁴ Command and control and market-based mechanisms can be used in a synergetic manner such that while broader environmental objectives are set by public authorities, the methods of achieving those objectives are determined by the business fraternity.⁵⁰⁵ Some argue that⁵⁰⁶ while market-based mechanisms are seen to extend the freedom to the market players, in command and control mechanisms, the benefits are said to flow to the consumers due to government intervention. Further, the government will always play its role of granting rights, imposing responsibilities, and extend, restrict, or eliminate privileges, while the market conservatives argue that once there is efficient market then the free play of the market forces will allocate resources to their highest valued uses and governments should therefore stay away.⁵⁰⁷

8.2 Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya

8.2.1 Introduction

Much of the debates revolving around sustainable development agenda have evolved around how environmental and natural resources can be harnessed in a way that puts man in the middle of such activities, that is, an anthropocentric approach. An anthropocentric approach focuses mainly on

⁵⁰² 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 21/01/2020].

⁵⁰³ 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/SustainabilitywellbeingArt..pdf> [Accessed on 21/01/2020].

⁵⁰⁴ Blanco, E. & Razaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives*, (Edward Elgar Publishing Limited, 2011), p. 106; See also Miller, B. W. & Morisette, 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.

⁵⁰⁵ Hanks, J.P., "Self-Regulation and Co-Regulation-Cost-effective Policy Options for Industrial Sustainable Development," in "Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice," (UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa), pp.48-58.

⁵⁰⁶ Swaney, J.A., "Market versus Command and Control Environmental Policies," *Journal of Economic Issues*, Vol. 26, No. 2, Jun., 1992, pp. 623-633, p. 624.

⁵⁰⁷ Ibid.

meeting the need of human beings at the expense of a system that values the environment and ecological health, that is, an ecocentric approach.

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.⁵⁰⁸ 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.⁵⁰⁹ There is an overemphasis on anthropocentric approach at the expense of an ecocentric approach that puts a greater emphasis on environment and ecological health. This section discusses Kenya's approach to environmental conservation and protection and makes a case for a more ecocentric approach.

8.2.2 Ecocentric Approaches to Environmental Management

The *World Charter for Nature*⁵¹⁰ points out that mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients. Furthermore, civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity, and for rest and recreation.⁵¹¹

Ecocentric approaches to environmental management explore such themes as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.⁵¹² The ecocentric approach to environmental management and governance advocates for the conservation of the environment as a matter of right and not merely because of the benefits that accrue to the human beings.⁵¹³ Under the ecocentric approach, there is a moral concern for nature.⁵¹⁴ Some scholars have rightly argued that we should give legal rights to forests, oceans, rivers⁵¹⁵ and other so-called "natural objects" in the environment—indeed, to the natural environment as a whole.⁵¹⁶

⁵⁰⁸ Fisher, A.D., 'A Human Rights Based Approach to the Environment and Climate Change' A GI-ESCR Practitioner's Guide, March 2014.

⁵⁰⁹ Ibid.

⁵¹⁰ UN General Assembly, World Charter for Nature, 28 October 1982, A/RES/37/7.

⁵¹¹ Ibid, Preamble.

⁵¹² See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers Limited, 2016).

⁵¹³ See generally, 'Species Extinction Is a Great Moral Wrong' (Elsevier Connect). Available at <<https://www.elsevier.com/connect/species-extinction-is-a-great-moral-wrong>> [Accessed on 21/01/2020].

⁵¹⁴ See Carter, A., "Towards a multidimensional, environmentalist ethic," *Environmental Values* 20, no. 3 (2011): 347-374.

⁵¹⁵ The Guardian, "New Zealand River Granted Same Legal Rights As Human Being," March 2017. Available at

<https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> [Accessed on 21/1/2020]; The Guardian, "Ganges and Yamuna rivers granted same legal rights as human beings," available at <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> [Accessed on 21/1/2020].

⁵¹⁶ See generally, Stone, C.D., "Should Trees Have Standing--Toward Legal Rights for Natural Objects." *S. Cal. L. rev.* 45 (1972): 450; cf. Varner, G.E., "Do Species Have Standing?" *Environmental Ethics*, Volume 9, Issue 1, Spring 1987, pp. 57-72.

8.2.3 Environmental Management Approaches in Kenya: Prospects and Challenges

Environmental management and governance in Kenya mainly focuses on achieving sustainable development, where development is interpreted as having several dimensions which include: Economic development; Human development; and Sustainable development.⁵¹⁷ It is thus evident that while there are attempts aimed at conserving the environment, much of the efforts seem to be directed at anthropocentric approach that seeks to meet the needs of human beings and the general developmental needs of the country.

8.2.4 Entrenching the Ecocentric Approach in Environmental Management in Kenya

The anthropocentric approach mostly adopted by most of the existing legal instruments in Kenya and indeed much of the sustainable development agenda debates create the false impression that the environment should only be protected for the convenience of human beings.⁵¹⁸ However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

There is a need for more emphasis while coming up with laws to ensure that there are measures that are geared towards protecting the aspects of nature whose benefits are not obvious to the human beings, if at all. Some of the challenges that the country is experiencing such as degradation of natural forests and dwindling water catchment areas would become a thing of the past if people understand that the earth has intrinsic value and right to be protected from climate change and degradation.

If human beings view themselves as part of the nature, and not merely as conquerors of the nature with a right to use or even plunder the earth resources, then respect for the environment is likely to increase as well as entrenchment of environmental ethics where people take care of the environment without necessarily doing it as a reaction to laws on environment in the country.⁵¹⁹

It is important that the country integrates both anthropocentric and ecocentric approaches to environmental conservation and protection. All beings are interdependent and every form of life has value regardless of its worth to human beings.⁵²⁰ For instance, without the bees, pollination of plants would be almost impossible, and without plants animal lives would be jeopardized. A sustained and secure environment is also useful for the regeneration of resources.⁵²¹

These organisms may not speak for themselves and it is important that human beings take them into consideration when exploiting environmental and natural resources. They should be a voice for the voiceless. There is an increased need for the policy makers and legislators to ensure that any laws, plans, policies and other legal instruments are geared more towards ensuring that environmental conservation and management efforts reflect ecocentric approaches.

⁵¹⁷ 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 http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf [Accessed on 21/1/2020].

⁵¹⁸ They focus on eliminating poverty and other social ills afflicting the human society in Kenya.

⁵¹⁹ Ojomo, P.A., "Environmental Ethics: An African Understanding," *African Journal of Environmental Science and Technology* 5, no. 8 (2011): 572-578.

⁵²⁰ World Charter for Nature, Principle 1.

⁵²¹ *Ibid*, Principle 2.

8.3 The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya

8.3.1 Introduction

The prevailing debate on sustainable development the world over mainly revolves around minimizing adverse human impact on the environment as part of maximizing accruing Ecosystem Services. 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.⁵²² Pollination services are provided both by wild, free-living organisms and by commercially managed bee species. Bees are considered the predominant and most economically important group of pollinators in most geographical regions.⁵²³ 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.⁵²⁴ Despite this, there is arguably inadequate evidence demonstrating Kenya's commitment 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 2010⁵²⁵.

The inadequacy 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.

⁵²² 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 21/1/2020].

⁵²³ 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.

⁵²⁴ "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 21/1/2020].

⁵²⁵ Constitution of Kenya, 2010, Art. 43.

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

Pollinators are important for the provision of ecosystem services.⁵²⁶ 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.⁵²⁷ 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 latter.⁵²⁸ 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’.⁵²⁹ Any threats to these animal-pollinators therefore threaten the whole chain of natural provision of ecosystem services.

8.3.3 Protection of Pollinators: the Legal, Institutional and Policy Framework

Internationally, the 1992 *Convention on Biological Diversity*⁵³⁰ was adopted during the Earth Summit in Rio de Janeiro, with the objective of conservation of biological diversity.⁵³¹ 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’.⁵³²

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.⁵³³

The *Agenda 21*⁵³⁴ also contains provisions under section 15 thereof on the conservation of biological diversity. Agenda 21 specifically acknowledges that our planet's essential goods and

⁵²⁶ 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 21/1/2020].

⁵²⁷ 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.

⁵²⁸ Ibid.

⁵²⁹ San Luis Obispo County, ‘Pollinator Information & Resources’, op cit., p.1.

⁵³⁰ United Nations Environment Programme, *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), United Nations, Treaty Series, vol. 1760, p. 79.

⁵³¹ *Convention on Biological Diversity*, Art. 1.

⁵³² *Convention on Biological Diversity*, Art. 2.

⁵³³ Ibid, Art. 6. General Measures for Conservation and Sustainable Use Each Contracting Party.

⁵³⁴ *Agenda 21 (A/CONF.151/26, vol.II)*, adopted by the United Nations Conference on Environment and Development on 14 June 1992.

services depend on the variety and variability of genes, species, populations and ecosystems. The *Aichi Biodiversity Target 7* seeks to ensure that, by 2020, areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.⁵³⁵

The *Environmental Management and Co-ordination Act 1999*⁵³⁶ (EMCA) calls for conservation of 'biological diversity'.⁵³⁷ Notably, EMCA provides for conservation of biological resources in situ and ex-situ.⁵³⁸ Other provisions in EMCA that are germane to protection of pollinators relate to standards of pesticides and toxic substances.⁵³⁹ EMCA further provides for the registration of the pesticide or toxic substance, before importing, manufacturing, processing or reprocessing of pesticides or toxic substance.⁵⁴⁰

Kenya's *National Environment Policy 2012* 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'.⁵⁴¹ '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.'⁵⁴²

All the foregoing national laws and policy instruments have some issues that may affect pollinators in their implementation, but notably, most of them hardly mention pollinators.⁵⁴³ There is no dedicated law that is meant to protect the pollinators and currently, their protection can only be done within the framework of all the above laws.

8.3.4 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.⁵⁴⁴ 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.⁵⁴⁵

⁵³⁵ Aichi Biodiversity Targets - Convention on Biological Diversity (CBD), <https://www.cbd.int/sp/targets/> [Accessed on 21/1/2020].

⁵³⁶ 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.

⁵³⁷ *Ibid.*, sec. 2.

⁵³⁸ *Ibid.*, sec. 51; sec. 53(1).

⁵³⁹ Environmental Management and Co-ordination Act, 1999, sec. 94.

⁵⁴⁰ *Ibid.*, sec. 94(1).

⁵⁴¹ Republic of Kenya, *National Environment Policy 2012*, (Government printer, 2012, Nairobi), para. 2.1.

⁵⁴² *Ibid.*, para. 2.2.

⁵⁴³ See also the Wildlife Conservation and Management Act, No.47 of 2013, Laws of Kenya; See also the Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017, Legal Notice No. 242 of 2017.

⁵⁴⁴ 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.

⁵⁴⁵ *Ibid.*, p. 251.

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.

i. 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.⁵⁴⁶

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.⁵⁴⁷

The *Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006*⁵⁴⁸, 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.

k. Reduction or Effective Control of Pesticide Use

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.⁵⁴⁹ 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.⁵⁵⁰ This calls for closer working relationship between farmers and the agricultural extension services officers for sensitisation and education on the same.

⁵⁴⁶ 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.)

⁵⁴⁷ 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%20FORENVIRONMENTAL%20AND%20SOCIAL%20%20JUSTICE%20IN%20KENYA-%20%2022nd%20%20October%20edited.pdf> [Accessed on 21/1/2020].

⁵⁴⁸ Environmental Management and Co-ordination Act, No. 8 of 1999, Legal Notice No. 160 of 2006.

⁵⁴⁹ 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 21/1/2020].

⁵⁵⁰ Kings River Conservation District (KRCDD), "Agricultural Management Practices," available at http://www.krccd.org/water/water_quality/ag_mgt_practices.html [Accessed on 21/1/2020].

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.⁵⁵¹ Additionally, conventional farmers are advised to be extremely cautious in the choice, timing, and application of insecticides and other chemicals.⁵⁵² 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.⁵⁵³

The Pest Control Products Board established under the Pest Control 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.⁵⁵⁴ 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.

I. Environmental Education, Awareness and Ethics

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.⁵⁵⁵ The local communities would be able to actively engage potential investors in ensuring environmental sustainability. Principles of public participation in governance and environmental democracy⁵⁵⁶ as envisaged in the current Constitution of Kenya becomes easier to implement.

m. 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. There is need for concerted efforts from the Government agencies concerned with agriculture and scientific research to work closely with the International Centre of Insect Physiology and Ecology (ICIPE) to address

⁵⁵¹ 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.

⁵⁵² *Ibid.*, p.257.

⁵⁵³ *Ibid.*, p.258.

⁵⁵⁴ *Ibid.*, Sec. 5 & 6.

⁵⁵⁵ 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.

⁵⁵⁶ 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.

some of the problems facing these important players for the realisation of sustainable development agenda.

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. 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.⁵⁵⁷ 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.

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.⁵⁵⁸

n. Addressing Climate Change

Scholars have rightly suggested that climate change may be one of the biggest anthropogenic disturbance factors imposed on ecosystems today.⁵⁵⁹ 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.⁵⁶⁰ The *Agenda 2030 on Sustainable Development* urges countries to take urgent action to combat climate change and its impacts.⁵⁶¹

⁵⁵⁷ Convention on Biological Diversity Secretariat, "TARGET 7 - Technical Rationale extended (provided in document COP/10/INF/12/Rev.1)," op. cit.

⁵⁵⁸ Thakuria, 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.

⁵⁵⁹ 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.

⁵⁶⁰ Ibid.

⁵⁶¹ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Goal 13.

8.4 Conclusion

The quest for sustainability and sustainable development requires integrating economic, social, cultural, political, and ecological factors.⁵⁶² As indicated above, the various management mechanisms have relevance in the management of natural resources in the Kenyan context. If effectively applied, the result would be the realisation of environmental justice and sustainable use of resources. In addition, a hybrid approach which harnesses the positive attributes of each perspective, while minimizing the negative aspects of each, is also suggested as the most appropriate approach going forward. All the approaches discussed this section have a place in sustainability debate. An integrated approach to natural resources and environmental management is the way to go in order to attain sustainable development.

9. Strengthening the Environmental Liability Regime in Kenya for Sustainable Development

9.1 Introduction

Environmental liability has been defined as an obligation which may result in future payments for the enterprise, due to past events or to compensate a third party harmed by environmental damage by the company.⁵⁶³ Liabilities incurred accrue from either legal obligations, such as rehabilitation of land, a fine or compensation as a result of court decision, or from contractual obligations arising out of company's internal commitment to environmental safeguards.⁵⁶⁴ Environmental liability stems from the states' desire and responsibility to not only ensure the protection of the right to clean and healthy environment but also the fact that the environment is considered to be the main reservoir for most of the resources necessary for realisation of economic and social rights.⁵⁶⁵

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.⁵⁶⁶ In this regard, addressing the effects of the environment on human health is considered to be essential if we are to achieve the goal of health for all.⁵⁶⁷

Despite the progressive Kenyan Constitution making great strides in promoting environmental conservation and protection⁵⁶⁸, there is still no evidence of strict environmental culpability in cases

⁵⁶² 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.

⁵⁶³ Nuta, F. M., & Nuta, A. C., "Environmental Liabilities Accounting: A Review of Some Standards and Guidelines," *Journal of Public Administration, Finance and Law* 2, no. 2 (2012): 47-51, at p.47.

⁵⁶⁴ *Ibid*, at p.47.

⁵⁶⁵ See generally, 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.

⁵⁶⁶ Health and Environment Linkages Initiative – HELI, Health and Environment Linkages Initiative, available at <http://www.who.int/heli/en/> [Accessed on 21/01/2020].

⁵⁶⁷ Higenbottam, N., 'Nurse's Role as an Environmental Activist,' p.2. Available at <http://www.theluminaryproject.org/downloads/Essay%20Contest%20Higenbottam.pdf> [Accessed on 21/1/2020].

⁵⁶⁸ See Section Five of the Constitution, Part 2 (Articles 69-72).

of environmental damage, with many of the environmental restoration and protection initiatives being left to the state.⁵⁶⁹

It is against this background that this section examines the status of the environmental liability regime in Kenya and makes some recommendations on how enforcement and compliance with environmental standards can be enhanced as a step towards realising sustainable development in the country.

9.2 Environmental Liability under the International and Regional Environmental Legal Framework

Article 2 (1) of the *Vienna Convention for the Protection of the Ozone Layer*⁵⁷⁰ outlines some of the States' general obligations towards the ozone layer. This Convention mainly advocates for preventive and control measures by States implemented through cooperation.

The *1972 Stockholm Declaration of the United Nations Conference on the Human Environment* under Principle 13 deals with the issue of compensation for damage to victims of environmental damage. The *Rio Conference on Environment and Development from 1992* not only established the basic principles of civil protection of basic ecological values, but also the precautionary principle, all based on the recommendations of the Brundland Commission.⁵⁷¹

The *Montreal Protocol*,⁵⁷² an international Treaty, aims to regulate the production and use of chemicals that contribute to the depletion of Earth's ozone layer. The Protocol sets limits on the production of chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.⁵⁷³

*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*⁵⁷⁴ 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.⁵⁷⁵

Also relevant is the *Minamata Convention on Mercury*⁵⁷⁶ is a global treaty to protect human health and the environment from the adverse effects of mercury.⁵⁷⁷

⁵⁶⁹ Article 69 of the Constitution of Kenya 2010.

⁵⁷⁰ United Nations, *Vienna Convention for the Protection of the Ozone Layer*, Vienna, 22 March 1985, United Nations, Treaty Series, vol. 1513, p. 293. Kenya is a signatory to the Convention.

⁵⁷¹ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," op. cit., at p. 1167.

⁵⁷² *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.

⁵⁷³ Arts. 2A-I.

⁵⁷⁴ *Basel, 22 March 1989*, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.

⁵⁷⁵ Preamble.

⁵⁷⁶ 16 August 2017, No. 54669. Adopted in 2013 in Japan, entered into force in 2017.

⁵⁷⁷ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-17§ion=27&clang=_en [Accessed on 21/1/2020].

The International Court of Justice, in the 1997 case concerning the *Gabcikovo-Nagymaros Project* (Hungary and Slovakia)⁵⁷⁸, 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 *Aarhus Convention*⁵⁷⁹ provides that each Party should make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.⁵⁸⁰ This Convention affirms the central role of the principle of public participation in environmental assessment.

9.3 Environmental Liability under Kenya's Legal Framework: The (In) Adequacy

Under the Fourth Schedule to the Constitution, the National and County Governments have shared responsibilities when it comes to environment and natural resources. The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment.⁵⁸¹ The two government levels should work together to facilitate a coordinated, multisectoral approach for effectiveness discharge of their environmental responsibilities.

9.3.1 Environmental Management Tools in Kenya

While some approaches seek to rely on a human rights approach to environmental conservation and protection, 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.⁵⁸² This section discusses some of these approaches in reference to Kenya's environmental laws. It is however worth pointing out that while most of these tools are provided for and enforced through the *Environmental Management and Coordination Act* (EMCA)⁵⁸³, there are corresponding provisions and requirements under the various sectoral laws on water⁵⁸⁴, land⁵⁸⁵, forests⁵⁸⁶, mining⁵⁸⁷, public health⁵⁸⁸, agricultural production⁵⁸⁹ and energy⁵⁹⁰ sectors, among others. Their wordings may be different but they are

⁵⁷⁸ *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7.

⁵⁷⁹ UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (the Aarhus Convention), 1998

⁵⁸⁰ *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, Art. 7.

⁵⁸¹ Article 42, *Constitution of Kenya 2010* (Government printer, Nairobi, 2010).

⁵⁸² 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 21/1/2020].

⁵⁸³ *Environmental Management and Coordination Act (EMCA)*, Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015).

⁵⁸⁴ *Water Act*, No. 43 of 2016, Laws of Kenya.

⁵⁸⁵ *Land Act*, No. 6 of 2012, Laws of Kenya.

⁵⁸⁶ *Forests Management and Conservation Act*, No. 34 of 2016, Laws of Kenya.

⁵⁸⁷ *Mining Act*, No. 12 of 2016, Laws of Kenya.

⁵⁸⁸ *Public Health Act*, Cap 242, Laws of Kenya; *Health Act*, No. 21 of 2017, Laws of Kenya.

⁵⁸⁹ *Agriculture and Food Authority*, No. 13 of 2013, Laws of Kenya; *Fisheries Management and Development Act*, No. 35 of 2016, Laws of Kenya; *Crops Act*, No. 16 of 2013, Laws of Kenya.

⁵⁹⁰ *Energy Act*, No. 1 of 2019, Laws of Kenya.

mainly concerned with health and environmental protection while carrying out various activities or laying out relevant infrastructure. They also define penalties and other remedies in case of violation of set rules and regulations.

o. Civil Liability Against State and Private persons

Civil law protection is enforced through sanctions as a mechanism of coercion against a person or entity that causes damage, with the aim of achieving and bringing the property or other personal non-material goods to the state in which they were before threat or disturbance.⁵⁹¹ Notably, civil law sanctions relating to protection of the environment are grouped on the basis of their function: *preventive sanctions, natural restitution and compensatory and reparatory sanctions* (emphasis added).⁵⁹²

The Constitution of Kenya guarantees 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. It defines duties and obligations for both the state and every person.

p. Criminal Liability in Environmental Matters

Criminal law enforces the protection of society from crime, so that the most favorable protection of the environment is achieved in this way.⁵⁹³

The *Environmental Management and Coordination Act (EMCA), 1999*, provides for criminal liability in environmental matters under various sections.⁵⁹⁴ Part XIII of EMCA on environmental offences carries more elaborate provisions on criminal liability in environmental matters.⁵⁹⁵

q. Environmental Impact Assessment

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.⁵⁹⁶ Effective Environmental Impact Assessment (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.⁵⁹⁷

⁵⁹¹ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176, 1163.

⁵⁹² *Ibid.*, at p. 1163.

⁵⁹³ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

⁵⁹⁴ S. 118, EMCA.

⁵⁹⁵ *Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146.*

⁵⁹⁶ *Environmental Management and Co-Ordination Act, No 8 of 1999* (Government Printer, Nairobi, 1999), s.2; Al Ouran, N.M., 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

⁵⁹⁷ 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/Art./109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf> [Accessed on 21/1/2020].

Environmental Impact Assessment (EIA) is one of the tools for environmental management, a procedure for evaluating the likely impact of a proposed activity on the environment. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed.⁵⁹⁸ The *Environment (Management and Conservation) Act (EMCA) 1999*⁵⁹⁹ provides for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts.

EIA can be a powerful tool for keeping the corporates including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered through more involvement 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.⁶⁰⁰

r. Strategic Environmental and Social Assessment (SESA) and Strategic Environmental Assessment (SEA)

One of the conceptual definitions of SEA is a process directed at providing the proponent (during policy formulation) and the decision-maker (at the point of policy approval) with a holistic understanding of the environmental and social implications of the policy proposal, expanding the focus well beyond the issues that were the original driving force for new policy.⁶⁰¹

The objectives of the Strategic Environmental Assessment (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.⁶⁰²

Thus, it may be said that Strategic environment assessment is all about ensuring that public policy, programmes and plans are compliant with sound environmental management. Strategic Environmental and Social Assessment (SESA) is an effective environmental management tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.⁶⁰³

Strategic Environmental Assessment (SEA) has been hailed as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector

⁵⁹⁸ Birnie, P. & Boyle, A., *International Law and the Environment*, (2nd ed., Oxford University Press, 2002), p.131-132.

⁵⁹⁹ Act No. 8 of 1999, Laws of Kenya.

⁶⁰⁰ Jenje, B., '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 15/1/2020]; See also Chege, M. W., 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.

⁶⁰¹ Brown, A.L. & Thérivel, R., 'Effective methodologies: Principles to guide the development of strategic environmental assessment methodology,' *op cit*, at p. 184.

⁶⁰² *Ibid*; See also the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Regulations 42 & 43.

⁶⁰³ Notably, the Energy Act, No. 1 of 2019, Laws of Kenya, section 107 (1) (2)(d); s. 57A(1), Environmental Management Co-ordination (Amendment) Act 2015.

decision-making and reform, and the World has even demonstrated its commitment to promoting the use of SEA as a tool for sustainable development.⁶⁰⁴

While Kenya's parent Environmental Act (EMCA) was initially silent on SEA, the same was introduced via the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act 2015).⁶⁰⁵ It has been posited that the establishment of Strategic Environmental Assessment (SEA) in Kenya was ostensibly in recognition of the fact that the existing Environmental Impact Assessment (EIA) tool was unable to respond to environmental integration needs at strategic levels of decision-making.⁶⁰⁶

The Amendment Act 2015 amended EMCA by introducing section 57A (1) which provides that all Policies, Plans and Programmes for implementation should be subjected to Strategic Environmental Assessment.⁶⁰⁷

The *Environmental (Impact Assessment and Audit) Regulations, 2003*⁶⁰⁸ also provide for SEA and interprets it to mean the process of subjecting public policy, programmes and plans to tests for compliance with sound environmental management.⁶⁰⁹ The Regulations also require the Government and all the lead agencies to incorporate principles of strategic environmental assessment in the development of sector or national policy.⁶¹⁰

The Constitution captures all the elements of SEA such as public participation and sustainable development and calls for an integrated approach to environmental and development agenda.

Applied as a systematic process, SEA leads to more pro-active decision making in support of sustainable development, ensuring that ethical principles are considered in policy, plan and programme making and different paths on how to achieve overall goals and objectives can be mapped out.⁶¹¹

s. Environmental Audits and Monitoring

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.⁶¹² An initial environmental audit and a control audit are conducted by a qualified and authorized environmental auditor or environmental inspector who is an expert or a firm of experts registered by NEMA. In the case of an ongoing project NEMA requires the proponent to undertake an initial environmental audit study to provide baseline information upon which subsequent environmental audits shall be based. The

⁶⁰⁴ The World Bank, 'Strategic Environmental Assessment,' September 10, 2013, available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 21/1/2020].

⁶⁰⁵ Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.

⁶⁰⁶ Mutui, F.N., 'The Development and Practice of Strategic Environmental Assessment (Sea) in Kenya,' *European Scientific Journal*, October 2013, vol.9, No.29, pp. 165-185, p. 166.

⁶⁰⁷ S. 42, Environmental Management and Co-ordination (Amendment) Act, 2015.

⁶⁰⁸ Legal Notice No. 101 of 2003.

⁶⁰⁹ Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101, Regulation 2.

⁶¹⁰ *Ibid*, Regulation 42(3); 43 (1).

⁶¹¹ Fischer, T.B., 'Strategic environmental assessment in post-modern times,' *op cit*, at p. 163.

⁶¹² Constitution of Kenya, 2010, Art. 69(1) (f).

proponent shall be issued with an acknowledgement letter and an improvement order where necessary.⁶¹³ The *Environment (Assessment and Audit) Regulations, 2003*⁶¹⁴ provide the necessary guidelines on the procedure. Arguably, NEMA, as it is currently, is still facing challenges in discharging its mandate and there is a need to work closely with the county governments in order to be in touch with what is happening across the country.⁶¹⁵

t. Implementation of Principles of Sustainable Development

The principles of sustainable development as captured in EMCA⁶¹⁶ include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the principle of international co-operation in the management of environmental resources shared by two or more states; the polluter-pays principle; and the pre-cautionary principle.

There is a 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.

9.4 Enhanced Environmental Enforcement and Compliance for Sustainable Development in Kenya

Environmental protection is inherent in the concept of sustainable development, as is a focus on the sources of environmental problems rather than the symptoms.⁶¹⁷ While the existing laws seem to put great emphasis on enforcement of environmental responsibilities, there is little evidence of actual promotion of deterrence under the current environmental liability regime in Kenya.

Proper apportionment of environmental liability in the country will go a long way in ensuring that all stakeholders, both public and private play their role in achieving sustainable development agenda. Investing in compliance and enforcement of environmental laws benefits the public by securing a healthier and safer environment for themselves and their children.⁶¹⁸

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

⁶¹³ The Environmental (Impact Assessment and Audit) Regulations, 2003. Available at https://www.nema.go.ke/index.php?option=com_content&view=article&id=27&Itemid=167 [Accessed on 21/1/2020].

⁶¹⁴ Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Laws of Kenya (Government Printer, Nairobi, 2003).

⁶¹⁵ See Johnson Kamau Njuguna & another v Director of Public Prosecutions [2018] eKLR, Judicial Review No 9 of 2018.

⁶¹⁶ EMCA, S. 3(5).

⁶¹⁷ Ibid, para. 50.

⁶¹⁸ 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.

conserving the environment.⁶¹⁹ 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.⁶²⁰

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.

9.4.1 Encouraging Proactive Corporate Environmental Compliance

It has rightly been pointed out that virtually all companies face the possibility of environmental liability costs and as such, it is imperative for the management to make at least a general estimate of their company's potential future environmental liability be it from legally mandated cleanup of hazardous waste sites or from lawsuits involving consumers, employees, or communities.⁶²¹ The gathered information, it is argued could be useful in the following ways: encourage defensive and prudent operations and waste reduction; improve manufacturing, waste disposal and shipping practices; negotiate and settle disputes with insurance carriers; influence regulators and public policy makers; determine suitable levels of financial resources; reassess corporate strategy and management practices (think green); articulate a comprehensive risk management program; improve public relations and public citizenship; and assess hidden risks in takeovers and acquisitions.⁶²²

It is advisable for companies and organisations to engage in proactive environmental risk management as part of their strategic plans in order to avoid costly environmental liability mistakes.

9.4.2 Due Diligence/Cultivating Environmental Ethics

Kenyans have a role to play in achieving the ideal of a clean and healthy environment.⁶²³ There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same.⁶²⁴ 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.⁶²⁵ 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.⁶²⁶

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

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

⁶²¹ Schoemaker, P. J., & Schoemaker, J. A., "Estimating environmental liability: Quantifying the unknown," *California Management Review*, Vol.37, no. 3 (1995): 29-61, at p.29.

⁶²² Ibid, at pp. 29-30.

⁶²³ Article 69(2), Constitution of Kenya.

⁶²⁴ Preamble, Constitution of Kenya.

⁶²⁵ Article 69(2), Constitution of Kenya.

⁶²⁶ See generally, Muigua, K., *Realising Environmental Democracy in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf> [Accessed on 21/1/2020].

unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. 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 environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.⁶²⁷

The same should include change of attitude by the general public. The current generation has a responsibility and an environmental liability to ensure that future (unborn) generations have their future guaranteed (*Oposa et al. v. Fulgencio S. Factoran, Jr. et al (G.R. No. 101083) (199).*)⁶²⁸

9.4.3 Environmental Insurance

Environmental insurance is one of the tools that is used in environmental management. However, EMCA does not have provisions touching on the same. In addition, Kenyan insurance firms are yet to popularise environmental insurance services. It is suggested that this is a service that they should take up especially in light of the sustainable development agenda. However, all is not lost as a few of the insurance providers have packages on environmental impairment liability, such as the AIG Kenya Insurance Company whose package covers: third-party bodily injury; third-party property and environmental damage; and clean-up costs for pollution conditions, both on site or while migrating from site.⁶²⁹ Environmental law practitioners may also advise their clients on the possibility of taking up environmental liability insurance.

There is a need to popularize environmental insurance in the country for both medium and huge companies to shield them against environmental liability which could turn out to be too costly.⁶³⁰

9.5 Conclusion

The environment should be accorded some right, independent of the human beings. 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. Strengthening the environmental liability regime in Kenya is necessary in order to enable the country to have a clean and healthy environment and to achieve sustainable development.

10. Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development

10.1 Introduction

‘Environmental mainstreaming’ has been defined as the informed inclusion of relevant environmental concerns into the decisions of institutions that drive national, local and sectoral

⁶²⁷ 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 21/1/2020].

⁶²⁸ Ibid.

⁶²⁹ <https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability> [Accessed on 21/1/2020].

⁶³⁰ Smith Jr, T.T., "Environmental Damage Liability Insurance—A Primer," *The Business Lawyer* (1983): 333-354, at p.336.

development policy, rules, plans, investment and action.⁶³¹ The section thus looks at how traditional environmental knowledge can be mainstreamed not just in the agricultural sector but all areas that have an environmental aspect within them.

Africa has a rich and highly diverse array of natural resources. It also has traditional communities' knowledge and environmental governance practices that have been practised over centuries before the advent of colonialization.⁶³² This was a reflection of the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship of the local people with their environment.⁶³³ Traditional knowledge incorporates belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment.⁶³⁴

From international law to domestic laws, has been a realisation of the critical role that traditional knowledge has played over the centuries especially among indigenous and local communities. This is especially pronounced within the sustainable development discourse. As early as 1970s and 80s, there were attempts at mainstreaming traditional environmental knowledge in policy, law and action plans as a way of promoting sustainable development.⁶³⁵

Despite the international recognition of the rights of these communities to be consulted and involved in decision-making processes that directly affect their livelihoods, countries around the world continue to disregard such rights with adverse effects on the ability of the affected communities to fight poverty and realise the right to self-determination. The global call for application of Free, Prior, And Informed Consent (FPIC) in resource extraction and management is generally meant to address the abuse of the rights of indigenous peoples worldwide including: indigenous land rights, recognition of and respect for culture, the right to economic participation, to a livelihood and to a clean environment, among others.⁶³⁶

Food security depends, *inter alia*, on sustainable management of natural resources and the environment since in many indigenous communities, natural resources are the principal sources of their staple food.⁶³⁷ Environmental sustainability comes with sound environmental decision-making. This is supposed to be an all-inclusive process that involves not only the formal decision-makers but also communities. These communities are a rich source of traditional knowledge that includes environmental knowledge.

⁶³¹ Dalal-Clayton, D. B., & Bass, S., The challenges of environmental mainstreaming: Experience of integrating environment into development institutions and decisions, No. 1. IeD, 2009.

⁶³² African Regional Intellectual Property Organization, available at <http://www.aripo.org/index.php/services/traditional-knowledge> [Accessed on 22/1/2020].

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ WCED, Our common future: Report of the World Commission on Environment and Development, G. H. Brundtland, (Ed.). Oxford: Oxford University Press, 1987.

⁶³⁶ Owen, J.R. and Kemp, D., "Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing A Knowledge Base," Resources Policy, Vol.41 (2014): 91-100., at p. 92.

⁶³⁷ The Rome World Food Summit, Commitment No. 3.

10.2 Traditional Environmental Knowledge: Relevance to the Environment and Natural Resources Management

Traditional knowledge has been broadly defined as a cumulative, collective body of knowledge, experience, and values held by societies with a history of subsistence.⁶³⁸ 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.⁶³⁹

Traditional knowledge or traditional ecological knowledge is believed to represent experience acquired over thousands of years of direct human contact with the environment.⁶⁴⁰ A growing recognition of the capabilities of ancient agriculturalists, water engineers and architects led to increased appreciation of ethnoscience, ancient and contemporary, which paved way for the acceptability of the validity of traditional knowledge in a variety of fields.⁶⁴¹ One of the fields that embraced the use of traditional knowledge is the environment.

Traditional ecological knowledge is also seen as bound up with “indigenous stewardship method,” which is defined as the “ecologically sustainable use of natural resources within their capacity to sustain natural processes.”⁶⁴² Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.⁶⁴³

The resilience of indigenous peoples and local 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.⁶⁴⁴ They are thus interested parties when it comes to efforts towards achieving sustainable development and should thus be included.⁶⁴⁵

There are two recognised practical methods for encouraging the use of traditional knowledge in environmental decision-making. The first one includes those methods that are based on official recognition of traditional knowledge, followed the development of rules of procedure for the use of knowledge by institutions of authority. In this “top-down” approach, the structures of governance are constructed accommodate traditional knowledge, but the knowledge itself is not

⁶³⁸ Ellis, S.C., “Meaningful consideration? A review of traditional knowledge in environmental decision making,” *Arctic* (2005): 66-77, at p. 66.

⁶³⁹ *Ibid.*

⁶⁴⁰ Inglis, J., ed., *Traditional ecological knowledge: concepts and cases*, IDRC, 1993, at p. 1.

⁶⁴¹ *Ibid.*, p.2.

⁶⁴² Whyte, K.P., “On the role of traditional ecological knowledge as a collaborative concept: a philosophical study,” *Ecological processes*, Vol.2, no. 1 (2013): 7, at p.3.

⁶⁴³ Ellis, S.C., “Meaningful consideration? A review of traditional knowledge in environmental decision making,” *Arctic* (2005): 66-77, at p. 67.

⁶⁴⁴ 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 22/1/2020].

⁶⁴⁵ *Ibid.*, p.8.

fostered or sought out.⁶⁴⁶ The second category increases the capacity of indigenous people to bring traditional knowledge to bear on policies and procedures governance and regulation. This "bottom-up" approach is characterized by initiatives designed to encourage learning and transmission of traditional knowledge at community level, as well as developing the means communicate this knowledge within the structures processes of environmental governance.⁶⁴⁷

10.3 International and National Legal Framework on Traditional Environmental Knowledge

10.3.1 International Framework on Traditional Environmental Knowledge

The *Convention on Biological Diversity* recognizes the importance of indigenous and local communities to the conservation and sustainable use of biological diversity.

The *United Nations Declaration on the Rights of Indigenous Peoples*,⁶⁴⁸ provides that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.⁶⁴⁹

The Food and Agriculture Organization of the United Nations (FAO) opines that the promotion and protection of traditional and local food and agricultural knowledge will require international, intercultural and interdisciplinary approaches, communication and cooperation.⁶⁵⁰

10.3.2 National Legal and Institutional Framework on Traditional Environmental Knowledge

The Constitution of Kenya provides that culture is the foundation of the nation and the cumulative civilization of the Kenyan people and nation.⁶⁵¹ Specifically, 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 (emphasis added).⁶⁵² 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.⁶⁵³ The State should not just protect the indigenous knowledge but should also actively promote the use of this knowledge for environmental protection and conservation for sustainable environment.

It is also noteworthy that most of the principles of sustainable development are similar to the traditional practices of indigenous communities in Kenya as far as application of indigenous ecological knowledge is concerned. Such principles as precautionary principle are a reflection of

⁶⁴⁶ Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p.67.

⁶⁴⁷ *Ibid*, p.67.

⁶⁴⁸ 61/295. United Nations Declaration on the Rights of Indigenous Peoples.

⁶⁴⁹ United Nations Declaration on the Rights of Indigenous Peoples, Art. 31(1).

⁶⁵⁰ Food and Agriculture Organization of the United Nations (FAO), *FAO and traditional knowledge: the linkages with sustainability, food security and climate change Impacts*, 2009, p.9.

⁶⁵¹ Art. 11(1), Constitution of Kenya 2010.

⁶⁵² *Ibid*, Art. 11(2) (b) & (3) (b).

⁶⁵³ *Ibid*, Art. 69(1) (c),.

the unwritten principles on environmental management that have existed for generations across indigenous cultures. These communities considered themselves and their cultural ecological practices as part of the ecosystem hence adopted both anthropocentric and ecocentric approaches when dealing with environmental and natural resource management.⁶⁵⁴ It has been acknowledged by some government officials that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country's forest cover.⁶⁵⁵ This is because such people have the traditional skills needed to help the Government conserve the forests.⁶⁵⁶ These communities ensured conservation of the wildlife resource through cultural and social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.⁶⁵⁷

One way of implementing the constitutional obligations on the state to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities is to incorporate it with the scientific knowledge and involving these communities and helping them appreciate all the foregoing principles of natural resource management for realisation of sustainable development agenda. These principles are both international and cultural.⁶⁵⁸

10.4 Kenya's Environmental and Natural Resources Laws: Challenges and Prospects

As already highlighted in the previous section, formal recognition of traditional knowledge has existed in Kenya's laws for some time.⁶⁵⁹ However, this has not marked an increase or even efforts to promote any meaningful or active utilisation of the knowledge held by communities for management of environmental problems in the country. There has been what mostly seems like promoting use of formal and western knowledge at the expense of the traditional one. As a result, communities feel sidelined as they are neither involved in decision-making and management practices and are also expected to respond to the government's directives without any inclusion. This has especially been exemplified by the Government's efforts at conservation and management

⁶⁵⁴ See generally, Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at <http://www.kmco.co.ke/attachments/article/175/Traditional%20knowledge%20and%20conflict%20management-25%20April%202016.pdf> [Accessed on 22/01/2020].

⁶⁵⁵ Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy*, 2012, p.2.

⁶⁵⁸ See *Protection of Traditional Knowledge and Traditional Cultural Expressions Act*, 2016, No. 33 of 2016, (Government Printer, Nairobi, 2016).

⁶⁵⁹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016; Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at <http://www.kmco.co.ke/attachments/article/175/Traditional%20knowledge%20and%20conflict%20management-25%20April%202016.pdf> [Accessed on 22/01/2020].

of forests and the associated resources.⁶⁶⁰ During evictions, people have been accused of illegal logging and clearing of forests for settlement and farming.⁶⁶¹

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*⁶⁶², the Court observed that: “quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests.

The Maasai peaceful co-existence with wildlife is however not without challenges especially when environmental co-management is practised. It has been observed that although Maasai knowledge is evoked in conservation planning proposals, Maasai participation as knowledgeable actors in conservation activities on their lands remains extremely limited.⁶⁶³ This is compared to situations throughout the world where environmental co-management is said to be taking place between scientists and local communities.⁶⁶⁴ Thus, while some instances seem to support and recognise the use of traditional knowledge, there has not been consistency. There is a need to mainstream traditional environmental knowledge for environmental management and governance in Kenya.

10.5 Mainstreaming Traditional Ecological Knowledge in Kenya’s Environmental Governance Framework

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.⁶⁶⁵

Recognition and active utilisation of communities’ traditional environmental knowledge can create a viable channel for communities to appreciate government’s efforts in effective environmental governance through promoting sustainable use of the environment and its resources.⁶⁶⁶ It has been argued that ‘while trust and community are equally necessary in addressing complex

⁶⁶⁰ Soi, C., “Kenya to evict thousands to protect Mau forest,” Al Jazeera News, 14 March 2019. Available at <https://www.aljazeera.com/news/2019/03/kenya-evict-thousands-protect-mau-forest-190314165702863.html> [Accessed on 22/01/2020].

⁶⁶¹ Murage, G., “CS Tobiko to order second phase of Mau evictions,” The Star, 16 July 2019. Available at <https://www.the-star.co.ke/news/2019-07-16-cs-tobiko-to-order-second-phase-of-mau-evictions/> [Accessed on 22/01/2020]; Vidija, P., “Rift Valley MPs turn wrath on Tobiko over Mau evictions,” The Star, 29 July 2018. Available at <https://www.the-star.co.ke/news/2018-07-29-rift-valley-mps-turn-wrath-on-tobiko-over-mau-evictions/> [Accessed on 22/01/2020]. Per Hon. Isaac Ruto, former Governor of Bomet County.

⁶⁶² ELC Civil Suit No. 821 of 2012 (OS).

⁶⁶³ Goldman, M., "Tracking wildebeest, locating knowledge: Maasai and conservation biology understandings of wildebeest behavior in Northern Tanzania," *Environment and Planning D: Society and space* 25, no. 2 (2007): 307-331, at p.308.

⁶⁶⁴ Ibid.

⁶⁶⁵ African Regional Intellectual Property Organization, op cit.

⁶⁶⁶ Mohammad, N., ‘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.

environmental problems, building institutions that foster knowledge and trust, participation and community, is one of the greatest challenges confronting today's human societies'.⁶⁶⁷

It is important to point out that while policy and legal framework is necessary, it cannot alone guarantee achievement of environmental justice for communities. The law alone cannot enforce the common interest and thus it needs community knowledge and support, which entails greater public participation in the decisions that affect the environment. This is best secured by decentralizing the management of resources upon which local communities depend, and giving these communities an effective say over the use of these resources. It will also require promoting citizens' initiatives, empowering people's organizations, and strengthening local democracy'.⁶⁶⁸

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.⁶⁶⁹ In Africa, environmental justice mostly entails the right to have access to, use and control over natural resources by communities.⁶⁷⁰

Traditional knowledge, coupled with other forms of knowledge can enhance predicting and preventing the potential environmental impacts of development, as well as informing wise land-use and resource management especially within the local community setups.⁶⁷¹ Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.⁶⁷²

Traditional knowledge can be 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.⁶⁷³ Exploring the community's knowledge and knowledge of people dealing with agriculture, is crucial to determine their norms, values, and belief in regards to their activities, particularly in the area of water and land management.⁶⁷⁴

⁶⁶⁷ Jasanoff, Sheila, "The dilemma of environmental democracy," *op cit.*, at 65.

⁶⁶⁸ Brundtland, GH, *Our Common Future: report of the World Commission on Environment and Development*, Oxford University, 1987, A/RES/42/187, para. 77.

⁶⁶⁹ 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 22/1/2020].

⁶⁷⁰ Obiora, L., "Symbolic Episodes in the Quest for Environmental Justice," *Human Rights Quarterly*, Vol.21, No. 2, 1991, p. 477.

⁶⁷¹ Ellis, S.C., 'Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making,' *Arctic*, Vol. 58, No. 1 (March 2005), p. 66–77 at p. 67.

⁶⁷² *Ibid* at p. 67.

⁶⁷³ 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 22/1/2020].

⁶⁷⁴ 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.

Incorporating provisions recognising traditional environmental knowledge in national environmental laws is commendable but just marks the first step towards mainstreaming such knowledge into effective environmental governance. There is need for actively and meaningfully involving communities in utilising traditional environmental knowledge to practice sustainable production methods. Where they do not perceive a danger to their livelihoods, these communities are likely to embrace development projects and are also not likely to turn to unconventional ways of protecting their livelihoods.⁶⁷⁵

10.6 Conclusion

One way of protecting and enhancing the use of traditional environmental knowledge in environmental management, while ensuring meaningful inclusion and participation of local communities, is integrating it into the environmental governance framework as this will help achieve sustainable development as contemplated in the sustainable development agenda. Combining western scientific knowledge which forms the bulk of *formal laws, policies and programmes with traditional environmental knowledge for the purpose of improving natural resources and environmental management is important for inclusive and participatory approaches to environmental management* (emphasis added). The implication would be that environmental scientists and policy professionals, indigenous and non-indigenous, should focus more on creating long term processes that allow for the implications of different approaches to knowledge in relation to stewardship and management priorities to be responsibly thought through.⁶⁷⁶ This will improve cooperative environmental and natural resources stewardship and management between indigenous and non-indigenous institutions.⁶⁷⁷

11. Effective Environmental Management and Governance for Peace Building in Kenya

11.1 Introduction

SDG Goal 16 of the *2030 Agenda for Sustainable Development*⁶⁷⁸ 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.⁶⁷⁹ The *Agenda* also rightly points out that there can be no sustainable development without peace and no peace without sustainable development. The *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.⁶⁸⁰

It is against this background that this section discusses the fundamental principles underlying environmental governance and links the same to peacebuilding. The discussion is based on the

⁶⁷⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

⁶⁷⁶ Whyte, K.P., "On the role of traditional ecological knowledge as a collaborative concept: a philosophical study." *Ecological processes*, Vol.2, no. 1 (2013): 7, p. 2.

⁶⁷⁷ *Ibid*, p. 3.

⁶⁷⁸ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁶⁷⁹ Goal 16,

⁶⁸⁰ Target 35, *Transforming our world: the 2030 Agenda for Sustainable Development*.

hypothesis that there exists a link between the state of environmental governance and the peace building in any country.

11.2 Environmental Governance: Theories and Conceptualisation

11.2.1 Theories and Conceptualisation of Environmental Governance

There exist different definitions of the term ‘governance’ by various scholars. Governance has been defined as a system for shaping behaviour to socially useful ends, involving many participants serving various roles. Those involved in this system include government officials, legal authorities, self-governing organisations and non-government actors such as citizens, industry stakeholders, those being governed and those who are affected by governance.⁶⁸¹

Environmental Governance has been defined as the means by which society determines and acts on goals and priorities related to the management of natural resources. This includes the rules, both formal and informal, that govern human behavior in decision-making processes as well as the decisions themselves. Appropriate legal frameworks on the global, regional, national and local level are also considered to be a prerequisite for good environmental governance.⁶⁸²

‘Governance of natural resources’ has been used to mean the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say in the management of natural resources – including biodiversity conservation...⁶⁸³ The concept of ‘good governance’ includes accountability and is built on “fundamental human values and rights, including fairness, equity and meaningful engagement in and contribution to decision making.”⁶⁸⁴

It is arguable that environmental governance in any country is only as effective as the general governance framework in place. Environmental governance does not operate in a vacuum but also relies on the effectiveness of the general governance in a given country.

11.2.2 Role of Law in Environmental Governance and Management

The law contains anticipatory mechanisms to ensure that natural resources are properly distributed, conserved and protected well into the future. Since law is the key instrument for transforming societal goals and aspirations into practice, its role is vital in interweaving environmental interests into the scheme of economic development. Law sets substantive norms, establishes decision-

⁶⁸¹ Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability* IUCN, Gland, Switzerland, 2016, xii + 126 pp at p. 1. Available at https://www.iucn.org/sites/dev/files/framework_for_assessing_and_improving_law_for_sustainability.pdf [Accessed on 22/01/2020].

⁶⁸² IUCN, *Environmental Law: Governance and MEAs*, available at <https://www.iucn.org/theme/environmental-law/our-work/governance-and-meas> [Accessed on 21/01/2020].

⁶⁸³ IUCN Resolution 3.012 on Governance of natural resources for conservation and sustainable development adopted in Bangkok, Thailand in 2004. Available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2004_RES_12_EN.pdf [Accessed on 22/1/2020].

⁶⁸⁴ Ibid.

making institutions and processes, and provides mechanisms for accountability and conflict-resolution.⁶⁸⁵

It has rightly been argued that law reflects the combined result of the many viewpoints, values, knowledge systems, information types, and power struggles that come into play in its making and is thus inherently integrative. Law reflects the values of society.⁶⁸⁶ Law creates rights, duties, powers, establishes institutions and procedures, and the basic principles on how people are to interact with each other and with natural resources. Further, the economic and financial interests that drive most of the decisions concerning natural resources are also reflected in the law.⁶⁸⁷

The system depends upon norms that may be translated into formal or informal rules, and upon organisations and institutional arrangements to implement these norms. Governance systems vary between communities, and change over time, and they intersect. Nation-state governance intersects with private sector approaches, such as voluntary commitments or supply chain standards, and with traditional and indigenous norms and practices for conserving and using the natural world.⁶⁸⁸

In Kenya, there are intricate and detailed frameworks and sectoral laws in place to ensure proper conservation and protection of natural resources.⁶⁸⁹ The key weaknesses that have made the law seem not to be playing its intended role in natural resources management are the complex institutional set ups, differing and overlapping mandates and organizational cultures of state agencies created to manage natural resources. Laws also provide for differing management and enforcement methods over similar resources thus creating conflict between agencies, as well as, between agencies and communities living with the resources.⁶⁹⁰

What is required is a strengthened and clear framework law that gives proper attention to all sectors of natural resources as well as inclusive of all stakeholders for effective management.

11.3 Peace Building: Meaning and Scope

11.3.1 Meaning and Scope of Peace Building

The term 'peace' is related to the well-being of any person. It is a generally accepted value. In most cultures it is a type of desideratum linked to harmony, tranquillity, cooperation, alliance, well-

⁶⁸⁵ Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability* IUCN, Gland, Switzerland, 2016, at p. 1.

⁶⁸⁶ Cosens, B.A., Craig, R.K., Hirsch, S.L., Arnold, C.A.T., Benson, M.H., DeCaro, D.A., Garmestani, A.S., Gosnell, H., Ruhl, J.B. and Schlager, E., "The role of law in adaptive governance," *Ecology and society: a journal of integrative science for resilience and sustainability* 22, no. 1 (2017): 1, p.1.

⁶⁸⁷ Moore, P., et al, *Natural Resource Governance Trainers' Manual*, (IUCN, RECOFTC, SNV, Bangkok, Thailand, 2011), p. 119.

⁶⁸⁸ *Ibid*, at p. 1.

⁶⁸⁹ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶⁹⁰ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

being, and agreement.⁶⁹¹ Notably, 'peace is not just the absence of violence, it is much more.'⁶⁹² 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.⁶⁹³

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.⁶⁹⁴ 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.⁶⁹⁵

The scope and context of this section is limited to discussing the connection between positive peace and environmental management and how effective environmental governance can be used as one of the tools geared towards achieving positive peace. Negative peace is just to be treated as a byproduct of the efforts aimed at positive peace.

Peacebuilding is about dealing with the reasons why people fight in the first place and supporting societies to manage their differences and conflicts without resorting to violence. It involves a broad range of measures, which can take place before, during and after conflict. They aim to prevent the outbreak, escalation, continuation and recurrence of conflict.⁶⁹⁶ Peacebuilding approaches can also be geared towards either 'positive' or 'negative' peace.⁶⁹⁷

11.3.2 Role of Law in Peace Building

Conflict is grounded in social, structural, cultural, political and economic factors as seen from the foregoing pillars, since depreciation in one increases chances of conflict in a particular society.⁶⁹⁸ Some scholars have also argued that peaceful nations are better equipped through their attitudes, institutions and structures to respond to external shocks. This can be seen with internal peace correlating strongly to measures of inter-group cohesion and civic activism, which are key proxies

⁶⁹¹ 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.

⁶⁹² Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

⁶⁹³ 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 22/1/2020].

⁶⁹⁴ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

⁶⁹⁵ *Ibid*, pp.106-107.

⁶⁹⁶ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [Accessed on 22/01/2020].

⁶⁹⁷ *Ibid*.

⁶⁹⁸ 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 22/1/2020]; 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 22/01/2020].

that indicate the ability of societies to resolve internal political, economic, and cultural conflicts as well as being able to respond to external shocks.⁶⁹⁹

Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.⁷⁰⁰ Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.⁷⁰¹ 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.⁷⁰² It is thus arguable that while the law may have in place structures directly meant to bring about negative peace by stopping violence through various mechanisms, all the legal structures meant to address the socio-economic factors listed above have a bearing on achievement of positive peace. It has rightly been argued that many root causes and drivers of conflict such as discrimination and marginalization, unequal distribution of public goods and services, corruption, impunity and lack of accountability stem from or are exacerbated by the absence of the rule of law.⁷⁰³

Also notable is the assertion that 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.⁷⁰⁴ The law can be useful in contributing to the change in institutional norms as well as shaping the changes in attitudes and behaviour.

The rule of law is seen as a framework for the peaceful management of conflict because of its defining features: laws 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.⁷⁰⁵ It is thus worth noting that this makes the law an important ingredient in the process of peace building, whether positive peace or negative peace.

⁶⁹⁹ Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' IEP Report 22, p. 5. Available at <https://www.files.ethz.ch/isn/169569/Pillars%20of%20Peace%20Report%20IEP.pdf> [Accessed on 22/01/2020].

⁷⁰⁰ Ibid, p. 2.

⁷⁰¹ Ibid, p. 6.

⁷⁰² Ibid.

⁷⁰³ IDLO, "Sustaining Peace, Building Justice: Discussion Note," available at <https://www.idlo.int/system/files/event-documents/IDLO%20IN%20-%20Sustaining%20Peace-Building%20Justice%20NO%20CONTACTS.PDF> [Accessed on 22/1/2020].

⁷⁰⁴ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [Accessed on 22/01/2020].

⁷⁰⁵ Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" available at <http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844> [Accessed on 22/01/2020].

11.4 Nexus between Environmental Governance and Peace Building

Debates about the relationship between the environment and peace building focus on how environmental problems, like resource scarcity and climate change, are likely to create or exacerbate conflict. Some scholars have opined that the environmental governance of a system based on participation, accountability, and equity ensures the broad political social and economic issues of the marginalized sections of the society are addressed.⁷⁰⁶

Environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.⁷⁰⁷ These conflicts are especially expected to be more devastating in poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.⁷⁰⁸ The role of natural resources in conflict has also been a focus of many authors. The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.⁷⁰⁹ Under the scarcity theory, it is argued that rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to exacerbate poverty and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict."⁷¹⁰

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the "resource curse"—corruption, economic stagnation, and violent conflict over access to revenues.⁷¹¹ For instance, it has been pointed out that for many resource rich developing countries, there have been cases of low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.⁷¹²

Communities expect that availability of environmental goods and services in their region will improve their livelihoods by 'real' development, which may not always be the case.⁷¹³ Poor and

⁷⁰⁶ Nafees, A., "The Role of Civil Society Institutions in Environmental Governance in India: Post-colonial Context and Human Rights Challenges in the Environmental Justice," *International Journal of Legal Studies and Research*, Special Issue-June 2018, pp. 16-39, at p. 16.

⁷⁰⁷ Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," *International security* 19, No. 1 (1994): 5-40 at p. 6.

⁷⁰⁸ *Ibid.*, p.6.

⁷⁰⁹ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*, 2007, p.8.

⁷¹⁰ *Ibid.*, p.8.

⁷¹¹ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors*, 2007, p.8.

⁷¹² Alstine, J.V., et al, *Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda*, *Resources Policy*, Vol. 40, 2014, pp.48-58, p. 48.

⁷¹³ Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 22/01/2020].

low economic development⁷¹⁴ and consequently, failed economies result in conflicts,⁷¹⁵ as a result of environmental and natural resources' bad governance or mismanagement.⁷¹⁶

It is thus evident that any peacebuilding efforts that do not factor in streamlining environmental and natural resources governance are bound to fail as they would not capture the very basic needs of the communities in question: satisfaction of their socio-economic needs with minimal or no struggle.

11.5 Building Lasting Peace through Effective Environmental Governance

The 2030 SDGs Agenda maintains that while the causes of conflict vary widely, the effects of climate change only exacerbate them. 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. 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.⁷¹⁷

The Constitution of Kenya, 2010 provides for both the state and personal obligations in respect of the environment.⁷¹⁸ This provision emphasizes the need for incorporation of good governance practices in the management of natural resources. These good governance practices should demonstrate democracy in terms of accountability and transparency.⁷¹⁹ The law is a necessary part of the solution to sustainability challenges.⁷²⁰ This section offers some recommendations that go beyond the law in enhancing environmental governance as one of the prerequisites for successful peace building in the country.

11.5.1 Use of Alternative Dispute Resolution Mechanisms to Enhance Public Participation in Environmental Conflict management

The Constitution of Kenya, 2010 encourages the application of traditional dispute resolution mechanisms in land conflicts.⁷²¹ The *Environment and Land Court Act*, 2011 empowers the Court 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.

⁷¹⁴ See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012).

⁷¹⁵ Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

⁷¹⁶ Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf> [Accessed on 22/01/2020].

⁷¹⁷ 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].

⁷¹⁸ Art. 69 Constitution of Kenya 2010.

⁷¹⁹ Art. 69(1) (d).

⁷²⁰ Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability*IUCN, Gland, Switzerland, 2016, at p.ix.

⁷²¹ Art.67 (2) (f); Article 159(2), Constitution of Kenya.

Alternative Dispute Resolution (ADR) mechanisms have the potential to create forums for engaging the various stakeholders in environmental matters and subsequently address any underlying tension or feelings of marginalization. This can go a long way in creating more peaceful societies.

11.5.2 Inclusive and Participatory Approaches to Environmental Governance and Management

The *UN Conference on Environment and Development, Agenda 21*⁷²² under section 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.

Kenya's approach to environmental governance and natural resources management has largely been sectoral and informed by the command and control approach. 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. 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.⁷²³

Governance structures for all sectors, including environmental sector, should be built around the national values and principles of governance as enunciated in the Constitution of Kenya.⁷²⁴ As already pointed, people who feel meaningfully engaged in governance matters are more likely to appreciate the process and also keep peace even when resources are scarce. Local people should be actively engaged in governance matters especially those that directly affect their livelihoods.⁷²⁵

11.5.3 Inclusive Education for Sustainable Livelihoods and Societies

There exists several regional legal instruments which promote the right to education for all.⁷²⁶ At the international level, education is treated as a fundamental human right and essential for the exercise of all other human rights. It is said to be a right that promotes individual freedom and empowerment and yields important development benefits.⁷²⁷

⁷²² United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁷²³ Art. 22(1), Art. 42, Art. 69(2), Constitution of Kenya.

⁷²⁴ Art. 10(2), Constitution of Kenya.

⁷²⁵ United Nations Development Programme, *Local Governance In Fragile And Conflict-Affected Settings: Building a Resilient Foundation for Peace and Development*, A UNDP how-to guide, 2016.

⁷²⁶ The American Declaration of the Rights and Duties of Man (1948), Article XII, Article XXXI; See also the Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms 1952; The African Charter on Human and Peoples' Rights (1981), Article 17; See also the Charter on the Rights and Welfare of the African Child (1990).

⁷²⁷ UNESCO, 'The Right to Education', visit

<http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education/>
[Accessed on 22/1/2020].

The international and regional framework calls on governments to fulfill their obligations both legal and political in regard to providing education of good quality for all, and to implement and monitor more effectively education strategies since education is conceived as a powerful tool by which economically and socially marginalized adults and children can lift themselves out of poverty and participate fully as citizens.⁷²⁸ In the Kenyan case of *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*⁷²⁹, the Court affirmed the governments' international obligation to ensure the realisation of right to education within the available resources.

Education has a great role to play in peace building efforts and effective environmental both of which are important components of sustainable development. This realisation forms the basis of SDG Goal 4 which provides that State Parties should ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.⁷³⁰

This section contemplates two forms of education namely: "environmental education" and "environment-based education". 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, thus enabling individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.⁷³¹

On the other hand, environment-based education focuses on educational results: using the environment to engage students in their education through "real-world" learning experiences, with the goals of helping them achieve higher levels of academic success as well as an understanding of and appreciation for the environment.⁷³² By applying environmental education to real-life problems, children are also given authentic opportunities to provide service for their communities and solve local problems.⁷³³

Education empowers individuals for full development of human personality, and participation in society through acquisition of knowledge, human values and skills. The right to education has close linkage with the right to development, and is a powerful tool in poverty reduction strategies.⁷³⁴ The need for promoting the right to education arises from the fact that the younger generation will need to acquire this basic education while having environmental education inculcated therein. The older generation will also need to have access to education, which education takes various forms especially when it comes to environmental education, including traditional knowledge.

If empowered through education, people are able to make their own decisions especially in matters relating to exploitation of natural resources and environmental management tools. Environmental education gives people the voice and enables them appreciate the available information on

⁷²⁸ Ibid.

⁷²⁹[2013] eKLR, Petition No. 133 of 2013.

⁷³⁰ Goal 4.7, Transforming our world: the 2030 Agenda for Sustainable Development.

⁷³¹ United States Environmental Protection Agency, 'What is Environmental Education?' available at <http://www2.epa.gov/education/what-environmental-education> [Accessed on 22/1/2020].

⁷³² California Department of Education, 'The Case For Environmental Education: Education and the Environment/ Strategic Initiatives for Enhancing Education in California', 2002, p. 5.

⁷³³ Ibid, p. 6.

⁷³⁴ UNESCO (2008), 'The Right to Education', p.2.

environment.⁷³⁵ There is a great need to ensure that appreciation and concern for the environment are instilled during the early years of development. Indeed, article 29(1) (e) of the *Convention on the Rights of the Child* (1989) states that States Parties agree that the education of the child shall be directed to, *inter alia*, the development of respect for the natural environment.

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.⁷³⁶

11.6 Conclusion

Peace building in any country is desirable, and so is effective environmental and natural resources governance and management. The two concepts are arguably joined at the hip and both are at the core of the 2030 Agenda on sustainable development. This section has discussed the various ways that the two are related and demonstrated how they cannot be treated as mutually exclusive if any efforts towards achieving either are to bear any fruits.

While putting in place, any peace building policies, policy makers and other stakeholders ought to have the bigger picture in mind-effective environmental and natural resources governance must first be achieved as these resources are central in realisation of socio-economic rights of citizens. When these rights are largely achieved for all in any country, then it becomes easier to talk about and also achieve peace. Enhancing Environmental governance for peacebuilding in Kenya is a necessity that cannot be ignored in the quest for sustainable development.

This paper has offered a detailed discussion on some topical issues on adopting an integrated approach to environmental management in Kenya. Section one has critically discussed the general role of law in environmental governance and management. This is in recognition of the fact that law is a necessary tool, in not only spelling out the environmental rights of the citizens, but also laying out the State's and citizenry's duties towards sustainable environmental management and conservation. The role of law also means that courts, which are the primary custodians of the law, have a huge role to play in not only ensuring that environmental rights of every individual are protected and upheld but also meting out punishment to those who violate environmental laws as part of guaranteeing access to environmental justice.

The Constitution of Kenya calls for a collaborative approach in environmental and natural resources governance and management, within the framework of the national values and principles of governance. In recognition of the important role played by corporations in the society and their contribution to the economic development, the paper has also discussed the contribution of corporations in promoting sustainable environmental and natural resources management as far as their environmental liability is concerned. The corporations are also expected to contribute

⁷³⁵ See generally UNESCO, 'Educating for a Sustainable Future: A Transdisciplinary Vision for Concerted Action', EPD-97/CONF.401/CLD.1.November 1997.

Available at

http://www.unesco.org/education/tlsf/mods/theme_a/popups/mod01t05s01.html [Accessed on 22/1/2020].

⁷³⁶ UNESCO, 'Educating for a Sustainable Future: A Transdisciplinary Vision for Concerted Action', EPD-97/CONF.401/CLD.1.November 1997. Available at http://www.unesco.org/education/tlsf/mods/theme_a/popups/mod01t05s01.html [Accessed on 22/01/2020].

positively towards improving the livelihoods of the people. The paper has analysed both positive and negative duties of these corporations in relation to environmental sustainability.

The paper also dedicates a whole section on the general environmental liability regime in the country as an important aspect of environmental management and measures geared towards achieving the sustainable development agenda.

The discourse recognises the important role that the citizenry can play, in line with the constitutional principles in achieving sustainable environmental management in Kenya, and as a result, has explored such themes as environmental democracy which is meant to empower the general public and enable them to meaningfully participate in environmental management.

Considering that Kenya is still at a nascent stage in exploring its extractives industry, the paper has substantively discussed the implications of these activities not only on the environment but also on the lives of communities. The theme of benefit sharing in natural resources and environmental goods also features across the paper as an acknowledgement of the fact that these resources form the backbone of many communities' livelihoods and measures must thus be put in place to ensure that there are some benefits that accrue to them. The State is supposed to manage these resources in trust for the people and must therefore ensure that they get to benefit from them in a bid to improve their living standards.

It is in the spirit of promoting meaningful inclusion and public participation that the theme of indigenous knowledge as a tool for promoting communities' participation features prominently in the paper. There is a need for the stakeholders to ensure that there is a complimentary application of the indigenous ecological knowledge alongside the scientific knowledge. The use of indigenous ecological knowledge not only make the communities own and appreciate the government's efforts in environmental management and conservation, it also enables the government to tap into the positive aspects of such community knowledge. Furthermore, local people are the custodians of traditional systems and are therefore well informed about their own situations, their resources, what works and what does not work.⁷³⁷ Traditional knowledge on environment should therefore be treated as equally important as the mainstream forms of environmental education in their role of achieving environmental sustainability.

It is also important to note that there are diverse resources within the country, ranging from the dryland resources to those that are to be found within the ocean and other large water bodies. The blue economy holds the potential for diversification of the sources of the much needed income not only for the government but also for improving the lives of communities living around these areas. There is thus a need to invest in the sector.

This paper calls for an integrated approach to environmental and natural resources management in Kenya in order to ensure that the various approaches to resource management are not only applied efficiently but also that the various aspects of the environment such as the flora and fauna are well

⁷³⁷ United Nations Convention to Combat Desertification (UNCCD) (2005), 'Revitalizing Traditional Knowledge: A Compilation of Documents and Reports from 1997 – 2003', UNCCD, Bonn, Germany. 150 pp. at p. 11.

taken care of. An integrated approach will also be important in addressing such challenges as pollution which poses one of the greatest threats to environmental sustainability. An integrated approach will also ensure that anthropocentric approaches coupled with ecocentric approaches strike a balance in safeguarding environmental, social and economic interests of the country.

When the needs of all interested parties and stakeholders are taken care, peacebuilding efforts become easy to fulfill. Conflicts and disputes are mainly caused by either inadequacy of environmental and natural resources required to meet the basic needs of people as well as marginalization of some groups which may be in the form of 'resource capture' by the elites in the society.

It is the high time that the state agencies recognised that sectoral approaches to environmental and natural resources management that is devoid of meaningful public participation may not only lead to the perennial conflicts associated with natural resources but may also mean that the realisation of sustainable development agenda as envisaged under the different international environmental legal instruments and domestic laws may remain a pipe dream. With the ever increasing competing needs for the natural and environmental resources, an integrated approach to the management of these resources that involves the state agencies, civil society, corporations and communities will not only actualize environmental ideals as conceived in the *2030 Agenda for Sustainable Development*⁷³⁸ which is a plan of action for people, planet and prosperity, but will also be useful addressing social challenges such as poverty, food security and peace, among others for a sustainable society.

It is vital that we effectively manage the environment to ensure survival of the current and future generations. We all deserve a clean and healthy environment. Securing our destiny is our noble responsibility.

⁷³⁸ 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.

Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse

Abstract

This paper calls for more efforts towards ensuring that community practices and cultural voices are incorporated and play a more active and influential role in shaping the government's agenda in achieving sustainable development goals. As things stand now, there is little evidence of communities being actively involved in plans, programmes and actions that are geared towards achieving sustainable development goals. This is despite the fact that these groups of persons are equally if not more affected by the ills that bedevil the society such as poverty, environmental degradation and conflicts. While the Kenyan law recognises the place of culture in development, this paper argues that the same has not been translated into action and thus calls for more active integration of the community practices and culture in development plans.

1. Introduction

The United Nations 2030 Agenda for Sustainable Development Goals seeks to not only achieve sustainability under the various aspects of development but also aims at an inclusive society where all voices are heard and considered in the development agenda. As rightly pointed out, everyone is needed to reach these ambitious targets.¹ This is to be achieved through such aspects as public participation in decision making, and the integration of all forms of knowledge, including scientific and traditional forms of knowledge. The process of sustainable development binds in a relationship of interdependence, the protection and enhancement of natural resources to the economic, social, in order to meet the needs of the present generation, without compromising the ability of future generations to meet their own needs.² It also follows that it would be incompatible with any practice either by private persons or the government that contributes to the degradation of heritage and natural resources, as well as the violation of human dignity and human freedom, poverty and economic decline, and the lack of recognition of the rights and equal opportunities.³

The social aspect of sustainable development agenda requires that 'a socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation'.⁴ Notably, in many African societies, culture and traditions have been at the centre of affairs of rural communities, especially in the conservation of natural sites earmarked as sacred.⁵ However, in reality, cultural and traditional forms of knowledge have not received as much attention in the sustainable development debates as the scientific or western forms of knowledge, especially in relation to environmental and natural resources governance and management. As things stand currently in Kenya and many parts of the world, communities seem sidelined in the efforts sustainable development agenda in

¹ 'Sustainable Development Goals | UNDP in Kenya' (UNDP) <<https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html>> accessed 6 January 2021.

² Nocca F, 'The Role of Cultural Heritage in Sustainable Development: Multidimensional Indicators as Decision-Making Tool' (2017) 9 Sustainability 1882, 2 <<https://www.agbs.mu/media/sustainability-09-01882-v3.pdf>> accessed 6 January 2021.

³ Ibid, 2.

⁴ Harris J, 'Basic Principles of Sustainable Development' (2001).

⁵ 'The Place and Voice of Local People, Culture, and Traditions: A Catalyst for Ecotourism Development in Rural Communities in Ghana' (2019) 6 Scientific African e00184.

the country, with the state organs leading the same and communities together with their cultural and traditional expertise especially on environmental matters getting directions on what to do without any meaningful participation or contribution. The frequent evictions from forest areas is one such example.⁶

It is against this background that this paper argues for the need for more efforts towards ensuring that the community knowledge and practices as well as cultural voices are incorporated into the sustainable development discourse in Kenya, as a platform for boosting communities' participation in pursuit of the sustainable development agenda.⁷ Communities are more likely to embrace the same if they feel like part of it.

2. The Place of Community Practices and Cultural Voices in International and Domestic Laws

2.1 Community Practices and Cultural Voices under International Law

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.⁸ 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.⁹ 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.¹⁰ 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.'¹¹ 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

⁶'Kenya: Abusive Evictions in Mau Forest' (Human Rights Watch, 20 September 2019) <<https://www.hrw.org/news/2019/09/20/kenya-abusive-evictions-mau-forest>> accessed 6 January 2021.

⁷Kenya: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/memberstates/kenya>> accessed 6 January 2021.

⁸Dessein, 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 6 January 2021.

⁹ Ibid, p.14.

¹⁰ Ibid, p. 21.

¹¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Culture for Sustainable Development,' available at <http://en.unesco.org/themes/culture-sustainable-development> Accessed 6 January 2021.

diversity of the world and recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.¹²

African States and other stakeholders, in the *Ngorongoro Declaration*¹³ 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.¹⁴ 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.¹⁵

3. Community Practices and Cultural Voices under Kenyan Law: Prospects and Challenges

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹⁶ 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; 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.¹⁷ Parliament is also obligated to enact legislation to: ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; 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.¹⁸

The Ministry of Sports, Culture and Heritage was established through the Executive Order No. 2 “Organization of the Government of the Republic of Kenya dated May 2013” and comprises of departments of Sports, Office of the Sports Registrar, Culture, Permanent Presidential Music Commission, Kenya National Archives and Documentation Services, Library Services, Records Management, The Arts Services.¹⁹ Part of their mandate includes ‘developing, promoting and coordinating research, copyrights and conservation of Culture’ and to ‘develop, promote & coordinate the national culture policy, heritage policy and its management’.²⁰ Notably, the core functions of the Department of Culture under the Ministry are: the promotion, revitalization and

¹² 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.

¹³ The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016.

¹⁴ Ibid, p.2.

¹⁵ Ibid, p. 3.

¹⁶ Article 11 (1), Constitution of Kenya, 2010.

¹⁷ Ibid, Article 11 (2).

¹⁸ Ibid, Article 11 (3).

¹⁹ ‘The Ministry’ (The Ministry of Sports, Culture and Heritage) <<http://sportsheritage.go.ke/the-ministry/>> accessed 6 January 2021.

²⁰ Ibid.

development of all aspects of culture- including performing, visual arts, languages indigenous health, nutrition, environment, and oral traditions; and, education, information and research on all aspects of the tangible and intangible cultural heritage.²¹

The Department's core mandate includes, to: advise the government on cultural matters; set policy standards to guide the development of cultural programmes; develop national cultural infrastructure and actively engage in the promotion, preservation and development of culture, in collaboration with other likeminded government agencies, County governments, and local communities based on the principles of Free Prior and Informed Consent; coordinate the documentation of national cultural inventories, and support cultural programmes and events; promote the use of Kiswahili, sign and indigenous languages in Kenya; coordinate safeguarding of Kenya's intangible cultural heritage and promotion of the diversity of cultural expressions; conduct capacity building for county governments, and disseminating cultural information; coordinate and facilitate cultural exchange programmes for groups and individuals; liaise with cultural offices and Offer technical support for cultural development programmes; and register cultural groups, associations and agencies.²²

Notably, the Department of Culture acknowledges that 'while it has been playing some of the key roles in promotion of cultural integration, formulation of policies and standards that will guide the development of culture, Kenyan identity and social cohesion, both at the national and international levels, little information has been available to the Kenyan public'.²³ However, while the Department, in line with its constitutional mandate, seeks to use its website to disseminate information, and open up an online forum, where all Kenyans can contribute towards realisation of our shared dreams and aspirations; our pride in ethnic, cultural, and religious diversity, and the determination to live in peace and unity, as one indivisible and sovereign nation, there are challenges that come with this. Arguably, most of the custodians of the cultural practices and knowledge of Kenyan communities are either not able to access the internet due to infrastructure challenges or do not simply have the formal education required to enable them do so. This therefore means that the Department's initiative, however well meaning, will either not reach a large section of the target group or will not benefit from added knowledge that would be gained from the input of elders from the villages. There may therefore, be a need for the Department to organize physical forums where they can meet the communities' elders and leaders and share their dream with them in a bid to enrich their cultural knowledge database. The only way that the Department of culture and heritage can effectively achieve their mandate of advising the government on cultural matters, dissemination of cultural information, conducting capacity building for county governments, coordination and facilitate cultural exchange programmes for groups and individuals, offering technical support for cultural development programmes and registering cultural groups, associations and agencies would be through organizing forums where communities, without the limitation of technology or distance would come forward and share what they have with the Department. This cannot certainly be the online platform. Physical meetings should thus be organized at the grassroots level. Through such forums, the Department can collaborate with the other stakeholders especially in matters that are relevant to the sustainable development agenda in

²¹ 'Department of Culture' (The Ministry of Sports, Culture and Heritage)

<<http://sportsheritage.go.ke/culture-heritage/department-of-culture/>> accessed 6 January 2021.

²² Ibid.

²³Ibid.

order to tap into the communities' knowledge and practices where such can help in promoting sustainability.

Some of the main challenges that have been identified especially in relation to the implementation of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*²⁴ in Kenya, in the past include; Lack of a coordinated national framework on implementation of the Convention; Lack of official cultural statistics that has negatively affected fiscal and political decisions; Inadequate legislative and institutional framework to promote the cultural and creative cultural sector; Inadequate cultural infrastructure and spaces for cultural expression; and Lack of awareness and non-appreciation on the role of culture in development by key policy makers.²⁵

Cultural expressions, services, goods and heritage sites can contribute to inclusive and sustainable economic development, thus making a vital contribution to eradication of poverty as envisaged under sustainable development goal 1 of the 2030 Agenda on Sustainable Development Goals.²⁶ This is because the natural and environmental resources form the basis of the 2030 SDGs Agenda for provision of the resources required for eradication of poverty. These resources however require conservation for the sake of the current and future generations. It is also true that conservation principles and practices evolve and adapt to the cultural, political, social and economic environments in which they take place.²⁷ It is for this reason that cultural practices of communities become critical in giving communities a chance to participate in sustainable development discourse. It has been observed that conservation practices are intimately linked to codes of ethics dictated by local and/or international systems of values. In turn, these values are inscribed in legal frameworks or they comply with legal texts.²⁸ Arguably, it is not enough for the laws in Kenya to acknowledge the place of communities' cultural practices; there is a need to actually implement and incorporate these practices in environmental management and conservation measures through engaging communities in national plans and strategies geared towards the realisation of the sustainable development goals. Notably, while Kenya has been making progress towards realisation of the SDGs, if a 2017 Report by the Ministry of Devolution dubbed '*Implementation of the Agenda 2030 for Sustainable Development in Kenya* is anything to go by, there is little evidence of incorporation of communities' practices and indigenous knowledge in tackling the challenges that are likely to derail the realisation of the Agenda 2030.

The process seems to be state-led, with communities playing a peripheral role. They only seem to be included in making peace, which in itself is critical for development, but that is just about all. The farthest the Report has gone in demonstrating communities' inclusion is 'the Government putting in place mechanisms to foster peace among warring communities through initiatives like

²⁴Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, Paris, 20 October 2005.

²⁵ 'The Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (Diversity of Cultural Expressions, 15 February 2018) <<https://en.unesco.org/creativity/convention>> accessed 6 January 2021.

²⁶Cities U and Governments L, *Culture in the Sustainable Development Goals: a Guide for Local Action* (Academic Press 2015) <https://www.uclg.org/sites/default/files/culture_in_the_sdgs.pdf> accessed 3 January 2021.

²⁷ Anne-Marie Deisser and Mugwima Njuguna, *Conservation of Cultural and Natural Heritage in Kenya* (2016) 1 <<http://www.jstor.org/stable/10.2307/j.ctt1gxxpc6>> accessed 6 January 2021.

²⁸Ibid, 3.

joint Cultural Festivals, and signing treaties on cultural exchange programmes with 51 countries hosting Kenya Missions’ in pursuit of SDG Goal 16 on ‘promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level’.²⁹ Thus, while there are admittedly policy, legal and institutional frameworks meant to promote the utilization of cultural and traditional community knowledge in national development, there is little evidence that the same is actively being pursued.

4. Community Practices and Cultural Voices under the Sustainable Development Goals

Sustainable development is one of the national values and principles of governance that binds 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.³⁰ This is in addition to democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and good governance, integrity, transparency and accountability.³¹ Arguably, this should include participation of communities and their cultural knowledge especially in matters related to the sustainable development agenda.³²

Target 11.4 of the 2030 Agenda on Sustainable Development Goals seeks to, inter alia, “strengthen efforts to protect and safeguard the world’s cultural and natural heritage”. It has however been argued that this is a weak reference because it is not specific on cultural heritage, but it is mentioned together with natural one; furthermore, this specific target deals only with the protection and safeguard of cultural heritage.³³

Arguably, culture has received insufficient attention as an intrinsic component of sustainable development and must be translated and embedded in national and local development.³⁴ Indeed, some commentators have argued that culture, sustainability and sustainable development are complicated concepts that are not always easy for scientists, policy makers or practitioners to grasp or apply.³⁵

Culture can play a significant role in the attainment of the Sustainable Development Goals (SDGs), especially those related to quality education, sustainable cities, the environment, economic growth, sustainable consumption and production patterns, peaceful and inclusive societies, gender equality

²⁹ Republic of Kenya, Implementation of the Agenda 2030 For Sustainable Development In Kenya, June, 2017, 45 https://www.un.int/kenya/sites/www.un.int/files/Kenya/vnr_report_for_kenya.pdf accessed 6 January 2021.

³⁰ Article 10, Constitution of Kenya 2010.

³¹ Article 10(2), Constitution of Kenya 2010.

³² Nocca F, ‘The Role of Cultural Heritage in Sustainable Development: Multidimensional Indicators as Decision-Making Tool’ (2017) 9 Sustainability 1882.

³³ *Ibid*, 3.

³⁴ Energy and Resources Institute, Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development. (2019) 117.

³⁵ Dessein, J., Soini, K., Fairclough, G. and Horlings, L. (eds) 2015. Culture in, for and as Sustainable Development. Conclusions from the COST Action IS1007 Investigating Cultural Sustainability. University of Jyväskylä, Finland, 8 <<https://jyx.jyu.fi/bitstream/handle/123456789/50452/1/978-951-39-6177-0.pdf>> accessed 5 January 2021.

and food security.³⁶ According to UNESCO, from cultural heritage to cultural and creative industries, culture is both an enabler and a driver of the economic, social and environmental dimensions of sustainable development.³⁷ This is due to its potential to have community-wide social, economic and environmental impacts.³⁸

Notably, traditional knowledge can and should be used to contribute to the realization of sustainable development agenda, where most indigenous and local communities' contribution can go beyond conservation and sustainable use of biological diversity to include their skills and techniques which provide valuable information to the global community and a useful model for biodiversity policies.³⁹ Furthermore, as on-site communities with extensive knowledge of local environments, indigenous and local communities are most directly involved with conservation and sustainable use.⁴⁰ The relevance of this traditional knowledge in the sustainable development debate is premised on the fact that it is based on the experience, often tested over centuries of use, adapted to local culture and environment, dynamic and changing especially in relation to knowledge and skills on how to grow food and to survive in difficult environments, what varieties of crops to plant, when to sow and weed, which plants are poisonous, which can be used for control of diseases in plants, livestock and human beings.⁴¹

SDG Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture. As also acknowledged under the Constitution of Kenya, traditional knowledge related to the preservation of existing genetic resources, including the genetic diversity of seeds, should be recognized and maintained, and the fair sharing of the relevant benefits should be promoted.⁴² However, for effectiveness, it has been recommended that there should be integration of cultural factors, including the knowledge, traditions and practices of all people and communities, into local strategies on environmental sustainability.⁴³ The indigenous knowledge based on cultural practices should be utilized in achieving such goals as SDG Goal 2 on food security.

Thus, while there is little by way of mention in the 2030 Agenda on SDGs on the role of culture and communities' traditional knowledge in achieving sustainable development goals, practically, these communities have a lot to contribute in tackling the challenges that face the world today, ranging from food insecurity, poverty, and environmental degradation, among others. The global community cannot therefore afford to ignore their role in the same.

³⁶ UNESCO, 'Culture for Sustainable Development' (UNESCO, 15 May 2013) <<https://en.unesco.org/themes/culture-sustainable-development>> accessed 5 January 2021.

³⁷ Ibid.

³⁸ UNESCO. "Culture: A driver and an enabler of sustainable development." Thematic Think Piece. UN System Task Team on the Post-2015 UN Development Agenda (2012), 3.

³⁹ Unit B, 'Introduction' (6 October 2011) <<https://www.cbd.int/traditional/intro.shtml>> accessed 3 January 2021.

⁴⁰ Ibid.

⁴¹ CN Atoma, 'The Relevance of Indigenous Knowledge to Sustainable Development in Sub-Saharan Africa' (2011) 5 *International Journal of Tropical Agriculture and Food Systems* 72.

⁴² Cities U and Governments L, *Culture in the Sustainable Development Goals: A Guide For Local Action* (Academic Press 2015) <https://www.uclg.org/sites/default/files/culture_in_the_sdgs.pdf> accessed 3 January 2021.

⁴³ Ibid.

5. Development from the Global South Perspective

The 'Global South' is a term used to refer to less economically developed countries and these comprise a variety of states with diverse levels of economic, cultural, and political influence in the international order.⁴⁴ It has rightly been pointed out that 'when major global events are told from a Western perspective, the voices of the colonised and oppressed often go missing, which leads to a different basis for theorising'.⁴⁵ It is thus it is important to incorporate non-Western actors and non-Western thinking in order to explore the ways in which different actors challenge, support, and shape global and regional orders.⁴⁶

While the term 'development' carries different connotations to different people, more so those in the developing world, it is worth pointing out that development is not purely an economic phenomenon but rather a multi-dimensional process involving reorganization and reorientation of entire economic and social system.⁴⁷ In addition, development is process of improving the quality of all human lives with three equally important aspects, namely: raising peoples' living levels, that is, incomes and consumption, levels of food, medical services, and education through relevant growth processes; creating conditions conducive to the growth of peoples' self-esteem through the establishment of social, political and economic systems and institutions which promote human dignity and respect and increasing peoples' freedom to choose by enlarging the range of their choice variables, such as varieties of goods and services.⁴⁸

It has been argued that indigenous knowledge builds on long-term understanding and practices of socio-ecological systems of various societies across the world. It is a social learning process by which practices and behaviours are adjusted towards embracing better uses of the surrounding environment and contributing to the well-being at individual, communal and societal levels.⁴⁹ If these communities are to overcome the challenges that face them in their day to day lives, western and scientific notions of development will not help; they must be meaningfully involved in the development plans to not only enable them appreciate the same but to also ensure that these challenges are addressed using local solutions, where possible. Sometimes, all they need is the support of the government and other stakeholders to enable them come up with suitable solutions.

⁴⁴ 'Global South Perspectives on International Relations Theory' (E-International Relations, 19 November 2017) <<https://www.e-ir.info/2017/11/19/global-south-perspectives-on-international-relations-theory/>> accessed 6 January 2021.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Abyu G, Concept of Development (2020) <https://www.researchgate.net/publication/340127781_Concept_of_Development/link/5e7a0844299bf1b2b9ac2b0b/download> accessed 3 January 2021.

⁴⁸ 'GEO 260 - Third World Development' <http://www.uky.edu/AS/Courses/GEO260/glossary_development.html> accessed 6 January 2021.

⁴⁹ Energy and Resources Institute, Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development. (2019) 120.

6. Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse: Way Forward

6.1 Call for Diversity in Development Voices

People-centred development is inclusive and participatory and rooted in local culture and heritage.⁵⁰ While the national government should continually strengthen efforts to implement policies/legislation aimed at addressing cultural practices such as female genital mutilation and child marriage, which slow access to education and affect attainment of gender equality and equity, the positive aspects of culture should be tapped into especially in relation to natural resources management.⁵¹

SDG Goal 17 calls for countries to ‘strengthen the means of implementation and revitalize the global partnership for sustainable development’. One of the targets under this goal is tackling systemic issues which include countries respecting each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development, and encouraging and promoting effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships.⁵² The Global South should tap into all available knowledge including traditional knowledge to tackle the unique problems that may exist in their territories. Communities are more likely to identify and offer plausible solutions to the problems found within their localities better than the scientific or western knowledge would do.

6.2 Equitable Access of Resources by Communities and Fair Benefit Sharing

Communities should tap into the available resources, enjoy equitable access, to enable them utilize these resources to achieve tangible development within their regions. The government should thus continually look for ways through which this can be achieved. This would give these communities incentives to not only participate in the sustainable development of resources but also to proffer solutions to degradation challenges where they feel that their traditional knowledge can be utilized.⁵³

The law should therefore not be used to limit communities’ access and enjoyment of the accruing benefits from natural resources but should instead be used to guarantee the same.⁵⁴

⁵⁰Energy and Resources Institute, *Global Sustainable Development Report 2019: The Future Is Now: Science for Achieving Sustainable Development*. (2019) 92.

⁵¹ SDGs Kenya Forum, ‘The Third Progress Report on Implementation of SDGs in Kenya,’ 2020 <<https://sdgkenyaforum.org/content/uploads/documents/8b832986477ddd.pdf>> accessed 6 January 2021.

⁵²‘#Envision2030 Goal 17: Partnerships for the Goals | United Nations Enable’ <<https://www.un.org/development/desa/disabilities/envision2030-goal17.html>> accessed 6 January 2021.

⁵³ ‘Indigenous Peoples and the Nature They Protect’ (UN Environment, 8 June 2020) <<http://www.unenvironment.org/fr/node/27724>> accessed 8 January 2021.

⁵⁴ Elisa Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 *European Journal of International Law* 353; Norfolk, Simon. "Examining access to natural resources and linkages to sustainable livelihoods." A case study of Mozambique. *FAO Livelihood support programme Working Paper 17* (2004): 69; ‘Managing Natural Resources for Development in Africa: A Resource Book’ <<https://www.idrc.ca/sites/default/files/openebooks/506-9/index.html>> accessed 8 January 2021; Yolanda T Chekera and Vincent O Nmehielle, ‘The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds’ (2013) 6 *African Journal of Legal Studies* 69; ‘Tenure, Governance, and Natural Resource Management’ (LandLinks) <<https://land-links.org/issue-brief/tenure-governance-and-natural-resource-management/>> accessed 8 January 2021;.

The cultural and creative industries have been rated among the fastest growing sectors in the world, with an estimated global worth of 4.3 trillion USD per year, **accounting for 6.1% of the global economy** and nearly 30 million jobs worldwide, employing more people aged 15 to 29 than any other sector.⁵⁵ Thus, cultural and creative industries are considered to be essential for inclusive economic growth, reducing inequalities and achieving the goals set out in the 2030 Sustainable Development Agenda.⁵⁶ There is a need for the government to rise to the occasion and promote a conducive environment for communities to benefit from the intellectual property of their indigenous knowledge for economic advancement and achievement of sustainable development agenda.⁵⁷

6.3 Guaranteed Cultural Security

While the phrase "cultural security" is used to mean different things in different regions of the world, in Australia, the phrase is used when speaking about how modernization threatens to change the way of life of Aborigines, while in Africa, leaders have applied the phrase in voicing concerns over the impact of development on local traditions.⁵⁸ While modernization is desirable, the constitutional safeguards against erosion of culture should be upheld and used to ensure that communities are afforded a chance to celebrate their culture and meaningfully participate in the development agenda through the use of the beneficial aspects of their culture.⁵⁹ It should not only be a source of pride for them but also a source of livelihood where possible, through the support of the government.⁶⁰ They should be involved in what is referred to as Primary Environmental Care (PEC), 'a process by which local groups or communities organise themselves with varying degrees of outside support so as to apply their skills and knowledge to the care of natural resources and environment while satisfying livelihood needs'.⁶¹

⁵⁵ 'The Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (Diversity of Cultural Expressions, 15 February 2018) <<https://en.unesco.org/creativity/convention>> accessed 6 January 2021.

⁵⁶ Ibid.

⁵⁷ See Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (No. 33 of 2016), Laws of Kenya.

⁵⁸ Nemeth E, 'What Is Cultural Security? Different Perspectives on the Role of Culture in International Affairs' (23 April 2016).

⁵⁹ Rivière, François, ed. Investing in cultural diversity and intercultural dialogue. Vol. 2. Unesco, 2009; 'Kenya's New Constitution Benefits Indigenous Peoples' <<http://www.culturalsurvival.org/news/kenya-new-constitution-benefits-indigenous-peoples>> accessed 8 January 2021; EO Wahab, SO Odunsi and OE Ajiboye, 'Causes and Consequences of Rapid Erosion of Cultural Values in a Traditional African Society' (Journal of Anthropology, 5 July 2012) <<https://www.hindawi.com/journals/janthro/2012/327061/>> accessed 8 January 2021; Campese, Jessica. Rights-based approaches: Exploring issues and opportunities for conservation. CIFOR, 2009; Bockstael, Erika, and Krushil Watene. "Indigenous peoples and the capability approach: taking stock." Oxford Development Studies 44, no. 3 (2016): 265-270; Kanyinga, Karuti. "Kenya: Democracy and political participation." (2014).

⁶⁰ '2. Cultural Characteristics Of Small-Scale Fishing Communities' <<http://www.fao.org/3/y1290e05.htm>> accessed 8 January 2021; Daskon, Chandima Dilhani. "Cultural resilience—the roles of cultural traditions in sustaining rural livelihoods: a case study from rural Kandyan villages in Central Sri Lanka." Sustainability 2, no. 4 (2010): 1080-1100; Soh, Mazlan Bin Che, and Siti Korota'aini Omar. "Small is big: The charms of indigenous knowledge for sustainable livelihood." Procedia-Social and Behavioral Sciences 36 (2012): 602-610.

⁶¹ Melissa Leach, Robin Mearns and Ian Scoones, 'Challenges to Community-Based Sustainable Development: Dynamics, Entitlements, Institutions' (1997) 28 IDS Bulletin 4, 5, <https://www.researchgate.net/publication/227736698_Challenges_to_Community-Based_Sustainable_Development_Dynamics_Entitlements_Institutions> accessed 6 January 2021.

7. Conclusion

The paper has highlighted some of the initiatives or areas of collaboration that reflect 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.⁶² This is, however, not to say that there are no cultural practices that are counterproductive in their effect as far as development and sustainability are concerned. Such retrogressive practices ought to be shunned while embracing the ones that are compatible with progress and sustainable development goals.⁶³

If the sustainable development goals are to be accomplished in a way that leaves no one behind, there is a need for the stakeholders to adopt a bottom-up approach that includes traditional and cultural institutions and the associated knowledge in tackling the problems that afflict the society. Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse is indeed a step in the right direction.

⁶² See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Eleven, for the full discussion.

⁶³ See ‘Cultural Practices That Hinder Children’s Rights among the Digo Community - Msambweni District, Kwale County - Kenya’ (Resource Centre) <https://resourcecentre.savethechildren.net/node/7573/pdf/report_on_cultural_practices_-_mswambweni1.pdf> accessed 6 January 2021.

Promoting Sustainable Consumption and Production Patterns in Kenya for Development

Abstract

This paper discusses how Kenya can achieve sustainable consumption and production patterns as envisaged under the United Nations 2030 Agenda for Sustainable Development Goal 12. The paper identifies the challenges that still make it difficult to achieve this goal and offers solutions based on the same. The solutions range from social, economic, political and environmental in nature and also require the participation of all stakeholders.

1. Introduction

The world is faced with dwindling environmental and natural resources attributable to a myriad of reasons which include but are not limited to climate change, environmental degradation due to pollution and other unsustainable consumption and production practices by the human race.¹ The potential for human kind to destroy the environment was indeed acknowledged in 1972 when the UN Conference on the Human Environment stated: “In our time, man’s capability to transform his surroundings, if used wisely, can bring to all peoples the benefit of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and human environment”.² Undoubtedly, this human power has been used wrongly through unsustainable consumption and production patterns, and the results have been devastating, the world over, including in Kenya where there have been rampant cases of environmental degradation.³ The United Nations argues that the human population is currently consuming more resources than ever, exceeding the planet’s capacity for generation.⁴

As a way of addressing this challenge, the United Nations 2030 Agenda on Sustainable Development Goals⁵ (SDGs) dedicates SDG Goal 12 to ensuring sustainable consumption and production patterns by all countries.⁶ It has been observed that although consumption and

¹ ‘1.4 The Environmental Crisis’ <https://www.soas.ac.uk/cedep-demos/000_P500_ESM_K3736-Demo/unit1/page_11.htm> accessed 6 November 2020; ‘Sustainable Consumption and Production Global Edition. A Handbook for Policymakers: Sustainable Development Knowledge Platform’ <<https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=1951&menu=35>> accessed 6 November 2020; see also Magnus Bengtsson and others, ‘Transforming Systems of Consumption and Production for Achieving the Sustainable Development Goals: Moving beyond Efficiency’ (2018) 13 Sustainability Science 1533.

² ‘What Is Sustainable Consumption and Production?’ (One Planet Network, 13 September 2016) <<https://www.oneplanetnetwork.org/about/what-Sustainable-Consumption-Production>> accessed 6 November 2020.

³ Adam Lampert, ‘Over-Exploitation of Natural Resources Is Followed by Inevitable Declines in Economic Growth and Discount Rate’ (2019) 10 Nature Communications 1419; Global Environment Outlook: GEO4 : Environment for Development (United Nations Environment Programme [host 2007] 93; Washington Odongo Ochola and others (eds), *Managing Natural Resources for Development in Africa: A Resource Book* (co-published by University of Nairobi Press in association with International Development Research Centre, International Institute of Rural Reconstruction, Regional Universities Forum for Capacity Building in Agriculture 2010).

⁴ UN Environment, ‘Sustainable Consumption and Production Policies’ (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies>> accessed 7 November 2020.

⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁶ Goal 12. Ensure sustainable consumption and production patterns

production are at the core of the global economy, the current unsustainable production and consumption patterns lead to deforestation, water scarcity, food waste, and high carbon emissions, and cause the degradation of key ecosystems.⁷

Sustainable Consumption and Production (SCP) can be defined as:

*“the use of services and related products which respond to basic needs and bring a better quality of life while minimising the use of natural resources and toxic materials as well as the emission of waste and pollutants over the life cycle of the service or product so as not to jeopardise the needs of future generations”.*⁸ *It has also been defined as: a holistic approach to minimising the negative environmental impacts from consumption and production systems while promoting quality of life for all”.*⁹

Thus, while Sustainable Consumption and Production (SCP) may mean different things to different people, it can generally be agreed that SCP is about systemic change, decoupling economic growth

12.1 Implement the 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns, all countries taking action, with developed countries taking the lead, taking into account the development and capabilities of developing countries

12.2 By 2030, achieve the sustainable management and efficient use of natural resources

12.3 By 2030, halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses

12.4 By 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment

12.5 By 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse

12.6 Encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle

12.7 Promote public procurement practices that are sustainable, in accordance with national policies and priorities

12.8 By 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature

12.a Support developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production

12.b Develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products

12.c Rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities.

⁷ United Nations, ‘Goal 12—Ensuring Sustainable Consumption and Production Patterns: An Essential Requirement for Sustainable Development’ (United Nations) <<https://www.un.org/en/chronicle/article/goal-12-ensuring-sustainable-consumption-and-production-patterns-essential-requirement-sustainable>> accessed 6 November 2020.

⁸ ‘What Is Sustainable Consumption and Production?’ (One Planet Network, 13 September 2016) <<https://www.oneplanetnetwork.org/about/what-Sustainable-Consumption-Production>> accessed 6 November 2020.

⁹ Lewis Akenji, Emily Briggs, and United Nations Environment Programme, Sustainable Consumption and Production: A Handbook for Policymakers (2015), 10.

from environmental degradation and applying a lifecycle thinking approach, taking into account all phases of resource use in order to do more and better with less.¹⁰

2. Sustainable Consumption and Production Patterns in Kenya: Challenges

It has rightly been pointed out that a major challenge in environmental policymaking is determining whether and how fast our society should adopt sustainable management methods as these decisions may have long lasting effects on the environment.¹¹

2.1 Excessive Use of agrochemicals and Overreliance on Agriculture

It has rightly been pointed out that commercialization of horticulture farming, expansion of farms, and the practice of monoculture favour the proliferation of pests, which in turn increases the need for pesticides.¹²

Currently, due to agricultural industrialization, more and more farmers in Kenya and indeed globally, are using agro-chemicals (fertilizers and pesticides) in their farms to deal with pests and all other destructive insects as well as increasing productivity.¹³ The need for increased food production is occasioned by the growing population thus making it imperative to ensure food security by increasing crop production.¹⁴ Some commentators have argued that application of excessive fertilizers and pesticides to improve crop production has negative environmental implications, including soil degradation, enhanced greenhouse gas emissions, accumulation of pesticides, and decline in the availability and quality of water.¹⁵ Indeed, indiscriminate use of chemical pesticides not only affects the texture and productivity of soil but also affects the environment, health-related issues, and the non-target microorganism.¹⁶

2.2 High Levels of Abject Poverty

Arguably, environmental unsustainability is due to both structural features and historically specific characteristics of industrial capitalism resulting in specific patterns of production and

¹⁰ Ibid.

¹¹ Adam Lampert, 'Over-Exploitation of Natural Resources Is Followed by Inevitable Declines in Economic Growth and Discount Rate' (2019) 10 *Nature Communications* 1419, 1.

¹² Aliyu Ahmad Warra and Majeti Narasimha Vara Prasad, 'Chapter 16 - African Perspective of Chemical Usage in Agriculture and Horticulture—Their Impact on Human Health and Environment' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020) <<http://www.sciencedirect.com/science/article/pii/B9780081030172000167>> accessed 7 November 2020; Binoy Sarkar and others, 'Chapter 8 - Sorption and Desorption of Agro-Pesticides in Soils' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020) <<http://www.sciencedirect.com/science/article/pii/B9780081030172000088>> accessed 7 November 2020.

¹³ Ibid.

¹⁴ Sachchidanand Tripathi and others, 'Chapter 2 - Influence of Synthetic Fertilizers and Pesticides on Soil Health and Soil Microbiology' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020) <<http://www.sciencedirect.com/science/article/pii/B9780081030172000027>> accessed 7 November 2020.

¹⁵ Ibid.

¹⁶ Vipin Kumar Singh and others, 'Chapter 10 - Impact of Pesticides Applications on the Growth and Function of Cyanobacteria' in Prashant Kumar Singh and others (eds), *Advances in Cyanobacterial Biology* (Academic Press 2020) <<http://www.sciencedirect.com/science/article/pii/B9780128193112000103>> accessed 7 November 2020.

consumption, as well as population growth.¹⁷ Poverty has often contributed to unsustainable production and consumption patterns and ultimately to environmental degradation in the country.¹⁸ It has been observed that the objective of SCP is to: conserve natural resources through more efficient use so that human needs can be satisfied without exhausting the world's finite supply of such resources, leaving behind enough for future generations; and ensure that the goods and services we produce and consume and the manner in which they are produced, used and discarded does not pollute the planet.¹⁹

The poor depend much more on nature for their livelihoods than the rich. Thus "natural" changes – for instance those brought about by climate change due to man-made activities – are likely to hit the poor much harder than the rich, although ultimately they will affect all.²⁰ Thus, poverty may make communities more susceptible to environmental degradation or contribute to the same.

2.3 Food Wastage and losses at Consumer and Production Levels

It has been noted that although Sub-Saharan Africa faces severe food shortages, on one hand, it experiences high rates of postharvest loss on the other, with an estimation that about 50% of fruits and vegetables, 20% of cereals, pulses and legumes and 40% of roots and tubers are lost before they reach the consumer.²¹ Thus, such wastage and loss not only leaves the people hungry with inadequate food to consume but also exerts undue pressure on the lands for higher production of food to feed the ever growing population.

3. Promoting Sustainable Consumption and Production Patterns in Kenya for Sustainable Development: Prospects

It has been observed that although environment does not feature in Vision 2030 as a pillar, there has been a wide range of policy, institutional and legislative frameworks by the Government aimed at addressing the major causes of environmental degradation and negative impacts on ecosystems emanating from industrial and economic development programmes.²²

As already pointed out, SDG 12 requires countries around the globe to work towards the following: implement the 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns, all countries taking action, with developed countries taking the lead, taking into account the development and capabilities of developing countries; by 2030, achieve the sustainable

¹⁷ Helen Kopnina, 'The Victims of Unsustainability: A Challenge to Sustainable Development Goals' (2016) 23 *International Journal of Sustainable Development & World Ecology* 113.

¹⁸ Lewis Akenji, Emily Briggs, and United Nations Environment Programme, *Sustainable Consumption and Production: A Handbook for Policymakers* (2015).

¹⁹ *Ibid.*

²⁰ *Ibid.*; Jeremy Millard and others, 'Social Innovation for Poverty Reduction and Sustainable Development: Some Governance and Policy Perspectives', *Proceedings of the 9th International Conference on Theory and Practice of Electronic Governance - ICEGOV '15-16* (ACM Press 2016) <<http://dl.acm.org/citation.cfm?doid=2910019.2910079>> accessed 8 November 2020; United Nations Environment Programme (ed), *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP 2011).

²¹ Huho, Julius M. "Reducing food loss and waste through innovative food preservation technologies applied by women in rural areas in Kenya." *International Journal of Latest Research in Humanities and Social Science (IJLRHSS)* Vol 3, no. 1 (2020): 76-82.

²² United Nations, 'Sustainable Development in Kenya: Stocktaking in the run up to Rio+20' (2012) Nairobi: United Nations, 3.

management and efficient use of natural resources; by 2030, halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses; by 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment; by 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse; encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle; promote public procurement practices that are sustainable, in accordance with national policies and priorities; by 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature; support developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production; develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products; and rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities.²³ Banking on these SDG obligations, Kenya can take up and implement a number of measures that can inch it closer to achieving sustainable consumption and production patterns.

3.1 Tackling Food Wastage at Consumer and Production Levels

There is a need to address the challenge of food wastage and loss during harvesting, transportation, storage as well as at the consumption stage in order to ensure that there is enough for local consumption as well as possible sale of the excess as a way of improving the livelihoods of farmers.²⁴ 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.²⁵

3.2 Promoting Environmental Ethics

Environmental ethics is a term used to refer to the moral relationship between the status of the land (from the perspective of the human being) and the use of the land by humans and other living

²³ SDG Goal 12, Transforming our world: the 2030 Agenda for Sustainable Development.

²⁴ Timmermans, A. J. M., J. Ambuko, W. Belik, and Jikun Huang. Food losses and waste in the context of sustainable food systems. No. 8. CFS Committee on World Food Security HLPE, 2014; Kimiywe, J. "Food and nutrition security: challenges of post-harvest handling in Kenya." *Proceedings of the Nutrition Society* 74, no. 4 (2015): 487-495; Huho, Julius M. "Reducing Food Loss and Waste through Innovative Food Preservation Technologies Applied by Women in Rural Areas in Kenya." *International Journal of Latest Research in Humanities and Social Science (IJLRHSS)* Vol 3, no. 1 (2020): 76-82.

²⁵ Muigua, K., Utilizing Africa's Natural Resources to Fight Poverty, available at <http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa's%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf>

species.²⁶ Environmental ethics has also been defined as a set of expectations, rules of behaviour, of how we treat the planet's inhabitants, human and nonhuman.²⁷ Environmental ethics dictate that one should base their behaviour on a set of ethical values that guide our approach toward the other living beings in nature.²⁸ In addition, it has been argued that since sustainability makes us consider what we do in light of future consequences, good and bad, our contemporary environmental ethic stretches environmental awareness in space and time.²⁹ Environmental ethicists advocate the need for change in consciousness, attitudes, thoughts, models, beliefs and world view.³⁰

As a way of ensuring that the general populace in Kenya is aware of the impact of all their actions on their surroundings, there is a need for promoting an approach to production and consumption that incorporates both anthropocentrism and ecocentrism.³¹ Ecocentrism finds inherent (intrinsic) value in all of nature. It takes a much wider view of the world than does anthropocentrism, which sees individual humans and the human species as more valuable than all other organisms.³² There is therefore a need for environmental education in order to supply the general public with the relevant information and awareness for sustainable development and lifestyles in harmony with nature.

3.3 Investing in Scientific and Technological Capacity

The Constitution obligates the State to recognise the role of science and indigenous technologies in the development of the nation.³³ There is a need for the country to invest in and adopt scientific knowledge especially locally for eliminating unsustainable and harmful practices that adversely affect realization right to clean and healthy environment for all as well as the sustainable development agenda. This may be aimed at achieving, inter alia, use of science and technology in

²⁶ Donald L Grebner, Pete Bettinger and Jacek P Siry, *Introduction to Forestry and Natural Resources* (First edition, Academic Press 2013).

²⁷ Daniel A Vallero, *Paradigms Lost: Learning from Environmental Mistakes, Mishaps, and Misdeeds* (Butterworth-Heinemann 2006) ch 1.

²⁸ IV Muralikrishna and Valli Manickam, *Environmental Management: Science and Engineering for Industry* (Butterworth-Heinemann, an imprint of Elsevier 2017) ch 4.

²⁹ Daniel A Vallero, *Paradigms Lost: Learning from Environmental Mistakes, Mishaps, and Misdeeds* (Butterworth-Heinemann 2006) ch 1.

³⁰ S Morand and Claire Lajaunie, *Biodiversity and Health: Linking Life, Ecosystems and Societies* (ISTE Press ; Elsevier 2018) ch 12.

³¹ Sabine Lenore Müller and Tina-Karen Pusse (eds), *From Ego to Eco: Mapping Shifts from Anthropocentrism to Ecocentrism* (Brill 2018); Muigua, Kariuki. "Achieving Environmental Security in Kenya." *E. Afr. LJ* (2018): 1; 'Why Ecocentrism Is the Key Pathway to Sustainability' (MAHB, 4 July 2017) <<https://mahb.stanford.edu/blog/statement-ecocentrism/>> accessed 8 November 2020; Noel E Boulting and The Society for Philosophy in the Contemporary World, 'Between Anthropocentrism and Ecocentrism': (1995) 2 *Philosophy in the Contemporary World* 1; Muigua, Kariuki. *Nurturing Our Environment for Sustainable Development*. Glenwood Publishers Limited, 2016; Karataş, Assist ProfDr Abdullah. "The Role of Environmental Education in Transition from Anthropocentrism to Ecocentrism." *International Journal of Business and Social Science* 7, no. 1 (2016); Jana Rülke and others, 'How Ecocentrism and Anthropocentrism Influence Human–Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 *Sustainability* 8213.

³² 'Why Ecocentrism Is the Key Pathway to Sustainability' (MAHB, 4 July 2017) <<https://mahb.stanford.edu/blog/statement-ecocentrism/>> accessed 8 November 2020.

³³ Constitution of Kenya, Art. 11(2) (b).

industrial waste management, adoption of green and clean technologies, climate change mitigation measures, food production and preservation measures, among others.³⁴

3.4 Addressing Poverty Levels in Kenya

A poverty stricken population is more likely to disregard sustainable production and consumption of environmental resources for lack of resources to explore possible alternatives to get their livelihoods and thus they end up overexploiting environmental resources and lands. It is therefore important for the stakeholders and policymakers to ensure that they support efforts towards addressing poverty levels as a prerequisite in achieving sustainability.

3.5 Pollution Prevention and Control

There is a need for stakeholders to identify opportunities and explore the same in order to reduce the production of wastes and the use of toxic materials, to prevent soil, water, and air pollution and to conserve and reuse resources.³⁵ The Constitution of Kenya guarantees the right of every person to a clean and healthy environment including 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 69.³⁶

Pollution may be as a result of, inter alia, waste by-products emanating from industrialization of our society, the introduction of motorized vehicles, and the explosion of the human population, leading to an exponential growth in the production of goods and services.³⁷

Combating pollution in all its forms is thus critical if the sustainable development agenda is to be achieved and this calls for concerted efforts from all stakeholders including state organs, private sector and individuals.³⁸

3.6 Agricultural Diversification and Diversification of Livelihood Sources in Kenya

Agricultural diversification is considered to be an important mechanism for economic growth. Agricultural diversification can be facilitated by technological breaks-through, by changes in consumer demand or in government policy or in trade arrangements, and by development of irrigation, roads, and other infrastructures.³⁹ It has been argued that the policy frameworks of government for rural infrastructure transport, irrigation, storage facilities, processing, and

³⁴ Muigua, K., *Utilising Science and Technology for Environmental Management in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf>

³⁵ Boubaker Elleuch and others, 'Environmental Sustainability and Pollution Prevention' (2018) 25 *Environmental Science and Pollution Research* 18223.

³⁶ Art. 42; Art. 70(1) of the Constitution 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. See the case of Peter K. Waweru vs R, Misc civ application no. 118 of 2004

³⁷ See Muigua, K., 'Safeguarding the Environment through Effective Pollution Control in Kenya', September 2019, available at <http://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf>

³⁸ Muigua, K., 'Safeguarding the Environment through Effective Pollution Control in Kenya', 26-27.

³⁹ 'IV. Agricultural Diversification on Small Farms' <<http://www.fao.org/3/ac484e/ac484e06.htm>> accessed 8 November 2020.

providing incentives to the farmers encourages agricultural diversification.⁴⁰ A research targeting Southern Nakuru County on ‘Sustainable food systems through diversification and indigenous vegetables’ found that one way to improve sustainability of the local food system is diversification, starting with better integrating indigenous vegetables, into the food system.⁴¹ Overreliance on certain foods in the country such as maize and so the staple grains often leads to communities overexploiting their lands through farming. There is a need for continued campaigns for communities to change their attitudes towards other sources of food and embracing the same.⁴² The overreliance on certain foods is also what leads to excessive use of agrochemicals leading to environmental degradation. Thus, diversification of food sources and agricultural diversification may not only ensure that there is food security but also help in environmental conservation and restoration.⁴³

It is not only important to promote agricultural diversification but also livelihood diversification, where the latter means farming households engaging in multiple agricultural and nonagricultural activities. Both agricultural and livelihood diversification are ways of managing climate risk.⁴⁴ In addition, agricultural diversification can address poverty levels by increasing and stabilizing farmers' incomes and rural employment.⁴⁵

While some authors have conflicting opinion on the full effect of agrochemicals on the environment, there is a need for farmers to turn towards compost manure and treat their soils in attempts to reduce agrochemicals inputs for the sake of healthy environment and sustainability purposes.

3.7 Sustainable Public Procurement Practices and Green Economy Investments

It has been suggested that shifting public spending towards more sustainable goods and services can help drive markets in the direction of innovation and sustainability, thereby enabling the transition to a green economy.⁴⁶ Kenya’s *Public Procurement and Asset Disposal Act, 2015*⁴⁷ was

⁴⁰ Donald L Sparks, *Advances in Agronomy*. Volume 110 (Elsevier 2011) ch 4 <<http://site.ebrary.com/id/10444577>> accessed 8 November 2020.

⁴¹ Molina, P.B., D’Alessandro, C., Dekeyser, K. and Marson, M., "Sustainable food systems through diversification and indigenous vegetables." (2020), 104.

⁴² Muigua, K., ‘Achieving the Right to Food for Sustainable Development in Kenya,’ Paper Presented at the Public Engagement Forum on the Right to Food Inception Meeting held on 24th July 2018 at the African Population and Health Research Center (APHRC) Campus < <http://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf>> Accessed 8 November 2020.

⁴³ Katharina Waha and others, ‘Agricultural Diversification as an Important Strategy for Achieving Food Security in Africa’ (2018) 24 *Global Change Biology* 3390.

⁴⁴ Clayton Campanhola and Shivaji Pandey, *Sustainable Food and Agriculture: An Integrated Approach* (2019) <<https://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=5611463>> accessed 8 November 2020.

⁴⁵ Chiara Mazzocchi and others, ‘The Dimensions of Agricultural Diversification: A Spatial Analysis of Italian Municipalities’ (2020) 85 *Rural Sociology* 316; Cristina Salvioni, Roberto Henke and Francesco Vanni, ‘The Impact of Non-Agricultural Diversification on Financial Performance: Evidence from Family Farms in Italy’ (2020) 12 *Sustainability* 486.

⁴⁶ UN Environment, ‘Sustainable Consumption and Production Policies’ (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies>> accessed 7 November 2020.

⁴⁷ Public Procurement and Disposal Act, No. 33 of 2015, Laws of Kenya (Revised Edition 2016 [2015]).

enacted to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.⁴⁸ The Act provides that public procurement and asset disposal by State organs and public entities shall be guided by, *inter alia*, the following values and principles of the Constitution and relevant legislation—the national values and principles provided for under Article 10; maximisation of value for money; and promotion of local industry, sustainable development and protection of the environment.⁴⁹ An accounting officer of a procuring entity is required to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings. The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured, and the technical requirements shall, where appropriate, *inter alia*: factor in the socio-economic impact of the item; be environment-friendly; and factor in the cost disposing the item.⁵⁰

Regarding disposal of assets, the Act provides that radioactive or electronic waste shall be disposed of only to persons licensed to handle the respective waste under section 88 of the Environmental Management and Coordination Act, 1999.⁵¹ The *Public Procurement and Asset Disposal Regulations, 2020*⁵² provides that while the user department shall be submitting the requisition to the head of the procurement function for processing, it shall be accompanied by, *inter alia*, as applicable: environmental and social impact assessment reports.⁵³ Regulation 193(2) provides that the documents, procedures and approvals required for waste disposal management shall be obtained from the relevant public agencies allowing a procuring entity to dispose those items that are harmful and unfriendly to the environment.⁵⁴

There is a need for the public entities to uphold the foregoing provisions and work towards ensuring that both the processes of procurement of goods and disposal of waste are not only environmentally friendly but are also cost effective and contribute towards achieve the sustainable development agenda.

The public funds expenditure should be geared towards targeted green investments in a bid to develop green economy. A green economy is defined as 'low carbon, resource efficient and socially inclusive, where growth in employment and income are driven by public and private investment into such economic activities, infrastructure and assets that allow reduced carbon emissions and pollution, enhanced energy and resource efficiency, and prevention of the loss of biodiversity and ecosystem services.'⁵⁵

⁴⁸ Ibid, Preamble.

⁴⁹ Ibid, s. 3.

⁵⁰ Public Procurement and Disposal Act, s. 60.

⁵¹ Ibid, s. 165(2).

⁵² Public Procurement and Asset Disposal Regulations, 2020, Kenya Gazette Supplement No. 53 (Legislative Supplement No. 37), Legal Notice No. 69, Laws of Kenya.

⁵³ Public Procurement and Asset Disposal Regulations, 2020, Regulation 71(2)(c).

⁵⁴ Ibid, 2020, Regulation 193(2).

⁵⁵ UN Environment, 'Green Economy' (UNEP - UN Environment Programme, 23 January 2018) <<http://www.unenvironment.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/green-economy>> accessed 8 November 2020.

3.8 Promoting Gender Equity and Equality

Sustainable Development Goal 5 seeks to achieve gender equality and empower all women and girls. This is because gender equality is not only seen as a fundamental human right, but a necessary foundation for a peaceful, prosperous and sustainable world.⁵⁶

While there has been impressive progress in tackling gender discrimination over the years, there are still many challenges facing women such as: discriminatory laws and social norms which remain pervasive, women continue to be underrepresented at all levels of political leadership, and 1 in 5 women and girls between the ages of 15 and 49 report experiencing physical or sexual violence by an intimate partner within a 12-month period.⁵⁷ While these statistics are not specifically for Kenya, it does not mean that Kenya's situation is any better.⁵⁸ It has been argued that due to the different roles women and men play in households, the economy, and environmental sustainability in most societies, enhancing gender equality is integral to ensuring a balanced approach to the economic, social and environmental dimensions of sustainable development and to achieving all other SDGs.⁵⁹ Thus, efforts towards promoting sustainable consumption and production patterns in Kenya may not bear the desired results if they do not incorporate gender equality and equity measures.

4. Conclusion

Arguably, Sustainable Consumption and Production can contribute substantially to poverty alleviation and the transition towards low-carbon and green economies.⁶⁰ It is considered to be a holistic approach and is about systemic change.⁶¹ It is indeed possible to improve production processes and consumption practices to reduce resource consumption, waste generation and emissions across the full life cycle of processes and products in the different sectors of the economy as a way to promote sustainable development agenda. Unless all stakeholders are brought on board and ensuring that there is a societal attitude and behavioural change as far as interactions with the environment are concerned, then realization of truly sustainable development practices remains a mirage. There is a need for a shift to a lifestyle that is geared towards achieving sustainability in all areas of economy. Promoting Sustainable Consumption and Production for Development may take a while to achieve, but it is worth pursuing.

⁵⁶ 'Gender Equality and Women's Empowerment' (United Nations Sustainable Development) <<https://www.un.org/sustainabledevelopment/gender-equality/>> accessed 7 November 2020.

⁵⁷ Ibid.

⁵⁸ Muigua, K., "Actualising the National Policy on Gender and Development in Kenya." *Journal of cmsd* Volume 5(2) (2020).

⁵⁹ OECD, *Policy Coherence for Sustainable Development: Fostering an Integrated Policy Agenda* (OECD 2018).

⁶⁰ UN Environment, 'Sustainable Consumption and Production Policies' (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies>> accessed 7 November 2020.

⁶¹ Ibid.

Giving Natural Resources a Legal Personality: A Kenyan Perspective

Abstract

This paper offers a critique of the current approach in natural resources management in both international and national laws which is mostly anthropocentric. The argument is that while the Earth Charter recognises nature and the need for environmental conservation, the same document also ties this with human rights and human needs, thus implying that the main reason for respect for the environment and Mother Nature is to be able to meet and fulfil the needs of the humankind. In addition, while some jurisdictions have taken the bold step of vesting nature with a legal personality and consequently rights based on its intrinsic nature, the practice has been to conserve the environment and natural resources guided by the sustainable development agenda which is largely anthropocentric, that is, putting the human being and the satisfaction of all their needs at the centre of these efforts. The paper examines the idea of giving natural resources a legal personality and relates this to the Kenyan context. It advocates for an approach that strikes a balance between ecocentrism/biocentrism and anthropocentrism approaches in environmental and natural resources management and conservation in Kenya.

1. Introduction

The Constitution of Kenya 2010 defines “natural resources” to mean the physical non-human factors and components, whether renewable or non-renewable, including—(a) sunlight; (b) surface and groundwater; (c) forests, biodiversity and genetic resources; and (d) rocks, minerals, fossil fuels and other sources of energy.¹ Under Kenya’s *Environmental Management and Coordination Act*², natural resources include resources of the air, land, water, animals, and plants including their aesthetic qualities.³

Thus, natural resources include all aspects of the environment which are not man-made and are of value to human beings such as forests, minerals, oceans, freshwater, soil and air.⁴ Natural resources are classified as either renewable or non-renewable; *renewable resources* are those that can be replenished at about the same rate as they are used, while non-renewable resources are those that are depleted faster than they can regenerate.⁵

In 2011, Bolivia passed the world's first laws granting all nature equal rights to humans which included, inter alia: the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to balance; the right not to be polluted; and the right to not have cellular structure modified or genetically altered.⁶ Notably, the proposal for the ‘rights of nature’ is credited to have initially developed in North America and

¹ Article 260, Constitution of Kenya 2010.

² Environmental Management and Coordination Act, No. 8 of 1999, Laws of Kenya.

³ S. 2, Act No. 8 of 1999.

⁴ Devlin, R. & Grafton R, *Economic Rights and Environmental Wrongs: Property Rights for the Common Good*, (Edward Elgar Publishing, 1998).

⁵ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶ ‘Bolivia Enshrines Natural World’s Rights with Equal Status for Mother Earth’ (the Guardian, 10 April 2011) <<http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>> accessed 10 November 2020.

Europe in the mid-twentieth century, and was built on a platform of ideas, including those of Leopold and proponents of animal rights such as Peter Singer, Tom Regan and Jeremy Bentham.⁷ The *Earth Charter*, which comes closest to acknowledging the intrinsic value of Mother Nature, is a declaration of fundamental ethical principles for building a just, sustainable and peaceful global society in the 21st century. It seeks to inspire in all people a new sense of global interdependence and shared responsibility for the well-being of the whole human family, the greater community of life, and future generations.⁸ It does not therefore offer an approach purely informed by the need to protect the nature as it is but by the need to ensure its continued supply of resources for the sake of human beings.

Conspicuously, anthropocentrism is deeply embedded in modern society, where human beings are treated as the central and most important entity in the world; superior to non-human life because they are the only ones that have consciousness, values and moral status. In this context, nature is seen as something separate from humans; it exists for the survival and development of human societies; it is the 'environment' of humans and a set of resources that can be exploited for their benefit.⁹

This paper challenges the current approaches, both international and national, to environmental and natural resources management which are largely based on an anthropocentric lens, that is, taking care of nature as a means to an end which is meeting the basic needs of the human beings and not necessarily for the sake of the nature itself and the other organisms that rely on it.

2. Legal Status of Natural Resources Management: International and National Approaches

While the international law is generally concerned with provision of guidelines and principles on management of environmental and natural resources by state parties as well as governance of the common areas such as seas and oceans, the international legal regime of natural resources has in several instruments affirmed the sovereignty of a state over the natural resources found within its territory.¹⁰ Notably, these legal instruments affirm the countries' legal right to exploit the resources as they wish with occasional guiding principles such as the principles of sustainable development meant to remind these countries to conserve the resources for the sake of future generations in those territories.¹¹

It has now become common for the most recent constitutions around the world to provide for norms concerning the environmental protection as a consequence to the increased attention over

⁷ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 114.

⁸ 'Earth Charter' (Charter for Compassion) <<https://secure.charterforcompassion.org/350-org/earth-charter>> accessed 11 November 2020.

⁹ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 107.

¹⁰ Schrijver, Nicolaas. "Self-determination of peoples and sovereignty over natural wealth and resources." (2013): 95-102; Gumplová, Petra. "Sovereignty over natural resources—A normative reinterpretation." *Global Constitutionalism* 9, no. 1 (2020): 7-37; United Nations General Assembly, Resolution 1803 (XVII), 1962; 'Indigenous Peoples Permanent Sovereignty Over Natural Resources | Australian Human Rights Commission' <<https://humanrights.gov.au/about/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources>> accessed 11 November 2020.

¹¹ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

the past years towards ecological hardship.¹² However, these constitutional reforms which embrace strengthened proper rights of nature and similarly of ethnic rights also grant the State the right to exploit and commercialize natural resources and extractivism has increased.¹³ Indeed, it has rightly been pointed out that 'while the environmental dimension is incorporated into some constitutions, it appears purely in terms of the interest or usefulness that nature represents for people. The requirement of a 'healthy environment' does imply certain levels of quality, but not for living species or the integrity of the ecosystems, rather as an indispensable factor in ensuring human health.¹⁴

It has been observed that natural resources law focuses mostly on extraction and primary production of goods and services, that is, consumption while environmental law focuses on secondary processing, transportation, manufacturing, and disposal, that is, it is more about the unwanted side effects of consumption.¹⁵ Natural resources law is dominated by a "resource-ist," utilitarian approach rather than by a naturalist intrinsic value approach.¹⁶

The 2010 Constitution of Kenya includes provisions related to land, environment and natural resource management, and envisages development of new laws, policies, guidelines and other enabling legal instruments relating to different yet related sectors at the national and county levels.¹⁷ The enactment and implementation of these laws is to be guided by the national values and principles of governance which include: patriotism, 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.¹⁸ Again, these values and principles are largely anthropocentric and have little or nothing to do with respecting nature for its own intrinsic value.

There are three main approaches to environmental ethics depending on how people think about and interact with their environment which are: anthropocentrism; ecocentrism and biocentrism. Anthropocentrism is a combination of egoistic and socialturistic values, held by those who emphasize the consequences of environmental deterioration for oneself and for human beings in general; a human-centered approach, meaning that human beings are the most important life forms; they consume natural resources to fulfil their own needs, hoping to develop the environment they most desire.¹⁹ Thus, under this approach, nature is valued for its convenience, and therefore it

¹² Rebecca Romanò, 'Can Nature Be Entitled to Constitutional Rights? A Historical Overview and the Innovative Approach of Bolivia and Ecuador.'

¹³ Rickard Lalander, 'Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?' (2014) 3 *Iberoamerican Journal of Development Studies* 148.

¹⁴ 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

¹⁵ Fischman, Robert L. "What Is Natural Resources Law?" 78 *University of Colorado Law Review* 717 (2007) (2007), 731.

¹⁶ *Ibid*, 733.

¹⁷ Constitution of Kenya 2010, Chapter Five.

¹⁸ Art.10 (2), Constitution of Kenya.

¹⁹ Surmeli, Hikmet, and Mehpare Saka. "Preservice teachers' anthropocentric, biocentric, and ecocentric environmental ethics approaches." *International Journal of Academic Research* 5, no. 5 (2013): 159-163.

should be protected for the purpose of maintaining an appropriate quality of life for human beings.²⁰

Ecocentrism is the broadest term for worldviews that recognize intrinsic value in all lifeforms and ecosystems themselves, including their abiotic components.²¹ Ecocentrism goes beyond biocentrism (ethics that sees inherent value to all *living* things) by including environmental systems as wholes, and their abiotic aspects. It also goes beyond zoocentrism (seeing value in animals) on account of explicitly including flora and the ecological contexts for organisms.²² Some scholars see ecocentrism as the umbrella that includes biocentrism and zoocentrism, because all three of these worldviews value the non-human, with ecocentrism having the widest vision.²³

Thus, while anthropocentric concerns for the environment are narrowly aimed at preserving the welfare of humans, biocentric and ecocentric concerns are oriented toward protecting non-human organisms and nature as a whole.²⁴

3. Management and Governance of Natural Resources in Kenya: Challenges in Approaches

The management and governance of natural resources in Kenya is largely governed by the various values attached to these resources, including: economic, social or cultural, where; economically, natural resources are not only a source of food and raw materials but are also a source of income for individuals and the State; socially, natural resources like water bodies play recreational role amongst others, they also contribute to the improvement of the quality of life of individuals; and culturally, different Kenyan communities attach importance to some natural resources that may be revered as shrines, dwelling places for ancestors and sacred sites where rites of passage and other cultural celebrations take place.²⁵

The Constitution of Kenya outlines the obligations of the State in relation to the environment and natural resources as follows: 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.²⁶ The Constitution also obligates every person to cooperate with State organs and other persons to protect

²⁰ Ibid.

²¹ Washington, Haydn, Bron Taylor, Helen Kopnina, Paul Cryer, and John J. Piccolo. "Why ecocentrism is the key pathway to sustainability." *The Ecological Citizen* 1, no. 1 (2017): 35-41, 35.

²² Ibid, 35.

²³ Ibid, 35.

²⁴ Joshua Rottman, 'Breaking down Biocentrism: Two Distinct Forms of Moral Concern for Nature' (2014) 5 *Frontiers in Psychology* <<https://www.frontiersin.org/articles/10.3389/fpsyg.2014.00905/full>> accessed 11 November 2020.

²⁵ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

²⁶ Constitution of Kenya, 2010, Article 69(1).

and conserve the environment and ensure ecologically sustainable development and use of natural resources.²⁷

Notably, while these obligations are geared towards conservation measures, they lean towards an anthropocentric approach but have little to do with an ecocentric or biocentric approach. They seek to preserve and conserve environmental and natural resources for the sake of human needs. The law on environment and natural resources management and governance in Kenya thus takes the same approach taken by many other jurisdictions around the world where these resources are taken care of for as long as they can meet and satisfy the economic and social needs of the human race.²⁸ This is also affirmed in the Constitution's guarantee on 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 70.²⁹ While the law has evolved from the case of *Maathai v Kenya Times Media Trust Ltd*³⁰, where the Court ruled that a person must have *locus standi* before they can bring a petition before court for environmental damage, to a situation where one does not need to prove *locus standi*³¹, the Constitution still 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 (emphasis added).³² The implication is that these provisions were coined along anthropocentric approach to conservation, that is, a clean and healthy environment should be maintained for the sake of enjoyment by human beings and not necessarily for its intrinsic value or for the benefit of the other non-human living and non-living things.

It is clear that inasmuch as there has been progress towards protection and conservation of environmental and natural resources in Kenya, the law still largely leans towards taking an anthropocentric approach, at least practically. While the Constitution acknowledges that the environment is the heritage of the people of Kenya, the same makes it clear that the same is to be respected and the determination is to sustain it for the benefit of future generations.³³ This is the approach that also mainly informs the sustainable development agenda, where these resources are to be conserved and utilized for the sake of meeting the needs of the current generation and future generations.³⁴

²⁷ Ibid, Article 69(2).

²⁸ Ochola, Washington Odongo, Pascal C. Sanginga, and Isaac Bekalo, eds. *Managing natural resources for development in Africa: A resource book*. IDRC, 2010.

²⁹ Constitution of Kenya, 2010, Article 42.

³⁰ *Maathai v Kenya Times Media Trust Ltd*, Civil Case No 5403 of 1989.

³¹ See sec. 3, Environmental Management and Coordination Act, No. 8 of 1999, Laws of Kenya; see also Article 70 (3), Constitution of Kenya 2010.

³² Constitution of Kenya 2010, Art. 70(1).

³³ Ibid, Preamble.

³⁴ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016

4. Giving Natural Resources a Legal Personality: Prospects and Challenges

Environmental law commentators have argued that while so much have been done both internationally and within countries to put in place laws to avert environmental degradation, scientific evidence indicates that the global environmental crisis is accelerating and that environmental laws have not been able to reverse the trend.³⁵ The trend is well summarized in the following quote:

*“human activities are significantly influencing Earth’s environment in many ways in addition to greenhouse gas emissions and climate change. Anthropogenic changes to Earth’s land surface, oceans, coasts and atmosphere and to biological diversity, the water cycle and biogeochemical cycles are clearly identifiable beyond natural variability. They are equal to some of the great forces of nature in their extent and impact. Many are accelerating. Global change is real and is happening now.”*³⁶

It is further noted that this global change cannot be understood in terms of a simple cause and effect model since the human-driven changes cause multiple effects that cascade through the Earth system in complex ways, and these effects interact with one another and with local and regional-scale changes in multidimensional patterns that are challenging to understand and even more difficult to predict.³⁷ As a result of this deficiency, a movement to recognize nature as a rights holder argues that existing laws regulate, rather than stop, the destruction of the natural world, and instead of incrementally reforming such laws, a growing number of jurisdictions around the world have recognized rights for nature.³⁸

Rights for collectives, rights for animals, and rights of nature have been grounded in the interest theory of rights.³⁹ Since according to the interest theory of rights, a person or other entity has a right if and only if they are capable of having rights, and some aspect of their interest or well-being is “a sufficient reason for holding some other person(s) to be under a duty”, some interests of nature that have been argued to be sufficient to produce rights include existence, habitat, and fulfilling ecological roles.⁴⁰

However, while the interest theory itself does not resolve whether nature is capable of having rights, some commentators have suggested that entities that have value for their own sake, rather than for the value they provide others, can have rights, and accordingly, rights-of-nature advocates make a moral assertion that nature does have this intrinsic value.⁴¹

Other rights arguments stem from religion or spirituality, as was the case in New Zealand’s recognition of the Whanganui River and surrounding area as the legal person Te Awa Tupua which

³⁵ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1; See also Rodgers Jr, William H. "Improving Laws, Declining World: The Tort of Contamination." *Valparaiso University Law Review* 38, no. 4 (2011): 1249-1261.

³⁶ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 110.

³⁷ *Ibid*, 110.

³⁸ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1.

arose out of a treaty settlement with a Maori tribe and that tribe's spiritual connection to the river.⁴² This also informed the decision of the the Andean countries of Ecuador and Bolivia, where indigenous worldviews that prioritise harmony with nature over economic development have been enshrined in law.⁴³ The ideals encapsulated in the concept of *Buen Vivir* ("good way of living") and the recognition of the rights of Mother Nature draw from ancient Andean indigenous traditions that pre-date the Spanish colonial era.⁴⁴ The "good way of living" (or *Buen Vivir* in Spanish) is rooted in the cosmovision of the Quechua peoples of the Andes, of "sumac kawsay", a kichwa term which denotes the fullness of life, rooted in community and harmony with other people and nature.⁴⁵

Notably, even among most African traditional societies, land belonged first to God, and then to the clan or sub-clan and its access and use is controlled by elders, and everyone was under obligation to care for the environment, water and pastures.⁴⁶ However, the creation of modern institutions for natural resources management has undermined the effectiveness of traditional institutions, yet in most areas it is still traditional institutions that are found on the ground.⁴⁷

The Bolivian Constitution of 2009 recognises *Buen Vivir* as a principle to guide state action.⁴⁸ Bolivia's 2011 Law of Mother Nature was the first national-level legislation in the world to bestow rights to the natural world.⁴⁹ Unlike the anthropocentric approach to conservation in which nature is valued for the utility or the benefits it provides (conventionally as use or exchange value), biocentrism, which is a narrower aspect of ecocentrism, defends the intrinsic values of nature as independent of the value of the non-human world for human uses and purposes.⁵⁰

There is a need for the stakeholders in the environmental and natural resource governance and management sector in Kenya to consider moving away from the anthropocentric approach only and embrace an ecocentric approach for the sake of all living and non-living organisms that rely on the nature for their wellbeing.⁵¹ It is in such an approach that human needs will also be met through natural resources exploitation, as a by-product and not necessarily as an end in itself.

The Constitutional provisions on land and environment which recognize environment as an important part of humanity are not enough; there may be a need to consider granting nature some rights that should exist independently of its usefulness in meeting human needs. Granting nature a

⁴² Ibid.

⁴³ 'Buen Vivir: The Rights of Nature in Bolivia and Ecuador' <<https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/>> accessed 10 November 2020.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ International Union for Conservation of Nature, 'Local rules and customary regulations on natural resource management in Lower Tana catchment, Kenya,' Building Drought Resilience Project, April, 2013, 2.

⁴⁷ Ibid, 4.

⁴⁸ 'Buen Vivir: The Rights of Nature in Bolivia and Ecuador' <<https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/>> accessed 10 November 2020.

⁴⁹ Ibid.

⁵⁰ 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

⁵¹ Muigua, K., 'The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya,' Journal of Conflict Management and Sustainable Development, Volume 1, No 2, (2017).

legal personality, however, does not automatically guarantee efficiency in environmental conservation and protection. Some authors have argued that despite Ecuador and Bolivia granting nature a legal personality, they are yet to achieve the expected ideal experience as far as environmental conservation and natural resources protection are concerned.

5. Place of Human Beings in the Biodiversity Conservation Debate

It is now an established fact that human civilization has had a huge negative impact on biodiversity, particularly since the industrial revolution through such activities as overfishing and hunting, the destruction of habitats through agriculture and urban sprawl, the use of pesticides and herbicides, and the release of other toxic compounds into the environment.⁵² While some organisms have been able to adapt to the changing environmental conditions, the impact of mankind on biodiversity has clearly been detrimental to many animals, plants and the natural environment in general.⁵³

The anthropocentric approach which places man at the centre of nature and his environmental surroundings has all the more contributed to this wanton destruction of nature as man seeks to meet his needs using environmental and natural resources despite the negative effects left on the environment.⁵⁴ This is attributable to the fact that anthropocentrism regards humans as separate from and superior to nature and holds that human life has intrinsic value while other entities (including animals, plants, mineral resources, and so on) are resources that may justifiably be exploited for the benefit of humankind.⁵⁵ Anthropocentrism is heavily reflected in the sustainable development debate as first captured in the *Report of the World Commission on Environment and Development: Our Common Future*⁵⁶ which stated, *inter alia*:

*This Commission believes that people can build a future that is more prosperous, more just, and more secure. Our report, Our Common Future, is not a prediction of ever increasing environmental decay, poverty, and hardship in an ever more polluted world among ever decreasing resources. We see instead the possibility for a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base. And we believe such growth to be absolutely essential to relieve the great poverty that is deepening in much of the developing world.*⁵⁷

⁵² Philip Hunter, 'The Human Impact on Biological Diversity. How Species Adapt to Urban Challenges Sheds Light on Evolution and Provides Clues about Conservation' (2007) 8 EMBO Reports 316; Anastasia A Kokovkina, 'Ecological Crisis and Global Responsibility Ethics', Proceedings of the XXIII World Congress of Philosophy (2018).

⁵³ Ibid.

⁵⁴ Richard A Gray, 'Ecology and Ethics: Is There a Duty to Nature?' (1994) 22 Reference Services Review 57; Berfin Kart, 'Ethical Responsibility of Man for Ecological Problems in Context of HPP (Hydroelectrical Power Plant)'.

⁵⁵ 'Anthropocentrism | Philosophy' (Encyclopedia Britannica) <<https://www.britannica.com/topic/anthropocentrism>> accessed 13 November 2020.

⁵⁶ World Commission on Environment and Development (ed), *Our Common Future* (Oxford University Press 1987).

⁵⁷ World Commission on Environment and Development (ed), *Our Common Future*, para. 3.

Despite this conflict between humans and the nature, it is an open secret that human beings need the nature to meet most if not all of their basic needs.⁵⁸ It is for this reason that some commentators have challenged the possibility of adopting an exclusively ecocentric approach to environmental conservation and natural resources management due to the arguably complicated relationship between human beings and their environment.⁵⁹

To demonstrate the complicated relationship that different cultures and groups of people have with the environment, some authors have argued that since there are different approaches to this relationship or views, disagreement, competition and even conflict between rival individuals and groups is not a social aberration but, on the contrary, an essential characteristic of society's uncertain relationship with its environment.⁶⁰ This may be used to explain the often witnessed conflict between government agencies seeking to 'uproot' communities from what they consider to be their homes for conservation purposes, as evidenced by the Mau forest evictions in Kenya.⁶¹

The proponents of the argument seeking to strike a balance between anthropocentrism and ecocentrism approaches to environmental challenges suggest if the governing institutions would be willing to entertain all the views, the reward for tolerating a degree of apparent internal inconsistency is the discovery of synergies between opposed views.⁶² To them, under conditions of uncertainty, legitimacy should be extended to all possible perspectives on human-nature relationships as a way of ensuring that there is an acknowledgment of the role of institutions' and actors' "social involvements".⁶³ This is perhaps the part where conflict management would come

⁵⁸ Richard Wilk, 'Consumption, Human Needs, and Global Environmental Change' (2002) 12 *Global environmental change* 5; David Kaimowitz and Douglas Sheil, 'Conserving What and for Whom? Why Conservation Should Help Meet Basic Human Needs in the Tropics' (2007) 39 *Biotropica* 567; Bjørn P Kaltenborn, John DC Linnell and Erik Gómez-Baggethun, 'Can Cultural Ecosystem Services Contribute to Satisfying Basic Human Needs? A Case Study from the Lofoten Archipelago, Northern Norway' (2020) 120 *Applied Geography* 102229; Farhan Ali, Shaoan Huang and Roland Cheo, 'Climatic Impacts on Basic Human Needs in the United States of America: A Panel Data Analysis' (2020) 12 *Sustainability* 1508; Juan Angel Chica Urzola and Vanessa Benavides Miranda, 'Sustainable Development, Human Needs, Well-Being and Energy' (2018) 5 *International Journal of Innovation and Research in Education Sciences-IJRES* 52; Jona Razzaque, 'Human Rights and the Environment: The National Experience in South Asia and Africa'; Elisa Lanzi and others, 'Developing Pathways to Sustainability: Fulfilling Human Needs and Aspirations While Maintaining Human Life Support Systems'.

⁵⁹ See Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 *International Research in Geographical and Environmental Education* 36.

⁶⁰ *Ibid.*

⁶¹ 'Mau Forest Evictions Leave Ogiek Homeless' <<http://www.culturalsurvival.org/news/mau-forest-evictions-leave-ogiek-homeless>> accessed 16 November 2020; 'Ministry of Environment and Forestry » Blog Archive » Second Phase of Mau Evictions to Kick off Soon' <<http://www.environment.go.ke/?p=6844>> accessed 16 November 2020; 'Kenya Forest Service Evicts 300 Ogiek Families from Their Homes in the Mau Forest. Despite the African Court on Human and Peoples' Rights 2017 Ruling That the Ogiek Should Not Be Evicted | REDD-Monitor' <<https://redd-monitor.org/2020/07/16/kenya-forest-service-evicts-300-ogiek-families-from-their-homes-in-the-mau-forest-despite-the-african-court-on-human-and-peoples-rights-2017-ruling-that-the-ogiek-should-not-be-evicted/>> accessed 16 November 2020; <https://www.the-star.co.ke/authors/gilbertkoech>, 'Environment CS Stops Eastern Mau Forest Evictions' (The Star) <<https://www.the-star.co.ke/counties/rift-valley/2020-07-23-environment-cs-stops-eastern-mau-forest-evictions/>> accessed 16 November 2020.

⁶² Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 *International Research in Geographical and Environmental Education* 36.

⁶³ *Ibid.*

in handy, using more of the collaborative approaches such as negotiation, mediation and conciliation, among others.⁶⁴ Regarding the debate to accord nature a legal personality status, some of the earliest proponents have rightly observed that:

“The fact is, that each time there is a movement to confer rights onto some new entity,” the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of “us”-those who are holding rights at the time.”⁶⁵

The above was meant to elicit a debate toward considering human beings and the law in general giving legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment-indeed, to the natural environment as a whole.⁶⁶ The suggestion was that we should have a system in which, when a friend of a natural object perceives it to be endangered, he or she can apply to a court for the creation of a guardianship.⁶⁷ In such a system, it was suggested, the law would have provisions which could provide for guardianship both in the instance of public natural objects and also, perhaps with slightly different standards, in the instance of natural objects on "private" land, effectively securing an effective voice for the environment.⁶⁸

Coming back to the Kenyan scenario, the Constitution of Kenya 2010 defines a 'person' to 'include a company, association or other body of persons whether incorporated or unincorporated'.⁶⁹ Notably, this recognition comes with rights and responsibilities. While the Constitution and the relevant statutes may not outline 'responsibilities' for the environment and all it entails (for what other responsibilities or duties should we place on the environment while we already view it as the source of our livelihoods?), we may consider granting the same a legal personality for purposes of protecting it for its intrinsic value, away from the basis of taking care of it for the goods and services that we get from it as human beings. This constitutional provision may therefore need to be expanded in light of granting nature a 'legal personality' as was done in Ecuador and Bolivia, for the sake of protecting the environment for its intrinsic value in the ecosystem and not necessarily for the sake of the benefits that accrue to the human beings. The recognition the 'legal standing' and 'independent voice' of a major river on NZ's North Island (Whanganui River represents a noteworthy milestone in a broader movement towards the legal recognition of the rights of nature.⁷⁰ There is the case of the Río Atrato in Colombia, recognised as a legal person by the domestic Constitutional Court in November 2016, in a decision not released publicly until May

⁶⁴ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, chapt. 16; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶⁵ Stone, Christopher D. "Should Trees Have Standing? Towards Legal Rights for Natural Objects." *Southern California Law Review* 45 (1972): 450-501, 455.

⁶⁶ *Ibid*, 456.

⁶⁷ *Ibid*, 466.

⁶⁸ *Ibid*, 465, 470.

⁶⁹ Article 260, Constitution of Kenya, 2010.

⁷⁰ Good, Meg. "The river as a legal person: evaluating nature rights-based approaches to environmental protection in Australia." *National Environmental Law Review* 1 (2013): 34.

2017.⁷¹ According to the Colombian Constitutional Court, the Atrato River needs better care and is “subject to the rights that implicate its protection, conservation, maintenance and in this specific case, restoration.” The Court also called out the state on its neglectful behaviour and ordered that the river be cleaned up.⁷² Commenting on the place of human beings in nature, the Colombian Constitutional Court stated as follows:

5.9. Finally, *the ecocentric approach starts from a basic premise according to which the land does not belong to man and, on the contrary, assumes that man is part of the earth, like any other species* [86]. According to this interpretation, *the human species is just one more event in a long evolutionary chain that has lasted for billions of years and therefore is not in any way the owner of other species, biodiversity, or resources, or the fate of the planet.* Consequently, this theory conceives nature as a real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it (emphasis added).⁷³

The court’s sentiments in the above case affirms the position that an anthropocentric approach to relating with the environment makes the humans forget that they are not really lords over every other aspect of the environment and their actions should reflect this. The Court also commented on what they identified as bio-cultural rights and the special relationship that exists between a community’s culture and the environment and had the following to say:

5.11. The first thing that must be pointed out is that so-called *biocultural rights, in their simplest definition, refer to the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories --according to their own laws and customs --and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity.* These rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent with each other and cannot be understood in isolation. The central elements of this approach establish an intrinsic link between nature and culture, and the diversity of the human species as part of nature and manifestation of multiple life forms. From this perspective, the conservation of biodiversity necessarily leads to the preservation and protection of the ways of life and cultures that interact with it. In a country as rich in environmental aspects as Colombia, which is considered fifth among the seventeen most mega-biodiverse countries in the world, and which has natural forests and paramos in about 53% of its territory --which provides water to 70% of the national population --and in which there are more than 54,871 animal and plant species, 341

⁷¹ Elizabeth Macpherson and Felipe Clavijo Ospina, ‘The Pluralism of River Rights in Aotearoa, New Zealand and Colombia’ (SocArXiv 2020) <<https://osf.io/preprints/socarxiv/rdh4x/>> accessed 16 November 2020; ‘Colombia’s Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters’ (Mongabay Environmental News, 22 May 2017) <<https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/>> accessed 16 November 2020.

⁷² ‘Colombia’s Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters’ (Mongabay Environmental News, 22 May 2017) <<https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/>> accessed 16 November 2020.

⁷³ Judgment T-622/16 (The Atrato River Case), Constitutional Court of Colombia (2016), para. 5.9.

different types of ecosystems, and 32 terrestrial biomes [92], and including important ancestral cultures. The protection and preservation of cultural diversity is essential to the conservation and sustainable use of biological diversity and vice versa (emphasis added).⁷⁴

Regarding the above two instances (Colombia and New Zealand), it has also been noted that “recognizing that the river is a person is an attempt to accommodate diverse legal and cultural interests in the river, in order to establish a new collaborative relationship between the state and river communities. Whether either model results in improved river outcomes, or increased indigenous or community jurisdiction to govern, turns not on the fiction that the river is a person but on the surrounding institutional framework, which has been carefully designed to engender enforceability”.⁷⁵

It is therefore worth considering extending the same treatment to the natural resources and the environment in Kenya and also recognise the special relationship between nature and human beings especially among the indigenous communities and those who interact with certain aspects of the environment on a day to day basis. It is not enough for the Constitution of Kenya to place what seems like a secondary duty on every persons to merely ‘cooperate’ with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁷⁶ There is a need for active involvement of communities in these efforts. In some instances, they could even elect amongst themselves who would act like the ‘legal guardians’ of certain resources or natural features on behalf of the community and country in general. Article 11 of the Constitution on culture should be positively implemented and extended to utilize unique communities’ cultural and traditional ecological knowledge to achieve conservation and sustainability.⁷⁷

The argument for "personifying" the environment would allow the law to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans.⁷⁸ It is, however, acknowledged that legal person models are certainly context-specific, but further comparative studies of the Colombian and New Zealand

⁷⁴ Ibid, para. 5.11.

⁷⁵ Elizabeth Macpherson and Felipe Clavijo Ospina, ‘The Pluralism of River Rights in Aotearoa, New Zealand and Colombia’ (SocArXiv 2020) <<https://osf.io/preprints/socarxiv/rdh4x/>> accessed 16 November 2020.

⁷⁶ Article 69(2), Constitution of Kenya 2010.

⁷⁷ 11. Culture

(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall--

(a) 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;
(b) recognise the role of science and indigenous technologies in the development of the nation; and
(c) promote the intellectual property rights of the people of Kenya.

(3) Parliament shall enact legislation to--

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

⁷⁸ Stone, Christopher D., *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 475.

models is needed to examine if and how legal personality improves river governance and state-community relationships, not just for future generations but for the entire human species.⁷⁹

6. Conclusion

As rightly pointed out, whether nature has moral rights is likely to remain debated, but nature clearly can have legal rights, and does so in jurisdictions that have recognized, granted, or enacted them.⁸⁰ Arguably, rights of nature may offer benefits lacking in other types of legal protection for the environment, and these nature rights can lead to a remedy when regulations fail to correct injustices.⁸¹ This is because, majority or all of conservation laws only seek to protect the nature from destruction but do not expressly grant nature the right to exist on their own, so that if these conservation laws were to be repealed, there would be no incentive to protect the nature from destruction or overexploitation.

Arguably, nature should be treated as the possessor of intrinsic values and these values are proper to the environment itself and do not depend on its usefulness or appropriation by human beings; they represent the intrinsic value of living beings and their physical underpinning.⁸² The implications of this ecocentric/biocentric approach would be at least on three levels: ethical, legitimizing a debate on the values the non-human environment encompasses; moral, from which obligations such as ensuring the preservation of biodiversity are derived; and political, expressed in aspects that range from Constitutional authority to the elaboration of a new legal framework.⁸³

An anthropocentric approach does not afford proper protection of natural resources as it leans towards ensuring that these resources are taken care of as a means towards satisfying the needs of humankind as opposed to protecting them from destruction based on their own intrinsic value. It is time for stakeholders to reconsider the approach taken in coming up with environmental and natural resources laws in Kenya. An ecocentric approach which would enable nature to be granted legal personality would possibly achieve better results in conserving the environmental resources. It is for this reason that there arises a need for taking an approach that strikes a balance between anthropocentrism and ecocentrism in efforts geared towards addressing the continuing environmental uncertainty in Kenya.⁸⁴ The conservation and protection of environmental and natural resources should be based on the recognition of the intrinsic values of the resources and the whole ecological system and not merely as part of securing human needs that rely on these resources for satisfaction. It is the high time that human beings recognised that they are merely a part of the larger natural system and not the fulcrum around which the system revolves as the current human beings mentality seems to suggest, at least through their actions.

⁷⁹ Ibid, 30.

⁸⁰ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, 'A rights revolution for nature,' *Science*, 1.

⁸¹ Ibid, 2.

⁸² 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

⁸³ Ibid.

⁸⁴ Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 *International Research in Geographical and Environmental Education* 36.

Ensuring Healthy Lives and Well-being for All Kenyans

Abstract

Sustainable Development Goal (SDG) 3 of the United Nations 2030 Agenda on Sustainable Development obligates State Parties to work towards ensuring healthy lives and wellbeing of people of all ages in their territories by the year 2030. The Corona Virus Disease Pandemic (COVID-19) has drawn the attention of all countries to the status of their health system, mostly by exposing the weaknesses. This ranges from the inadequate health facilities, shortage of health workers and even the limited financial investment in emergency treatment requirements. The results have been devastating on most countries' economies. Kenya has not been left behind as it has had to mainly rely on grants and loans from foreign sources to meet its public health obligations and needs. This paper highlights these challenges in line with Sustainable Development Goal 3 (SDG 3) which requires all states to put in place measures geared towards ensuring healthy lives and the general wellbeing of their citizens. The paper also offers some recommendations in line with the same.

1. Introduction

The Corona Virus Disease Pandemic (COVID-19) has exposed and brought to the attention of the whole world just how important health and wellbeing of the population is. Indeed, the fact that COVID-19 has affected all sectors of the global economy is evidence enough that human health and wellbeing form the backbone of the global economy. It has become clear that no matter how much governments invest in other areas of the economy, if the health sector is ailing, then all the other efforts come to naught. Indeed, it has been argued that 'health care is not only a problem of healthcare but also a problem of a profound social nature, making it an integral part of all the social and economic development conditions'.¹

While Kenya has been investing and making efforts towards guaranteeing the realisation of the right to health care and wellbeing for all, there are still a lot of challenges facing the health sector. This paper discusses some of the main challenges and offers recommendations on what the country can do in its efforts towards realisation of Sustainable Development Goal (SDG) 3 on ensuring healthy lives and wellbeing of all its citizens.² SDG 3 spells out the specific targets and end goals

¹ Tomaziu-Todosia M, 'The Importance of Public Health Policies in the Social-Economic Development of Romania' (2019) 10 *Postmodern Openings* 162.

² SDG 3 seeks to "ensure healthy lives and promote wellbeing for all at all ages". The Health targets for SDG 3 include: By 2030, reduce the global maternal mortality ratio to less than 70 per 100 000 live births; By 2030, end preventable deaths of newborns and children under 5 years of age, with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1000 live births and under-5 mortality to at least as low as 25 per 1000 live births; By 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combat hepatitis, water-borne diseases and other communicable diseases; By 2030, reduce by one third premature mortality from non-communicable diseases through prevention and treatment and promote mental health and well-being; Strengthen the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol; By 2020, halve the number of global deaths and injuries from road traffic accidents; By 2030, ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes; Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all; By 2030, substantially reduce the number of deaths and illnesses

that countries should aspire to achieve. Notably, SDG 3 outlines targets that touch on various aspects of right to health for all groups of people, including men, women and children and their group-specific health needs.

2. Right to Health: Definition and Scope

The 1946 Constitution of the World Health Organization (WHO) defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The preamble further states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”³

The *CESCR General Comment No. 14 on The Right to the Highest Attainable Standard of Health*⁴, defines the right to health as a; “... a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”⁵

Arguably, the right to health is conditioned by the health system and the socio-economic factors, which are reflected in the health of the population.⁶ Notably, socioeconomic status underlies three major determinants of health: health care, environmental exposure, and health behaviour.⁷

The World Health Organization's Commission has defined the Social Determinants of Health, that is, the factors apart from medical care that can be influenced by social policies and shape health in powerful ways, as “the conditions in which people are born, grow, live, work and age” and “the

from hazardous chemicals and air, water and soil pollution and contamination; 3.a Strengthen the implementation of the WHO Framework Convention on Tobacco Control in all countries, as appropriate; 3.b Support the research and development of vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries, provide access to affordable essential medicines and vaccines, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health, which affirms the right of developing countries to use to the full the provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights regarding flexibilities to protect public health, and, in particular, provide access to medicines for all; 3.c Substantially increase health financing and the recruitment, development, training and retention of the health workforce in developing countries, especially in least developed countries and small island developing States; and 3.d Strengthen the capacity of all countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks.

(‘WHO | Sustainable Development Goal 3: Health’ (WHO) <<http://www.who.int/topics/sustainable-development-goals/targets/en/>> accessed 16 December 2020).

³ Preamble, Constitution of the World Health Organization, Basic Documents, Forty-fifth edition, Supplement, October 2006, pp.1-18.

⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

⁵ *Ibid*, para. 1.

⁶ Tomaziu-Todosia M, ‘The Importance of Public Health Policies in the Social-Economic Development of Romania’ (2019) 10 *Postmodern Openings* 162.

⁷ Nancy E Adler and Katherine Newman, ‘Socioeconomic Disparities in Health: Pathways and Policies’ (2002) 21 *Health Affairs* 60.

fundamental drivers of these conditions”.⁸ Related to this is the fact that ‘health-related behaviours are strongly shaped by social factors, including income, education, and employment’.⁹

The scope, content and nature of State obligations under Article 12 of the ICESCR have been expounded by the *Committee on Economic, Social and Cultural Rights (CESCR)* under the *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*. The *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*¹⁰ acknowledges that ‘the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement, all of which and other rights and freedoms address integral components of the right to health.’¹¹

It has been observed that while it is difficult to pinpoint exactly what the right to health entails, there are specific elements that constitute the core content of the right to health and these include: a) access to maternal and child health care, including family planning; b) immunisation against the major infectious diseases; c) appropriate treatment of common diseases and injuries; d) essential drugs; e) adequate supply of safe water and basic sanitation; and f) freedom from serious environmental health threats. In addition to the scope of core content, a number of guidelines constitute the framework of the right to health: a) availability of health services; b) financial, geographic and cultural accessibility of health services; c) quality of health services; and d) equality in access to available health services.¹²

In addition to the foregoing, the right to health is also considered to be part of the broader right to an adequate standard of living.¹³ Under Article 25(1) of the 1948 Universal Declaration of Human Rights, ‘everyone has the right to a standard of living adequate for the health and well-being of himself and his family’ and this includes the following elements: a) food; b) clothing; c) housing; d) medical care; and e) necessary social services.¹⁴ These elements are also all captured under Article 43 of the Constitution of Kenya 2010 on socio-economic rights.

It is therefore evident that the right to health is not a standalone right but instead it is intertwined with many other rights.

⁸ Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 *Public Health Reports* 19.

⁹ *Ibid.*

¹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

¹¹ *Ibid.*, para. 3.

¹² ‘The Right to Health’ (Icelandic Human Rights Centre) <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health>> accessed 16 December 2020.

¹³ *Ibid.*

¹⁴ *Ibid.*

3. Right to Health: International and National Legal Frameworks

3.1 Right to Health and International Law

The *Universal Declaration of Human Rights*¹⁵ guarantees that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.¹⁶ In addition, ‘motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection’.¹⁷

The *International Covenant on Economic, Social and Cultural Rights*¹⁸ is one of the main international human rights instrument laying basis for a comprehensive recognition of the right to health. It guarantees that ‘the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.¹⁹ In addition, ‘the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.’²⁰

The *Convention on the Elimination of All Forms of Discrimination against Women*²¹ captures the State Parties’ concern that in situations of poverty women have the least access to food, *health*, education, training and opportunities for employment and other needs.²² The Convention requires State Parties to take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women, *inter alia*: access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.²³ In addition, States Parties are to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular, *inter alia*: the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.²⁴

¹⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁶ *Ibid*, Article 25(1).

¹⁷ *Ibid*, Article 25(2).

¹⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, *International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200.

¹⁹ *International Covenant on Economic, Social and Cultural Rights*, *International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, Article 12(1).

²⁰ *Ibid* Article 12(2).

²¹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

²² *Ibid*, Preamble.

²³ *Ibid*, Article 10 (h).

²⁴ *Ibid*, Article 11(f).

Besides the foregoing, the Convention states that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.²⁵ Notwithstanding the provisions of paragraph I of this article, States Parties are also obligated to ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.²⁶ The State Parties to this Convention are supposed to ensure that these rights extend to all women including those in the rural areas by ensuring that they have, inter alia, access to adequate health care facilities, including information, counselling and services in family planning.²⁷

The *Convention on the Rights of the Child*²⁸ requires that States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.²⁹ Under the Convention, States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall thus strive to ensure that no child is deprived of his or her right of access to such health care services.³⁰ In line with this, States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: to diminish infant and child mortality; to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; to ensure appropriate pre-natal and post-natal health care for mothers; to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; and to develop preventive health care, guidance for parents and family planning education and services.³¹

The *African Charter on Human and Peoples' Rights*³² guarantees that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'.³³ In addition, States Parties to the Charter are obligated to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.³⁴

²⁵ Ibid, Article 12(1).

²⁶ Ibid, Article 12(2).

²⁷ Ibid, Article 14.

²⁸ UN Commission on Human Rights, Convention on the Rights of the Child, 7 March 1990, E/CN.4/RES/1990/74.

²⁹ Ibid, Article 3(3).

³⁰ Ibid, Article 24(1).

³¹ Ibid, Article 24(2).

³² 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).

³³ Ibid, Article 16(1).

³⁴ Ibid, Article 16(2).

Notably the foregoing international and regional legal instruments spell out the state obligations relating to the realization of the right to health which obligations relate to: the obligations to *respect, protect and fulfil*. Under the *General Comment No. 14 on the right to health*: The *obligation to fulfil* contains *obligations to facilitate, provide and promote*. The *obligation to respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The *obligation to protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the *obligation to fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.³⁵

These obligations are in turn captured under the domestic laws of state parties and are supposed to define the content of legal and institutional frameworks. Notably, the right to health is not to be understood as a right to be healthy but it contains both freedoms and entitlements.³⁶ The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. On the other hand, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.³⁷

3.2 Right to Health under the Domestic Law in Kenya: Legal and Institutional Framework

Notably, Article 2 (5) and (6) of the Constitution of Kenya make any treaty or convention ratified by Kenya, part of the laws applicable to Kenya.³⁸ Thus, in addition to the legal instruments discussed under this section, the international ones discussed in the foregoing section are also applicable in Kenya in so far as the same have been ratified accordingly. The Constitution of Kenya 2010 has numerous provisions that capture not only the various elements of the right to health/health care services but also guarantees this right for all groups of persons.³⁹

³⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), para. 33.

³⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), para. 8.

³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), para. 8.

³⁸ See also Treaty making and Ratification Act, No. 45 of 2012, Laws of Kenya.

³⁹ Section 26 of the Bill of Rights provides for the fundamental right to life.

Article 27(1) and (2) of the Constitution of Kenya states that every person is equal before the law and has a right to equal protection, equal benefit and equal enjoyment of all rights and fundamental freedoms. (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.

Article 43 (1) (a) of the Constitution provides 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.

Article 43 (2) also provides that a person shall not be denied emergency medical treatment.

Article 46. Consumer rights

(1) Consumers have the right—

(a) to goods and services of reasonable quality;

(c) to the protection of their health, safety, and economic interests;

Article 53. Children

(1) Every child has the right—

The Constitution 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.’⁴⁰ Article 43(2) thereof also provides that a person shall not be denied emergency medical treatment.⁴¹ The state of health is closely the state of the environment and as such, Article 42 of the Constitution guarantees 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.’⁴² This connection has

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—e) have reasonable access to water, health services and infrastructure.

57. Older members of society

The State shall take measures to ensure the rights of older persons—

(d) to receive reasonable care and assistance from their family and the State.

204. Equalisation Fund

(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.

⁴⁰ Constitution of Kenya 2010, Article 43(1).

⁴¹ *Ibid*, Article 43(2). Art 42: See also Article 26. Right to life

(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

⁴² In *Kiluwa Limited & another v Commissioner of Lands & 3 others* [2015] eKLR, Constitutional Petition 8 of 2012, the Court stated as follows:

137. The right to a clean and healthy environment, guaranteed under 42 of the Constitution includes the right to have the environment protected for the benefit of the present and future generations not only through legislative and other measures, and particularly those measures contemplated in Article 69 to ensure *inter alia* sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.

.....

142. On the question of the right to clean and healthy environment, though Article 43 of the Constitution guarantees that right, it would not be remiss for this court to refer to the much earlier law, the Environment Management and Control Act No. 8 of 1999) (EMCA) which came into force on 14th January, 2000 (as amended by Acts of that name Nos. 6 of 2006, No. 17 of 2006, and No. 5 of 2007), had in section 3(1) thereof, declared that every person in Kenya is entitled to a clean and healthy environment, and has the duty to safeguard and enhance the environment. That right is granted constitutional sanctity in Article 42 of the constitution, that every person has the right to a clean and healthy environment and this includes –

been affirmed in various courts, locally and internationally.⁴³ In the case of *Peter.K.Waweru vs R*⁴⁴, the High Court of Kenya affirmed that indeed, the right to life and right to clean and healthy environment are connected, in the following words:

“it is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word “life” means much more than keeping body and soul together.”

-
- (a) 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
 - (b) to have the obligations relating to the environment fulfilled under Article 70.

143. Under section 3(2) of EMCA, the entitlement to a clean and healthy environment under section 3(1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes. Section 3(4) gives capacity or standing to any person 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 injury provided that such action–

- (a) is not frivolous or vexatious, or
- (b) is not an abuse of the court process.

144. An action seeking any orders on protection of the environment, may include orders to -

- (1) prevent, discontinue any act or omission deleterious to the environment;
- (2) to compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment.

145. In granting any of the above orders, the court will be guided by the following principles –

- (1) the principle of public participation in the development of policies, plans and processes for the management of the environment;
- (2) 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;
- (3) the principles of international co-operation on the management of environmental resources shared by two or more states;
- (4) the polluter pays principle; and
- (5) the precautionary principle.

⁴³ Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004; In Ms. Shehla Zia v. WAPDA, PLD 1994 SC 693 Justice SALEEM AKHTAR (Supreme Court of Pakistan) held as follows: “The Constitution guarantees dignity of man and also right to “life” under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing shelter education, healthcare, clean atmosphere and unpolluted environment.”

⁴⁴ Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004.

The UN Conference on the Human Environment 1972, that is the Seminal Stockholm Declaration noted that the environment was “essential to ... the enjoyment of basic human rights – even the right to life itself.” Principle 1 asserts 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.”⁴⁵

In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR⁴⁶, the High Court of Kenya stated as follows:

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 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.

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.

.....

277. Article 70 of the Constitution confers standing upon a person who alleges violation of rights to a clean and healthy environment. This means that “the environmental right is sufficiently comprehensive and all-encompassing to provide ‘everyone’ with the possibility of seeking judicial recourse in the event that any of several potential aspects related to the right or guarantee derived there from is infringed.” From the foregoing, it is clear that protection of the environment has now become an urgent responsibility to which our legal system responds to inadequately. It is undisputed that environmental protection in Kenya has constitutional protection.

⁴⁵ As quoted in *Peter K. Waweru v Republic* [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004.

⁴⁶ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012.

The right to clean and healthy environment is thus recognised under the laws of Kenya as an integral part of the right to health and general wellbeing for all people.⁴⁷

The Health Act, 2017⁴⁸ was enacted to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.⁴⁹ The objects of the Act are to—establish a national health system which encompasses public and private institutions and providers of health services at the national and county levels and facilitate in a progressive and equitable manner, the highest attainable standard of health services; protect, respect, promote and fulfill the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment; protect, respect, promote and fulfill the rights of children to basic nutrition and health care services contemplated in Articles 43(1) (c) and 53(1) (c) of the Constitution; protect, respect, promote and fulfill the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health; and recognize the role of health regulatory bodies established under any written law and to distinguish their regulatory role from the policy making function of the national government.⁵⁰

The Health Act, 2017 guarantees that it is a fundamental duty of the State to observe, respect, protect, promote and fulfill the right to the highest attainable standard of health including reproductive health care and emergency medical treatment by inter alia—developing policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person; ensuring the prioritization and adequate investment in research for health to promote technology and innovation in health care delivery; ensuring the realization of the health related rights and interests of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities and members of particular ethnic, religious or cultural communities; ensuring the provision of a health service package at all levels of the health care system, which shall include services addressing promotion, prevention, curative, palliative and rehabilitation, as well as physical and financial access to health care; and ensuring adequate investment in research for health to promote technology and innovation in health care delivery.⁵¹

The Health Act also guarantees that every person has the right to the highest attainable standard of health which shall include progressive access for provision of promotive, preventive, curative, palliative and rehabilitative services.⁵² In addition, every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the Constitution and this Act.⁵³ The other relevant national legal instruments include: Public Health Act Cap 242⁵⁴; Public

⁴⁷ See Muigua, K., "Reconceptualising the Right to Clean and Healthy Environment in Kenya." (2015).

⁴⁸ Health Act, No. 21 of 2017, Laws of Kenya.

⁴⁹ Ibid, Preamble.

⁵⁰ Health Act, 2017, sec. 3.

⁵¹ Health Act, 2017, sec. 4.

⁵² Health Act, 2017, sec. 5(1).

⁵³ Health Act, 2017, sec. 5(2).

⁵⁴ An Act of Parliament to make provision for securing and maintaining health.

Health Officers (Training Registration and Licensing) Act of 2013⁵⁵; Kenya Health Sector Referral Implementation Guidelines 2014⁵⁶; Kenya Health Sector Referral Strategy 2014-2018; Kenya Health Policy 2012-2030⁵⁷; and Kenya National Patients' Right Charter 2013⁵⁸.

While Kenya's healthcare system is made up of several systems: public, private and faith-based or NGO, it is estimated that about 48% are public and operate under the Ministry of Health, 41% are in the private sector, 8% are faith-based health services, and 3% are run by NGOs.⁵⁹ In a bid to implement Sustainable Development Goal 3 on Good Health and Well-being, the institutional stakeholders working together in Kenya include but are not limited to: Ministry of Health (MOH); Ministry of labour; Government of Kenya (GOK); Council of Governors (COG); Ministry of Education; Elizabeth Glaser Pediatric AIDS Foundation (EGPAF); and National Social Security Fund (NSSF).⁶⁰

4. The State of Health Sector in Kenya: Challenges and Successes

In 2018, the Government of Kenya launched the national Universal Health Coverage pilot programme in a controlled population in four counties namely: Kisumu County, because it leads in the high number of infectious diseases like HIV/AIDS and tuberculosis; Machakos County hospital visits are mostly because of accidents and injuries; Nyeri County which is leading in cases of non-communicable diseases, particularly diabetes; and Isiolo County which was ideally meant to assess how the package will work among the nomadic population.⁶¹

The Government of Kenya has made some progress and key reforms towards achieving Universal Health Care, and these include: free maternity services in all public health facilities since 2013;

⁵⁵ An Act of Parliament to make provision for the training, registration and licensing of public health officers and public health technicians, to regulate their practice, to provide for the establishment, powers and functions of the Public Health Officers and Public Health Technicians Council and for connected purposes.

⁵⁶ The goal of the referral guidelines is to guide the effective management of referral services to ensure continuity of care and effective management of the health needs of the population of Kenya (para. 1.4.1); The referral guidelines have the following objectives: Increase the use of services at lower levels of the health care system; Reduce self-referral to the higher levels of care; Develop service providers' capacity to offer services and appropriately refer at each level of the health care system; Improve the health system's ability to transfer clients, client parameters, specimens and expertise between the different levels of the health care system; Improve supportive supervision, thereby ensuring up-to-date management practices in use across the country; Improve referral performance monitoring and coordination; Improve preparedness and response to emergencies and disasters; Improve counter referral and referral feedback information system and strengthen out-reach systems for provision of referral health services to marginalized and vulnerable populations; Provide quality emergency health services at the point of need, regardless of ability to pay.

⁵⁷ The Kenya Health Policy 2012–2030 has defined the approach to strengthen comprehensive service delivery in the country. It emphasises the elaboration of service delivery solutions across the six levels of care from the community health services (level 1), primary care services (levels 2 and 3), county health services (levels 4 and 5), and the national referral services (level 6).

⁵⁸ The patient's rights charter explains the rights of patients and how patients can register complaints or compliments about any health professional or facility.

⁵⁹ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (The Conversation) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020.

⁶⁰ 'Sustainable Development Goal 3: Good Health and Well-Being | United Nations in Kenya' <<https://kenya.un.org/en/sdgs/3>> accessed 14 December 2020.

⁶¹ 'County Governments at the Centre of Achieving Universal Health Care | Kenya Vision 2030' <<https://vision2030.go.ke/county-governments-at-the-centre-of-achieving-universal-health-care/>> accessed 15 December 2020.

free primary health care in all public primary healthcare facilities – about 3,300 facilities; major programme to equip major public hospitals across the country with modern diagnostic equipment (94 facilities) where contracts have already been signed up with suppliers; a National Referral Strategy has been developed and piloted; health insurance subsidies through NHIF targeting disadvantaged groups continues to be implemented; provision of infrastructure and equipment to health facilities across county governments (new wards, ambulances, additional health workers); among other initiatives.⁶²

It is however worth pointing that despite this, the Kenyan population is struggling with financing medical care and it is estimated that about 20% of Kenyans have some form of health insurance coverage, including national health insurance, but this varies by region, with 41% of residents in Nairobi having cover, while under 3% have cover in marginalised rural areas such as Wajir and West Pokot.⁶³

While the Government of Kenya, both at national and devolved levels of governance, has been making efforts to achieve the right to health for the people of Kenya, there are a lot of challenges that have been identified as still affecting the sector. According to a Report published by the National Commission on Human Rights in 2017 focusing on a Case Study of Kisumu County on realization of the right to health, there has been progress in the realization of the right to health, but significant gaps still exist, which include: concerns about poor services or the total lack of some aspects of health services in the country. In addition, the ability of the county governments to ensure the realization of the right to health has also been questioned by some stakeholders, including medical practitioners and members of the public.⁶⁴ The complaints range from underequipped public facilities; inability of the infrastructure in place to contain the growing population of residents; inadequate human resource in comparison to persons seeking medical treatment, thereby limiting the ability of residents to access quality and affordable health care services, among others.⁶⁵

Kenyans wake up every other day to threats of strikes by medical staff ranging from doctors to nurses in public health facilities. The strikes are attributable to limited career opportunities, insufficient workforce, and low remuneration thus increasing the risk of the health care staff migrating from their countries but also within countries such as from public hospitals to private

⁶² ‘Beyond The Conference – Kenya’s Progress towards Affordable and Accessible Health Care | Kenya Vision 2030’ <<https://vision2030.go.ke/beyond-the-conference-kenyas-progress-towards-affordable-and-accessible-health-care/>> accessed 16 December 2020.

⁶³ Mohiddin A and Temmerman M, ‘COVID-19 Exposes Weaknesses in Kenya’s Healthcare System. And What Can Be Done’ (The Conversation) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020; Dutta, A., T. Maina, M. Ginivan, and S. Koseki. 2018. Kenya Health Financing System Assessment, 2018: Time to Pick the Best Path. Washington, DC: Palladium, Health Policy Plus <http://www.healthpolicyplus.com/ns/pubs/11323-11587_KenyaHealthFinancingSystemAssessment.pdf> accessed 15 December 2020.

⁶⁴ Kenya National Commission on Human Rights, The Right to Health: A Case Study of Kisumu County, 2017 <<https://www.knchr.org/Portals/0/EcosocReports/Report%20on%20the%20Right%20to%20Health%20in%20Kisumu%20County.pdf?ver=2018-02-19-123045-547>> accessed 14 December 2020.

⁶⁵ Kenya National Commission on Human Rights, The Right to Health: A Case Study of Kisumu County, 2017.

ones.⁶⁶ This is despite the fact health care staff are crucial for health service delivery and the provision of quality care to patients.⁶⁷

5. Ensuring Healthy Lives and Wellbeing for All Kenyans

The *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health* affirms that the realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments.⁶⁸ This section outlines some recommendations that can help Kenya get closer to ensuring that all its citizens enjoy healthy lives and general wellbeing.

5.1 Addressing the Socioeconomic Factors that Affect Right to Health in Kenya: Way Forward

As already pointed out, the health status of any population is not independent of the socioeconomic status of the group of people in question. Studies, although some contentious, have established a relation between health and other factors such as poverty, income and education, among others.⁶⁹ It is however acknowledged that these factors do not work in isolation even in their influence on health-genetics also may play a role in an individual's vulnerability or resilience to socioeconomic adversity: different individuals' biological responses to the same socio-environmental trigger can vary markedly according to specific genetic polymorphisms.⁷⁰

Studies carried out on socio-economic inequality and inequity in use of health care services in Kenya have established that:

‘there is significant inequality and inequity in the use of all types of care services favouring richer population groups, with particularly pronounced levels for preventive and inpatient care services. These are driven primarily by differences in living standards and educational achievement, while the region of residence is a key driver for inequality in preventive care use only. Pro-rich inequalities are particularly pronounced for care provided in privately owned facilities, while public providers serve a much larger share of individuals from lower socio-economic groups’.⁷¹

⁶⁶ Goetz K and others, ‘Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study’ (BioMed Research International, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020; Waithaka D and others, ‘Prolonged Health Worker Strikes in Kenya- Perspectives and Experiences of Frontline Health Managers and Local Communities in Kilifi County’ (2020) 19 International Journal for Equity in Health 23.

⁶⁷ Goetz K and others, ‘Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study’ (BioMed Research International, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020.

⁶⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), para. 1.

⁶⁹ See Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 Public Health Reports 19.

⁷⁰ Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 Public Health Reports 19.

⁷¹ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 International Journal for Equity in Health 196.

There are also other studies which support the fact that individuals from poorer households show lower propensity to seek care in health facilities (as opposed to relying on traditional healers or self-treating with medicines bought directly from pharmacies) when facing health problems and illness and the quality of service providers is lower in poorer areas.⁷²

There is a need for the Government to continually address abject poverty that afflicts huge parts of the Kenyan population. This is because it has been argued that children growing up in socioeconomically disadvantaged neighborhoods face greater direct physical challenges to health status and health-promoting behaviours; they also often experience emotional and psychological stressors, such as family conflict and instability arising from chronically inadequate resources.⁷³ It is worth pointing out that the realization of these socio-economic factors is also closely related to the realization of the right to dignity as guaranteed under Article 28 of the Constitution which provides that; *“Every person has an inherent dignity and the right to have that dignity respected and protected.*

Article 19 of the Constitution of Kenya is categorical that ‘the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’.⁷⁴ In addition, it provides 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’.⁷⁵

5.2 Multisectoral Approach and Collaboration among Different Stakeholders

While continued investment on improving the health sector in the country is a commendable move, ‘in order to achieve equity in health and access to care, such efforts must be paralleled by multi-sectoral approaches to address all key drivers of inequity: persistent poverty, disparities in living standards and educational achievement, as well as regional differences in availability and accessibility of care’.⁷⁶

Under the current Constitution of Kenya, primary health care provision is a shared responsibility between the national and county governments.⁷⁷ It has been argued that while the pilot implementation of UHC in four counties in Kenya has demonstrated better impact on the health outcome and greater accessibility while building Resilient and Sustainable Health system that can respond to unforeseen shocks, the success of UHC in Kenya will require more than executive or

⁷² Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 *International Journal for Equity in Health* 196.

⁷³ See Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 *Public Health Reports* 19.

⁷⁴ Constitution of Kenya 2010, Article 19 (1).

⁷⁵ Constitution of Kenya 2010, Article 19 (2).

⁷⁶ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 *International Journal for Equity in Health* 196.

⁷⁷ Constitution of Kenya 2010, Fourth Schedule.

national-level goodwill; with health as a devolved function, each of the 47 counties must put in systems and resources to ensure its success.⁷⁸

The county governors ought to prioritize delivery of a better healthcare system to citizens through a deliberate cohesive approach to UHC between the central government and the counties in order to achieve desired outputs within a short time.⁷⁹

The collaboration should however go beyond provision of healthcare services to tackling the challenges that hinder enjoyment of the right to health care by all, such as persistent poverty, disparities in living standards and educational achievement, as well as regional differences in availability and accessibility of care'. There must be better coordination between the government, private and faith or NGO institutions especially in relation to specialist care and other empowerment programmes.⁸⁰

5.3 Strict Regulation of Private Health Care Providers

Due to socio-economic inequalities, the private sector primarily serves wealthier individuals, whereas those from poorer households more commonly rely on public care providers or use lower standard, often unlicensed, private care facilities.⁸¹ Reports from as recent as the year 2019 indicated that as at March 2019, at least 7,900 health facilities in Nairobi County were not registered or licensed and were therefore operating illegally.⁸² These numbers would grow astronomically if a study were to document the whole country. It also follows that a huge number of the poor sections of the general population has either suffered loss or obtained substandard medical attention.

There is a need for the relevant Regulatory boards such as the Kenya Medical Practitioners and Dentists Board, the Nursing Council, the Clinical Officers Council, Laboratory Board, Radiation Board and the Pharmacy and Poisons Board to crack the whip and weed out all these illegal facilities in a bid to protect the health and wellbeing of the Kenyan populace.

5.4 Affordable and Sustainable Health Insurance Cover in Kenya

COVID-19 disease pandemic has exposed the challenges of health care financing in the country, especially with the National Health Insurance Fund (NHIF) declining to fund treatment for its

⁷⁸ 'COVID-19: Lessons from the Losses' (Inter Press Service, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

⁷⁹ Ibid.

⁸⁰ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (The Conversation) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020.

⁸¹ Ilinca S and others, 'Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey' (2019) 18 International Journal for Equity in Health 196.

⁸² Omulo C, 'Kenya: 7,900 Clinics Operating Illegally in Nairobi, Committee Reports' (allAfrica.com, 11 April 2019) <<https://allafrica.com/stories/201904110184.html>> accessed 15 December 2020; <<https://www.the-star.co.ke/authors/maureen-kinyanjui>, '7,964 Health Facilities in Nairobi Are Illegal' (The Star) <<https://www.the-star.co.ke/counties/nairobi/2019-04-11-7964-health-facilities-in-nairobi-are-illegal/>> accessed 15 December 2020; Thiong'o J, '90pc of Nairobi Clinics Do Not Have Licenses - Standard Health' (Health) <<https://www.standardmedia.co.ke/health/article/2001320591/90pc-of-nairobi-clinics-do-not-have-licenses>> accessed 15 December 2020.

members who contract the disease, with the exception of civil servants, police and prisons service.⁸³ Notably, even the private insurers declined to cover the cost of treating COVID-19 cases thus complicating the problem further.⁸⁴

NHIF is the primary provider of health insurance in Kenya and the primary vehicle through which Kenya intends to expand insurance coverage.⁸⁵ It is one of the most common employment based health financing scheme in the country. While the NHIF has been expanding in coverage areas and the target population,⁸⁶ the failure or inability to cover COVID-19 cases has demonstrated all the more the urgent need for the Universal Health Coverage (UHC) for all.⁸⁷ Recent studies have concluded that ‘Through its focus on increasing affordability of care for all Kenyans, the newly launched universal health coverage scheme represents a crucial step towards reducing disparities in health care utilization’.⁸⁸

The country’s development blueprint, Vision 2030 and the Presidency’s Big Four Agenda all have 100% Universal Health Coverage (UHC) as one of the main pillars, a commendable step.⁸⁹ The 100% Universal Health Coverage (UHC) aims to: actualize 100% cost subsidy on essential health services and reduce medical out-of-pocket expenses by 54% as a percentage of household expenditure.⁹⁰ The Government has been distributing World Class medical equipment to all counties, introduced a free maternity health program and expanded National Hospital Insurance Fund.⁹¹

There is a need for financial investment and political goodwill towards ensuring that the UHC is realised for all Kenyans to benefit, both rich and poor. UHC might be more stable than the employment based health financing as a source of health revenue, because employment based health financing is unstable, fragmented, and inequitable, particularly during economic crises as

⁸³ pm EM on 18 N 2020-12:52, ‘NHIF to Only Cover Covid-19 Costs for Govt Workers’ (Kenya.co.ke) <<https://www.kenya.co.ke/news/59265-nhif-only-cover-covid-19-costs-govt-workers>> accessed 15 December 2020; Thiong’o J, ‘Over 100,000 Nairobi County Staff Risk Losing NHIF Cover’ (The Standard) <<https://www.standardmedia.co.ke/business/article/2001369484/over-100-000-nairobi-county-staff-risk-losing-nhif-cover>> accessed 15 December 2020.

⁸⁴ am EM on 15 N 2020-9:07, ‘Father’s Agony as Family Billed 750K After 4 Days’ (Kenya.co.ke) <<https://www.kenya.co.ke/news/59153-crisis-nhif-private-insurers-refuse-settle-covid-19-bills>> accessed 15 December 2020.

⁸⁵ Dutta, A., T. Maina, M. Ginivan, and S. Koseki. 2018. Kenya Health Financing System Assessment, 2018: Time to Pick the Best Path. Washington, DC: Palladium, Health Policy Plus, 60; see also National Hospital Insurance Act of 1966.

⁸⁶ ‘President’s Delivery Unit - Flagship Projects - NHIF Expansion’ <<https://www.delivery.go.ke/flagship/nhif>> accessed 15 December 2020.

⁸⁷ ‘COVID-19: Lessons from the Losses’ (Inter Press Service, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

⁸⁸ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 International Journal for Equity in Health 196.

⁸⁹ ‘The Big 4 - Empowering the Nation’ <<https://big4.delivery.go.ke/>> accessed 15 December 2020.

⁹⁰ Ibid.

⁹¹ ‘President’s Delivery Unit - Flagship Projects’ <<https://www.delivery.go.ke/flagship>> accessed 15 December 2020.

evidenced during the covid-19 pandemic where many people lost access to employment linked healthcare because of a job loss in the family.⁹²

While employment based health financing remains an important source of revenue, especially for low and middle income countries that need to mobilise additional domestic resources, it has been suggested that universal healthcare entitlements, mandatory inclusion in national schemes, general tax contributions for resource pooling, and a move away from voluntary or contributory schemes that are linked to benefits entitlements are recommended.⁹³

Notably, the realization of UHC in Kenya will only be achieved if the Government of Kenya will increase its budget allocation towards health and lead solid health system strengthening initiatives – as for example the NHIF reform – to increase efficiency, effectiveness and accountability within the health sector.⁹⁴

Medical care should however also be made generally affordable. In *Pharmaceutical Society of South Africa v. Tshabalala-Msimang*, South African High Court held that ‘access to health care services required services to be both physically accessible and affordable, and acknowledged that prohibitive pricing of medicines may amount to a denial of access.’⁹⁵

5.5 Improved Working Conditions for Health workers in Kenya

Job satisfaction and working atmosphere are considered to be important for optimal health care delivery.⁹⁶ In the face of frequent strikes by health workers in Kenya, there is a need for the national government and the county governments to work closely with all the stakeholders and health workers’ unions’ leaders to address the challenges of limited career opportunities, insufficient workforce, and low remuneration in order to curb the risk of the health care staff migrating to other countries as well as also within countries such as from public hospitals to private ones. This should be done as part of ensuring that Kenyans are guaranteed access to health care services and wellbeing.⁹⁷

Even as the national and county governments continually invest in health infrastructure and facilities under the UHC programmes, there is a need for the investment in infrastructure to be done simultaneously with that in human capital, competent and well-trained personnel to handle

⁹² Vijayasingham L and others, ‘Employment Based Health Financing Does Not Support Gender Equity in Universal Health Coverage’ (2020) 371 *BMJ* m3384.

⁹³ *Ibid.*

⁹⁴ ‘NHIF Reform Critical to Affordable Health For All in Kenya’ (Inter Press Service, 27 March 2019) <<http://www.ipsnews.net/2019/03/nhif-reform-critical-affordable-health-kenya/>> accessed 16 December 2020; cf. Okungu V, Chuma J and McIntyre D, ‘The Cost of Free Health Care for All Kenyans: Assessing the Financial Sustainability of Contributory and Non-Contributory Financing Mechanisms’ (2017) 16 *International Journal for Equity in Health* 39.

⁹⁵ *Pharmaceutical Society of South Africa v. Tshabalala-Msimang* 2005 (3) SA 23 8 (SCA) paras 42, 53, 77.

⁹⁶ Goetz K and others, ‘Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study’ (BioMed Research International, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020.

⁹⁷ Waithaka D and others, ‘Prolonged Health Worker Strikes in Kenya- Perspectives and Experiences of Frontline Health Managers and Local Communities in Kilifi County’ (2020) 19 *International Journal for Equity in Health* 23.

the equipment and patients in these facilities.⁹⁸ Even as the Government of the Republic of Kenya continue to hire foreign doctors and in particular doctors from Cuba to work in Kenyan public medical facilities, there is need for capacity building within the local medical health workers.⁹⁹

5.6 Use of Technology in Health Care Provision: Telemedicine

Telemedicine has been taking root in Kenya, especially with the outbreak of the COVID-19 pandemic. The World Health Organisation observes that Information and Communication Technologies (ICTs) have great potential to address some of the challenges faced by both developed and developing countries in providing accessible, cost-effective, high-quality health care services through the use of telemedicine. Telemedicine uses ICTs to overcome geographical barriers, and increase access to health care services. This is particularly beneficial for rural and underserved communities in developing countries – groups that traditionally suffer from lack of access to health care.¹⁰⁰ The World Health Organization uses the following broad description of the term ‘telemedicine’:

*“The delivery of health care services, where distance is a critical factor, by all health care professionals using information and communication technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interests of advancing the health of individuals and their communities”.*¹⁰¹

Notably, telemedicine is an open and constantly evolving science, as it incorporates new advancements in technology and responds and adapts to the changing health needs and contexts of societies.¹⁰²

Telemedicine episodes may be classified on the basis of: (1) the interaction between the client and the expert (i.e. real-time or prerecorded), and (2) the type of information being transmitted (for example, text, audio, video).¹⁰³

In Kenya, a large portion of the population is unable to have face-to-face consults with medical providers and as a result, much of the care is triaged through community health workers and nurses and only those patients deemed to be in critical need of hospital services are transferred to see a medical provider.¹⁰⁴ This situation is made worse by the fact that there is a shortage of

⁹⁸ ‘COVID-19: Lessons from the Losses’ (Inter Press Service, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

⁹⁹ Cf. Samuel Nduati & 3 others v Cabinet Secretary Ministry of Health & 9 others [2018] eKLR, Petition 42 & 46 of 2018 (Consolidated).

¹⁰⁰ Seewon Ryu, ‘Telemedicine: Opportunities and Developments in Member States: Report on the Second Global Survey on EHealth 2009 (Global Observatory for EHealth Series, Volume 2)’ (2012) 18 *Healthcare Informatics Research* 153, 8.

¹⁰¹ *Ibid.*, 9.

¹⁰² *Ibid.*

¹⁰³ Craig J and Patterson V, ‘Introduction to the Practice of Telemedicine’ (2005) 11 *Journal of telemedicine and telecare* 3.

¹⁰⁴ ‘Telehealth, MHealth, Mobile Medical Care, Telehealth Technology’, (Village HopeCore International, 6 September 2018) <<https://www.villagehopecore.org/telehealth-in-rural-kenya/>> accessed 16 December 2020.

approximately 50% of the needed health care workforce to meet the needs of the population in Africa.¹⁰⁵ Telemedicine and other telehealth services are thus meant to address the very limited access to face-to-face medical consults and high medical cost which can consequently see a reduction in poverty, improved health and well-being, improved education, and economic growth.¹⁰⁶

In places such as Lamu County, where residents face extremely limited access to healthcare, the residents have now access to care-at-a-distance through the telemedicine project initiated by Huawei, Safaricom and local partners, which allows local healthcare workers and patients to remotely consult with specialists in towns and cities.¹⁰⁷ There is a scarcity of licensed doctors and specialists in Lamu, and telemedicine is expected to transform medical care for low-income families in the region by reducing travel time and expenses; and 50% more patients will attend referrals each year, leading to significantly better patient outcomes.¹⁰⁸

The Philips Foundation, a registered charity and platform for the worldwide societal activities of Royal Philips, has also since introduced mobile ultrasound technology, meant to improve maternal and child health, where ways will be explored to use mobile ultrasound technology at primary care level, performed by midwives and supported by remote experts through telehealth, to enhance availability of affordable services in the underserved communities and remote areas of Kenya.¹⁰⁹

While telemedicine is no longer new in Kenya¹¹⁰, there is a need for the regulators to continually review the regulatory framework that will not only promote its growth and development, but also to ensure that those who use it are either held or benefit from the same standards of professional care as those under the traditional forms of medical care and data protection.¹¹¹ Notably, the Health

¹⁰⁵ Ibid.

¹⁰⁶ Ibid; See also Holmes K and others, 'Pilot Results of a Telemedicine Social Franchise in Rural Kenya: Evidence of Sustainable Livelihood Creation' (2014) 78 *Procedia Engineering* 200; 'Profit-Making Idea: The Time for Telemedicine Has Arrived in Kenya' (How We Made It In Africa, 31 July 2020) <<https://www.howwemadeitinafrica.com/profit-making-idea-the-time-for-telemedicine-has-arrived-in-kenya/69458/>> accessed 16 December 2020; 'Telemedicine Takes Root in Kenya amid COVID-19 Infection Fears - Xinhua | English.News.Cn'

<http://www.xinhuanet.com/english/africa/2020-05/12/c_139050942.htm> accessed 16 December 2020.

¹⁰⁷ 'Making Remote Healthcare a Reality in Kenya' (huawei) <<https://www.huawei.com/en/industry-insights/outlook/mobile-broadband/wireless-for-sustainability/cases/making-remote-healthcare-a-reality-in-kenya>> accessed 16 December 2020.

¹⁰⁸ Ibid.

¹⁰⁹ 'Philips Foundation Announces Projects in Kenya' (Philips) <<https://www.philips.co.ke/a-w/about/news/archive/standart/news/press/2019/20190307-philips-foundation-announces-projects-in-kenya.html>> accessed 16 December 2020.

¹¹⁰ 'Tele-Health Providers in Kenya – Kenya Healthcare Federation' <https://khf.co.ke/covid19_khf-news/tele-health-providers-in-kenya/> accessed 16 December 2020; 'Kenya Launches Telemedicine Initiative for the Poor' (Sub-Saharan Africa) <<https://www.scidev.net/sub-saharan-africa/news/kenya-launches-telemedicine-initiative-poor/>> accessed 16 December 2020; CORRESPONDENT, 'Smart Applications Partners with Rural Private Hospitals Associations' (*Capital Business*, 22 October 2020) <<https://www.capitalfm.co.ke/business/2020/10/smart-applications-partners-with-rural-private-hospitals-associations/>> accessed 16 December 2020; Sue Anderson, 'Telemedicine In Kenya: Big Idea Creating Access To Healthcare' (*MATTER*, 25 September 2020) <<https://www.matter.ngo/telemedicine-kenya/>> accessed 16 December 2020; Bonner L, 'Kenya Opens First Telemedicine Center for COVID-19 Detection - Axis Imaging News' <<https://axisimagingnews.com/news/kenya-opens-first-telemedicine-center-for-covid-19-detection>> accessed 16 December 2020.

¹¹¹ Rangasamy M and others, 'Role of Telemedicine in Health Care System: A Review' "Role of telemedicine in health care system: a review," *Int J Recent Adv Pharma Res* 2 (2011): 1-10; 'The Emerging

Act, 2017 defines “e-Health” to mean the combined use of electronic communication and information technology in the health Sector including telemedicine.¹¹²

Telemedicine and telehealth services can indeed supplement the investment in physical infrastructure in provision of health care services.¹¹³

5.7 Investment in Advanced medical technologies: The Viability of Medical Tourism

A working health system is not only capable of ensuring that the citizens enjoy healthy lives and wellbeing, but is also capable of earning some extra income for the government through what is now commonly known as ‘medical tourism’, defined as the travel of people to a place other than where they normally reside for the purpose of obtaining medical treatment in that country.¹¹⁴ India has emerged as one of the countries that have heavily invested in medical tourism. Medical tourism is a multi-billion dollar industry that has been heavily promoted by governments and the medical and tourism industries for the potential mutual benefits.¹¹⁵ India takes pride in being uniquely placed by virtue of its skilled manpower, common language, diverse medical conditions that doctors deal with, the volume of patients, and a large nonresident Indian population overseas.¹¹⁶ They have also invested in provision of dedicated services to alleviate the anxiety of foreign patients which include translation, currency conversion, travel, visa, post treatment care system, and accommodation of patient relatives during and after treatment.¹¹⁷ In 2019, India was ranked as the third most preferred destination for medical tourism, with the industry set to reach \$9 billion in valuation in 2020, although the projection might have since been affected by the COVID-19 pandemic.¹¹⁸

Practice of Telemedicine and the Law: Kenya’s Stance’ (Centre for Intellectual Property and Information Technology law, 20 August 2020) <<https://cipit.strathmore.edu/the-emerging-practice-of-telemedicine-and-the-law-kenyas-stance/>> accessed 16 December 2020.

¹¹² Sec. 2, Health Act, 2017.

¹¹³ ‘Telemedicine Takes Root in Kenya amid COVID-19 Infection Fears - Xinhua | English.News.Cn’ <http://www.xinhuanet.com/english/africa/2020-05/12/c_139050942.htm> accessed 16 December 2020; ‘Africa Can Improve Future Health Systems Resilience by Complementing Gaps in Physical Infrastructure with Digital Health Solutions | African Arguments’ <<https://africanarguments.org/2020/11/africa-can-improve-future-health-systems-resilience-by-complementing-gaps-in-physical-infrastructure-with-digital-health-solutions/>> accessed 16 December 2020.

¹¹⁴ ‘India’s Medical Tourism Gets Africans’ Attention’ (Africa Renewal, 25 November 2016) <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/india%E2%80%99s-medical-tourism-gets-africans%E2%80%99-attention>> accessed 15 December 2020; ‘Medical Tourism and The Value Of Technology In Medicine - Electronic Health Reporter’ <<https://electronichealthreporter.com/medical-tourism-and-the-value-of-technology-in-medicine/>> accessed 16 December 2020; Manickam R and others, ‘Emerging Trends and Future Prospects of Medical Tourism in India’ (2015) 7 Journal of Pharmaceutical Sciences and Research 248.

¹¹⁵ ‘Medical Tourism in India: Winners and Losers | Indian Journal of Medical Ethics’ <<https://ijme.in/articles/medical-tourism-in-india-winners-and-losers/?galley=html>> accessed 15 December 2020.

¹¹⁶ Gupta V and Das P, ‘Medical Tourism in India’ (2012) 32 Clinics in Laboratory Medicine 321; ‘Why Medical Tourism Is Booming In India | The Dope Why Medical Tourism Is Booming In India’ (The Dope, 25 February 2020) <<https://thedope.news/why-medical-tourism-is-booming-in-india/>> accessed 16 December 2020.

¹¹⁷ Ibid.

¹¹⁸ Biswas D, ‘In Dire Straits: India’s Medical Tourism Companies Find No Business amid COVID-19’ (YourStory.com, 24 June 2020) <<https://yourstory.com/2020/06/coronavirus-medical-tourism-industry-lockdown-business>> accessed 15 December 2020; CNN MS, ‘India Wants to Make Medical Tourism a \$9

Notably, South Africa has also been making medical advances, and in addition to shorter travel times than India, South Africa advertises the added allure of safaris and spas.¹¹⁹

As Kenya pursues the dream of UHC as a key delivery under Vision 2030 and the Big Four Agenda, the government and all the relevant stakeholders in the health care sector should consider following in the footsteps of India and South Africa. In India, while the private sector has always been prominent as a source of medical care, since 1991 neoliberal government policies supporting the private sector have created conditions for its rapid growth.¹²⁰ This may, therefore, take a while to achieve, but continuous investment in infrastructure and the medical personnel will see to it that we finally get there. While the country may not yet benefit from patients from outside the continent, it may first target patients from the region and the African continent in general. Medical tourism, however, should not be pursued at the expense of the poor in the country: the Government should ensure that the general populace in the country can access health care services before it seeks to extend the same to the foreigners. Kenya should consider going the Cuban way where, Cuba, which has been a pioneer in medical tourism for almost four decades, has hospitals for Cuban residents and others for foreigners and diplomats. Both kinds are run by the government and Cubans receive free healthcare for life while tourists have to pay for it.¹²¹ In addition, the Cuban government has developed medical tourism to generate income which is then reinvested into the country's medical sector to benefit its country's citizens.¹²²

6. Conclusion

The right to health is not an isolated right as demonstrated in this paper. It not only forms the basis for the realisation and enjoyment of other rights but it also requires the implementation and protection of other human rights for its full enjoyment. While Kenya has made commendable steps towards ensuring that its citizens enjoy healthy lives and general wellbeing, there is still a lot that requires to be done. This calls for multisectoral approach and cooperation between stakeholders to ensure that the same is realised. Any nation that seeks to develop must first invest in the health of its people. A healthy population is a wealthy population.¹²³

Billion Industry by 2020' (CNN) <<https://www.cnn.com/2019/02/13/health/india-medical-tourism-industry-intl/index.html>> accessed 16 December 2020.

¹¹⁹ 'India's Medical Tourism Gets Africans' Attention' (Africa Renewal, 25 November 2016) <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/india%E2%80%99s-medical-tourism-gets-africans%E2%80%99-attention>> accessed 15 December 2020.

¹²⁰ 'Medical Tourism in India: Winners and Losers | Indian Journal of Medical Ethics' <<https://ijme.in/articles/medical-tourism-in-india-winners-and-losers/?galley=html>> accessed 15 December 2020.

¹²¹ Ibid.

¹²² Ibid; Network eHealth, 'Medical Tourism in Puducherry, an Under-Exploited Potential - EHealth Magazine' <<https://ehealth.eletsonline.com/2018/07/medical-tourism-in-puducherry-an-under-exploited-potential/>> accessed 15 December 2020; Hernández Nariño A, 'Cuban Medical Tourism : Strategies to Make It More Competitive' (2008).

¹²³ 'The Health and Wealth of Nations' (ResearchGate) <https://www.researchgate.net/publication/238827665_The_Health_and_Wealth_of_Nations> accessed 16 December 2020; '(PDF) Population Health and Economic Growth in Sub-Saharan Africa: A Panel Cointegration Analysis' (ResearchGate) <https://www.researchgate.net/publication/343281582_Population_health_and_economic_growth_in_sub-Saharan_Africa_A_Panel_Cointegration_Analysis> accessed 16 December 2020; Baum F, 'Wealth and Health: The Need for More Strategic Public Health Research' (2005) 59 *Journal of Epidemiology & Community Health* 542.

Ensuring Healthy Lives and Well-being for All Kenyans

Ensuring Healthy Lives and Wellbeing for all Kenyans is a vital Sustainable Development goal that should be attained at the earliest.

Multinational Corporations, Investment and Natural Resource Management in Kenya

Abstract

Over the years, the Multinational Corporations (MNCs) have expanded their reach to most developing world countries, controlling the main activities in exploration and exploitation of natural resources. This is mainly based on their huge financial muscle and technical expertise as far as these activities are concerned. These countries hope to reap benefits from engaging these corporations, and often they do. There is however the downside to this relationship in that their activities negatively affect many other areas such as the social and political stability of the people. This paper casts a critical look at multinational corporations and their impact on natural resource management particularly in developing countries such as Kenya. While the discussion acknowledges the fact that the place of the MNCs in the global economy cannot be wished away, the paper offers some thoughts on how the engagement between the developing world and the MNCs can be made more fruitful and mutually beneficial.

1. Introduction

This paper casts a critical look at multinational corporations and their impact on natural resource management particularly in developing countries such as Kenya. International trade and investments law has facilitated Multinational Corporations (MNCs) to access new markets and new resources in the developing world. Foreign companies are able to move to regions where there are abundant resources, including cheap labour with few restrictions.¹ While it is acknowledged that there are benefits that may accrue to host states as a result of the presence of MNCs in their territories, criticisms have arisen that the relations between multinational corporations and host countries mostly favour the MNCs. It is said that host countries receive few benefits, and that foreign investments distort local economies and politics.² This paper contributes to this debate in the context of the involvement of multinationals in natural resource exploration and exploitation. It also analyses the nature of the laws governing these investments and the extent of their conformity with the countries' constitutions and the political, economic, social, scientific and technological factors that play an important role in natural resources management.³

2. Background

MNCs or TNCs are for-profit enterprises marked by two basic characteristics: They engage in business activities including sales, distribution, extraction, manufacturing, and research and development outside their country of origin so that it is dependent financially on operations in two or more countries; and its management decisions are made based on regional or global

¹ Jensen, N.M., 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment,' *International Organization* Vol. 57, 2003, pp 587-616.

² Moran, T.H., 'Multinational corporations and dependency: a dialogue for dependentist as and non-dependentist as,' *International Organization*, Vol. 32, 1978, pp 79-100; See also Wyrzykowska, M., "Role of transnational corporations in the international trade," available at <http://www.etsg.org/ETSG2010/papers/Wyrzykowska.pdf> [Accessed on 16/11/2018].

³ Jensen, N.M., 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment,' *op cit*.

alternatives.⁴ MNCs control over 50% of all oil extraction and refining, and a similar proportion of the extraction, refining, and marketing of gas and coal. Additionally, they have virtually exclusive control of the production and use of ozone-destroying chlorofluorocarbons (CFCs) and related compounds. Their activities are believed to generate more than half of the greenhouse gases emitted by the industrial sectors with the greatest impact on global warming.⁵

3. MNCs and Natural Resources

Natural resources have been exploited in many countries around the world and used to boost economic development in these countries through the revenue derived from these endeavours. However, the exploitation of Africa's natural resources is normally carried out by foreign Multi-national Corporations (MNCs) which have shown almost no regard for the impact of their actions on people in Africa.⁶ Although there are advantages associated with MNCs, they have also been vilified because in some cases they take a country's natural resources, paying but a pittance while leaving behind environmental and social disasters.⁷

Their activities have had the result of destruction of the environment and livelihoods of local populations and caused widespread pollution and even war, with the desire to control economically profitable natural resources being the reason behind several conflicts in Africa, especially in Congo DRC.⁸ MNCs have contributed greatly towards conflicts and taken advantage of the occurrence of conflicts to continue exploiting these resources.⁹ This scenario is not unique to DRC Congo only but is a reflection of what is happening across Africa.¹⁰

MNCs usually enter into negotiations with governments for the exploitation of mineral resources and thereafter are usually awarded contracts to exploit these resources. When entering into these negotiations, these corporations usually aim at ensuring maximum profits from the undertakings which in most cases is done at the expense of the host State. The concession contracts are usually drawn in a manner that ensures that the companies have unlimited rights to the natural resources

⁴ Greer, J. & Singh, K., 'A Brief History of Transnational Corporations,' (Global Policy Forum, 2000), available at <https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html> [Accessed on 16/11/2018].

⁵ *Ibid.*

⁶ Africa Europe Faith & Justice Network (AEFJN), *The Plundering of Africa's Natural Resources*, available at http://www.aefjn.org/tl_files/aefjn-files/publications/Fact%20Sheets%20EN/120521-NatResources-Factsheet-eng.pdf [Accessed on 16/11/2018].

⁷ Patrick, S.M., "Why Natural Resources Are a Curse on Developing Countries and How to Fix It." Available at *The Atlantic*. < <http://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/>>, [Accessed on 16/11/2018]; See also Stiglitz, J., "Resource Rich, Cash Poor." *Slate*, August 12 (2012). Available at <https://slate.com/business/2012/08/why-resource-rich-countries-usually-end-up-poor.html> [Accessed on 16/11/2018].

⁸ See generally, Batware, B., 'Resource Conflicts: The Role of Multinational Corporations in the Democratic Republic of Congo,' (MA Peace and Conflict Studies, EPU, 2011), available at <http://acuns.org/wp-content/uploads/2012/06/RoleofMultinationalCorporations.pdf> [Accessed on 16/11/2018].

⁹ Ezekiel, A., "The application of international criminal law to resource exploitation: Ituri, democratic republic of the Congo," *Natural Resources Journal* (2007): 225-245.

¹⁰ See generally United Nations Expert Group Meeting on 'Natural Resources and Conflict in Africa: Transforming a Peace Liability into a Peace Asset,' *Conference Report*, 17-19 June 2006, Cairo, Egypt. Organized by the Office of the Special Adviser on Africa (OSAA) in cooperation with the Government of Egypt.

leaving no room for future amendments by the host state. This makes the host states to lose out on revenue, where there are changes in the fiscal regime in the future.¹¹

Some of the contracts and deals are concluded in questionable manner mostly influenced by high level corruption as recently evidenced in the Kenyan case of *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*¹². The contract involved investments in the Kenyan mining sector, including a 21-year mining license for the extraction of rare earths at the Mrima Hill project, southern part of the country. However, there arose a dispute and claims arising out of the Government's allegedly unlawful revocation of claimant's mining license, following the discovery of new rare earths deposits by the claimant. The investor filed a case against Kenya before the International Centre for Settlement of Investment Disputes (ICSID) claiming USD 2,000 Million. However, Kenya argued that the contracts were awarded irregularly and were marred with corruption and the process did not follow the laid out legal requirements. Although the corruption allegations did not stand¹³, the Tribunal concluded that the Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA licence (or approval in any valid form) from National Environment Authority (NEMA) concerning the environmental issues involved in the proposed removal of 130 million tonnes of material from Mrima Hill, constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.¹⁴ The case was thus dismissed with costs.

This is just one of the many examples of irregular contracts that are signed between developing countries, in Africa and elsewhere, and MNCs without regard to the existing laws or the accruing benefits to the host states and their people. Thus, the MNCs' political influences upon the governments of less developed countries in natural resources exploitation and investments cannot be underestimated.¹⁵

¹¹ *Ibid*, p. 224. It has been suggested that one of the tools that can be used to counter this scenario is the use of additional profits tax (APT).

¹² ICSID Case No. ARB/15/29.

¹³ *Ibid*, para. 185.

¹⁴ *Ibid*, para. 365.

¹⁵ Helleiner, G.K., "The role of multinational corporations in the less developed countries' trade in technology," *World Development* 3, no. 4 (1975): 161-189.

Fig. 3: Multinationals and Natural Resources

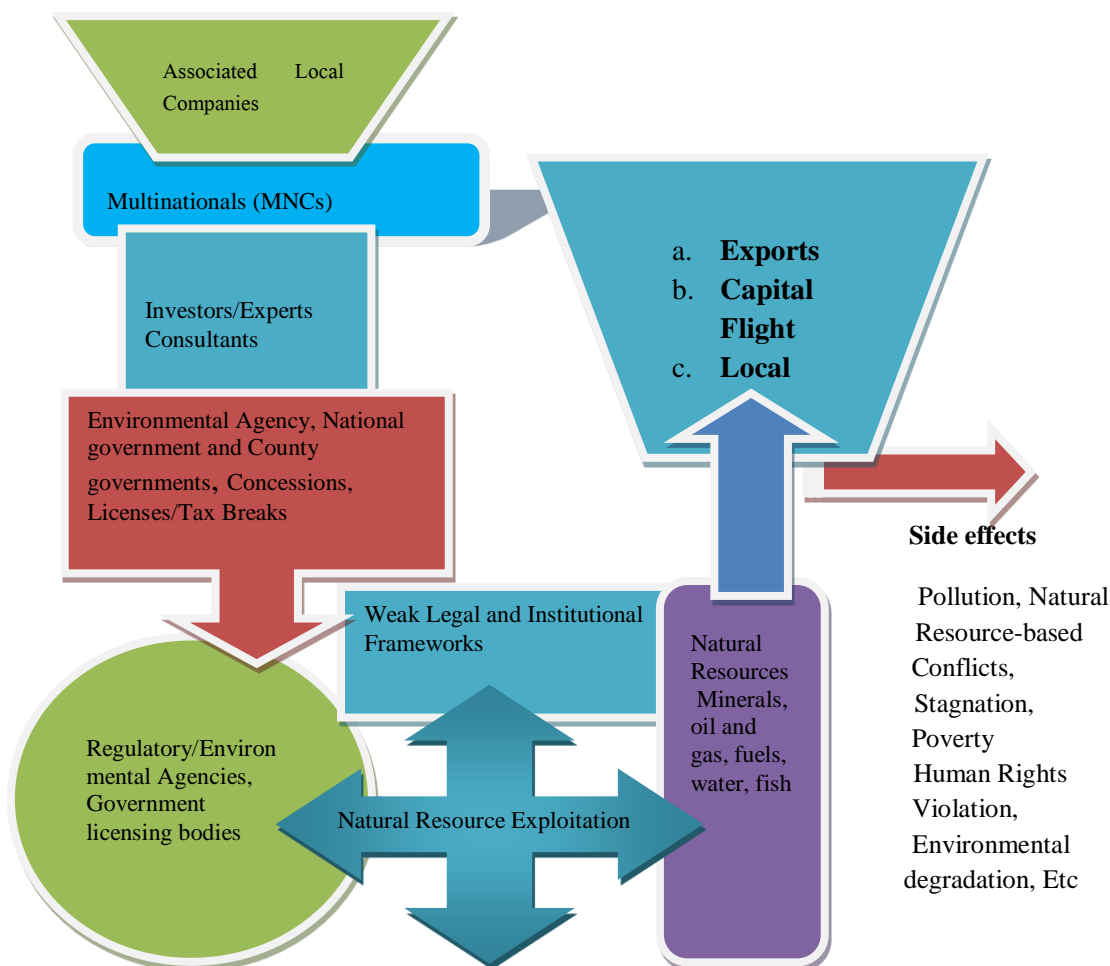


Fig. 4.0 Source: Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015

4. FDI and Natural Resources

Foreign Direct Investment (FDI) is a form of international inter-firm co-operation that involves significant equity stake and effective management decision power in, or ownership or control of foreign enterprises.¹⁶ It also encompasses other broader, heterogeneous non-equity forms of co-operation that involve the supply of tangible and intangible assets by a foreign enterprise to a domestic firm.¹⁷

FDI reflects a lasting interest by a resident entity of one economy in an enterprise that is resident in another economy.¹⁸ The ideological underpinning of this concept is the transmission to the host country of a package of capital, managerial skill and technical knowledge, as a potent agent of

¹⁶ Mello, R., 'Foreign direct investment-led growth: evidence from time series and panel data,' *Oxford Economic Papers*, No. 51, pp.133-151, p. 135, (Oxford University Press, 1999).

¹⁷ *Ibid.*

¹⁸ Duce, M. & Espana, B., 'Definitions of Foreign Direct Investment (FDI): a methodological note,' available at <http://bis.hasbeenforeclosed.com/publ/cgfs22bde3.pdf> [Accessed 16/11/2018].

economic transformation and development.¹⁹ The role of natural resources in economic development touches on many issues, from FDI to the environment to the level and management of exchange rates. MNCs are the main players engaging in value adding activities based on cross-border transactions. They base most of their industrial activities on natural resources. They derive the raw materials from the host countries and export the same either in their raw form or semi-processed one for value addition, which later comes back as a finished product ready for the local market as well as the international markets. For instance, with regard to oil, the exploration and production of oil results in foreign direct investment (FDI) inflows only when the activities are financed by foreign MNCs.²⁰ The dominance of MNCs in Africa's extractive industries is because mineral extraction is capital-intensive, requires sophisticated technology, has long gestation periods and is also risky.

There is no guarantee that oil may be discovered after spending an extensive amount of resources on exploration. As a consequence, the increased exploration and production in the region has led to a substantial increase in extractive industry FDI.²¹ Further, countries that are rich in natural resources, in particular oil, tend to have weak institutions,²² suggesting the direct link between FDI and natural resources exploitation. In such arrangements, the host countries often derive little benefits while the lion's share goes to the MNCs and their home countries. Indeed, it has been argued that MNCs investment distorts industrial growth in poor areas, and confirms their dependence and underdevelopment, rather than promoting the widespread effects of genuine development.²³

The unsustainable development of natural resource endowments has several basic limitations as a means of promoting broad-based economic development.²⁴ Primary product exports have low value added compared to processed and manufactured goods, and the lion's share of value addition occurs in developed countries, where raw materials are converted into manufactured goods.²⁵ In this cycle, MNCs play a central role.

5. State Sovereignty over Natural Resources vis-à-vis Multinational Corporations

International law has put in place a framework law to guide natural resources allocation and exploitation.²⁶ It establishes basic rules under which nations can assert property rights in resources. This influences how nations deal with resource allocation. However, apart from international law, other factors ranging from political, economic, social, scientific and technological factors also contribute to allocation of resources. Under international law, property rights are defined in terms

¹⁹ Kojima, K., 'A Macroeconomic Approach to Direct Foreign Investment,' *Hitotsubashi Journal of Economics*, June 1973, p. 3.

²⁰ Asiedu, E., 'Foreign direct investment, natural resources and institutions,' *Working Paper*, March 2013, p. 2.

²¹ *Ibid*, p. 2.

²² *Ibid*.

²³ Langdon, S., "Multinational corporations, taste transfer and underdevelopment: A case study from Kenya," *Review of African Political Economy* 2, no. 2 (1975): 12-35 at 12.

²⁴ Cf. Pérez, R.T., "Structural Problems and Changes in Cuba's Economic Model," In *No More Free Lunch*, pp. 5-22. Springer, Cham, 2014.

²⁵ Cronin, R., *et al*, (eds), 'Exploiting Natural Resources: Growth, Instability, and Conflict in the Middle East and Asia,' *Natural Resources and the Development-Environment Dilemma*, 2009, p. 72.

²⁶ Bilder, R.B., 'International Law and Natural Resources Policies,' *Natural Resources Journal*, Vol. 20, 1980, pp. 451-486 at p. 451.

of national sovereignty or territorial or jurisdictional rights.²⁷ The dissolution of colonial bonds in a rising tide of nationalism has led to assertions of sovereignty over natural resources by States.²⁸

However, in the face of globalization and need for economic development, States have had to enter into agreements with Multinational Corporations (MNCs) for exploitation of natural resources, mainly due to their infrastructural (in)capacities (technological, financial, human resource).²⁹ They also do so with the objective of boosting foreign direct investments (FDIs) which are believed to be key for development. Developed countries invest in developing countries, with the object of securing increased imports of primary products, which are vitally important for their economy, although the benefits of such development assistance have been criticized as being limited; the employment and training effects are small in so far as the goods are exported in the form of raw materials.³⁰

MNCs have also been criticized as being exploitative of the weak legal regimes in most developing countries. Most of these corporations use this to evade liability where they are in violation of the laws.³¹ Further, these corporations have used their financial muscles to frustrate legal proceedings brought against them and further collaborate with corrupt government officials to ensure that they are not held liable for violations attributable to them.³² They have also taken advantage of their financial muscle to enter into contracts with governments and the imbalance of power usually occasions the entering into bad deals by governments.³³ These actions by the MNCs have rightly been viewed as an affront or encroachment on sovereignty and an attempt by contract to limit the legislative competence of the host country.³⁴ Arguably, the cumulative effect of it is weakened effect of state sovereignty especially in the case of developing countries.

6. Multinational Corporations and Human Rights Violations

Most MNCs have been identified as gross human rights violators in their areas of operation.³⁵ In this regard, the relationships between the MNCs and the host communities have often been

²⁷ *Ibid.*

²⁸ Brown, R., 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources,' *op. cit.*, p. 218.

²⁹ Giuliani, E., *Multinational corporations, technology spillovers and human rights' impacts on developing countries*, No. 2010/06. LEM Working Paper Series, 2010. Available at <http://www.lem.sssup.it/WPLem/files/2010-06.pdf> [Accessed on 16/11/2018]; cf. Osuagwu, G.O. and Obumneke, E., "Multinational corporations and the Nigerian economy." *International Journal of Academic Research in Business and Social Sciences* 3, no. 4 (2013): 359.

³⁰ Brown, R., 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources,' *op. cit.*, p. 4.

³¹ Osuagwu, G.O. and Obumneke, E., "Multinational corporations and the Nigerian economy." *International Journal of Academic Research in Business and Social Sciences* 3, no. 4 (2013): 359.

³² *Ibid.*; See also Giuliani, E. and Macchi, C., "Multinational corporations' economic and human rights impacts on developing countries: a review and research agenda," *Cambridge journal of economics* 38, no. 2 (2013): 479-517.

³³ See generally, Fieldhouse, D., "'A New Imperial System'?: The Role of the Multinational Corporations Reconsidered," In *International Political Economy*, pp. 177-189. Routledge, 2002.

³⁴ Brown, R., The Relationship between the State and the Multinational Corporation in the Exploitation of Resources, *op. cit.*, p. 223; See also Fieldhouse, D., "'A New Imperial System'?: The Role of the Multinational Corporations Reconsidered," In *International Political Economy*, pp. 177-189.

³⁵ Rahman, K., "MNCs and TNCs: Their Role and Socioeconomic Impact on Host Societies." *Policy Perspectives* (2007): 115-126.

characterized by conflict, ranging from ideological opposition and dispute, to armed conflict and the extensive loss of lives, livelihoods, and environments.³⁶ This arises from the fact that these corporations are in most cases viewed as ‘outsiders’ who come to interfere with the relative peace enjoyed by communities. MNCs operating in most developing countries have in many cases suppressed the rights of workers in their facilities leading to gross human rights violations, such as killings.³⁷ The activities by the MNCs especially in the mining sector have also resulted both directly and indirectly to the deaths of members of communities and livestock owned by these communities.³⁸

In this regard, the civil society in most of the countries where the MNCs are in operation, have been on the forefront in seeking to hold these entities accountable for their actions, with the aim of protecting and promoting fundamental human rights and labour rights of the employees of these corporations.³⁹ This is largely attributable to the fact that a majority of the populace amongst whom these corporations operate, are not usually aware of their rights and the mechanisms for enforcement of those rights.

Efforts by civil society organisations have, however, proved to be futile in certain instances due to the laxity in legal processes to remedy the situation, with certain players in the legal sectors being aiders and abettors of the violations. This is as a result of lack of political will in the host countries to prosecute the violators.⁴⁰ In *SERAC v Nigeria*,⁴¹ the communication alleged that the exploitation of oil resources in Ogoniland resulted to the violation of the right to health and the environment of the community, and that the government of Nigeria had condoned and facilitated the violations by the Nigerian National Petroleum Company (NNPC) whose majority shareholder was the Shell Petroleum Development Corporation (SPDC). The African Commission on Human and People’s Rights held that the State of Nigeria was in violation of the African Charter on Human and People’s Rights. States are supposed to take measures to ensure that the actions of MNCs operating within their respective countries, are not in violation of national and international law, and to also ensure that these actions are not in violation of human rights.

In order to ensure that their activities are sustainable and ‘acceptable’ in the different countries where they operate, it is imperative that the MNCs respect the rights of the communities amongst

³⁶ Ballard, C., & Bank, G., ‘Resource Wars: The Anthropology of Mining,’ *Annual Review of Anthropology*, Vol. 32, 2003, pp. 287-313, p. 289.

³⁷ Makwana, R., ‘Multinational Corporations (MNCs): Beyond the Profit Motive,’ *Share the World Resources*, 3rd October 2006, <http://www.stwr.org/multinational-corporations/multinational-corporations-mncs-beyond-the-profit-motive.html#legalrights> [Accessed on 16/11/2018].

³⁸ Luvhengo, V., "Multinational Corporations and Human Rights Violations in African Conflict Zones: The Case Study of Angola 1992-2005," PhD diss., 2007. Available at <https://core.ac.uk/download/pdf/39664716.pdf> [Accessed on 16/11/2018]; See Awuah-Nyamekye, S. and Sarfo-Mensah, P., "Mining or Our Heritage? Indigenous Local People’s Views on Industrial Waste of Mines in Ghana." In *Industrial Waste*. InTech, 2012. Available at http://cdn.intechopen.com/pdfs/30862/InTech-Mining_or_our_heritage_indigenous_local_people_s_views_on_industrial_waste_of_mines_in_ghana.pdf [Accessed on 16/11/2018].

³⁹ Social Watch Report 2009 - *Making finances work: People first*, ‘Holding transnational corporations accountable for human rights obligations: the role of civil society,’ available at <http://socialwatch.org/node/812> [Accessed on 16/11/2018].

⁴⁰ *Ibid.*

⁴¹ [2001] AHRLR 60 (ACHPR 2001).

whom they operate. Host States must ensure that these corporations are held accountable in case of any violations. Particularly, these corporations must ensure that they respect the fundamental rights of individuals and respect the environmental rights in the societies amongst whom they operate. Most importantly, they respect the rights of pastoralist communities who mostly hold land in groups or communities. Respect of these rights will ensure that these corporations gain 'legitimacy,' among these communities thus granting them 'social licence' to operate in these areas.⁴²

7. International Policy, Legal and Institutional Frameworks

The *Agreement on Trade-Related Investment Measures (TRIMs)*,⁴³ seeks to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members.⁴⁴ The agreement, thus, takes note of the vulnerable position which most developing countries usually are at and seeks to alleviate the situation in these countries. The agreement further provides for the importance of ensuring that transactions between corporations and states are done in a manner that is transparent.

The *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*,⁴⁵ seeks to reduce distortions and impediments to international trade, and takes into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.⁴⁶ TRIPS plays a useful role in the protection of intellectual property rights. However, it has been a subject of criticism in many African countries as it largely embodies western standards in I.P. Therefore, the agreement does not offer much protection especially to traditional knowledge, which is an important form of intellectual property in Africa.

The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*,⁴⁷ seeks to ensure that States establish mechanisms to ensure that parties to international business transactions who engage in corrupt practices are held liable for these actions. Each contracting party must thus take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.⁴⁸ This Convention has recognized that corruption plays a big role in illegal transactions and corrupt practices which are usually done at the expense of the governed and has sought to ensure that these entities are held accountable. This Convention could be very useful in ensuring

⁴² See Rodhouse, T. and Vanclay, F., "Is free, prior and informed consent a form of corporate social responsibility?." *Journal of Cleaner Production* 131 (2016): 785-794.

⁴³ Marrakesh Declaration of 15 April 1994, ANNEX 1A: Multilateral Agreements on Trade in Goods, (GATT secretariat publication, Sales No. GATT/1994-7).

⁴⁴ Preamble.

⁴⁵ The TRIPS Agreement, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

⁴⁶ Preamble.

⁴⁷ Dec. 18, 1997, 37 I.L.M. 1 (1998), *Convention On Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted At Paris On November 21, 1997, by a Conference Held Under The Auspices Of The Organization For Economic Cooperation And Development (OECD). Convention Signed In Paris on December 17, 1997, By the United States and 32 other Nations, adopted by the Negotiating Conference on 21 November, 1997.

⁴⁸ Art. 2.

that cases of corruption by MNCs often reported in developing countries are effectively dealt with, so as to ensure that the proceeds of natural resource exploitation benefit the locals. In this regard, institutions have to be established which will ensure that the MNCs are held to account for their actions.

The Convention has realized the importance of good governance in the running of MNCs and the need to ensure accountability. Accountability and transparency are said to be related principles which ensure good governance. In this regard, accountability mechanisms ensure that oversight is exercised over the actions of various entities. The broad aim of oversight is to ensure that initiatives by the government meet their planned objectives, respond to the needs of the citizenry and contribute to better governance and the reduction of poverty.⁴⁹

The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies and ensure that confidence is built among the societies amongst whom these enterprises operate. The Guidelines are part of the *OECD Declaration on International Investment and Multinational Enterprises*, the other elements of which, relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.⁵⁰ They apply to multinational enterprises (MNEs) in all sectors, wherever they operate.

Enterprises should contribute to sustainable development, respect human rights, abstain from improper involvement in local political activities and refrain from retaliating against workers who report practices that contravene the law, the *Guidelines* or the enterprise's policies.⁵¹ Further, they should conduct due diligence to avoid being involved in adverse impacts on matters covered by the *Guidelines*. These entities are also to endeavor to ensure that they take into consideration the views of members of the public in the governance process. All these initiatives relate to inclusion of democratic principles in the governance of MNCs. Democratic governance of MNCs is important in ensuring that there are increased levels of economic growth. The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise.⁵²

The *OECD Principles of Corporate Governance*⁵³ are intended to assist OECD and non-OECD governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries. It seeks to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the

⁴⁹ Ako, R. & Uddin, N., 'Good governance and resources management in Africa,' in Botchway, F. (ed), *Natural Resource Investment and Africa's Development*, (Edward Elgar Publishing, Inc., 2011), p. 25.

⁵⁰ Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27, June, 2000.

⁵¹ The Trade Union Advisory Committee to the OECD (TUAC) 2012, *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*, Trade Union Guide. *op cit*, p. 2.

⁵² OECD Guidelines for Multinational Enterprises, 2008.

⁵³ OECD, 2004.

process of developing good corporate governance. The Principles are of importance to both traded and non-traded companies and they represent a common basis that OECD member countries consider essential for the development of good governance practices.

The United Nations Environmental Programme (UNEP) helps States cooperate to achieve agreed environmental priorities, and supports efforts to develop, implement and enforce new international environmental laws and standards.⁵⁴ UNEP observes that to achieve their environmental commitments and goals, States need strong legislative, political and judicial systems. To promote this, UNEP seeks to use its expertise in environmental policy and law to help States further develop these institutions, and enhance their ability to effectively participate in international negotiations.⁵⁵ In this regard, therefore, Multilateral Environmental Agreements (MEAs) have been formulated and they are driven at formulating guidelines to states on how to deal with transboundary hazards. Despite the fact that these guidelines are in existence, practice has shown widespread occurrence of non-compliance by states and non-enforcement with respect to many MEAs.⁵⁶

The United Nations Global Compact is a call to companies everywhere to voluntarily align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of UN goals and issues.⁵⁷ The principles seek to guide the manner in which businesses are to operate and it seeks to ensure that these entities respect human rights in their operations. The UN Global Compact has largely adopted a voluntary approach to sustainability and currently has over 12,000 signatories from business and key stakeholder groups based in 145 countries.⁵⁸

The *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, provides guidance on the application of the "arm's length principle,"⁵⁹ which is the international

⁵⁴ United Nations Environment Programme, Environmental Governance, *op cit*, p2. It is noteworthy that the UN Environmental Assembly of the UN Environment Programme (UNEP), has since replaced the UNEP Governing Council. During a plenary meeting on 13 March 2013, the UN General Assembly (UNGA) adopted a draft resolution that changes the UN Environment Programme (UNEP) Governing Council to the "United Nations Environment Assembly of UNEP." The resolution, contained in an Annex to the note, states that the UNGA decides to change the designation of the GC of UNEP to the United Nations Environment Assembly of UNEP. This was meant to reflect its universal character.

⁵⁵ *Ibid.*

⁵⁶ Neumayer, E., *Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement, A report for the Consumer Unity & Trust Society Jaipur, India*, p. 4, available at <http://www.lse.ac.uk/geographyandenvironment/whoswho/profiles/neumayer/pdf/cuts.pdf> [Accessed on 16/11/2018].

⁵⁷ Available at <https://www.unglobalcompact.org/> [Accessed 16/11/2018].

⁵⁸ The United Nations Global Compact, Background: UN Global Compact and Leaders Summit 2013, About The UN Global Compact, available at http://www.unglobalcompact.org/docs/about_the_gc/UNGC_Leaders_Summit2013_Fact%20Sheet.pdf [Accessed on 16/11/2018].

⁵⁹ Notably, OECD member countries have agreed that to achieve a fair division of taxing profits and to address international double taxation, transactions between connected parties should be treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by unconnected parties. This is the arm's length principle. See H.M Revenue & Customs, INTM412040-Transfer pricing: legislation: rules: the arm's length principle, available at <http://www.hmrc.gov.uk/manuals/intmanual/intm412040.htm> [Accessed on 16/11/2018]. The arm's length principle is endorsed by the OECD and enshrined in Art. 9 (the Associated Enterprises Article) of the OECD

consensus on transfer pricing, i.e. on the valuation, for tax purposes, of cross-border transactions between associated enterprises.⁶⁰ In a global economy, where multinational enterprises (MNEs) play a prominent role, transfer pricing is high on the agenda of tax administrators and taxpayers alike, and governments need to ensure that the taxable profits of MNEs are not artificially shifted out of their jurisdictions and that the tax base reported by MNEs in their respective countries reflect the economic activity undertaken therein.⁶¹

The existing international framework governing multinational corporations is, however, seen to be inadequate as the international framework largely relies on implementation by States. The problem is particularly seen where there are violations within developing countries. These countries are usually not in a position to regulate the MNCs which operate within their countries since states have trans-border limitations and thus not in a position to effectively regulate the operations of the MNCs.⁶² States have also been complacent in ensuring that the MNCs are held to account for their actions. States are, thus, supposed to ensure that international norms that have been established are domesticated and ensure that any violations arising from the operations of these corporations are redressed.

8. Natural Resource Management and Multinational Corporations in Kenya

Kenya is well endowed with diverse natural resources including non-metallic minerals such as geothermal energy, soda ash, fluorspar, with the latest boosting coming from the petroleum oil discovered in Turkana. Its entrance into the extractive industries is expected to generate fiscal revenues, foreign exchange earnings and surpluses to finance much needed socio-economic development in the country.⁶³

Most of the players involved in the extractive industries are multinational companies. It is expected that these corporations are to operate in accordance with the principles of governance outlined in Article 10 of the Constitution and this includes the principle of sustainable development. Further, these entities are also to take into consideration the principle of social justice. In this regard, these entities are to ensure that the benefits accruing from the exploration of these resources are equitably shared with the members of the communities amongst whom they operate.

Model Tax Convention on Income and on Capital (usually referred to as the OECD Model Treaty or Model Convention).

⁶⁰ OECD (2010), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, OECD Publishing, available at http://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2010_tpg-2010-en [Accessed on 16/11/2018].

⁶¹ *Ibid.*

⁶² Deva, S., "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" *Connecticut Journal of International Law*, Vol. 19, 2003, pp. 1-57.

⁶³ See Johannes, E.M., Zulu, L.C. and Kalipeni, E., "Oil discovery in Turkana County, Kenya: a source of conflict or development?" *African Geographical Review* 34, no. 2 (2015): 142-164; Mkutu Agade, K., "Ungoverned Space and the Oil Find in Turkana, Kenya." *The Round Table* 103, no. 5 (2014): 497-515; Patey, L., "Kenya—An African oil upstart in transition." (2014). Available at https://ora.ox.ac.uk/catalog/uuid:5abd035d-5f6a-4d53-8f5b-5adef249c31b/download_file?file_format=pdf&safe_filename=WPM-53.pdf&type_of_work=Working+paper [Accessed on 16/11/2018].

The benefits to be shared are usually either in monetary or non-monetary form. Kenya is also in the process of formulating the Natural Resources (Benefit Sharing) Act which seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities and; to establish the Natural Resources Benefits Sharing Authority. Benefit sharing agreements are to be entered into between the corporations seeking to conduct exploration activities with the respective counties.

The corporations involved in the extraction activities are not only supposed to focus on maximising profits, but also impact positively on the lives of the communities amongst whom they operate. Corporate Social Responsibility is, thus, an important tool that can be used by MNCs as a business tool to promote a positive image to business stakeholders, and as a way to improve the quality of life among citizens of the host countries.⁶⁴ However, the work of MNCs must go beyond CSR and be sustainable in the long run, as CSR in most cases is largely philanthropic and not anchored in law.⁶⁵

In carrying out their functions, the various MNCs are to ensure that they operate in a manner that is sustainable. They are to ensure that their activities are socially sustainable, environmentally sustainable and economically sustainable. These three pillars of sustainability were identified by the World Commission on Environment and Development (WCED), *Our Common Future*, to be inextricably linked and deserving attention by all stakeholders. The emergence and popularization of sustainable development, has led to concerted efforts by players in the private sector to integrate sustainability in their activities and operations.⁶⁶

Further, the principle has been the subject of judicial interpretation as was the in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* where Judge Weeramantry, argued that the concept of sustainable development reaffirms that there must be both development and environmental protection, and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law.⁶⁷

Various initiatives driven at ensuring sustainability have thus been undertaken by players in the private sector. The banking industry has particularly played a key role in this and this was particularly seen in 2003 when private banks adopted the Equator Principles which enable banks to evaluate the social and environmental impacts of their actions and the risks potentially posed by projects which they finance. In addition to this, the UN Global Compact initiative was also established in 2000 with the aim of having ‘a more sustainable and inclusive global economy.’⁶⁸ All these initiatives have been adopted on order to curb the ill associated with the activities of MNCs.

⁶⁴ Pimpa, N., ‘Multinational Corporations: Corporate Social Responsibility and Poverty Alleviation in Thailand,’ School of Management, RMIT University.

⁶⁵ See generally, Porter, M.E. & Kramer, M.R., ‘Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility,’ *Harvard Business Review*, December, 2006.

⁶⁶ Kariuki, F., ‘Sustainability in the Financial Sector in Kenya,’ Kenya Bankers Association, WPS/01/15.

⁶⁷ *Hungary v Slovakia*, 1997, WL 1168556 ICJ.

⁶⁸ United Nations Global Compact, ‘The Ten Principles,’ available at www.unglobalcompact.org/abouttheGc/TheTenprinciples/index.html, [Accessed 16/11/2018].

It is, however, important that the sustainability models adopted by MNCs be able to meet the needs of the countries where they operate. MNCs must be mindful of how they identify, define and prioritise their sustainability agenda.⁶⁹ In this regard, these entities are supposed to ensure that they take into consideration the various sustainability challenges in order to ensure that the initiatives are successful and that they do not lead to further marginalization of certain groups.

Due to the infrastructural and financial (in) capacity of the country, Kenya could only work with MNCs to achieve its dream of joining oil producing countries, and in this case Tullow Oil, amongst others were contracted to carry out the work. It is hoped that Kenya and the local people will benefit from this discovery. However, the resource-curse phenomenon is very real and Kenya must not follow the steps of other countries around Africa and the world where natural resources, particularly hydrocarbons have resulted in environmental degradation and violent conflicts, ultimately leading to impoverishment and devastation of the lives of the locals. It has been rightly pointed out that governance issues such as weak environmental policy, resource utilization policy and fiscal policies has come to be viewed as key factors inhibiting the ability of countries to use revenues from their extractive industries for development.⁷⁰

8.1 Constitution of Kenya, 2010

The Constitution of Kenya 2010 has provisions that seek to guide the operations of various entities in the country, including MNCs. Firstly, the Constitution in Article 10(1) provides for national values and principles of governance which are to bind all State organs, State officers, public officers and all persons, including legal persons.

The principle of sustainable development is particularly of importance in Kenya. Related to this principle are the principles of intragenerational equity and that of intergenerational equity. The former has been defined in Section 2 of EMCA to mean that all people within the present generation have the right to benefit equally from exploitation of the environment, and that they have an equal entitlement to a clean and healthy environment. The principle of intergenerational equity, on the other hand, asserts that all generations hold the natural environment of our planet in common with other species, people, and with past, present and future generations.⁷¹

In Kenya, the two principles have received constitutional recognition in Article 60(1) which provides for the principles of land holding, stating that land in the country is to be held in a manner that is *inter alia* equitable, efficient, productive and sustainable. The government has a mandate of ensuring that investments made on land benefit members of the community and Parliament is mandated to enact legislation ensuring that investment in property benefits local communities and their economies.⁷² In this regard, mechanisms are supposed to be put in place to ensure that there is benefit-sharing with the local communities.

⁶⁹ Richardson, B., 'Africa: from object to agent of socially responsible investment' in Francis Botchway, F. (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar Publishing Limited, 2011).

⁷⁰ Obati, G.O. & Owuor, G., 'Extractive Industries, Natural Resources Management and Sustainable Development: a Review', August, 2010, p. 1, available at www.sap4africa.net/.../EI_NRM_and_Sustainable_Development_August [Accessed on 16/11/2018].

⁷¹ Muigua, K. & Kariuki, F., 'Sustainable Development and Equity in the Kenyan Context' UNLJ, Vol. 7(1), 2012.

⁷² Art. 66(2).

The Constitution further seeks to ensure that entities or persons who are not citizens, including MNCs, are to hold land for a limited period of time (99 years) and that they are only to hold land under leasehold tenure.⁷³ This is meant to ensure sustainable land utilisation and that the leases are able to take future land needs into consideration. Article 42 further provides for 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. The government is to undertake legislative measures to ensure the protection of the environment and ensure communities are able to benefit from the activities undertaken in their environments.

Further, the Constitution creates an obligation on all persons to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁷⁴ A 'person' has been defined in the Constitution to include a company, association or other body of persons whether incorporated or unincorporated.⁷⁵ In this regard, the MNCs are also under an obligation to ensure the protection and respect of the environment. These corporations can also be held liable for the violation of human rights as the provisions of the Bill of Rights binds State organs and persons.⁷⁶ The Constitution requires Parliament to enact legislation to: ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.⁷⁷

Noteworthy are the obligations of the State regarding the environment. The Constitution outlines them as including the obligation 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 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 and; encourage public participation in the management, protection and conservation of the environment..⁷⁸

The Constitution provides that a transaction is subject to ratification by Parliament if it involves 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; and is entered into on or after the effective date.⁷⁹ The foregoing constitutional provisions lay a basis for other legislation to be enacted in the country to govern investments by MNCs in the country.

⁷³ Art. 65 (1).

⁷⁴ Art.69 (2).

⁷⁵ Art.260.

⁷⁶ Art.20 (1).

⁷⁷Art. 11(3).

⁷⁸ Art. 69(1).

⁷⁹ Art. 71, Constitution of Kenya. Art. 260 thereof defines 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.

8.2 The Petroleum (Exploration and Production) Act

The *Petroleum (Exploration and Production) Act*⁸⁰ is an Act of Parliament to regulate the negotiation and conclusion by the Government of petroleum agreements relating to the exploration for, development, production and transportation of, petroleum and for connected purposes.⁸¹ "Petroleum" is a broad term that is used to mean mineral oil and includes crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.⁸² The Act vests all petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other person.⁸³ The Act empowers the Minister (now Cabinet Secretary) to, on behalf of the Government, negotiate, enter into and sign petroleum agreements with a contractor and petroleum agreements must, subject to the provisions of this Act, be in the prescribed form.⁸⁴

The Government is to enter into petroleum agreements only with contractors who have the financial ability, technical competence and professional skills necessary to fulfill the obligations under the petroleum agreement.⁸⁵ The Act also provides for the general terms and conditions of petroleum agreements, which notwithstanding any other written law and subject to this Act, shall be implied in every petroleum agreement an obligation on the contractor.⁸⁶ Any petroleum agreement must be negotiated on the basis of the model production sharing contract substantially in the form set out in the Schedule.⁸⁷ Missing from the general terms and conditions of petroleum agreements provided under the Act, is the implied requirement to preserve and clean the environment. Public participation as required by the Constitution of Kenya 2010 is also missing from the Act as a whole. There is also no express requirement for benefit sharing under the Act.

The proposed law, *Petroleum (Exploration, Development and Production) Bill, 2017*, was developed to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations; and for connected purposes. If approved, the Bill seeks to repeal *Petroleum (Exploration and Production) Act*.⁸⁸ Notably, the Bill introduces the concept of "local content" which means the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.⁸⁹ For the purpose of subsection (1) the contractor must, before engaging in upstream petroleum operations, prepare and submit a long term and annual local content plan which corresponds with the work program to the Authority for approval.⁹⁰ The local content plan should address- employment and training; research and development;

⁸⁰ Cap. 308, Laws of Kenya.

⁸¹ Preamble.

⁸² S. 2.

⁸³ S. 3.

⁸⁴ S. 5.

⁸⁵ S. 8.

⁸⁶ S. 9.

⁸⁷ *Petroleum (Exploration and Production) Regulations*, 1984 [L.N. 193/1984.], Regulations under S.6.

⁸⁸ Chapter 308, Laws of Kenya.

⁸⁹ Clause 77(1), *Petroleum (Exploration, Development and Production) Bill, 2015*.

⁹⁰ *Ibid*, Clause 77(2).

technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; and succession plans for positions not held by Kenyans.⁹¹

The proposed law requires that a contractor and a sub-contractor of the contractor conducting upstream petroleum operations must comply with local content requirements in all of the contractor's or sub-contractor's operations; give priority to services provided and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by the Kenya Bureau of Standards or in absence of a Kenyan standard any other internationally acceptable standard that the (Upstream Petroleum Regulatory) Authority shall approve; and ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain: Provided that the cost of local content should not be higher than at any other place.⁹²

8.3 Land Act, 2012

The *Land Act, 2012*,⁹³ is an Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes.⁹⁴ The Act also provides for allocation of public land by the National Land Commission and states that subject to the Constitution and any other law, the Commission may, in consultation with the national and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the *Vienna Convention on Diplomatic Relations*.⁹⁵ The Act goes further to state that at the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be.⁹⁶

8.4 The Wildlife Conservation and Management Act, 2013⁹⁷

This Act provides for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.⁹⁸ Under the Act, the Kenya Wildlife Service is established with functions which include, *inter alia*, promoting or undertaking commercial and other activities for the purpose of achieving sustainable wildlife conservation.⁹⁹ The Act has made attempts to provide for the regulation of wildlife dealings connected to bio-piracy¹⁰⁰ and bio-prospecting.¹⁰¹ For one to undertake such activities, the Act provides that such persons must obtain a permit from the Cabinet Secretary.

⁹¹ Clause 77(3).

⁹² Clause 77(1), *Petroleum (Exploration, Development and Production) Bill, 2015*.

⁹³ No. 6 of 2012, Laws of Kenya.

⁹⁴ Preamble.

⁹⁵ S. 12(5).

⁹⁶ S. 12(6).

⁹⁷ No. 47 of 2013, Laws of Kenya.

⁹⁸ Preamble.

⁹⁹ S. 7.

¹⁰⁰ S. 3 of the Act defines bio-piracy to mean 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.

¹⁰¹ S. 3 of the Act defines bio-prospecting to mean the exploration of biodiversity for commercially valuable genetic and biochemical resources. This definition echoes that offered by the Convention on Biological Diversity (CBD) Secretariat which defines bioprospecting as 'the exploration of biodiversity for commercially valuable genetic and biochemical resources,' [UNEP/CBD/COP/5/INF/7].

Certain considerations are to be taken into account before granting the permit and these include; ensuring that the interest of all stakeholders, both public and private is taken into account and that the interests of communities amongst whom these resources are found is protected. There are certain prerequisites before a person is granted a licence. An applicant for the licence has to disclose all material information relating to the relevant bio-prospecting and on the basis of that disclosure has obtained the prior consent of the stakeholders for the provision of or access to such resources. The applicant must also disclose any benefit-sharing arrangements that have been proposed by the stakeholders.¹⁰²

The Act states that the Service shall, in all bio-prospecting involving any wildlife resources, be a joint partner on behalf of the people of Kenya.¹⁰³ In what may be seen as a move to strengthen the Service's work, the Act states gives the Cabinet Secretary the mandate, on the recommendation of the Service, to require that a particular per centum of the proceeds from the bio-prospecting be contributed to the Wildlife Endowment Fund,¹⁰⁴ established under the Act.¹⁰⁵ In establishing conservation measures, it is required that the provisions of this Act are to be in line with those of EMCA.¹⁰⁶

Section 27 of this Act is of great significance as it provides that no user rights or other licence or permit granted under this Act shall exempt a person from complying with any other written law concerning the conservation and protection of the environment.¹⁰⁷ Subsequently, before one is granted user rights over a certain natural resource, they have to ensure that they are in compliance with the requisite environmental impact assessment studies.¹⁰⁸

The Act has further mandated the county governments with the management of resources, such as national reserves within their jurisdictions and the county governments have been authorized to enter into agreements on the management of the national reserves, and the management plans formulated should include provisions for the resolution of disputes that may arise from conflicts on these resources.¹⁰⁹ The foregoing provisions are useful in preventing recurrence of bio-prospecting and bio-piracy cases such as the Lake Bogoria extremophile case, where Kenya Wildlife Service sought money from a multinational for taking, patenting, cloning and selling "extremophile" microorganisms collected from lakes in Kenya.

In the late 1980s, scientists connected to Leicester University (UK) collected microorganisms living in the hot geysers of two of Kenya's lakes. The organisms produce enzymes that were found to be great fabric softeners and "faders," giving fabrics a stone-washed appearance popular with consumers.¹¹⁰ With assistance from scientists at the International Centre of Insect Physiology and Ecology (ICIPE), KWS launched a claim for a share of the proceeds accruing to the US

¹⁰² S. 22(4).

¹⁰³ S. 22(6).

¹⁰⁴ See s. 23.

¹⁰⁵ S. 22(7).

¹⁰⁶ S. 26.

¹⁰⁷ S. 27(1).

¹⁰⁸ S. 27(2).

¹⁰⁹ S. 35(3).

¹¹⁰ Heuer, S., 'The Lake Bogoria Extremophile: A Case Study,' 2004, pp. 8-9, available at <http://www.public.iastate.edu/~ethics/LakeBogoria.pdf> [Accessed on 16/11/2018].

multinational giant Procter & Gamble and to Genencor International BV of the Netherlands with respect to the sales of Tide Alternative Bleach Detergent and "stonewashing" material.¹¹¹

Kenya Wildlife Service maintains that the collectors never had the proper permits to take the microorganisms for commercial use in the first place. The Kenya Wildlife Service (KWS) sought a share of the hundreds of millions of dollars generated from the sales of the popular detergent and a bleaching agent manufactured in the US whose active ingredients were acquired in Kenya illegally. The case has not yet been resolved and it is yet to be seen what will become of it.

The most serious legal issue facing bioprospecting in the global commons, areas beyond national jurisdiction internationally recognised as the shared resources of humankind, is the lack of clear rules and guidelines, since various environmental, trade, and geographically-specific agreements currently offer incomplete, ambiguous, or conflicting provisions relating to bioprospecting activities; resulting in no clear rules on ownership, access, benefit-sharing, and environmental responsibility for bioprospecting in the global commons. The result of lack of clarity and distinct gaps in the existing laws encourages bioprospecting by companies keen to exploit the fragmented legal frameworks and policies for their own commercial benefit.¹¹² Going by the foregoing provisions, it is hoped that the Act may enable Kenya effectively deal with such incidences in future, at least at the national level. However, there is required much political goodwill to see this fully implemented.

8.5 Mining Act 2016

The Mining Act 2016¹¹³ was enacted to give effect to Articles 60, 62(1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. The Act provides for accruing benefits in the form of financial and other benefaction to which communities in mining areas are entitled to receive from the proceeds of mining and related activities.¹¹⁴

This clarification on what entails accruing benefits ensures that the targeted population does not direct all their focus on the monetary benefits while paying little or no attention to the non-monetary forms. This may be important in averting any disputes that may arise where a community's expectations of direct financial returns are not realized. The provisions may also be a good basis for working with the investors to get more involved in corporate social responsibility activities that directly benefit communities in terms of improved social amenities and infrastructure. Indeed, the *2009 Africa Mining Vision* correctly points out that the benefits to the local community may come in various forms including revenues which accrue to the community because of its location (property rates and land rents); benefits which are the community's share of central government revenues from mining and non-income benefits such as employment for

¹¹¹ *Ibid.*

¹¹² United Nations Environment Programme, 'Bioprospecting in the Global Commons: Legal Issues Brief,' p. 1, available at <http://www.unep.org/delc/Portals/119/Biosprecting-Issuepaper.pdf> [Accessed on 16/11/2018].

¹¹³ Act No. 12 of 2016, Laws of Kenya (Government Printer, Nairobi).

¹¹⁴ S. 42(1); s. 47; s. 109(i); s. 115; S. 117(2)(j); S. 183, Mining Act 2016; See also Mining Act (Licence and Permit) Regulations, LN. No. 87 of 2017; Mining (Use of Local Goods and Services) Regulations, LN. No. 83 of 2017; Mining (Employment and Training) Regulations, 2017, LN. No. 82 of 2017; Mining (Use of Local Goods and Services) Regulations, LN. No. 81 of 2017;

local residents; assistance to community health and educational institutions; access to the use of mine infrastructure by the general public, amongst others.¹¹⁵

8.6 The Environmental (Management and Co-Ordination) Act, 1999

The *Environmental (Management and Co-Ordination) Act, 1999*¹¹⁶ was enacted to provide the framework provisions to regulate access to genetic resources (bio-prospecting) and benefit sharing, implemented through gazettelement of *Ministerial Regulations on Access to Genetic Resources and Benefit Sharing*,¹¹⁷ and generally providing for the establishment of an appropriate legal and institutional framework for the management of the environment.

Section 3(1) thereof states that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may take such orders, issue such writs or give such directions, as it may deem appropriate to, *inter alia*, prevent, stop or discontinue any act or omission that is deleterious to the environment; compel any public officer; to take measures to prevent or discontinue any act or omission deleterious to the environment; require that any on-going activity be subjected to an environmental audit in accordance with the provisions of this Act; compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and provide compensation for any victims of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing. Unless these issues are sufficiently addressed, Kenya and its people risk suffering both in the short-term and long-term in the hands of MNCs.

8.7 Community Land Act 2016

The *Community Land Act, 2016*¹¹⁸ seeks to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.¹¹⁹ The Act defines "community" to mean an organized group of users of community land who are citizens of Kenya and share any of the following attributes- common ancestry; similar culture; socio-economic or other common interest; geographical space; or ecological space.¹²⁰ This definition is relevant in that it helps clarify the target group in case of benefits accruing from what would fall under community land and consequently avert potential conflict. This is affirmed under section 30 thereof provides that every member of the community has the right to equal benefit from community land, where equality includes full and equal enjoyment of rights of use and access. Section 35 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;

¹¹⁵ African Union, *Africa Mining Vision*, 2009, p. 23.

¹¹⁶ No. 8 of 1999, Laws of Kenya.

¹¹⁷ Legal Notice number 160.

¹¹⁸ No. 27 of 2016, Laws of Kenya.

¹¹⁹ Preamble, *Community Land Act, 2016*.

¹²⁰ Community Land Act 2016, section 2.

with transparency and accountability; and on the basis of equitable sharing of accruing benefits. This provision thus requires all those charged with administration of such jointly owned resources to not ensure equitable sharing of accruing benefits but also sustainable and productive use and management of the same.

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; 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.¹²¹

The content of this provision, if fully implemented, is likely to impact positively on the community in ways that ensure that the community becomes self-sustaining as far as livelihood sustenance is concerned. It would also help in ensuring that MNCs do not take advantage of communities or the state agencies in general. However, it must be noted that for the community to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way by the MNCs. They must be made to understand that the expected benefits will not only come in monetary terms only and must be made aware of the various non-monetary forms that benefits may accrue to them, envisaged under the *Nagoya Protocol*. Some of the forms 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.

9. Regulating MNCs

The Regulation of multinational companies operating in developing countries, presents difficulties especially with regard to extractive industries. Scholars have pointed out that demands for greater regulation have been met with demands for stronger protection. In fact, corporations have been expected to pursue more active strategies to achieve sustainable solutions to social and environmental problems, make a major contribution to development, take account of their impact on society and the environment in the ways that they do business, employ environmentally sensitive facilities; product design and production methods that reduce energy consumption and control emissions and active participation in social and humanitarian projects.¹²²

However, this has not always been the case since the MNCs have put forth a list of demands in countries where they operate. For instance, in Kenya, it has been noted that after independence, most MNCs entering Kenya were interested in import substitution rather than in export production, and they produced final consumer goods rather than intermediate capital goods. In the negotiations that preceded their entry, they demanded from the Kenya government import barriers and market protection.¹²³

¹²¹ Ibid, section 36.

¹²² Haugh, H.M. & Talwar, A., "How Do Corporations Embed Sustainability across the Organization?" *Academy of Management Learning & Education*, Vol. 9(3), pp.384–396.

¹²³ Jansen, K., "Multinational Corporations in the Political Economy of Kenya by Steven W. Langdon,"

MNCs operating in Kenya are required to operate within the legal structure that has been established and this includes the international legal frameworks that the country is party to. Other stakeholders like the civil society play a big role in ensuring that these corporations are held accountable. In this regard, the pressures from these entities have had positive results and it can be seen that most of the MNCs have adopted sustainable practices.

In cases of violation of their obligations, the MNCs are to be held liable and this ensures that these entities are able to comply with their obligations. Challenges however usually arise in the enforcement of liability since most of these entities are not usually incorporated in Kenya. In this regard, even where judgment is entered against these entities, enforcement becomes difficult and further worsened when these entities remove their assets from the jurisdiction.

The investment agreements between MNCs and governments have been one-sided, governments give foreign companies rights without imposing responsibilities, or without even facilitating their ability to ensure that the MNCs live up to their obligations.¹²⁴ Corporations' limited liability and corporate personhood rights, must be eliminated, and they should no longer have the same rights as human beings, and should instead serve the public. Holding shareholders accountable for any harm caused to the community, employees or the environment would create socially responsible business models.¹²⁵

In Kenya, the legal framework governing the operations of MNCs is scattered in different laws with the Constitution laying the basis for this. As discussed in the preceding sections, the Constitution contains provisions meant at ensuring that these entities respect the rights of the people amongst whom they operate. Further, the Constitution has provided in Article 20 that the provisions of the Bill of Rights are applicable to all persons, including private persons. In this regard, a person claiming that their rights have been violated by these private entities can seek the enforcement of their rights in a court of law.

Several Acts of Parliament have also been enacted to provide for the manner in which these entities are to operate. Firstly, the Investment Promotions Act, 2004 (the IPA) seeks to encourage investment in the country and ensure the elimination of bureaucratic red-tapes which are usually faced by investors in the country. Under the Act, the Kenya Investments Authority is established and tasked with the implementation of the goals of the IPA.

In order to eliminate illegal transactions by the MNCs, the Central Bank of Kenya Act (Cap 491) provides that any payments to be made outside the country by these entities must be effected through a bank that has been authorized by the CBK to ensure accountability in the transactions effected by these entities.

The *Natural Resources Benefit Sharing Bill, 2014* provides for offences that an organisation can be held liable for. An organisation which fails to furnish information that is required by the Benefit Sharing Authority under the Act or which furnishes wrongful information commits an offence and

The Journal of Developing Areas, Vol. 17, No.4, Jul., 1983, pp. 526-528, p. 52.

¹²⁴ *Ibid*, p. 473.

¹²⁵ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' *op cit*.

is liable for a fine. This provision seeks to ensure that the officers tasked with managing these organisations are held accountable for their actions and seeks to ensure integrity in their actions.

In order to ensure compliance with environmental regulations, EMCA provides that environmental inspections are to be conducted. In this regard, these inspections are to be conducted to determine whether corporations are in compliance with environmental requirements. The Act has thus prohibited any person from hindering or obstructing environmental inspectors in the exercise of their duties under the Act or regulations made thereunder.¹²⁶ Under the Act, it is also required that corporations carry out improvements recommended by the environmental inspector and ensure that they comply with the environmental standards that have been provided. This Act thus ensures that corporations are held accountable for any harm that they occasion on the environment and that corrective measures are adopted in case of violation.

The foregoing discussions reveal the fact that the legislation regulating MNCs are to be found in various legislations enacted in the country. The fact that the provisions regulating MNCs in the country are scattered in different legislations makes it difficult for these provisions to be effectively enforced and as such MNCs can easily evade liability in cases where they are in violation of their obligations. There exist loopholes in the national legal frameworks, and there is need to establish legally binding framework to ensure that they operate in a socially responsible manner to protect local communities and the environment.

9.1 Human Rights-Based Approach to Natural Resources Governance

The *Declaration on a Human Rights-Based Approach to Natural Resources Management*¹²⁷ which was adopted in preparation to the Rio+20 Summit in March, 2012 affirmed the interdependence between human and economic development as well as the integral nature of the earth, our home.¹²⁸ Also noteworthy, is the *1992 Rio Declaration* which places “*human beings at the centre of concerns for sustainable development, and are entitled to a healthy and productive life in harmony with nature.*” The right to a healthy environment is a human right recognized and protected by the *International Covenant on Economic, Social and Cultural Rights*, as well as in the jurisprudence of a number of national legislations, including Kenya’s.¹²⁹ According to the OECD Principles of Corporate Governance, Enterprises should respect human rights. They should have a human rights policy, conduct human rights due diligence and have legitimate processes in place for remedying actual adverse impacts where they have *caused* or *contributed to* those impacts.¹³⁰

The Constitution of Kenya 2010, states that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. Further, it 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

¹²⁶ EMCA, S.137 (a).

¹²⁷ Inter-American Commission on Human Rights and African Commission on Human and People’s Rights.

¹²⁸ Preamble.

¹²⁹ See Art. 42 & 43, Constitution of Kenya, 2010.

¹³⁰ The Trade Union Advisory Committee to the OECD (TUAC) 2012, *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*, Trade Union Guide, p. 2, available at <http://www.tuaoecdmguidelines.org/Docs/TradeUnionGuide.pdf> [Accessed on 16/11/2018].

realisation of the potential of all human beings.¹³¹ Article 10 provides the national values and principles of governance which include, *inter alia*, 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. Read together, the foregoing constitutional provisions bind even MNCs. While engaging in natural resource exploitation they are to observe human rights.¹³² Natural resources can be used to jump-start economies and invest in the infrastructure, institutions, and quality public services needed to translate growth into human development, if managed in transparent, inclusive, and sustainable ways.¹³³

9.2 Sustainability Reporting

Sustainability reporting has emerged as a common practice of 21st-century business, in that whereas sustainability disclosure was the province of a few unusually green or community-oriented companies, today it is a best practice employed by companies worldwide.¹³⁴ Further, a focus on sustainability helps organizations manage their social and environmental impacts and improve operating efficiency and natural resource stewardship, and it remains a vital component of shareholder, employee, and stakeholder relations.¹³⁵ Indeed, sustainability reporting has been linked to a number of benefits including: better reputation; meeting the expectations of employees; improved access to capital; and increased efficiency and waste reduction.¹³⁶

Sustainability reporting provides firms with the knowledge necessary to reduce their use of natural resources, increase efficiency and improve their operational performance. In addition, sustainability reporting can prepare firms to avoid or mitigate environmental and social risks that might have material financial impacts on their business, while delivering better business, social, environmental and financial value — creating a virtuous circle.¹³⁷ For reporting to be as useful as possible for managers, executives, analysts, shareholders and stakeholders, a unified standard that allows reports to be quickly assessed, fairly judged and simply compared is a critical asset. As firms worldwide have embraced sustainability reporting, the most widely adopted framework has been the Global Reporting Initiative (GRI) Sustainability Reporting Framework.

9.3 Environmental Litigation

Environmental litigation often transcends national jurisdictions, and it has been asserted that there is need for more effective national and international dispute settlement systems for resolving

¹³¹ Art. 19.

¹³² Art. 20(1) state that ‘the Bill of Rights applies to all law and binds all State organs and all persons.’

¹³³ Grynspan, R., “The role of natural resources in promoting sustainable development,” Remarks for Rebeca Grynspan, Associate Administrator of UNDP on the occasion of the Opening of the 67th UN General Assembly side event on “The Role of Natural Resources in Promoting Sustainable Development” UN New York, 28 September, 2012, available at <http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/09/28/rebeca-grynspan-the-role-of-natural-resources-in-promoting-sustainable-development-/> [Accessed on 16/11/2018].

¹³⁴ Ernst & Young Global Limited, ‘The Value of Sustainability Reporting,’ available at <http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/Value-of-sustainability> [Accessed on 16/11/2018].

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

conflicts.¹³⁸ Judges, public prosecutors and auditors have the responsibility to emphasize the necessity of law to achieve sustainable development and help make institutions effective.¹³⁹ In a Congress organized by UNEP, Chief Justices from around the world declared that States should cooperate to build and support the capacity of courts and tribunals, as well as prosecutors, auditors and other related stakeholders at the national, sub-regional and regional levels, to implement environmental law, and to facilitate exchanges of best practices in order to achieve environmental sustainability by encouraging relevant institutions, such as judicial institutes, to provide continuing education.¹⁴⁰

They further stated that environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law, predicated on: fair, clear and implementable environmental laws; public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the *Rio Declaration*, including exploring the potential value of borrowing provisions from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (*Aarhus Convention*) in this regard; accountability and integrity of institutions and decision makers, including through the active engagement of environmental auditing and enforcement institutions; clear and coordinated mandates and roles; accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies; recognition of the relationship between human rights and the environment; and specific criteria for the interpretation of environmental law.¹⁴¹

In addition to this, they declared that environmental sustainability, can only be achieved if there exist effective legal regimes, coupled with effective implementation and accessible legal procedures, including with regard to *locus standi* and collective access to justice, and a supporting legal and institutional framework and applicable principles from all world legal traditions. Justice, including participatory decision-making and the protection of vulnerable groups from disproportionate negative environmental impacts, must be seen as an intrinsic element of environmental sustainability.¹⁴²

In the *Endorois* case, the African Commission on Human Rights interpreted the right to property as including a justiciable right to the use of land by an indigenous community without real title.¹⁴³ The Commission laid down more detailed requirements for the justification of encroachment upon property. It examined the justifiability of the state's eviction of the Endorois from their ancestral land against the criteria of proportionality, participation, consent, compensation and prior impact assessment basically derived from Article 14 of the African Charter.¹⁴⁴ It found the state in violation of the right to property, as well as the right to development for its 'disproportionate'

¹³⁸ UNEP, *Advancing Justice, Governance and Law for Environmental Sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General, 2004*, Declaration No. 1.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, Declaration 2.

¹⁴² *Ibid.*

¹⁴³ *Centre for Minority Rights Development & Others v Kenya* (2009), AHRLR 75 (ACHPR 2009) (*Endorois* case), para. 287.

¹⁴⁴ *Ibid.*, para. 218 & 224-228.

forced removal of the community, its failure to allow effective participation or hold prior consultation with a view to secure the consent of the Endorois, the absence of reasonable benefit enjoyed by the community, the failure to provide collective land of equal value or compensation after dispossession, and the failure to conduct prior environmental and social impact assessment.¹⁴⁵ Well implemented, the recommendations contemplated by the Declaration can go a long way in empowering the national courts and international legal institutions to enforce laws against MNCs.

10. Conclusion

Transnational corporations are capable of taking a more proactive role in environmental protection due to their financial, managerial and technological strength; the latter includes access to clean technologies and pollution-abatement technology.¹⁴⁶ They must be closely monitored by law and policy enforcers to ensure that they abide by the law and fulfill their obligations as per the law and the agreements.¹⁴⁷ However, it is to be appreciated, as already noted herein, that host governments especially in developing countries, in their dealings with the multinationals are in a very weak bargaining position, and this is ultimately reflected in the terms of mining and petroleum agreements, particularly the ones directly touching on the fiscal regime.

Foreign direct investment is of assistance for economic growth. However, taking full advantage of the benefits of FDI requires a well-educated labor force, to promote technological diffusion and the adoption of better technologies.¹⁴⁸ The same applies to the development of natural resources. Here too, it is beneficial to have a high level of human capital,¹⁴⁹ to allow for innovation to take place, starting in the natural resources sector and spreading downstream or to other sectors.¹⁵⁰ An economy with strong institutions and protection of property rights is the best incentive for FDI.¹⁵¹ Geographical proximity and cultural affinity are thought to give regional MNCs an advantage in terms of familiarity with the operational environment and business needs in the host country. From the host country's point of view, developing country MNCs are seen as likely to be in possession of more appropriate technologies, with a greater potential for technology transfer – and better able to address the needs of local consumers, especially the poor.¹⁵² Good environmental governance

¹⁴⁵ *Ibid*, para. 238 & 281-298.

¹⁴⁶ Gafaru, A.A., Are Multinational Corporations Compatible with Sustainable Development? The Experience of Developing Countries, Georgia Tech Center for International Business Education and Research, Working Paper Series 2007-2008, *Working Paper*, 001-07/08, p. 12.

¹⁴⁷ Looking at the role of MNCs in host countries, the UNCTAD report notes that 'through their foreign investments and global value chains, TNCs can influence the social and environmental practices of businesses worldwide for the better, although there is uneven application and a lack of standardization regarding reporting' (p. cxxxvi). The need, stresses the report, is for the promotion of investment to be tied to CSR standards, not with one impeding the other. In this regard the role of government policies and institutional frameworks is seen as pivotal by the reports' authors.

¹⁴⁸ See generally, Javorcik, B.S., 'Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers through Backward Linkages,' *The American Economic Review*, Vol. 94(3), Jun., 2004, pp. 605-627.

¹⁴⁹ See Gregorio, J.D., The Role of Foreign Direct Investment and Natural Resources in Economic Development, Central Bank of Chile, Working Papers, N° 196, Enero 2003, p. 12. See also Borensztein, E., *et al*, 'How does foreign direct investment affect economic growth?' *Journal of International Economics*, Vol.45 (1)1 June 1998, pp. 115–135.

¹⁵⁰ *Ibid*, p. 12.

¹⁵¹ *Ibid*, p. 13.

¹⁵² Obuah, E.E. (ed), 'The Sub-Saharan Business Environment Report (SABER): 2011 Findings', *International Academy of African Business and Development (IAABD)*, Vol. 13, pp. 186-206, p. 201, (Peer-

should take into account the role of all actors that affect the environment. From governments, to NGOs, the private sector and civil society, cooperation is critical to achieving effective governance that can help move towards a more sustainable future.¹⁵³

Multinational Corporations should operate within the rule of law as envisaged by the Constitution of Kenya and respect the previously mentioned values and principles.

Reviewed Proceedings of the 13rd Annual International Conference), held at Mazagan Beach Resort 2400 El Jadida, Casablanca, Morocco, May 15-19, 2012, available at http://www.clas.ufl.edu/users/aspring/publications/Spring_2012_2012IAABD_SABER_Findings.pdf [Accessed on 16/11/2018].

¹⁵³ United Nations Environment Programme, *Environmental Governance*, *op. cit* p. 2; See also Art. 10, Constitution of Kenya.

Eradicating Poverty for Inclusive Development in Kenya

Abstract

The sustainable development goals as captured under the United 2030 Agenda for Sustainable Development (SDGs) seek to ensure that natural resources are managed in a way that balances the needs of human beings and the need for conservation of these resources for the sake of present and future generations. The SDGs acknowledge the complex relationship between economic, social and environmental elements of development. They also set goals and targets that states must meet by the year 2030 using these resources. SDG Goal 1 thereof seeks to ensure that countries end poverty in their all its forms in their territories as part of a prerequisite for the realisation of sustainable development. It is an open secret that world is still struggling with abject poverty and huge inequalities. Kenya is no exception since a huge number of its population are still considered to be living below poverty line. Thus, even when the country boasts of impressive economic growth, this class of people have little, if anything, to celebrate since the gains do not trickle down to positive touch their lives. As such, they often feel marginalised and sidelined as far as national development agenda is concerned.

This paper discusses how the SDG Goal 1 can be achieved in Kenya especially in the aftermath of Corona Virus Disease pandemic (COVID 19) which has affected the global economy, with the developing countries suffering the greatest. The paper offers some recommendations that may be considered for the sake of ensuring poverty in all its form is eradicated, consequently allow all sections of the society to feel that they belong, and that that the government's development agenda is inclusive. The recommendations range from financial support for empowerment, to climate change and gender equality and equity, among others. Poverty eradication is an important step towards ensuring that every person's inherent dignity and the right to have that dignity respected and protected is realised as guaranteed under the Constitution of Kenya.

1. Introduction

The sustainable development agenda is mainly informed by an anthropocentric approach to development. The concept of sustainable development seeks 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.¹ This is an approach that puts the needs of the human beings at the centre of development activities with a view to ensuring that their needs are fully satisfied while protecting and conserving the environment for the sake of future (human) generations.²

The anthropocentric approach to environmental management and development, both of which form the basis of sustainable development agenda, include poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation,

¹ Hopwood B, Mellor M and O'Brien G, 'Sustainable Development: Mapping Different Approaches' (2005) 13 Sustainable development 38, 39.

² See generally, Muigua K, Nurturing Our Environment for Sustainable Development. Glenwood Publishers Limited, 2016; see also Howarth RB, 'Sustainability, Well-Being, and Economic Growth' (2012) 5 Minding Nature 32.

gender equity, access to information and conflicts management, amongst others.³ Sustainable development seeks to promote and ensure 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.⁴ In this respect, the sustainable development debates revolve around how natural and environmental resources can be utilized to alleviate human suffering and poverty.⁵ 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.⁶

This is important considering 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'.⁷ Thus, while many countries across the world, including Kenya, have been working towards eradication of poverty, huge inequalities have persisted and progress has been uneven.⁸ The high rates of poverty have especially been more pronounced in developing countries mainly in the African continent.⁹ This is 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.¹⁰ 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

³ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

⁴ 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 < <http://www.ielrc.org/content/w9601.pdf> > accessed 24 December 2020.

⁵ 'The Relationship between Poverty and the Environment' (Voices of Youth) <<https://www.voicesofyouth.org/blog/relationship-between-poverty-and-environment>> accessed 24 December 2020.

⁶ '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.

⁷ '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.

⁸ 'Poverty Eradication: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/topics/povertyeradication>> accessed 25 December 2020.

⁹ '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.

¹⁰ '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.

structures.¹¹ This is however not to say that poverty is only to be found in developing countries because, as it has been pointed out by one scholar, ‘extreme poverty prevails in all countries of the world, regardless of their economic, social, and cultural situation and seriously affects the most vulnerable and disadvantaged individual’s families and groups who are hindered in the exercise of their Human Rights and fundamental freedom’.¹²

The United Nations 2030 agenda for Sustainable Development which contains 17 Sustainable Development Goals (SDGs) has some goals and targets that are specifically meant to address poverty and inequalities in the world. SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.¹³ This is supposed to involve targeting the most vulnerable, increasing basic resources and services, and supporting communities affected by conflict and climate-related disasters.¹⁴

¹¹ ‘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.

¹² Dr Dharmendra Kumar Singh, ‘Poverty and Human Dignity: A Human Rights Approach’ (2017) 22 IOSR Journal of Humanities and Social Science 48; see also ‘Goal 1: No Poverty | UNDP’ <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-1-no-poverty.html>> accessed 25 December 2020.

¹³ 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.

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.

¹⁴ ‘Goal 1: No Poverty | UNDP’ <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-1-no-poverty.html>> accessed 25 December 2020.

2. The Definition of Poverty: Meaning and Scope

While there is no single meaning of the term ‘poverty’ due to the varying elements associated with the same, there exists a number of definitions that ably captures the scope of the term as intended to be used in this paper. One author has observed that:

“Poverty is commonly understood as the state of one who lacks a certain amount of material possessions or money. It is a human condition where people do not have adequate access to their fundamental needs such as income, food, clothing, shelter, health care, security, education etc.”¹⁵

Poverty can also be conceptualized in a broad manner which may include, inter alia, the recognition that it is not limited to lack of income only, but comprises of deprivations in areas of health, education, participation and security.¹⁶ Furthermore, 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.¹⁷

Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.¹⁸ Indeed, in the Kenyan case of *M W K v another v Attorney General & 3 others [2017] eKLR*¹⁹, the High Court referred to South African jurisprudence and stated as follows:

49. Article 28 provides no definition of dignity. However, its role and importance as a foundational constitutional value has been emphasized in a number of cases. In the South African case of *S v Makwanyane*, [18] O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms: -

“The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3.”²⁰ (Emphasis added)

Sustainable development, as defined in the *Brundtland Commission* Report, includes human development.²¹ One of the ways of achieving human development which empowers people, both

¹⁵ ‘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.

¹⁶ 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 24 December 2020.

¹⁷ 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.

¹⁸ Vienna Declaration and Programme of Action, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹⁹ *M W K v another v Attorney General & 3 others [2017] eKLR*, Constitutional Petition 347 of 2015.

²⁰ *Ibid*, Para. 49.

²¹ Costantini, V. & Monni, S., “Measuring Human and Sustainable Development: an integrated approach for European Countries,” Working paper No. 41, 2004. p. 8

<<http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf>> accessed 24 December 2020.

men and women, is addressing poverty in order to empower people to contribute positively towards national development with dignity, without solely relying on the Government to do so.²²

The view that poverty is a shortage of income should also be discarded and instead embrace that perceives poverty as ‘unfreedoms’ of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions.²³ This is because while low income can contribute to poverty, 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.²⁴ Thus, as long as these factors exist, then poverty cannot be said to have been eliminated. Poverty is viewed as a socio-economic phenomenon.²⁵ It is therefore arguable that while the Constitution of Kenya guarantees right to dignity for everyone, this right goes beyond freedom from being treated or punished in a cruel, inhuman or degrading manner; it must be guaranteed through ensuring that the ‘unfreedoms’ mentioned above are addressed. Certainly, there is no dignity in living in abject poverty. Indeed, it has been posited that abject poverty conditions are not only a violation of the right to human dignity but in some circumstances, it is actually a threat to right to life.²⁶ The State must protect its people from descending into such circumstances where their human dignity becomes compromised through deprivation of basic needs or even reaches a point of threat to right to life. Some scholars have rightly argued that ‘poverty is not only deprivation of basic needs or material resources but a violation of human dignity. The most injurious and debilitating characteristic of poverty is loss of dignity’.²⁷ Arguably, social economic rights as guaranteed under Article 43 of the Constitution of Kenya²⁸ are critical for enjoyment of the right to life.

3. International and National Legal Frameworks on Poverty Eradication

There exists a number of international and regional legal instruments that are geared towards eradication of poverty.

3.1 International Human Rights Legal Instruments

The central aim of the *Agenda 21*²⁹ as adopted in 1992 was combating poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. It also 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

²² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

²³ 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 < http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf > accessed 24 December 2020.

²⁴ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

²⁵ Dr Dharmendra Kumar Singh, ‘Poverty and Human Dignity: A Human Rights Approach’ (2017) 22 IOSR Journal of Humanities and Social Science 48, 48.

²⁶ *Ibid*, 48.

²⁷ *Ibid*, 48.

²⁸ ‘Kenya Law: The Constitution of Kenya’ <<http://www.kenyalaw.org/kl/index.php?id=398>> accessed 25 December 2020.

²⁹ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

future.³⁰ Thus, the aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.³¹

Article 2 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*³² states:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

*Agenda 21*³³ also rightly pointed out that managing resources sustainably requires an environmental policy which not only focuses on the conservation and protection of resources but also takes due account of those who depend on the resources for their livelihoods as a way of addressing poverty and achieving long-term success in resource and environmental conservation.³⁴

In order to ensure that biological diversity management takes care of the needs of the people especially those living around them, the *Convention on Biological Diversity*³⁵ 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.³⁶ 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).³⁷

The *United Nations Conference on Sustainable Development ("Rio+20")*³⁸ which took place in Rio de Janeiro, Brazil in June 2012, also involved governments committing 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. The participants would ensure that they work towards eradicating poverty which they recognised as the greatest global challenge facing the

³⁰ Ibid, Preamble.

³¹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, Preamble (para. 1.3).

³² UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

³³ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

³⁴ Ibid, Clause 3.2.

³⁵ 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

³⁶ Article 1.

³⁷ 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.

³⁸ United Nations, Report of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil 20–22 June 2012, A/CONF.216/16.

world today and an indispensable requirement for sustainable development, thus creating the need for freeing humanity from poverty and hunger as a matter of urgency.³⁹

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.⁴⁰ The *2030 Agenda for Sustainable Development*, includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁴¹ The 2030 Agenda for Sustainable Development⁴² 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.⁴³

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.⁴⁴ The *African Convention on the Conservation of Nature and Natural Resources*⁴⁵ 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.⁴⁶

Under the SDGs and other legal instruments and policies, poverty eradication efforts have since adopted a human rights approach due to its complex relationship with the basic human rights. The Office of the High Commissioner for Human Rights (UN Human Rights) rightly observes that:

A human rights definition and understanding leads to more adequate responses to the many facets of poverty, responses that do not trample on rights in the pursuit of growth and development. It gives due attention to the critical vulnerability and subjective daily assaults on human dignity that accompany poverty. Importantly, it looks not just at resources but also at the capabilities, choices, security and power needed for the enjoyment of an adequate standard

³⁹ Ibid, Article 1.2; Article 1.8.

⁴⁰United Nations Conference on Sustainable Development
<<http://www.uncsd2012.org/about.html>>accessed 24 December 2020.

⁴¹ United Nations Development Programme, 'Sustainable Development Goals (SDGs),'
< http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development_agenda.html >
accessed 24 December 2020.

⁴²Transforming 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.

⁴³ Ibid, Preamble.

⁴⁴ 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.

⁴⁵ African Union, African Convention on the Conservation of Nature and Natural Resources, OAU, 1001 UNTS 3.

⁴⁶ Ibid, Article I.

*of living and other fundamental civil, cultural, economic, political and social rights.*⁴⁷

The main objective of all the major international legal instruments, policies and actions on human rights is the alleviation of human suffering and to promote the total wellbeing of all, the absence of which wellbeing is usually perceived to be poverty.⁴⁸

4. National Policy and Legal Frameworks on Poverty Eradication in Kenya

The Constitution of Kenya 2010 stipulates that ‘the national values and principles of governance include, inter alia, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised’.⁴⁹ The Preamble also recognises 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.⁵⁰ In addition, the Constitution states that ‘the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’.⁵¹ It also 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’.⁵² Article 28 of the Constitution also guarantees that ‘every person has inherent dignity and the right to have that dignity respected and protected’.⁵³

One of the ways that human dignity is violated or lost is through poverty. Indeed, it has been argued that the loss of dignity is worse than poverty itself.⁵⁴ The Court of Appeal at Mombasa in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR*⁵⁵ quoted with approval the Constitutional Court of South Africa in *Dawood and Another vs. Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8* :-

*“Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis.” [Emphasis added].*⁵⁶

The Court Appeal went on as follows:

⁴⁷ ‘OHCHR | Human Rights Dimension of Poverty’

<<https://www.ohchr.org/en/issues/poverty/dimensionofpoverty/pages/index.aspx>> accessed 23 December 2020.

⁴⁸ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

⁴⁹ Article 10 (2) (b), Constitution of Kenya, 2010.

⁵⁰ Preamble, Constitution of Kenya 2010.

⁵¹ Article 19 (1), Constitution of Kenya, 2010.

⁵² Article 19 (2), Constitution of Kenya, 2010.

⁵³ Article 28, Constitution of Kenya, 2010.

⁵⁴ ‘The Saddest Thing in the World Is Not Poverty; It’s Loss of Dignity | Jonathan Glennie’ (the Guardian, 28 January 2015) <<http://www.theguardian.com/global-development/2015/jan/28/dignity-sustainable-development-goals>> accessed 23 December 2020.

⁵⁵ *COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR*, Civil Appeal 56 of 2016.

⁵⁶ *Ibid.*, para. 25.

26. *It is thus apparent, regardless of one's status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. In addition, the South African Constitutional Court in Mayelane vs. Ngwenyama and Another (CCT 57/12) [2013] ZACC 14 stated that:-*

"...the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity."⁵⁷
The place of human dignity in the Bill of rights has also been acknowledged in both the International Covenant on Civil and Political Rights (ICCPR)⁵⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁹ provide in their preambles which are similar as follows:

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person..." [Emphasis added].⁶⁰

The Constitution also 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.⁶¹ It also guarantees that no person shall not be denied emergency medical treatment.⁶² It also obligates the State to provide appropriate social security to persons who are unable to support themselves and their dependants.⁶³

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.⁶⁴

⁵⁷ Ibid, para. 26.

⁵⁸ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁵⁹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁶⁰ See also the African Charter on Human and People's Rights whose Article 5 provides that:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

⁶¹ Article 43(1), Constitution of Kenya 2010.

⁶² Ibid, Article 43(2).

⁶³ Ibid, Article 43(3).

⁶⁴ Ibid, Article 21(3).

Going by the elements of poverty that were discussed hereinabove, it is arguable that the denial of any of these social economic rights in Kenya places one on a direct path to poverty. For instance, in the case of *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others [2015] eKLR*⁶⁵, the Court affirmed the relationship between education and alleviation of poverty by citing a South African case as follows:

Why is education such an important right? In Constitutional Law of South Africa/Commentary /Part 11, [http://ipproducts.jutaland.co. Za](http://ipproducts.jutaland.co.za), Ste Woolman and Michael Bishop quoted the opening lines of the Committee on Social, Economic and Cultural Rights' General Comment on the Right to Education to make the point that education is empowerment. The Committee stated thus;

“Education is both a human right in itself and an indispensable means of realizing other human rights. 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 exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical; a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”⁶⁶

I agree with the above sentiments.....⁶⁷

The Kenyan Court went on as follows:

It is therefore the conviction and strong view of this Court that the right to basic education is not to be progressively realised as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen the Constitution and even in a society where we live with great wealth disparities and million wallowing in abject poverty, only education can give everyone the chance and opportunity to realise their dream and aspirations. That opportunity was not granted in the circumstances obtaining in this Petition (emphasis added).

While the Constitution affirms that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43⁶⁸, and courts have also ruled in the past that some of the social economic rights

⁶⁵ *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others [2015] eKLR*, Petition 464 of 2013.

⁶⁶ *Ibid*, Para. 30.

⁶⁷ *Ibid*, Para. 31.

⁶⁸ Article 21(2), Constitution of Kenya 2010.

are to be progressively realised,⁶⁹ it is also true 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.’⁷⁰ While striving towards progressive realisation of social economic rights in Kenya, the Government should thus work towards ensuring that the most basic needs of people are met or such people are empowered enough to access the same, as a step towards fighting poverty.

*Sessional paper No. 10 of 2012 On Kenya Vision 2030*⁷¹ is a long-term development blueprint for Kenya which aims to transform the country into “a newly-industrialising, middle-income country providing a high quality of life to all its citizens in a clean and secure environment”.⁷² Kenya Vision 2030 was launched in 2008 as Kenya’s development blueprint covering the period 2008 to 2030.⁷³ The social pillar of the Vision 2030 seeks to invest in the people of Kenya.⁷⁴

The social pillar forms the basis of transformation in eight key social sectors, namely: education and training; health; water and sanitation; the environment; housing and urbanisation; as well as in gender, youth, sports and culture.⁷⁵ The Blueprint has very forward looking strategies meant to address poverty in the country. However, as at 2020, only ten years shy of the deadline to achieve Vision 2030, the same is threatened by lack of funds, lack of political good -will and corruption.⁷⁶ There is a need for the Government to renew its commitment towards ensuring that the same is achieved.

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.⁷⁷ The Agenda thus mainly focuses on social economic rights. It is expected to advance the goals of Vision

⁶⁹ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR, Advisory Opinions Application 2 of 2012.

⁷⁰ Article 20(5), Constitution of Kenya 2010.

⁷¹ Republic of Kenya, Sessional paper No. 10 of 2012 On Kenya Vision 2030, (Government Printer, 2012).

⁷² ‘Sessional Paper No. 10 of 2012 on Kenya Vision 2030 - Welcome to Foresight for Development’ <<http://www.foresightfordevelopment.org/sobipro/54/1263-sessional-paper-no-10-of-2012-on-kenya-vision-2030>> accessed 25 December 2020.

⁷³ ‘Towards 2030 | Kenya Vision 2030’ <<https://vision2030.go.ke/towards-2030/>> accessed 25 December 2020.

⁷⁴ ‘Sessional Paper No. 10 of 2012 On Kenya Vision 2030 - Welcome to Foresight for Development’, chapter Four.

⁷⁵ Ibid, 93.

⁷⁶ ‘Viewpoint: Will Corruption Kill off Kenya’s Vision 2030 Plans?’ BBC News (18 October 2012) <<https://www.bbc.com/news/world-africa-19980173>> accessed 25 December 2020; KIBATI M, ‘Corruption, Impunity Blocking Vision 2030’ (The Standard) <<https://www.standardmedia.co.ke/commentary/article/2001284573/corruption-impunity-blocking-vision-2030>> accessed 25 December 2020.

⁷⁷ ‘The Big 4 - Empowering the Nation’ <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

2030.⁷⁸ Specifically, the Third Medium Term Plan will be driven by the Big Four Agenda, implemented on the foundations that have been put in place during the First and Second Medium Terms Plans.⁷⁹

The above national constitutional, policy and statutory instruments are not exhaustive as they are implemented through various government policies, programmes, plans and actions. Also noteworthy is the fact that Article 2 (5) (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya⁸⁰ and to this end, they thus inform the government actions and measures geared towards eradication of poverty, in line with the United Nations 2030 Agenda on Sustainable Development.

4.1 Poverty Eradication in Kenya: Challenges and Prospects

A sustainably managed environment is seen as a prerequisite for socio-economic development and poverty reduction. This is because the natural environment supplies ecosystem goods and services that provide income, support job creation, poverty alleviation, contribute to safety nets and reduce inequity.⁸¹

As at 2019, that is, pre-COVID 19 period, it was reported that Kenya experienced robust economic growth from 2005-06 to 2015-16, growing at an average annual rate of 5.3%, higher than the average in Sub-Saharan Africa.⁸² The result was accelerated gains in the fight to reduce poverty, with about 4.5 million Kenyans escaping poverty, a decline from 46.8% to 36.1% of the population.⁸³ This growth was however inequitable since not every segment of the population benefited from the same.

⁸⁴ While rural areas have been experiencing some growth due to economic diversification, it was reported that urban poverty rate remained statistically unchanged, where the absolute number of urban poor increased from 2.3 million to 3.8 million due to high population growth, increasing living costs, especially because of high housing costs as well as high food prices, paired with scarce job opportunities thus reducing the disposable income for urban households.⁸⁵

While the World Bank observes that the poverty rate in Kenya had been on a downward trend over the past 15 years before 2020, the rate of poverty in Kenya cannot still be ignored, especially with

⁷⁸ 'Towards 2030 | Kenya Vision 2030' <<https://vision2030.go.ke/towards-2030/>> accessed 25 December 2020.

⁷⁹ Ibid.

⁸⁰ See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

⁸¹ Environment UN, 'GOAL 1: No Poverty' (UNEP - UN Environment Programme, 3 October 2017) <<http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-1-no>> accessed 24 December 2020.

⁸² 'More than Just Growth: Accelerating Poverty Reduction in Kenya' <<https://blogs.worldbank.org/african/more-than-just-growth-accelerating-poverty-reduction-in-kenya>> accessed 25 December 2020.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

the numbers rising due to the Corona Virus Disease pandemic (COVID-19).⁸⁶ According to the World Bank, an additional two million people in Kenya have been pushed into deprivation as the coronavirus pandemic increased poverty levels by four percentage points, with the country experiencing a situation where Kenya's poor population was predominantly rural and less well educated pre-Covid-19.⁸⁷ However, Covid-19 created a new group of 'newly' poor Kenyans with different demographic characteristics," such as urban with household heads who are younger and more educated.⁸⁸ As at November, 2020, it was also estimated that Kenya's unemployment rate almost doubled to 10.4% in the second quarter.⁸⁹

Thus, as things stand, the situation is getting worse and all the gains of yesteryears are quickly being undone. This therefore calls for the Government to work even harder than before to not only stabilize the economy, which has been shrinking⁹⁰, but also to ensure that the same gets back on track and the efforts towards eradication of poverty are given maximum attention.

5. Eradicating Poverty for Inclusive Development in Kenya

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.⁹¹

It has rightly been argued that a development strategy anchored in inclusive growth can have two mutually reinforcing strategic focuses, namely: high, sustainable growth which can create and expand economic opportunities; and broader access to these opportunities which can ensure that members of society can participate in and benefit from growth.⁹² This is meant to ensure that growth reaches the impoverished who remain excluded by circumstance, poor governance, and other market-resistant obstacles.⁹³

⁸⁶ 'Pandemic Created New Class of Kenyan Poor, World Bank Says' Bloomberg.com (25 November 2020) <<https://www.bloomberg.com/news/articles/2020-11-25/pandemic-hit-created-new-class-of-kenyan-poor-world-bank-says>> accessed 25 December 2020.

⁸⁷ Ibid.

⁸⁸ Ibid; 'Pandemic Pushes 2 Million Kenyans into Poverty' (The East African) <<https://www.theeastafrican.co.ke/tea/business/pandemic-pushes-2-million-kenyans-into-poverty-3216566>> accessed 25 December 2020.

⁸⁹ Ibid; 'Kenya: Rising Unemployment Leads People to Line for Dirty Jobs' <<https://www.aa.com.tr/en/africa/kenya-rising-unemployment-leads-people-to-line-for-dirty-jobs/1965212>> accessed 25 December 2020.

⁹⁰ 'Kenyan Economy Shrinks for the First Time since September 2008 - Citizentv.Co.Ke' <<https://citizentv.co.ke/business/kenyan-economy-shrinks-for-the-first-time-since-september-2008-347867/>> accessed 25 December 2020; 'Kenyan Economy Shrinks for First Time in 17 Years Due to Virus' <<https://www.bloomberquint.com/business/kenyan-economy-shrinks-for-first-time-in-17-years-due-to-virus/>> accessed 25 December 2020; 'Kenya's Economy Shrinks by 5.7% in 2020 Q2 as Pandemic Hits Key Sectors - Kenyan Wallstreet' <<https://kenyanwallstreet.com/kenyas-economy-shrinks-by-5-7-in-2020-q2/>> accessed 25 December 2020.

⁹¹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

⁹² Elmer, 'Inclusive Growth and Poverty Reduction' (Asian Development Bank, 6 January 2015) <<https://www.adb.org/themes/social-development/poverty-reduction/inclusive-growth>> accessed 25 December 2020.

⁹³ Ibid; see also 'Africa: Poor Excluded From Benefits of High Economic Growth' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and->

5.1 Gender Sensitive Approaches to Poverty Eradication

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.⁹⁴ 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.⁹⁵ In most parts of the world, women comprise the largest group among those excluded from the benefits of economic expansion and thus ought to be closely involved in development agenda to address their unique needs and ensured that they are also empowered in all spheres of life.⁹⁶ One of the main reasons why it is critical to empower women is the fact that women are considered as economic actors: they produce and process food for the family; they are the primary caretakers of children, the elderly and the sick; and their income and labour are directed toward children's education, health and well-being.⁹⁷ If both men and women are empowered, then households will get closer to eradicating poverty and focus on self-actualization and national development.⁹⁸

5.2. Eradicating Poverty for Environmental Sustainability

Poverty deprives people of the choice about whether or not to be environmentally sound in their activities.⁹⁹ The *1987 Brundtland Commission Report* 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.'¹⁰⁰ This may result in climate change, which again, has the reverse effect of contributing to poverty due to dwindling natural resources. Thus, poverty

development-in-africa/50363-africa-poor-excluded-from-benefits-of-high-economic-growth.html?itemid=id#969> accessed 25 December 2020; 'Growth Without Equity Roils South Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa/52239-growth-without-equity-roils-south-africa-.html?itemid=id#44653>> accessed 25 December 2020.

⁹⁴ 'Chapter 1: Women and Poverty – Global Women's Issues: Women in the World Today, Extended Version' <<https://opentextbc.ca/womenintheworld/chapter/chapter-1-women-and-poverty/>> accessed 25 December 2020.

⁹⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

⁹⁶ elmer, 'Inclusive Growth and Poverty Reduction' (Asian Development Bank, 6 January 2015) <<https://www.adb.org/themes/social-development/poverty-reduction/inclusive-growth>> accessed 25 December 2020.

⁹⁷ 'Chapter 1: Women and Poverty – Global Women's Issues: Women in the World Today, Extended Version' <<https://opentextbc.ca/womenintheworld/chapter/chapter-1-women-and-poverty/>> accessed 25 December 2020.

⁹⁸ Lefton R, 'Gender Equality and Women's Empowerment Are Key to Addressing Global Poverty' (Center for American Progress, 11 March 2013) <<https://www.americanprogress.org/issues/poverty/news/2013/03/11/56097/gender-equality-and-womens-empowerment-are-key-to-addressing-global-poverty/>> accessed 25 December 2020.

⁹⁹ 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<https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf> accessed 25 December 2020.

¹⁰⁰ Beder, S, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics,' *New Zealand Journal of Environmental Law*, Vol. 4, 2000, pp.227-243, p.230).

eradication should go hand in hand with climate mitigation measures. Notably, the *2030 Agenda for Sustainable Development* acknowledges this interrelationship as it seeks to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.¹⁰¹

5.3 Value Addition Model versus Commodity Export Model for Africa

It has been pointed out that one of the greatest unresolved challenges facing Africa's agribusiness sector is the lack of value addition.¹⁰² As a way of addressing poverty in Kenya and Africa in general, there is a need for governments to adopt and develop the value addition model as opposed to a commodity export model, as a way of promoting the use of the resources as anchors for regional growth clusters and consequently ensuring that they attract value-addition industries for job creation.¹⁰³

Notably, most processing of cash crops in Africa is basic where the majority of cash crops go through the bare minimum required for export or sale to the next part of the value chain and the results are that while African farmers and processors put in all the work to make a fungible commodity that is easy to trade, all of the value add goes to those further down the chain.¹⁰⁴ There is a need to change this practice as way of ensuring that African farmers and processors get value for the African resources and also get an opportunity for job creation which will ultimately help in alleviation of poverty. The lack of an efficient marketing infrastructure in Africa which prevents farmers and processors from getting full value from their crop, even in its raw form ought to be addressed in order to reverse this trend.¹⁰⁵ Such initiatives as the African Union's African Commodity Strategy, a part of Agenda 2063, should be fully exploited in order to find strategic measures to address price volatility and to use Africa's wealth of natural resources and absolute advantage in the commodities market to ensure that Africa's commodities are used for its industrialisation.¹⁰⁶

Notably, increased participation in international trade can catalyse economic growth and foster sustainable development. As such, promoting value addition and enhancing domestic productive

¹⁰¹ United Nations Development Programme, 'Sustainable Development Goals (SDGs),' <<http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html>> accessed 25 December 2020.

¹⁰² 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (Global Trade Review (GTR)) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020.

¹⁰³ Ngwenya, S., "Africa has to Shed off the Resource Curse Stigma" The Star Newspaper, Friday January 3, 2014.

¹⁰⁴ 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (Global Trade Review (GTR)) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020; 'Development Aid to Africa Negligible in Comparison to Illicit Outflows' <<https://www.globalpolicy.org/component/content/article/211-development/52662-development-aid-to-africa-negligible-in-comparison-to-illicit-outflows-.html>> accessed 25 December 2020.

¹⁰⁵ 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (Global Trade Review (GTR)) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020; Muigua K, Utilizing Africa's Natural Resources to Fight Poverty (2014) <kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf> accessed 25 December 2020.

¹⁰⁶ 'African Commodity Strategy | AUDA-NEPAD' <<https://www.nepad.org/agenda-2063/flagship-project/african-commodity-strategy>> accessed 25 December 2020.

capacity is therefore of continuing importance in developing countries as they seek to participate beneficially in global trade.¹⁰⁷ There is also a need for diversification of economic activities in the country as this may cushion the communities and national economy generally from unforeseen disruptions or a decline in the agricultural sector production which is prone to climate change yet it is considered to be the backbone of Kenya's economy.¹⁰⁸ The need for diversification has been witnessed in rural areas where it was reported in 2019 that poverty declined considerably in rural areas, from about 50% in 2005-06 to 38.8% in 2015-16, largely attributed to the increasing importance of non-agricultural income (particularly commerce) to supplement agricultural income for rural households, which has been aided by the expansion of mobile money and the telecommunication revolution.¹⁰⁹ There is therefore a need for the Government to work closely with stakeholders in different sectors to create opportunities for the Kenyan people, as a channel for diversification.

5.4. Population Control

Notably, while African economies are generating more income, that income has to be shared among an ever-increasing number of people, thus causing a slower rate in poverty reduction than population growth.¹¹⁰ The result has been that as more people leave the poverty class, others are joining that reducing the rate of poverty eradication in the continent.¹¹¹ For instance in Kenya, in 2009, it was estimated that Kenya had a population of 37.7 million people and the figure grew to about 47.6 million people in 2019.¹¹² As already pointed out, high population growth comes with extra expenditure and stretched out incomes thus undoing all the gains made in eradication of poverty. There is a need for the Government to work closely with other stakeholders such as religious organizations, civil societies and Non-Governmental Organizations (NGOs) to educate the communities on the need for birth control. This will not only ease strain on the particular households but also on the national economy.

5.5. Need for Increased Access to Finance for Communities Empowerment

It has been pointed out that eradicating deprivations, building capabilities and opening up opportunities require investment and as a result, governments should not only increase public

¹⁰⁷ United Nations, 'Promoting value addition and the enhancement of domestic productive capacity through local economic empowerment,' Note by the UNCTAD secretariat, Expert Meeting on Promoting Value Addition and Enhancement of Domestic Productive Capacity through Local Economic Empowerment Geneva, 16 October 2019 Item 3 of the provisional agenda < https://unctad.org/system/files/official-document/ciem10d2_en.pdf> accessed 25 December 2020.

¹⁰⁸ 'Kenya at a Glance | FAO in Kenya | Food and Agriculture Organization of the United Nations' <<http://www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/>> accessed 25 December 2020; Jowi E, 'Is Agriculture Still the Backbone of Kenya's Economy?' [2016] Natural Resource Modelling.

¹⁰⁹ 'More than Just Growth: Accelerating Poverty Reduction in Kenya' <<https://blogs.worldbank.org/african/more-than-just-growth-accelerating-poverty-reduction-in-kenya>> accessed 25 December 2020.

¹¹⁰ 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.

¹¹¹ Ibid.

¹¹² '2019 Kenya Population and Housing Census Volume II: Distribution of Population by Administrative Units' (Kenya National Bureau of Statistics) <<https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-ii-distribution-of-population-by-administrative-units>> accessed 25 December 2020.

spending towards empowerment programmes and measures but should also work closely with the private sector in order to help increase access and offer new approaches to provisioning.¹¹³ While there has been a number of Kenyan Government funded initiatives aimed at financing youth and women groups for empowerment,¹¹⁴ and commendably so, there is a need for the Government to also consider the men folk especially in the villages and informal urban settlements especially where the man is the head of the household. This will not only ensure that there is equity and equality but will also empower these households financially especially where the man has children and no wife or the wife is not in a position to work for gain for one reason or the other. Empowered households are able to tackle poverty without waiting for government handouts and donations and this also safeguards their dignity as human beings. This is also likely to spur economic diversification through investments in non-agricultural sectors such as information technology and science and technology in general, in line with the Constitution of Kenya 2010¹¹⁵. The Government should thus continually work with financial institutions to ensure that financing is available to all those who need it. This should target both formal and informal sectors in both urban and rural areas for accelerated eradication of poverty in Kenya.

However, the Government should also ensure that as these groups of people make their investment, there is a conducive tax regime to promote growth and development as well as ready markets both within the country and outside Kenya for the marketing of the end products, whichever the sector.

5.6. Promotion of Regional and International Trade

Trade is one of the most critical driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.¹¹⁶ The World Bank asserts that countries that

¹¹³ Independent Group of Scientists appointed by the Secretary-General, Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development, (United Nations, New York, 2019), 45 <https://sustainabledevelopment.un.org/content/documents/24797GSDR_report_2019.pdf> accessed 25 December 2020.

¹¹⁴ ‘Youth Enterprise Development Fund’ <<http://www.youthfund.go.ke/>> accessed 25 December 2020; ‘Home’ <<https://www.wef.co.ke/>> accessed 25 December 2020; ‘Women Empowerment in Kenya Organization. (WEIKE) - Kenya - 50 Million African Women Speak’ <https://www.womenconnect.org/web/kenya/empowerment/-/asset_publisher/aV6bGKqYx8gS/content/women-empowerment-in-kenya-organizatione-weike->> accessed 25 December 2020.

¹¹⁵ The Constitution provides as follows:

11. Culture

(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall—

(a) 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;

(b) recognise the role of science and indigenous technologies in the development of the nation; and

(c) promote the intellectual property rights of the people of Kenya.

¹¹⁶ ‘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; ‘Stronger Open Trade Policies Enable Economic Growth for All’ (World Bank)

are open to international trade tend to grow faster, innovate, improve productivity and provide higher income and more opportunities to their people. In addition, open trade also benefits lower-income households by offering consumers more affordable goods and services.¹¹⁷ The Government of Kenya should continually take advantage of the regional and international trade agreements and deals that will ensure that they get markets for goods and services produced or offered in the country and also ensure that the market remains affordable for the average Kenyan especially for goods and services that may not be available locally. This has the twin effect of not only ensuring that Kenyans earn money but also ensuring that they get the best deals when making purchases. The increased disposable income and the potential savings by consumers from an expanded market has the potential to address poverty and ultimately contribute to national development.¹¹⁸

6. Conclusion

Sustainable development mainly involves the integration of environmental, social, and economic concerns into all aspects of decision making.¹¹⁹ Arguably, ending poverty can be achieved if sustainable economic growth, social protection, and environmental health and stewardship are considered together.¹²⁰ Even as Kenya seeks to become a newly industrialising middle income country, there is a need to adopt empowerment measures that will ensure that this development is inclusive of all groups in the society. It is possible for Kenya to achieve Vision 2030 in a way that not only promotes and upholds the principles of sustainable development but also one that embraces all communities for inclusive development that benefits all. Economically and socially empowered people are able to appreciate the import of political and civil rights and therefore, they will be more likely to participate meaningfully in the governance of the country. Eradication of poverty therefore potentially holds the key to the economic, social, economic and political prosperity of the country.

Eradication of Poverty for Inclusive Development in Kenya is goal and a dream that is achievable through concerted effort by all.

<<https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all>> accessed 25 December 2020.

¹¹⁷ Stronger Open Trade Policies Enable Economic Growth for All' (World Bank) <<https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all>> accessed 25 December 2020.

¹¹⁸ 'Global Trade Liberalization and the Developing Countries -- An IMF Issues Brief' <<https://www.imf.org/external/np/exr/ib/2001/110801.htm>> accessed 25 December 2020.

¹¹⁹ Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' Brief for GSDR 2015, p.3<https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definition_rev.pdf> accessed 24 December 2020.

¹²⁰ Environment UN, 'Eradicating Poverty through an Inclusive Green Economy : UNEP Post 2015 Note 6' (UNEP - UN Environment Programme, 16 September 2017) <<http://www.unenvironment.org/resources/report/eradicating-poverty-through-inclusive-green-economy-unesp-post-2015-note-6>> accessed 25 December 2020.

Fostering the Principles of Natural Resources Management in Kenya

Abstract

International environmental law mainly consists of legal principles that offer guidelines on how states are to carry out environmental and natural resource management. They also offer the minimal content on their domestic policy and legal instruments. This paper offers a detailed examination of these principles and how their adoption and full implementation within the context of Kenya can be fostered.

1. Introduction

This paper examines some of the principles of natural resource management and their application in Kenya. These principles are recognized in the Constitution of Kenya, 2010 and in various international environmental instruments. Understanding these principles at the outset will enable one to appreciate existing legal regimes on natural resources in Kenya vis-à-vis the international regimes and their meeting points. The Constitution and consequently sectoral laws on natural resources have translated these principles into legally binding norms. The Court, in *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR¹, rightly observed that ‘The Environmental Law is principally concerned with ensuring the sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both municipal and international processes’.²

At the international level, these principles include the principle on transboundary environmental damage, sustainable development, sustainable use, prevention principle, precautionary principle, polluter pays principle, reasonable use and equitable utilization, international cooperation in management of natural resources and common but differentiated responsibilities.³ These principles are now applicable to Kenya by virtue of Articles 2 (5) and (6) of the Constitution which domesticates the general rules of international law and any treaty or convention ratified by Kenya.⁴

In addition, to the international principles, the national values and principles of governance outlined in Article 10 of the Constitution are relevant in natural resource management.⁵ These include devolution of power, democracy and participation of the people, equity, social justice, protection of the marginalized, good governance, transparency and accountability and sustainable development.⁶ Further, traditional ecological knowledge of communities in Kenya on the

¹ *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016.

² *Ibid*, para. 17.

³ See generally, Soto, M.V., "General Principles of International Environmental Law." *ILSA Journal of International & Comparative Law* 3, no. 1 (1996): 193-209; See also Sands, P. and Peel, J., *Principles of international environmental law*. Cambridge University Press, 2012; See also ‘Chapter 3: The Principles of International Environmental Law’, available at https://edisciplinas.usp.br/pluginfile.php/520713/mod_resource/content/1/Cap.3_International%20Environmental%20Law%20%281%29.pdf [Accessed on 5/1/2019].

⁴ Ratification of Treaties; See also the *Treaty Making and Ratification Act*, 2012, Laws of Kenya.

⁵ Art.10 (2), Constitution of Kenya.

⁶ *Ibid*.

management of natural resources also applies.⁷ Such traditional and cultural principles include traditional dispute resolution mechanisms.⁸

2. Sustainable Development

The concept of sustainable development predates the 1972 Stockholm Conference and can be traced back to traditional communities and ancient civilizations.⁹ It seeks to limit environmental damage arising from anthropogenic activities and to lessen the depletion of non-renewable resources and pollution of the environment.¹⁰ The *Brundtland Commission*¹¹ defined sustainable development as, “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”¹² Under section 2 of Environmental Management and Co-ordination Act, 1999¹³ (EMCA), sustainable development is defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among present generations, and *inter-generational equity*, that is equity between generations.¹⁴

Sustainable development is also 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. 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 activities.¹⁵ 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.¹⁶ Sustainable human development is, therefore, inextricably linked to people’s livelihoods, and is thus requisite in moving towards environmental justice.

⁷ S. 3 (5) (b) of EMCA, Act No. 8 of 1999.

⁸ See Art.159 (2) (c) and 67 (2) (f), Constitution of Kenya.

⁹ Per Judge Christopher Weeramantry in *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

¹⁰ Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003), pp.8 -9.

¹¹ The Brundtland Commission was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its mission was to unite countries to pursue sustainable development together. The Commission was named after its chairperson, Gro Harlem Brundtland, a former Prime Minister of Norway. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the term Sustainable Development.

¹² World Commission on Environment and Development, *Our Common Future*, GAOR, 42ndSess, Supp. No. 25, UN Doc, A/42/25 (1987), p.27; See also the Rio Declaration of 1992, UN Doc. A/CONF.151/26 (Vol. I).

¹³ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

¹⁴ Weiss, E.B., “In Fairness to Future Generations and Sustainable *Development*,” *American University International Law Review*, Vol.8, 1992.

¹⁵ 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.*

¹⁶ Kenya Vision 2030, Government of Kenya, 2007.

In the *Case Concerning the Gabčíkovo-Nagymoros Project*,¹⁷ Judge Weeramantry¹⁸ rightly opined that sustainable development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other. He considered sustainable development to be a ‘*principle with normative value*’ demanding a balance between development and environmental protection, and as a principle of reconciliation in the context of conflicting human rights, that is the *human right to development* and the *human right to protection of the environment*. Sustainable development reconciles these rights by ensuring that the right to development tolerates the ‘*reasonable demands of environmental protection*.’¹⁹

Previously in Kenya, the debate on sustainable development put a lot of emphasis on environmental protection to meet man’s needs (an anthropogenic approach) and ignored the need to protect the environment for its intrinsic value (an ecological approach). Such was the case in the mining industry where great emphasis was placed on the need to regulate the mining industry for extraction purposes to fulfill human needs without giving due attention to ecological issues.²⁰ However, the current *Mining Act 2016*²¹ has made attempts at striking a balance between these two potentially conflicting approaches to conservation and management. For instance, the Act requires investors or potential investors in this sector to carry out certain measures geared towards environmental protection and conservation that result in approved environmental impact assessment report, a social heritage impact assessment and/or environmental management plan, where required.²²

Although the ecological approach has been incorporated in the legal framework²³ its implementation is bound to face great challenges as exemplified by the conservation of the Mau ecosystem and the protection of the rights of the Lamu fishermen in the LAPSSET Project.²⁴

¹⁷ The Gabčíkovo–Nagymaros Project relates to a large damming project on the Danube River. This river is classified as an international waterway as it passes through or touches the borders of ten European countries before emptying into the Black Sea. The Project was specific to the part of the river passing through Hungary and Slovakia. It was initiated by the Budapest Treaty of 1977 between Slovakia and Hungary and aimed at preventing floods, improving river navigability and producing clean electricity for the two countries. Only a part of the project was completed in Slovakia, under the name Gabčíkovo Dam. Hungary suspended the Project in its territory and then later tried to terminate it citing environmental and economic concerns. Slovakia then proceeded with an alternative solution, called "Variant C", which involved diverting the river. These developments caused an international dispute between the two countries and they turned to the International Court of Justice for redress.

¹⁸ Judge of the International Court of Justice (ICJ).

¹⁹ *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

²⁰ Munyiri, S.K., “Policy Position on the Proposed Amendments of the Mining and Minerals Bill 2009,” Kenya Chamber of Mines, 2010.

²¹ *Mining Act*, No. 12 of 2016, Laws of Kenya.

²² See *Mining Act*, 2016, sec. 30(2); 42(2); 47(2); 72(3); 77(1); 78; 82(1)(e); 86(3)(c); 89(d); 98(2); 101(2)(i); 103(c); 106(i); 109(c); 115(c); 117(2) (d); 127(b); 133(b); 140(c); 144(4)(b); Part XI (Health, Safety and Environment, secs. 176-181); 200; 221(1)(3)(a); 223(2)(h); 225(5).

²³ Art.10 (2) (d), 42, 69 and 70, Constitution of Kenya.

²⁴ There has also been massive destruction of mangrove forests in the LAPSSET project in Lamu. See Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012; Business & Human Rights Resource Centre, “Kenya: Court declares construction of Lamu port violates indigenous community's right to information, healthy environment & culture, orders compensation,” May, 2018. Available at <https://www.business-humanrights.org/en/kenya-court-declares-construction-of-lamu-port-violates-indigenous-communitys-right-to-information-healthy-environment-culture-orders-compensation>

Courts in Kenya have applied the sustainable development principle as evidenced in the case of *Peter K. Waweru v Republic*,²⁵ where the court stated that intragenerational equity involves equality within the present generation, such that each member has an equal right to access the earth's natural and cultural resources. Towards sustainable development, courts are key actors in terms of developing environmental jurisprudence that protects environmental resources not only for the benefit of human beings but also for conservation purposes.²⁶ Similarly, the role of the public in decision-making processes is necessary in the sustainable management, protection and conservation of the environment.²⁷

3. Sustainable Use

In order to ensure sustainable consumption and production patterns, SDG Goal 12.2 requires that by 2030, all States should achieve the sustainable management and efficient use of natural resources. The aim is 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.²⁸

Sustainable use refers to the need to reduce and eliminate unsustainable patterns of production and consumption.²⁹ It is described as use that in any way and rate does not lead to long-term decline of biological diversity, thereby maintaining its potential to meet the needs of present and future generations.³⁰ It requires that present use of the environment and natural resources does not compromise the ability of future generations to use these resources or degrade the carrying capacity of supporting ecosystems.³¹ It is a principle that is applied to determine the permissibility of natural resource exploitation³² and is central to the principle of sustainable development.

Sustainable use of natural resources is recognized in Article 69 of the Constitution where the State is obliged to ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources.³³ Sustainable use requires governments and public authorities to ensure *strong sustainability* as opposed to *weak sustainability*. Strong sustainability views the environment as offering more than just economic potential. She opines that the environment offers services and goods that cannot be replaced by human-made wealth and that future generations should not inherit a degraded environment, no matter how many extra sources of wealth are

[Accessed on 8/1/2019]; Lwanga, C., 'Court orders State to pay Lamu fishermen Sh1.7bn in LAPSSET compensation,' Daily Nation, Tuesday, May 1, 2018, available at <https://www.businessdailyafrica.com/news/Court-orders-State-to-pay-Lamu-fishermen-Sh1-7bn-over-Lapsset/539546-4538748-5wslscz/index.html> [accessed on 8/1/2019].

²⁵ *Peter K. Waweru v Republic*, [2006] eKLR.

²⁶ See generally, Stone C., "Should Trees Have Standing?" *South California Law Review*, Vol. 45, 1972, p. 450. Stone posits that '*until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of us.*' We have to value our natural resources by granting them rights as suggested by Stone so that they can benefit the present and future generations.

²⁷ Art.10 (2) (a) and 69 (1) (d) of the Constitution.

²⁸ Preamble, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1.

²⁹ Principle 8 of the Rio Declaration.

³⁰ Art.2, Convention on Biological Diversity.

³¹ S. 2 of Act, No. 8 of 1999.

³² See Birnie, P., Boyle, A. and Redgwell, C., 'International Law and the Environment,' (3rd ed., Oxford 2009).

³³ Ar. 69 (1) (a).

available to them.³⁴ Strong sustainability is preferable to weak sustainability for reasons such as ‘non-substitutability’,³⁵ ‘uncertainty’,³⁶ and ‘irreversibility’.³⁷ Weak sustainability makes a wrong assumption that future generations will be adequately compensated for any loss of environmental amenity by having alternative sources of wealth creation.³⁸

Sustainable use, therefore, puts fetters in the utilization of natural resources. For example, not all forms of resource use will be permissible since certain forms of exploitation may lead to destruction of environmental resources with no substitutes, thus limiting the enjoyment of these resources by future generations. Moreover, uncertainty about the role of certain components of the environment and consequences of depletion and irreversible losses of species may militate against unsustainable use of natural resources in the Kenyan context. It is yet to be seen how this principle will be implemented in relation to resources such as forests where there are strong ancestral claims by local communities and the need to conserve catchment areas by the state.

4. Polluter Pays Principle

The polluter pays principle provides that the costs of pollution should be borne by the person responsible for causing the pollution.³⁹ It is one of the principles that is to guide Kenyan courts in enforcing the right to a clean and healthy environment in section 3 (5) (e) of EMCA. It is an important tool in natural resources management as it aims at preventing harm to the environment using a liability mechanism. It is defined in section 2 of EMCA as the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law.⁴⁰

It is evident that the polluter of the environment must pay the cost of pollution abatement, the costs of environmental restoration and costs of compensating victims of pollution, if any.⁴¹ The polluter pays principle promotes the right to a clean and healthy environment and gives appropriate remedies to victims of pollution.⁴² In this way, the polluter pays principle is key in enhancing access to environmental justice.

³⁴ Beder, S., “Costing the Earth: Equity, Sustainable Development and Environmental Economics,” *New Zealand Journal of Environmental Law*, Vol.4, 2000, pp.227-243.

³⁵ *Ibid.* The argument is that there are many environmental assets for which there are no substitutes, such as the ozone layer, tropical forests, wetlands, etc.

³⁶ *Ibid.* It has been said that scientific knowledge about the functions of natural systems and the possible consequences of depleting and degrading them is uncertain.

³⁷ *Ibid.* The depletion of natural capital can lead to irreversible losses such as species and habitats, which cannot be recreated using man-made resources.

³⁸ *Ibid.*

³⁹ Moutondo, E., “The Polluter Pays Principle,” in *Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice* (UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, 1997), p.43.

⁴⁰ S. 2 EMCA.

⁴¹ *Ibid.*

⁴² Moutondo, E., “The Polluter Pays Principle,” in *“Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice,” op. cit.*, p. 43.

It also acts as an economic policy tool by internalizing the costs of pollution as required by Principle 16 of the Rio Declaration. Principle 16 states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the application that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.⁴³

However, the application of the polluter pays principle in natural resource management is limited by the fact that not all forms of environmental damage can be remedied by means of the liability mechanism. For a liability mechanism to be effective, the polluter must be identified, damage must have occurred, and must be quantifiable and a causal link must be established between the damage and the polluter. The issue of causation and the difficulty of identifying the polluter to establish liability for environmental damage was noted in *Natal Fresh Produce Growers Association v. Agroserve (Pty) Ltd*,⁴⁴ where a South African court held that the manufacturer of herbicides was not liable since the use of hormonal herbicides anywhere in South Africa could not result in damage to fresh produce in Tala Valley. The effectiveness of the polluter pays principle is also reliant on the ability of the polluter to pay the costs of pollution.⁴⁵ This may limit its efficacy in natural resources management.

In Kenya, there are efforts aimed at preventing environmental pollution and environmental damage through the internalization of externalities. Section 108 of EMCA provides for environmental restoration orders which can be issued by NEMA to deal with pollution. Such an order may require the person to whom it is issued to restore the environment, prevent any action that would or is reasonably likely to cause harm to the environment, require payment of compensation and levy a charge for abatement costs. Likewise, a court can issue an environmental restoration order to address pollution with similar effects.⁴⁶ Section 25 (1) establishes the National Environment Restoration Fund consisting of fees or deposit bonds as determined by NEMA, and donations or levies from industries and other project proponents as contributions to the fund.⁴⁷ This fund acts as a supplementary insurance for the mitigation of environmental degradation, where the polluter is not identifiable or where exceptional circumstances require NEMA to intervene towards the control or mitigation of environmental degradation.⁴⁸

It was one of the principles applied by the court in *Peter K. Waweru v Republic*.⁴⁹ In this case, the Applicants and the interested parties had been charged with the offences of discharging raw sewage into a public water source and the environment and failing to comply with the statutory notice from the public health authority. The Court observed that sustainable development has a cost element which must be met by the developers. The Court also held that the right to a clean and healthy environment was equivalent to the right to life which ought to be protected at whatever cost.

⁴³ Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I).

⁴⁴ [1990] (4) SA 749.

⁴⁵ Moutondo, E., "The Polluter Pays Principle," in *"Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice," op cit.*

⁴⁶ S. 111 of Act No. 8 of 1999.

⁴⁷ *Ibid*, S. 25 (2).

⁴⁸ *Ibid*, S. 25 (4).

⁴⁹ High Court of Kenya at Nairobi, Misc Civ. Applic. 118 of 2004, 2 March, 2006.

5. Public Participation

Public participation is a key aspect of natural resources management. It allows individuals to express their views on key governmental policies and laws concerning the environmental conditions in their communities.⁵⁰ The importance of public participation is the recognition that better decision-making flows from involving the public. It is now generally agreed that environmental problems cannot be solved by solely relying on technocratic and bureaucratic monopoly of decision-making.⁵¹

Public participation is defined as the process by which public concerns, needs and values are incorporated into governmental and corporate decision-making with the overall goal of better decisions that are supported by the public.⁵² Some scholars have however given a broader definition by stating that, “*public participation includes organized processes adopted by elected officials, government agencies or other public or private sector organizations to engage the public in environmental assessment, planning, decision making, management, monitoring and evaluation.*”⁵³

There are various definitions of public participation but the main aspects that come out clearly are that: public participation relates to administrative decisions and not decisions made by elected officials and judges. It involves an interaction between the agency and the people participating. In public participation, there is an organized process of involving the public so that they can have some level of impact or influence on the decisions being made. According to some scholars, the definition of public participation excludes some kinds of participation that are legitimate components of a democratic society such as the electoral process, litigation and extra-legal protests.⁵⁴

Public participation may be provided for in law through at least three legal mechanisms; entrenchment in the Constitution as part of the Bill of Rights; in Environmental Impact Assessments; and through direct *locus standi* for the public in environmental matters.⁵⁵ One of the national values and principles of governance entrenched in the Constitution is participation of the people.⁵⁶ The Constitution provides that the state should encourage public participation in the

⁵⁰ Marianela, C., *et al*, *Environmental Law in Developing Countries: Selected Issues*, Vol. II, IUCN, 2004, p. 7.

⁵¹ *Ibid.*

⁵² Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement* (John Wiley & Sons, 2005), p.7.

⁵³ Dietz t. & Stern, P.C., (eds), *Public Participation in Environmental Assessment and Decision Making*, (National Academies Press, 2008), p.1; See also Ondrik, R. S., "Participatory approaches to national development planning," *Framework for Mainstreaming Participatory Development Processes into Bank Operations*, ADB (1999): 15. Available at http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1143156545724/Brief_ADB.pdf [Accessed on 8/1/2019].

⁵⁴ Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.8.

⁵⁵ Angwenyi, A.N., ‘An Overview of the Environmental Management and Coordination Act,’ in Okidi, C.O., *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008), p.30; See also URAIA, “What Is Public Participation?” Available at <http://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf> [Accessed on 8/1/2019].

⁵⁶ Art.10 (2) (a).

management, protection and conservation of the environment.⁵⁷ It goes a step further and imposes a duty on individuals to cooperate with the state organs and other persons in the protection and conservation of the environment.⁵⁸ This is also extended to the administration of county governments within the devolved system.⁵⁹

Principle 10 of the Rio Declaration 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 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.⁶⁰ Effective access to judicial and administrative proceedings, including redress and remedy, must also be provided. Public participation is, therefore, an essential principle in natural resources management. However, public participation is hampered by factors such as financial cost of engaging the public, time constraints, fear that participants may not be truly representative and belief that citizens lack knowledge of complex technical issues.⁶¹ 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.⁶² This is necessary because technocrats in these institutions are not directly elected by the people.

⁵⁷ Art.69 (1) (d).

⁵⁸ Art.69 (2).

⁵⁹ Republic of Kenya, *County Public Participation Guidelines*, (Ministry of Devolution and Planning & Council of Governors, January, 2016). Available at http://devolutionasals.go.ke/wp-content/uploads/2018/03/County-Public-Participation_Final-1216-2.pdf [Accessed on 8/1/2019].

⁶⁰ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

⁶¹ Senach, S.L., 'The Trinity of Voice: The Role of Practical Theory in Planning and Evaluating the Effectiveness of Environmental Participatory Process,' in Depoe, S.D. *et al*, (eds), *Communication and Public Participation in Environmental Decision Making* (SUNY Press Ltd., 2004) 13, p.16.

⁶² Creighton, J.L., *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement*, *op cit*, p.20; See also Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, pp.24-25; In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014, para. 346. Mutunga, CJ (as he then was) observed that:

“ [341]Cases touching on the environment and natural resources have examined the duty placed upon State organs to consult the people, and to engage communities and stakeholders, before making decisions affecting the environment. These cases were decided before and after the 2010 Constitution was promulgated, and the Courts have held that State organs that made or make decisions without consulting or engaging the people, the community or other interested stakeholders, acted or act outside their powers-and such actions stand to be quashed (see *Meza Galana and 3 Others v. AG and 2 Others* HCCC No. 341 of 1993; [2007] eKLR, *Hassan and 4 Others v. KWS* [1996] 1 KLR (E&L) 214; *Mada Holdings Ltd t/a Fig Tree Camp v. County Council of Narok* High Court Judicial Review No. 122 of 2011; [2012] eKLR; and *Republic v. Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others* HC Miscellaneous Application No. 55 of 2010).

5.1 Defining the ‘public’ in Public Participation

The ‘public’ in public participation refers to individuals acting both in their roles as citizens, as formal representatives of collective interest or affected parties that may experience benefit or harm or that otherwise choose to become informed or involved in the process.⁶³ The label ‘public’ is often used to refer to individual citizens or relatively unorganized groups of individuals but should be expanded to include the full range of interested and affected parties including corporations, civil society groups, technocrats and even the media.⁶⁴

Four categories of the public must be considered when deciding whether or not the ‘public’ has been involved. These are: stakeholders who are organized groups that are or will be affected by or that have a strong interest in the outcome of the decision; the directly affected public who will experience positive or negative effects from the environmental decision; the observing public which includes the media and opinion leaders who may comment on the issue or influence public opinion; and the general public who are all individuals not directly affected by the environmental issue but may choose to be part of the decision making process.⁶⁵

In *Hassan and 4 others v KWS*⁶⁶ the court described the public as “those entitled to the fruits of the earth on which the animals live” when stating that there was no express consent from the community allowing KWS to translocate the rare hirola antelope from their land. Further, in *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*,⁶⁷ the court gave a much wider description of the public by stating that it is “the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised.”⁶⁸

[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.”

⁶³ Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making*, *op cit*, p.15.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p.15.

⁶⁶ [1996] 1KLR (E&L) 214, p.215.

⁶⁷ HC Judicial Review No. 122 of 2011, [2012] eKLR.

⁶⁸ See also *In the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference 2 of 2014:

[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. It is further expounded in the County Government Act as well as the *Public Service Commission’s Guidelines for Public Participation in Policy Formulation*. The

5.2 Dimensions of Public Participation

The dimensions of public participation are the boundaries within which the activity should fall for it to be properly termed as public participation.⁶⁹ It requires effective protection of the human right to hold and express opinions and seek, receive and impart ideas.⁷⁰ The Constitution protects the freedom of expression.⁷¹ Public participation also requires the right of access to appropriate, comprehensible and timely information held by public institutions.⁷² In *Meza Galana and 3 others v AG and 2 others*,⁷³ community representatives from Tana River District filed a suit against the defendants seeking, *inter alia*, a declaration that the legal notice declaring Tana Primate Reserve to be a national reserve to be quashed as it was not a valid notice. The court held that the legal notice was indeed not valid as the community had not been made aware of the decision to gazette the area as a national reserve and their views had not been sought before the decision was made. The question of what constitutes public participation was also canvassed in the case of *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others*⁷⁴, the court stated that:

“From these decisions and others that were cited before us by the parties’ advocates, it is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable

Draft Public Participation Guidelines for County Government are also important, as they reflect the constitutional and statutory requirement of public participation.

[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.

⁶⁹ Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making*, *op cit*, p.14.

⁷⁰ UNEP, *Training Manual on International Environmental Law*, (UNEP, 2006), p.193.

⁷¹ Art. 33.

⁷² UNEP, *Training Manual on International Environmental Law*, *op cit*, p.193.

⁷³ HCCC No. 341 of 1993, [2007] eKLR.

⁷⁴ *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR, Civil Appeal 112 of 2016.

opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted.”⁷⁵

“.....What the appellant is really saying is that although they had their say, their views were not adequately considered. However, the fact that the views of the appellant and the interested parties did not carry the day was neither here nor there. All that the learned judge needed to establish was the fact that that step of involving the public and any other affected persons was taken. Given the facts that were before the learned judge, we have no reason to fault the learned judge for finding that the stakeholder meetings, discussions and communications constituted adequate public participation and consultation.”⁷⁶

*In the Matter of the Mui Coal Basin Local Community*⁷⁷ case the court summarized what entails public participation as follows:

97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public

⁷⁵ Para. 49, *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR, Civil Appeal 112 of 2016.

⁷⁶ *Ibid*, Para. 52..

⁷⁷ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”

- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.

- d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e. Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
- f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

98. If we take these principles into account, can we give the public participation programme designed for the Coal Mining Project a clean bill of health? We think it meets the threshold subject to continuing engagement....”

These cases generally capture the current trend in Kenyan courts as far as implementation and promotion of the principle of public participation in environmental matters is concerned.

5.3 Application of Public Participation in Kenya

Environmental Management and Co-ordination Act, 1999 (EMCA) is the overarching framework law on natural resource management and provides for specific application of public participation. Other sectoral statutes enacted after EMCA also have provisions for specific application of public participation. Most natural resources sectoral laws enacted prior to 1999 have no provisions relating to public participation. This part will take an in-depth look at public participation before 1999 and specific aspects of public participation provided for under EMCA and post-EMCA sectoral laws.

a. Judicial Review

The administrative system of government aids decision-making in natural resource management through the statutory functions of diverse administrative bodies.⁷⁸ Judicial review is a process through which a person aggrieved by a decision of an administrative body can seek redress in court. Judicial review is concerned with reviewing the decision-making process and not the merits of the decision itself. Some of the grounds upon which a person can bring a claim for judicial review are that the rules of natural justice were not followed during the process of decision-making. One important rule of natural justice, and which preceded the statutory requirements for public participation in natural resources management is the right to be heard. Before EMCA, most of the remedies sought against a public body which made a decision on natural resources without consulting the public were through judicial review. In *Nzioka and 2 others v Tiomin Kenya Ltd*,⁷⁹ the court stated that even if there was a distinct law on the environment, it was not exclusive and most environmental disputes were resolved by the application of principles of common law and administrative law.

Public consultation is an important aspect to be taken into account by agencies when making decisions that affect members of the public. In *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*,⁸⁰ the court issued an order of prohibition, stopping the respondent from charging the enhanced park entry fees because neither the applicant nor other stakeholders in the hotel industry had been consulted prior to revision of the said fees. Similarly, in *Hassan and 4 others v KWS*,⁸¹ the court held that KWS would be acting outside its powers if it were to translocate animals away from their natural habitat without express consent of the community. In *Republic v Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others*,⁸² the court quashed the gazette of Lake Kanyaboli National Reserve on the grounds that the Minister in gazetting the same did not consult all the interested parties and should have obtained the consent of the county council before proceeding to gazette the area.

b. Environmental Impact Assessment

Environmental Impact Assessment (EIA) is a tool that helps those involved in decision-making concerning development programs or projects to make their decisions based on the knowledge of

⁷⁸ R. Kibugi, 'Development and Balancing of Interests in Kenya,' in Michael Faure & Willemien du Plessis (eds.), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Press, 2011) 167, p.168.

⁷⁹ [2001] 1KLR (E&L) 423.

⁸⁰ High Court Judicial Review No. 122 of 2011, [2012] eKLR.

⁸¹ [1996] 1KLR (E&L) 214, p.215.

⁸² HC Miscellaneous Application No. 55 of 2010, [2012] eKLR.

the likely impacts that will be caused to the environment.⁸³ EIA is an important tool for public participation in natural resources management. Internationally, the CBD requires public participation in EIA procedures.⁸⁴ The need for EIA was also captured in Principle 17 of the 1992 *Rio Declaration on Environment and Development* in the following terms:⁸⁵ *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.*

In Kenya, EIA gets its legislative backing from EMCA.⁸⁶ The procedure for EIA provided for under EMCA is designed to be quite comprehensive and to ensure public participation.⁸⁷ The Act requires proponent of any project specified in the Second Schedule⁸⁸ 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: Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.⁸⁹ The Act then provides that the EIA study report shall be publicised for two successive weeks in the Kenya Gazette, a local newspaper and inviting members of the public to give their comments either orally or in writing on the proposed project within a period not exceeding sixty days.⁹⁰ However, the Authority may require any proponent of a project to carry out at his own expense further evaluation or environmental impact assessment study, review or submit additional information for the purposes of ensuring that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible.⁹¹ Thereafter, the Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.⁹²

In the *Mui case*, the Court observed as follows:

100. Having said that, we take cognizance of the fact that an Environmental Impact Assessment has not been completed. The Court therefore fully expects that the programme of public participation will continue even more robustly in the next phase of EIA. In particular, we expect that upon completion of the EIA the Government will follow the stipulations as directed under Regulation 17 of Legal Notice No. 101, the Environmental

⁸³ Angwenyi, A.N., 'An Overview of the Environmental Management and Coordination Act,' in Okidi, C.O., *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008) p.167.

⁸⁴ Art. 14(1) (a).

⁸⁵ 1992 *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

⁸⁶ Sec. 42; Part VI – Integrated Environmental Impact Assessment (sec. 57A-67). See also *Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003*.

⁸⁷ *Ibid*.

⁸⁸ Second Schedule [Section 58, Act No. 5 of 2015, s. 80.]– Projects Requiring Submission of an Environmental Impact Assessment Study Report.

⁸⁹ S. 58 (2).

⁹⁰ S. 59.

⁹¹ S. 62.

⁹² S. 63, EMCA.

(Impact Assessment & Audit) Regulations 2003, and in disseminating the information to ensure that the relevant information is given to the public; these reports should be in a simple language that everyone can understand; the venues of the *Barazas* should be centrally convenient; the dates of the meetings should be known to all well in advance and the County Government should be involved from now henceforth.

131. EIA is an obviously important component to this entire process as it is vanguard of the principles of sustainable development. It is from this assessment that we are guided as to the potential or lack of adverse effects of the project on the environment and where the decision will be made as to whether the project should continue or not.

In *Bogonko v NEMA*,⁹³ the applicant sought an order to quash NEMA's decision to stop his project of putting up a petrol station. NEMA contended that it issued the order to stop the construction because the applicant had failed to publish the EIA study report for two successive weeks and hence the public was not given sufficient notice to comment on the report. The court held that the purpose of advertisement as provided for by the law is to ensure that the public see the proposed project and give their comments as to whether the project is viable or not. In the present case, the members of the public were denied such an opportunity. The court, therefore, declined to quash the order stopping the project because according to it, the public interest far outweighed the applicant's individual right to put up a petrol station.

Similarly, in *Kwanza Estates Ltd. v KWS*,⁹⁴ the plaintiff sought orders to have KWS restrained from constructing a public toilet at the beach front as the toilet when in use would cause adverse environmental effects and devalue the plaintiffs prime beach property. KWS did not conduct an EIA before putting up the toilet. The court held that public participation was what informed the requirement for an EIA being done before any project commenced. The requirement for publicizing the report is what gave members of the public, like the plaintiff in this case, a voice in issues that may bear negatively on their right to a clean and healthy environment. The court proceeded to grant an injunction restraining KWS from constructing the toilet in the absence of an EIA to show how the waste from the toilet would be treated to prevent pollution in the ocean.

EIA is a continuous process that goes on throughout the duration of the project.⁹⁵

In addition to EIA, EMCA also provides for Strategic environmental assessment (SEA) which should be undertaken much earlier in the decision-making process than project environmental impact assessment (EIA).⁹⁶ While the parent Act (EMCA) was initially silent on SEA, the same

⁹³ [2006] 1KLR (E&L) 772.

⁹⁴ HCCC No. 133 of 2012, [2013] eKLR.

⁹⁵ S. 64, EMCA; See also *Gabcikovo-Nagymaros Case*, ICJ Rep. (1997), 7.

⁹⁶United Nations Economic Commission for Europe, 'Introduction,' available at http://www.unece.org/env/eia/sea_protocol.html [Accessed on 8/1/2019]. See also S. 57A, EMCA: 57A. Strategic Environmental Assessment

(1) All Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment.

(2) For the avoidance of doubt, the plans, programmes and policies are those that are—

was introduced via the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act 2015).⁹⁷ Whereas EIA concerns itself with the biophysical impacts of proposals only (e.g. effects on air, water, flora and fauna, noise levels, climate etc), SEA and integrated impact assessment analyze a range of impact types including social, health and economic aspects.⁹⁸ SEA is, arguably, not a substitute for EIA or other forms of environmental assessment, but a complementary process and one of the integral parts of a comprehensive environmental assessment tool box.⁹⁹

c. Public Consultation

The *Forest Conservation and Management Act, 2016*¹⁰⁰ and the *Water Act 2016*¹⁰¹ were both enacted after EMCA and both make similar provisions on public consultation. The only difference is that the provisions under the Water Act 2016 are in the main body of the statute¹⁰² while in the *Forest Conservation and Management Act*, they are in a schedule¹⁰³. These statutes give the requirements for public consultation which are almost similar to those of EIAs. They provide that where the law requires public consultation, the relevant entity shall publish a notice in relation to the proposed action in the Kenya gazette (for the *Forest Conservation and Management Act*), newspapers and local radio stations. The notice should invite written comments or objections to the proposed action from the public within sixty days¹⁰⁴ of the publication of the notice. The said authority should then publish through the same media a notice that copies of the decision and reasons therefore are available for public inspection. The last provision is critical because in public participation, the public agency retains the ultimate decision-making authority.¹⁰⁵

In *Lake Naivasha Friends of the Environment v AG and 2 others*,¹⁰⁶ the question was whether the respondents complied with the law on public consultation in developing a Catchment Management

(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.

(3) All entities shall undertake or cause to be undertaken the preparation of strategic environmental assessments at their own expense and shall submit such assessments to the Authority for approval.

(4) The Authority shall, in consultation with lead agencies and relevant stakeholders, prescribe rules and guidelines in respect of Strategic Environmental Assessments.

⁹⁷ *Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya. The Amendment Act 2015 defines 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*.

⁹⁸ Muigua, K., *Legal Aspects of Strategic Environmental Assessment and Environmental Management*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf> [Accessed on 8/1/2019].

⁹⁹ Organisation for Economic Co-Operation and Development, 'Applying Strategic Environmental: Assessment Good Practice Guidance for Development Co-Operation,' *DAC Guidelines and Reference Series*, 2006, p. 32. Available at <http://www.oecd.org/environment/environment-development/37353858.pdf> [Accessed on 8/1/2019].

¹⁰⁰ *Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

¹⁰¹ *Water Act*, No.43 of 2016, laws of Kenya.

¹⁰² *Ibid*, S.139.

¹⁰³ Second Schedule, s.34, Provisions for Public Consultation.

¹⁰⁴ The Water Act 2016 provides for 30 days.

¹⁰⁵ Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.7.

¹⁰⁶ HC Petition No. 36 of 2011, [2012] eKLR.

Strategy. The respondents advertised the Catchment Management Strategy in the Kenya Gazette and in a local newspaper inviting the public to forward their comments. There were also meetings held with various stakeholders. The court found that the meetings and advertisements constituted sufficient consultations under the Water Act and that it was impractical for the respondents to contact and invite every interested individual personally to give their input. It also held that in implementing policy, it was impossible for the State to please each person or meet their individual interests. In some circumstances, the rights of the majority will be elevated over those of the individual.

6. Prevention Principle

The prevention principle aims at averting damage to the environment before it actually occurs. The reasoning behind this principle is that prevention is less costly than allowing environmental damage to occur and then taking mitigation measures.¹⁰⁷ According to UNEP, experience and scientific expertise demonstrate that prevention of environmental harm should be the golden rule in environmental governance, for both ecological and economic reasons. This is because it is frequently impossible to remedy environmental injury.¹⁰⁸ There is an international obligation not to cause damage to the environment irrespective of whether or not there is transboundary impact or international responsibility.¹⁰⁹ This principle requires that activities that might cause risk or damage to the environment be reduced, limited or controlled.¹¹⁰ It requires anticipatory investigation, planning and action before undertaking activities which can cause harm to the environment.¹¹¹

Under this principle, States are under an obligation to prevent damage to the environment within their own jurisdictions.¹¹² The standard of care for prevention, is due diligence.¹¹³ Due diligence in customary international law requires effective national legislation and administrative controls.¹¹⁴ In Kenya, the Constitution contains provisions that reflect this principle. One of the obligations of the State in respect of the environment, as envisaged under Article 69(1) of the Constitution, is to eliminate processes and activities that are likely to endanger the environment. Further, Article 69(2) places a legal duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Further, Article 70 of the Constitution gives courts the power to make orders or give directions that would be appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment. It is also noteworthy, that this would be done after an application by any person who may feel that the right to a clean and healthy environment as guaranteed under Article 42 is likely to be violated, denied, threatened or infringed. Such a person does not have to demonstrate *locus standi* to do so.¹¹⁵

¹⁰⁷ *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016, para. 18.

¹⁰⁸ UNEP, *Training Manual on International Environmental Law*, *op cit*, p.32.

¹⁰⁹ *Ibid.*

¹¹⁰ Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.

¹¹¹ Nanda, V. & Pring, G.R., *International Environmental Law and Policy for the 21st Century* (2nd Revised Edition Martinus Nijhoff Publishers, 2012), p.62.

¹¹² Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.

¹¹³ Nanda V. & Pring, G.R, *International Environmental Law and Policy for the 21st Century*, *op cit*, p. 62.

¹¹⁴ *Ibid.*

¹¹⁵ Art.70 (3), Constitution of Kenya, 2010.

Under national legislation, EMCA has provisions that reflect the principle of prevention of harm to the environment. Section 9 of EMCA outlines the objects and functions of the National Environment Management Authority. Amongst these is the responsibility to publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environment degradation. Section 38 of EMCA outlines the functions of the National Environment Action Plan which includes identifying and recommending policy and legislative approaches for preventing, controlling or mitigating specific as well as general adverse impacts on the environment. The foregoing provisions play a preventive role, thus preventing environmental harm.

7. International Cooperation in Management of Natural Resources

As countries embrace globalization and the resultant competition over natural resources, especially those that are transboundary to fast track economic growth, there has arisen a need for international cooperation in the management of natural resources. This is due to the fact that some environmental problems that arise out of mismanagement of natural resources like climate change are themselves transnational in nature hence requiring the effort and cooperation of every state to combat them. This cooperation principally includes both multilateral and bilateral, transboundary and private sector cooperation.¹¹⁶

The duty to cooperate is well established in international law. The first part of Principle 7 of the Rio Declaration provides that “*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth’s ecosystem.*” Principle 14 provides that States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health. In Kenya, this Principle has not been emphasized in natural resources legislation. However, EMCA recognizes this Principle as one of the principles of sustainable development in the management of environmental resources shared by one or more states.¹¹⁷

This principle is especially relevant when it comes to international trade between nations and regions. For instance, the *United Nations Conference on Sustainable Development - or Rio+20* calls on countries to cooperate in coming up with well-designed and managed tourism in order to make a significant contribution to the three dimensions of sustainable development, with close linkages to other sectors and can create decent jobs and generate trade opportunities.¹¹⁸

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. As such, it seeks to continue to promote a universal, 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

¹¹⁶ Nkonya, E., *et al.*, International cooperation for sustainable land and water management, *SOLAW Background Thematic Report - TR16*.

¹¹⁷ No. 8 of 1999, S. 3 (5) (c).

¹¹⁸ United Nations, *The Future We Want*, A/RES/66/288, Sixty-sixth session Agenda item 19, Resolution adopted by the General Assembly on 27 July 2012, para. 130. Art. 1.11 of the RIO+20 Report, requires State parties to strengthen international cooperation to address the persistent challenges related to sustainable development for all, in particular in developing countries.

Organization to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda.¹¹⁹

Equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer¹²⁰, 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.¹²¹ This is important for the realisation of the SDG Goal 8 which seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.

Participating in international trade can widen the economic space needed to create new job opportunities, promote efficient use of resources, increase access to food, energy and basic services, and improve productive, managerial and entrepreneurial capacity required for economic diversification, growth and development.¹²² However, this can only be effectively achieved through international cooperation for realisation of sustainable development agenda.¹²³ This is also reflected in the SDG Goal 17 which seeks to strengthen the means of implementation and revitalize the global partnership for sustainable development. This is envisioned through, inter alia, strengthening domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.¹²⁴ International cooperation is also envisioned through Goal 17.6 which seeks 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. International cooperation is also important for capacity building through enhancing 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.¹²⁵

Notably, the 2030 Agenda on Sustainable Development strongly urges to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance

¹¹⁹ Ibid, para. 68.

¹²⁰ Art. 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 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.”

¹²¹ 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 8/1/2019].

¹²² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), p. 244.

¹²³ Principle 5 of the *Rio Declaration* calls on all States and all people to cooperate in the essential task of eradicating poverty 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; See also World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, 1987, A/42/427.

¹²⁴ SDG Goal 17.1.

¹²⁵ SDG Goal 17.9.

with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries.¹²⁶

8. Common but Differentiated Responsibilities

The principle of ‘common but differentiated responsibility’ is said to have evolved from the notion of the ‘common heritage of mankind’ and is also a manifestation of general principles of equity in international law.¹²⁷ Principle 7 of the Rio Declaration requires States to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem. It goes on to state that, in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.

This principle is envisaged in a number of international legal instruments including, the Rio Declaration and the *United Nations Framework Convention on Climate Change* (UNFCCC) and its Kyoto Protocol. The UNFCCC provides that Parties should act to protect the climate system, “on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities.”¹²⁸ Member States who have polluted most, have to take the biggest responsibilities in reducing the effects of that pollution. Differentiated responsibility is especially important in ensuring fairness to developing and Least Developed States that have contributed less to climate change and global warming. The responsibility of each State depends on the amount of emissions that result from them. For instance, large emerging economies would have a bigger responsibility towards environmental management and conservation when compared to a tiny developing State.

The principle of common but differentiated responsibility is a way to take into account the differing circumstances, particularly in each state’s contribution to the creation of environmental problems and in its ability to prevent, reduce or control them.¹²⁹ The idea is to encourage universal participation and equity.¹³⁰

This principle is important for the realisation of Agenda 2030 SDG goals which reaffirm all the principles of the Rio Declaration on Environment and Development, including, inter alia, the principle of common but differentiated responsibilities, as set out in principle 7 thereof. In order to reduce inequality within and among countries, SDG Goal 10.a seeks to inter alia, implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements.

9. Equitable Sharing of Benefits

With the accelerated efforts to foster economic growth and globalisation, the natural resources available for exploitation are quickly dwindling due to the competition for the same. This favours some countries while working against others because of the variance in technology and expertise

¹²⁶ A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.

¹²⁷ The Principle of Common But Differentiated Responsibilities: Origins and Scope, For the World Summit on Sustainable Development, 2002, Johannesburg, 26 August, *A Centre for International Sustainable Development Law (CISDL) Legal Brief*, p. 1.

¹²⁸ Art.3 of the UNFCCC.

¹²⁹ UNEP, *Training Manual on International Environmental Law*, op cit, p.29.

¹³⁰ *Ibid.*

to exploit the same. The United Nations and other international bodies therefore call for equitable sharing of the benefits that accrue from such shared resources. For instance, the fair and equitable sharing of the benefits derived from biodiversity is one of the central objectives of the Convention on Biological Diversity (CBD).¹³¹ Article I thereof provides that the objectives of the Convention, are to be pursued in accordance with its relevant provisions. 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.¹³²

In the Kenyan context, the principle is explicit in a number of laws. Article 60(1) (a) of the Constitution of Kenya, 2010 enumerates equitable access to land as one of the guiding principles of the land policy in the country. All should have equitable access to land and public spaces including people with disabilities, the youth and marginalised communities. In addition, Article 69(1) (a) thereof, further provides that one of the obligations of the State with regard to the environment is to ensure equitable sharing of the accruing benefits. Article 42 guarantees every person the right to a clean and healthy environment, including the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, particularly those contemplated under Article 69.

To facilitate more equitable distribution of accruing benefits among locals, often amongst subsistence, and indigenous peoples, the environmental laws provide for community based natural resource management. For instance, the Forests Act, 2005 provides for community participation in forests management under sections 45-48. Communities may register groups that get involved in management and use of forests resources in their area. Under the Water Act, 2002 provision is made for communities to establish Water Resources Users Associations and Catchment Areas Advisory Committees to among other things, ensure that water as a resource is used equitably and conflicts managed effectively at the local level. Section 43 of EMCA provides that the Minister (Cabinet Secretary) may, by notice in the Gazette, declare the traditional interests of local communities customarily resident within or around a lake shore, wetland, coastal zone or river bank or forest to be protected interests.

10. Reasonable Use and Equitable Utilization

The principle of reasonable use and equitable utilisation of resources comes into play mostly where there are transboundary resources being shared by more than one state. This principle has been incorporated in a number of international legal instruments on environmental conservation to which Kenya is a signatory. The principle has been codified in Article of the 1997 Convention on the Law of Non-Navigational Uses of International Water Courses,¹³³ which is considered a codification of customary principles. It requires that a State sharing an international watercourse with other States utilize the watercourse, in its territory, in a manner that is equitable and reasonable *vis-à-vis* the other States sharing it. In order to ensure that their utilization of an international

¹³¹ The Union for Ethical Bio-Trade, Available at <http://www.ethicalbiotrade.org/abs/>[Accessed on 7/1/2019].

¹³² Art. I, Convention on Biological Diversity.

¹³³ Convention on the Law of the Non-Navigational Uses of International Watercourses New York, 21 May 1997.

watercourse is equitable and reasonable, States are to take into account all relevant factors and circumstances. Article 5 also sets forth, in paragraph 2, the principle of equitable participation. According to this principle, States are to “*participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.*” This principle is expected to have significant implications in Kenya, in light of recent discoveries of underground water aquifers traversing a number of countries in the East African Region.¹³⁴

11. Precautionary Principle

EMCA defines precautionary principle as the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹³⁵ The precautionary principle recognizes the limitations of Science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where there is uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities.¹³⁶ This is well captured under Principle 15 of the *Rio Declaration*¹³⁷ which provides that

“where there are warnings of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason of postponing cost-effective measures to prevent environmental degradation.”

Some scholars have identified a number of core elements to the precautionary principle, indicating that there are seven main themes, though each of them has a different intellectual and policy underpinning.¹³⁸ These elements are: Firstly, *pro-action*: this is the willingness to take action in advance of scientific proof, or in the face of fundamental ignorance of possible consequences, on the grounds that further delay or thoughtless action could ultimately prove far more costly than the 'sacrifice' of not carrying on right now; Secondly, cost-effectiveness of action in that proportionality of response should be designed to show that there should be a regular examination of identifiable social and environmental gains arising from a course of action that justifies the costs; Third, safeguarding ecological space as a fundamental notion underlying all interpretations of the precautionary principle in terms of how far natural systems and social organisations are resilient or vulnerable to further change or alteration; Fourth, legitimising the status of intrinsic value or bioethics in that vulnerable, or critical natural systems, namely those close to thresholds, or whose existence is vital for natural regeneration, should be protected as a matter of moral right;

¹³⁴ BBC, “Kenya aquifers discovered in dry Turkana region,” 11 September 2013. Available at <https://www.bbc.com/news/science-environment-24049800> [Accessed on 8/1/2019]; Pflanz, M., “Kenya finds ‘70-year supply’ of water in desert region,” *The Telegraph*, 11 Sep 2013. Available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10302421/Kenya-finds-70-year-supply-of-water-in-desert-region.html> [Accessed on 8/1/2019]; International Groundwater Resources Assessment Centre, ‘Eastern Africa,’ available at <https://www.un-igrac.org/regions/eastern-africa> [Accessed on 8/1/2019].

¹³⁵ S. 2, Act No. 8 of 1999.

¹³⁶ *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016, para. 18.

¹³⁷ *Rio Declaration* of 1992, UN Doc. A/CONF.151/26 (Vol. I).

¹³⁸ O’riordan, T., *et al*, “The Precautionary Principle in Contemporary Environmental Politics,” *Environmental Values*, Vol. 4, No. 3 (August 1995), pp. 191-212, p. 195.

Fifth, shifting the onus of proof such that the burden of proof should shift onto the proto-developer to show '*no reasonable environmental harm*' to such sites or processes, before development of any kind is allowed to proceed; Sixth, is meso-scale planning. A meso-scale is the period, over which any major decision will have an influence; and seventh, precautionary principle requires paying for ecological debt which is a case for considering a burden-sharing responsibility for those not being cautious or caring in the past.¹³⁹

The precautionary principle encourages policies that protect human health and the environment in the face of uncertain risks.¹⁴⁰ It is therefore at the heart of sustainable development agenda. Article 10 of the Constitution of Kenya, 2010 provides for sustainable development as one of the national values and principles of governance. This principle must therefore guide the law making organs while legislating on environmental management and conservation.¹⁴¹ Section 11 of the *Land Act*, 2012 mandates the National Land Commission to take appropriate measures to conserve ecologically sensitive public land to prevent environmental degradation and climate change. The precautionary principle is one of the principles of sustainable development guiding the Environment and Land Court as provided for under section 18 of the *Environment and Land Act*, 2012.

12. Transboundary Environmental Damage

Transboundary environmental damage usually arises where the impact of environmental damage and degradation affects not only the country of origin but also another country. This is especially so in the case of water pollution. This is one of the principles that informed the making of the Treaty for the Establishment of the East African Community which was signed in Arusha on 30 November 1999 and entered into force on 7 July 2000. The regional organisation aims at achieving its goals and objectives through, *inter alia*, promoting a sustainable growth and equitable development of the region, including rational utilisation of the region's natural resources and protection of the environment. This places responsibilities on the member States to ensure realization of the goals and objectives of the Treaty.

Regulation 44 of the Legal Notice Number 101 provides that where a project is likely to have a transboundary impact, the proponent of the project must, in consultation with the Authority (NEMA), ensure that appropriate measures are taken to mitigate any adverse impacts, taking into account any existing treaties and agreements between Kenya and the other country. This places a huge responsibility on the State to prevent transboundary environmental damage.

13. Conclusion

This Paper has examined some of the principles of natural resource management and their application in Kenya. These principles are recognized in the Constitution 2010 and in various international instruments some of which have been mentioned herein. Principles play an important

¹³⁹ *Ibid.*

¹⁴⁰ Kriebel, D., *et al*, "The Precautionary Principle in Environmental Science," *Environmental Health Perspectives*, Vol. 109, No. 9, Sep., 2001, pp. 871-876.

¹⁴¹ Art. 10(1), Constitution, 2010 provides that the national values and principles must bind all State organs and all persons whenever they, *inter alia*, enact, apply or interpret any law, or make or implement public policy decisions.

role in environmental law and are engines in the evolution of natural resources law.¹⁴² They guide policy formulators and legislators when developing policy and law on natural resources. Understanding these principles will help in appreciating the context within which natural resources management is required to take place in Kenya. Fostering the adoption of these principles in the policy and legal making processes can go a long way in achieving sustainable management of natural resources in Kenya as envisaged under the constitutional provisions. It is also noteworthy that most of these principles are similar to the traditional practices of indigenous communities in Kenya as far as application of indigenous ecological knowledge is concerned. Such principles as precautionary principle are a reflection of the unwritten principles on environmental management that have existed for generations across indigenous cultures. These communities considered themselves and their cultural ecological practices as part of the ecosystem hence adopted both anthropocentric and ecocentric approaches when dealing with environmental and natural resource management.¹⁴³ It has been acknowledged by some government officials that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country's forest cover.¹⁴⁴ This is because such people have the traditional skills needed to help the Government conserve the forests.¹⁴⁵ Also worth pointing out is the fact 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 social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.¹⁴⁶

One way of implementing the constitutional obligations on the state to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities is to incorporate it with the scientific knowledge and involving these communities and helping them appreciate all the foregoing principles of natural resource management for realisation of sustainable development agenda. These principles are both international and cultural.

¹⁴² UNEP, *Training Manual on International Environmental Law*, *op cit*, p.23.

¹⁴³ See generally, Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at <http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf> [Accessed on 8/1/2019].

¹⁴⁴ Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

¹⁴⁵ *Ibid.*

¹⁴⁶ Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy*, 2012, p.2.

Charting a New Path for Environmental Management and Conservation in Kenya

Abstract

This paper offers some practical recommendations on how Kenya can actualise the current progressive constitutional and statutory provisions that are meant to drive the country towards achieving the sustainable development agenda as well as improving the lives of communities in a way that makes them meaning players in the game of environmental management and conservation. The paper draws from the best practices internationally and while it acknowledges the uniqueness of Kenya's socio-economic context, the recommendations are broad enough to take care of the needs of all stakeholders. They can be tailored in a way that would make them applicable and largely acceptable to communities and other stakeholders. The major argument in the discussion is pegged on the notion that solutions facing the country's sustainability problems must come from scientific as well as indigenous knowledge and practices.

1. Introduction

Environmental management encompasses all activities geared towards the protection, conservation and sustainable components of the environment.¹ While the law provides for various approaches to environmental management and governance such as the command and control, market-based approaches, incentives (taxation and subsidies), Community Based Natural Resource Management (CBNRM) and traditional resource management institutions, among others, the actualisation of these approaches requires some innovative approaches to ensure that the same are fully adopted and implemented. Such innovation is important in overcoming the shortcomings that may be associated with each of the approaches.

This paper offers a brief yet detailed discussion on some topical issues on how Kenya can adopt an integrated approach to environmental management in Kenya for sustainability. While the paper acknowledges that law is a necessary tool in effective environmental management, the paper proposes some recommendations that go beyond the law in not only achieving the environmental rights of the citizens, but also ensuring that the State's and citizenry's duties towards sustainable environmental management and conservation are achieved.

2. Meaningful and Active Participation of Citizens in Environmental management

The sustainable development agenda envisages not only the participation of all stakeholders in environmental and natural resources governance and management, but also ensuring that the interests of all parties are satisfactorily taken care of while at the same time balancing such interests with sustainability requirements. The importance of the Constitution of Kenya 2010 in its provisions on the obligations of the State with respect to the environment cannot be overstretched. The Constitution envisages the participation of all stakeholders, both as rights-holders as well as duty-bearers as far as environmental matters are concerned.²

¹ Sec. 2, Environmental (Management and Coordination) Act, No. 8 of 1999, Laws of Kenya.

² Article 69, Constitution of Kenya, 2010.

While these are commendable provisions, their full realisation in terms of implementation and respect by the policy and legal stakeholders remains a mirage. There are no defined mechanisms yet to ensure that the same are meaningfully implemented. There is a need for the policy and lawmakers to develop stakeholder engagement and free prior and informed consent guidelines and toolkits. Communities, with the right information and sensitization on issues affecting the environment and the nation at large, can meaningfully engage other stakeholders by way of defining their immediate needs against the national policies on environmental management and conservation.³ The call for written submissions via the print media as is mostly the case may not always work as some of the most affected communities and groups of persons may not even have the ability to read and write let alone accessing the newspapers and other news media.⁴

This calls for more forums where the stakeholders can engage such groups of persons one on one and get their views. The Constitution of Kenya requires a collaborative approach in environmental and natural resources governance and management, within the framework of the national values and principles of governance. If this is to be achieved, then there is a need for change of tact in collecting views. The most common argument from some quarters has always been that if all interested and affected groups of persons were to be given a forum to air their views, then some key development infrastructure and activities would never go on.⁵ However, it must be acknowledged that some of these activities, especially mining activities are likely to change the lives of these communities permanently and even affect their generations to come.

A relevant example is the alleged lead poisoning in Owino Uhuru, a slum area in Mombasa city adjacent to a lead battery recycling factory, which has led to protracted court battles.⁶ It is reported that leakages from the factory have significantly increased lead concentration in the slum's environment which poses environmental health risks especially to children living in the slum.⁷ Further, studies have also indicated that this has contributed to soil pollution in the area.⁸ Admittedly, and backed by research, the effects of lead on the environment and the people's health

³ See UN Environment, 'Managing Forests with Community Participation in Kenya' (UN Environment, 13 December 2019) <<http://www.unenvironment.org/news-and-stories/story/managing-forests-community-participation-kenya>> accessed 6 May 2020.

⁴ UN Environment, 'Managing Forests with Community Participation in Kenya' (UN Environment, 13 December 2019) <<http://www.unenvironment.org/news-and-stories/story/managing-forests-community-participation-kenya>> accessed 6 May 2020.

⁵ Some court cases have approved some projects based on this argument, arguing that elected leaders can give their consent on behalf of the represented communities or group of persons.

⁶ Okeyo B. & Wangila A., "Lead Poisoning in Owino Uhuru Slums in Mombasa- Kenya," (Eco-Ethics International –Kenya Chapter, 2012). Available at <https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf> [Accessed on 21/1/2020]; Zoë Schlanger, "A Kenyan mother, two disappearing Indian businessmen, and the battery factory that poisoned a village," Quartz Africa, March 18, 2018. Available at <https://qz.com/africa/1231792/a-battery-recycling-plant-owned-by-indian-businessmen-caused-a-lead-poisoning-crisis-in-kenya/> [Accessed on 21/1/2020].

⁷ Consumer Federation of Kenya, 'Lead Poisoning in Owino Ohuru Slums in Mombasa-Kenya' available at <https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf> [Accessed on 6/5/2020].

⁸ Caravanos, 'Conflicting Conclusions or Competing Methodologies? Documenting Soil Lead Pollution in Owino Uhuru, Kenya' *Journal of Health & Pollution*, Vol. 9, No. 21, March 2019.

are bound to be long term.⁹ Some writers have even rightly pointed out that the effects of lead poisoning are not usually detected in a short visit with a doctor.¹⁰ It would therefore be not only a case of great environmental injustice but also a form of death sentence for any developer to engage in such projects that predispose a community and their future generations to lead poisoning and yet deny them a chance to participate in the approval process, in the name of their democratically elected leaders making the decision on their behalf.

It is therefore imperative that the constitutional and statutory provisions on public participation be fully implemented not just through calling for public comments on proposed projects but also ensuring that where such projects directly affect the livelihoods of a certain group of persons, the affected persons are fully engaged through such forums as public *barazas* where the Government should also ensure that health officials are invited to answer any of the community's concerns on possible health effects of the proposed projects.

It is important to entrench environmental democracy which is meant to empower the general public and enable them to meaningfully participate in environmental management.¹¹

3. Enhancing the Effectiveness of the Regulatory Framework on Corporations'

Environmental Liability

In recognition of the important role played by corporations in the society and their contribution to the economic development, it is arguable that the potential contribution of corporations in promoting sustainable environmental and natural resources management as far as their environmental liability is concerned cannot be ignored. This is in recognition of the fact while some are directly involved in natural resources extraction and other environmental resources as sources of their raw materials, even those that are concerned with other industrial activities have wastes and discharges which, if not properly dealt with can adversely affect the environment and the lives of communities living within their locality. If the local news over the last few years is anything to go by, there has been some evidence of laxity in holding these corporations liable for environmental pollution.¹²

There is a need for more stringent measures to be taken as a way of curbing the blatant pollution of water bodies and the environment in general by the industries especially those dealing with

⁹ Cheng, Z., "Late attention to children's health under lead exposure: legacy of Flint water crisis?." PhD diss., University of Pittsburgh, 2018; Ravipati, E.S., Mahajan, N.N., Sharma, S., Hatware, K.V. and Patil, K., "The toxicological effects of lead and its analytical trends: an update from 2000 to 2018." *Critical reviews in analytical chemistry* (2019): 1-16; Yamauchi, Osamu. "Astrid Sigel, Helmut Sigel, Roland KO Sigel (Eds): "Lead: Its Effects on Environment and Health." Volume 17 of *Metal Ions in Life Sciences*." *Transition Metal Chemistry* 42, no. 6 (2017): 575-577; Assi, M.A., Hezmee, M.N.M., Haron, A.W., Sabri, M.Y.M. and Rajion, M.A., "The detrimental effects of lead on human and animal health." *Veterinary world* 9, no. 6 (2016): 660.

¹⁰ Hanna-Attisha, M., Lanphear, B. and Landrigan, P., "Lead poisoning in the 21st century: the silent epidemic continues." (2018): 1430-1430.

¹¹ See Muigua, K., 'Enhancing Environmental Democracy in Kenya,' *The Law Society Law Journal*, Vol. 4, No. 1, 2008.

¹² National Environment Management Authority, 'Factories Closed, Owners Arrested for Polluting the Environment' available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454 [Accessed on 4/5/2020].

chemical discharges. The National Environment Management Authority enforcement officers should work closely with the locals and the media to not only apprehend but also hold accountable those who flout environmental rules and regulations. There may also be a need to revisit the prescribed penalties in order to curb the vice.

As a way of using their corporate social responsibility (CSR) towards achieving sustainability, the corporations are also expected to contribute positively towards improving the livelihoods of the people. However, while the CSR is entirely pegged on the corporations' initiatives, the local content provisions that are now found within the mining and petroleum laws¹³ in the country should be fully implemented in a way that ensures that any affected groups of persons have the legal backing as far as the accruing benefits are concerned.

Considering that Kenya is still at a nascent stage in exploring its extractives industry, building local capacity is critical if the full benefits of this industry are to be realised. The Government should invest in not only community empowerment but also expanding the capacity of local institutions of higher learning to offer specialized training and knowledge that is relevant for this part of the world. The stakeholders can work closely with other advanced countries in order 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 across the entire mining industry value chain.¹⁴

It commendable that there are already in place legal, institutional and policy frameworks towards ensuring that there is safeguarding of the environment against the negative impact of extraction activities as well as improving the livelihoods of the communities. There is however a lot of good will that is required from the government agencies, communities as well as the private investors in order to ensure that the same works as intended.

4. Expediting the Approval of the Legislation on Benefit Sharing

While the theme of benefit sharing in natural resources and environmental goods features across most of the statutes and regulations governing the sector, it is pointing out that the single piece of legislation that is meant to provide substantive guidelines on benefit sharing has been pending for quite some time. The proposed *Benefit Sharing Bill 2018*¹⁵ has been pending for several years due to some contentious issues as put forth by various stakeholders. There is a need to wrap up the discussion and have the Bill passed as law.

The law will come in handy considering that the State is supposed to manage these resources in trust for the people and must therefore ensure that they get to benefit from them in a bid to improve their living standards.

¹³ Energy Act, No. 1 of 2019, Laws of Kenya; Mining (Employment and Training) Regulations, 2017, Legal Notice No. 82, Laws of Kenya; Mining (Use of Local Goods and Services) Regulations, 2017, Legal Notice No. 83 of 2017, Laws of Kenya; Mining Act, No. 12 of 2016, Laws of Kenya; Petroleum Act, No. 2 of 2019, Laws of Kenya.

¹⁴ Mining (Employment and Training) Regulations, 2017, Regulation 3.

¹⁵ Natural Resources (Benefit Sharing Bill), 2018 (Government Printer, Nairobi, 2018).

5. Creating Practical Platforms for use of Science and Indigenous knowledge

It is in the spirit of promoting meaningful inclusion and public participation that the theme of indigenous knowledge as a tool for promoting communities' participation features prominently in the Constitution of Kenya 2010. There is a need for the stakeholders to ensure that there is a complimentary application of the indigenous ecological knowledge alongside the scientific knowledge. The use of indigenous ecological knowledge not only make the communities own and appreciate the government's efforts in environmental management and conservation, it also enables the government to tap into the positive aspects of such community knowledge. It is common knowledge that communities have had some cultural environmental knowledge for centuries and have had a special relationship with their environment, which have made them diligently take care of it. If such practices are brought on board to form part of the government's knowledge for decision-making, it increases the chances of promoting sustainability backed by the communities.

The Government's agencies charged with coming up with resilient varieties of crops should work closely with communities in order to incorporate their knowledge on the same.¹⁶ Traditional knowledge is capable of yielding better results, technologically speaking, when placed within its environmental and social context. This is because sometimes, it has the most refined technologies, other times, it is very simple but still more appropriate, ecologically compatible and locally manageable.¹⁷ Furthermore, local people are the custodians of traditional systems and are therefore well informed about their own situations, their resources, what works and what does not work. They are also aware of the possible impact of a change in one factor on the other parts of the production system.¹⁸

The incorporation of traditional knowledge in crop production will not only enhance food security but will also be useful in afforestation and reafforestation since the knowledge will greatly contribute in identifying the most ecologically suitable trees in some regions where the most common and exotic varieties of trees would not grow.

6. Entrenching Integrated Pest Management in Agricultural Production in Kenya

While pests may have major impacts on crop production, the mode of control of these pests may potentially have even a bigger impact on biodiversity. Some of the chemicals used may lead to crop poisoning, water and soil pollution and consequently, have an adverse effect on the biodiversity thriving within the soil and water. In Kenya, use of pesticides has been promoted to expand agricultural production and increase productivity.¹⁹

The concept of Integrated Pest Management (IPM) was born in response to the discovery of pesticide resistance as well as the environmental and health impact of pesticide overuse, and IPM

¹⁶ Ibid, Article 11.

¹⁷ United Nations Convention to Combat Desertification (UNCCD) (2005), 'Revitalizing Traditional Knowledge: A Compilation of Documents and Reports from 1997 – 2003', UNCCD, Bonn, Germany. 150 pp. at p. 11.

¹⁸ Ibid.

¹⁹ Macharia, I.N., Mithã, M. and Waibel, H., "Potential environmental impacts of pesticides use in the vegetable sub-sector in Kenya." *African Journal of Horticultural Science* 2 (2009).

has greatly evolved and expanded.²⁰ IPM is associated with many advantages because it optimizes the cost of production (a benefit to the farmer) and the cost of food (a benefit to the consumer) without indirect environmental costs while also providing a long-term benefit for overall food production (a benefit to the environment).²¹ Integrated pest management (IPM) is an ecological approach to pest management as it discourages the use of pest control methods that have negative effects to the non-target organisms.²² It is estimated that “90-95% of strawberry growers in California use predatory mites to manage pest mites, an example of inundative biological control in outdoor farming.”²³

There are some positive steps that Kenya has made towards promotion and achievement of IPM. In 2018, the Ministry of Agriculture, Livestock, Fisheries and Irrigation (MoALF&I) came up with the “Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)” whose main objective are objectives of IPMP are to: establish clear procedures and methodologies for IPM planning, design and implementation of micro-projects to be financed under the Project; develop monitoring and evaluation systems for the various pest management practices for subprojects under the Project; to assess the potential economic, environmental and social impacts of the pest management activities within the micro-projects; to mitigate against negative impacts of crop protection measures; to identify capacity needs and technical assistance for successful implementation of the IPMP; to identify IPM research areas in the Project; and to propose a budget required to implement the IPMP.

²⁴ This document on Integrated Pest Management (IPM) is meant to provide a strategic framework for the integration of climate change mitigation measures, smart agriculture, SLM practices and technologies, environmental and pest management considerations in the planning and implementation of the activities to be implemented within the National Agricultural and Rural Growth Project (NARIGP).²⁵

The Ministry of Agriculture, Livestock, Fisheries and Irrigation (MOALF&I) is designated as the principal agency responsible for overall mitigation and monitoring of the adverse impacts of the pesticides including ensuring that the IPMP is followed under the NARIGP.²⁶ Notably, the targeted micro-projects will use farmer groups and associations who are the project beneficiaries to

²⁰ ‘Integrated Pest Management: The Future of Agriculture?’ (FreshFruitPortal.com, 5 May 2020) <<https://www.freshfruitportal.com/news/2020/05/05/is-integrated-pest-management-the-future-of-agriculture/>> accessed 5 May 2020.

²¹ Ibid.

²² Para. 17, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.

²³ ‘Integrated Pest Management: The Future of Agriculture?’ (FreshFruitPortal.com, 5 May 2020) <<https://www.freshfruitportal.com/news/2020/05/05/is-integrated-pest-management-the-future-of-agriculture/>> accessed 5 May 2020.

²⁴ Para. 23, Republic of Kenya, Ministry Of Agriculture, Livestock, Fisheries And Irrigation National Agricultural And Rural Inclusive Growth Project (NARIGP), Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018. Available at <http://www.kilimo.go.ke/wp-content/uploads/2019/02/NARIGP-INTERGRATED-PEST-MANAGEMENT-PLAN-IPMJANUARY-2019.pdf> accessed 5 May 2020.

²⁵ Para. 18, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.

²⁶ Para. 8, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.

undertake monitoring for instance in observing the pests in the farms, identifying weeds, and reporting as part of the surveillance to inform what sort of control measure to adopt.

The farmer groups and associations will be trained on surveillance and best management practices in pesticide application and use.²⁷ In addition, the Agrochemical Association of Kenya (AAK) and distributors or wholesalers of pesticides will also be used to mitigate and monitor the adverse impacts. The agro-vet distributors will be trained to provide education and awareness to farmers on judicious pesticide use and application for the benefit of the environment and human health since they have constant contact with the farmers.²⁸

The Pest Control and Product Board (PCPB) and the National Environment Management Authority (NEMA) are also to be included in the implementation.²⁹ The above document rightly points out that in Kenya, Integrated Pest Management is not prioritized, particularly through government policies. In addition, though many solutions to pest problems exist, farmers tend to rely on pesticides as the first choice of pest control measure, particularly in high input agriculture experienced in horticultural sector.³⁰

While the above Project was a step in the right direction, the same was targeted and hence it can only be hoped that the outcome of this project will be passed on to the target farmers who will in turn be used to reach out to other farmers in order to ensure that the lessons are replicated in other farms across the country. As it is now, most large and small scale farmers continue to engage in indiscriminate use of pesticides in crop and animal production.³¹ For instance, the Kenya Plant Health Inspectorate Service (Kephis) reported in its 2018 annual report that there were pesticide residues in vegetable samples collected from various outlets and markets across the country. Some

²⁷ Para 10, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.

²⁸ Para. 11, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.

²⁹ Paras. 12 & 13, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.

³⁰ Para. 18, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.

³¹ 'Kenyan Farmers Grapple with High Pesticide Use - Xinhua | English.News.Cn' <http://www.xinhuanet.com/english/2019-11/10/c_138544622.htm> accessed 6 May 2020; 'ATAMBA: Pesticides Used in Kenya Do More Harm than Good' (Business Daily) <<https://www.businessdailyafrica.com/analysis/ideas/Pesticides-used-in-Kenya-do-more-harm/4259414-5260702-bcexptz/index.html>> accessed 6 May 2020; 'Kenyan Farmers Cost for Using Europe's Poisoned Agrochemicals - News' <<https://www.farmers.co.ke/article/2001339810/kenyan-farmers-cost-for-using-europe-s-poisoned-agrochemicals>> accessed 6 May 2020; Macharia, I.N., Mithá, M. and Waibel, H., "Potential environmental impacts of pesticides use in the vegetable sub-sector in Kenya." *African Journal of Horticultural Science* 2 (2009); Route to Food, "Pesticides in Kenya: Why our health, environment and food security are at stake," August, 2019. Available at <https://routetofood.org/wp-content/uploads/2019/08/RTFI-White-Paper-Pesticides-in-Kenya.pdf> accessed 6 May 2020; 'Regulation of Harmful Pesticides in Kenya – Kenya News Agency' <<https://www.kenyanews.go.ke/regulation-of-harmful-pesticides-in-kenya/>> accessed 6 May 2020; Duncan M Taiti, 'Effects of the Use of Pesticides on the Health of Farmers in Molo District Kenya' (Thesis, University of Nairobi, Kenya 2010) <<http://erepository.uonbi.ac.ke/handle/11295/4956>> accessed 6 May 2020; <https://www.the-star.co.ke/authors/johnmuchangi>, 'Farmers Use Killer Chemicals to Grow Food, Study Finds' (The Star) <<https://www.the-star.co.ke/news/2019-08-21-farmers-use-killer-chemicals-to-grow-food-study-finds/>> accessed 6 May 2020.

of the most affected vegetables included kales (94percent of 1,139 samples), peas (76percent) and capsicum (59percent).³² There is a need for stakeholders, including the legislators, to step in and curb the situation or at least ensure that the chemical pesticides on sale are highly regulated also and at par with the accepted international standards.³³

It has been reported that two species of insect parasitoids, one form of biological control of pests, have been discovered in Kenya. They have found to be efficient biological control agents against two major maize pests: the *Cotesia typhae* to control the maize stemborer, *Sesamia nonagrioides*, which has invaded France, and *Cotesia icipe* to control the fall armyworm, *Spodoptera frugiperda*, in Africa.³⁴ These are good news for the farmers and the country in general as these will contribute in avoiding and eliminating chemical control of pests due to the chemicals' adverse environmental and economic effects.

With the International Centre of Insect Physiology and Ecology (ICIPE) headquartered in Nairobi, there is a need for continued research towards discovering more non-destructive but ecologically beneficial species of insects that can contribute towards biological control of pests. Farmers also need to be sensitized fully on the possibility of adopting IPM in their farming activities. Traditional ecological knowledge of the various communities in Kenya should also be further exploited in order to streamline the positive aspects of such knowledge that may have a bearing on biological control of pests.

However, even as we move towards adoption of IPM, the Government agencies should also continue working on crop species that are fairly resistant to pests yet safe for the human use and consumption, such as the BT cotton, a genetically modified organism (GMO) or genetically modified pest resistant plant cotton variety, which produces an insecticide to combat bollworm.³⁵ This will also contribute positively towards the gradual eradication of use of harmful pesticides in the agricultural sector and encourage the adoption of biological means of pest control.

³² 'ATAMBA: Pesticides Used in Kenya Do More Harm than Good' (Business Daily) <<https://www.businessdailyafrica.com/analysis/ideas/Pesticides-used-in-Kenya-do-more-harm/4259414-5260702-bcexptz/index.html>> accessed 6 May 2020.

³³ Gladys Shollei, 'Kenya Should Do Away with Harmful Pesticides' (The Standard) <<https://www.standardmedia.co.ke/article/2001349775/kenya-should-do-away-with-harmful-pesticides>> accessed 6 May 2020.

³⁴ Paul-andré Calatayud and Sevgan Subramanian, 'New Bugs, Found in Kenya, Can Help to Control Major Maize Pests' (The Conversation) <<http://theconversation.com/new-bugs-found-in-kenya-can-help-to-control-major-maize-pests-134906>> accessed 6 May 2020.

³⁵ 'Briefly on Farming and Agribusiness' (Daily Nation) <<https://www.nation.co.ke/business/seedsofgold/Briefly-on-farming-and-agribusiness/2301238-5539566-141yuq/index.html>> accessed 6 May 2020; 'Kenya's Bt Cotton Approval Opens Door to Other GMO Crops' (Alliance for Science) <<https://allianceforscience.cornell.edu/blog/2019/12/kenyas-bt-cotton-approval-opens-door-to-other-gmo-crops/>> accessed 6 May 2020; See also 'Prospects Looking up for Cotton Farmers – Kenya News Agency' <<https://www.kenyanews.go.ke/prospects-looking-up-for-cotton-farmers/>> accessed 6 May 2020; MT KENYA STAR, 'Mwea BT Cotton to Unlock Billions - News' <<https://www.farmers.co.ke/article/2001343003/mwea-bt-cotton-to-unlock-billions>> accessed 6 May 2020; Muhammad Arshad, Rashad Rasool Khan and Asad Aslam and Waseem Akbar, 'Transgenic Bt Cotton: Effects on Target and Non-Target Insect Diversity' [2018] Past, Present and Future Trends in Cotton Breeding <<https://www.intechopen.com/books/past-present-and-future-trends-in-cotton-breeding/transgenic-bt-cotton-effects-on-target-and-non-target-insect-diversity>> accessed 6 May 2020.

7. Adoption of Greener Technologies in Infrastructural Development in Cities and Towns

The ever growing human population and the need for housing and other supporting amenities have often resulted in clearing of forests and other buffer zones, leading to pollution and affecting the efforts towards tackling climate change. However, some architects and engineers have been coming up with innovative ways to mitigate the loss.³⁶ They have been advocating for adoption of green technology as a tool to solve these problems with an orientation towards sustainable development at all levels.³⁷

Green technology is considered to be a very effective tool in modern urban planning which incorporates all aspects of planning such as infrastructure and industry, energy, telecommunications, transportation and other vital areas in cities. These technologies are environment friendly inventions that often involve - energy efficiency, recycling, safety and health concerns, renewable resources, and more.³⁸ Green technologies include several forms of technology that help to minimize negative effects on the environment and create new ways to achieve sustainable development.³⁹

The technology is used to make production processes more efficient, finding solutions to various "threats" that may affect the ability of cities to compete, such as the use of soil and urban transport, waste management in the city, quality of air, cultural heritage of cities, urban information systems, sustainable energy, agriculture, and new building materials applied to urban development and sustainable water management.⁴⁰

The various aspects of green technology can be incorporated into the spatial planning process to help find new ways to achieve sustainable development by reducing the negative impacts of various economic and human activities on the environment and ecosystems and guiding development towards adoption of green and eco-friendly ways of life in cities and urban areas through such means as promoting green transport to enhance access to services and help reduce pollution levels and health inequities of the city's population; the use of treated wastewater in public water and green gardens help to reduce overall water consumption. Cities should look at circular development models that recycle water and waste and produce energy in them, so that sewage can be used.⁴¹

While originally, "green" infrastructure was identified with parkland, forests, wetlands, greenbelts, or floodways in and around cities that provided improved quality of life or "ecosystem services" such as water filtration and flood control, now, green infrastructure is more often related to environmental or sustainability goals that cities are trying to achieve through a mix of natural approaches: "green" infrastructure and technological practices include green, blue, and white

³⁶ Chai-Lee Goi, 'The Impact of Technological Innovation on Building a Sustainable City' (2017) 3 International Journal of Quality Innovation 6.

³⁷ Laffta, S. and Al-rawi, A., "Green technologies in sustainable urban planning." In MATEC Web of Conferences, vol. 162, p. 05029. EDP Sciences, 2018.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid, p. 05029.

⁴¹ Ibid; See also Bai, M., Zhou, S., Zhao, M. and Yu, J., "Water use efficiency improvement against a backdrop of expanding city agglomeration in developing countries—A case study on industrial and agricultural water use in the Bohai Bay Region of China." Water 9, no. 2 (2017): 89.

roofs; hard and soft permeable surfaces; green alleys and streets; urban forestry; green open spaces such as parks and wetlands; and adapting buildings to better cope with floods and coastal storm surges.⁴² Applications of these green infrastructure approaches range in scale from individual buildings, lots, and neighborhoods to entire cities and metro regions.⁴³

It is noteworthy that many cities and towns across the world have embraced the idea of green technologies in infrastructural developments.⁴⁴ The benefits of developing Eco-cities and Eco-Townships; which among other things, are largely green and eco-friendly include: efficient land-use, habitat preservation and restoration, effective transport management and energy efficiency, efficient use of resources, emissions and pollution control and enhanced quality of life for the occupants.⁴⁵

It is important that towns and cities in Kenya start not only embracing this idea but also implementing the same in larger scales, considering that the real estate in Kenya has been on upward trajectory in the last few years and the effect has been adverse on the environment.* The county and national governments should work closely with private investors and professionals such as engineers, architects and urban planners to incorporate green technologies into urban planning and management.⁴⁶

⁴² Foster, J., Lowe, A. and Winkelman, S., "The value of green infrastructure for urban climate adaptation." Center for Clean Air Policy 750, no. 1 (2011): 1-52, at p.3; Goi, C.L., "The impact of technological innovation on building a sustainable city." International Journal of Quality Innovation 3, no. 1 (2017): 6.

⁴³ Ibid.

⁴⁴ Bertie Russell, 'This Small German Town Took Back the Power – and Went Fully Renewable' (The Conversation) <<http://theconversation.com/this-small-german-town-took-back-the-power-and-went-fully-renewable-126294>> accessed 10 May 2020; 'Small Towns May Hold the Key to India's Future of Sustainability' (Times of India Blog, 10 June 2019) <<https://timesofindia.indiatimes.com/blogs/voices/small-towns-may-hold-the-key-to-indias-future-of-sustainability/>> accessed 10 May 2020; 'Three Ways Cities Can Take the Lead on Climate Change — Quartz' <<https://qz.com/1750042/three-ways-cities-can-take-the-lead-on-climate-change/>> accessed 10 May 2020; 'The Case for ... Making Low-Tech "dumb" Cities Instead of "Smart" Ones | Cities | The Guardian' <<https://www.theguardian.com/cities/2020/jan/15/the-case-for-making-low-tech-dumb-cities-instead-of-smart-ones>> accessed 10 May 2020; 'To Fix Our Infrastructure, Washington Needs to Start from Scratch' <<https://www.brookings.edu/research/to-fix-our-infrastructure-washington-needs-to-start-from-scratch/>> accessed 10 May 2020; 'Truly Sustainable Cities Are All about Balance' <<https://www.sustainability-times.com/in-depth/truly-sustainable-cities-are-all-about-balance/>> accessed 10 May 2020; 'A 100 Percent Clean Future - Center for American Progress' <<https://www.americanprogress.org/issues/green/reports/2019/10/10/475605/100-percent-clean-future/>> accessed 10 May 2020.

⁴⁵ 'Eco-Innovations in Designing Eco-Cities and Eco-Towns' <<https://www.thsmartcityjournal.com/en/articles/1042-eco-innovations-eco-cities-eco-towns>> accessed 10 May 2020.

⁴⁶ 'Invest in Technologies That Convert Waste into Energy and Fuel, CS Macharia Challenges Counties – Kenya News Agency' <<https://www.kenyanews.go.ke/invest-in-technologies-that-convert-waste-into-energy-and-fuel-cs-macharia-challenges-counties/>> accessed 10 May 2020; See also Hermelin, B. and Andersson, I., "How green growth is adopted by local policy—a comparative study of ten second-rank cities in Sweden." Scottish Geographical Journal 134, no. 3-4 (2018): 184-202; Hammer, S. et al. (2011), "Cities and Green Growth: A Conceptual Framework", OECD Regional Development Working Papers 2011/08, OECD Publishing. <http://dx.doi.org/10.1787/5kg0tflmzx34-en>; cf. Zuniga-Teran, A.A., Staddon, C., de Vito, L., Gerlak, A.K., Ward, S., Schoeman, Y., Hart, A. and Booth, G., "Challenges of mainstreaming green infrastructure in built environment professions." Journal of Environmental Planning and Management 63, no. 4 (2020): 710-732.

8. Conclusion

An integrated approach to environmental and natural resources management in Kenya with practical application of diverse knowledge from science and traditional ecological knowledge would go a long way in ensuring that the various approaches to resource management are not only applied efficiently but also that the various aspects of the environment such as the flora and fauna are well taken care of. The law, if applied alone will not be effective in addressing such challenges as pollution, environmental degradation, food insecurity, natural resource based conflicts and other social ills all of which pose some threats to environmental sustainability. For hundreds of years, local communities have acknowledged and indeed observed the ecological approaches to conservation. However, rising levels of poverty and the ever shrinking parcels of land due to the commercialization of land in the country have often made them lean more towards anthropocentricity at the expense of sustainability.

However, all hope is not lost as the government agencies can work closely with them to address the challenges through integrated approaches to poverty alleviation, agriculture, animal husbandry, and generally the realisation of the sustainable development agenda. This is the only way that will ensure that anthropocentric approaches coupled with ecocentric approaches are adopted in order to strike a balance in safeguarding environmental, social and economic interests of the country.

This is the only way that the global *2030 Agenda for Sustainable Development*⁴⁷ which is a plan of action for people, planet and prosperity, will be achieved.

Charting a new path for Environmental Management and Conservation in Kenya is absolutely necessary. We have to explore new paradigms in order to achieve the goal of effectively managing the environment for the present and future generations.

⁴⁷Transforming 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.

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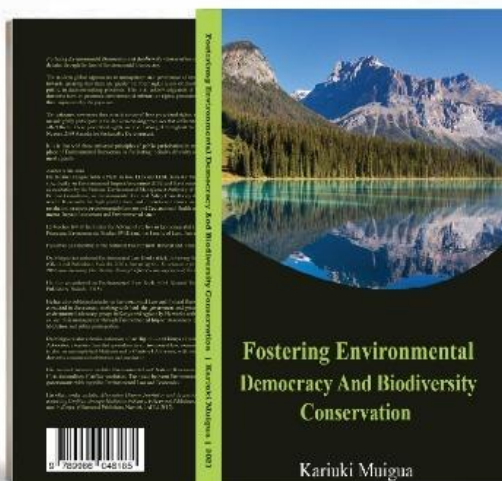
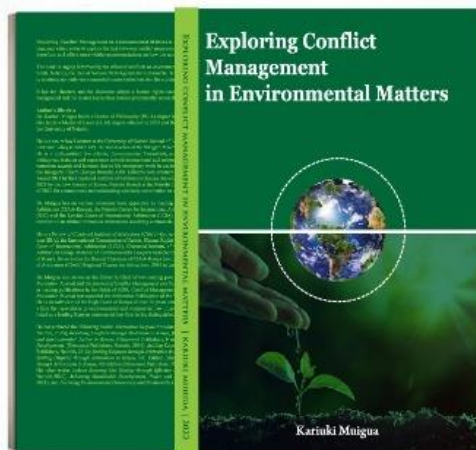
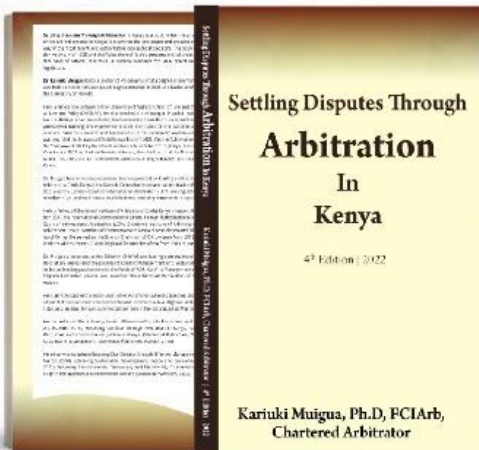
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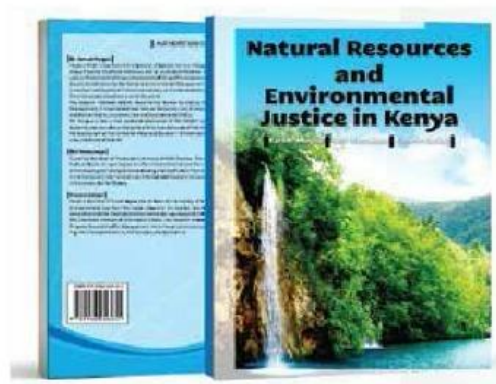
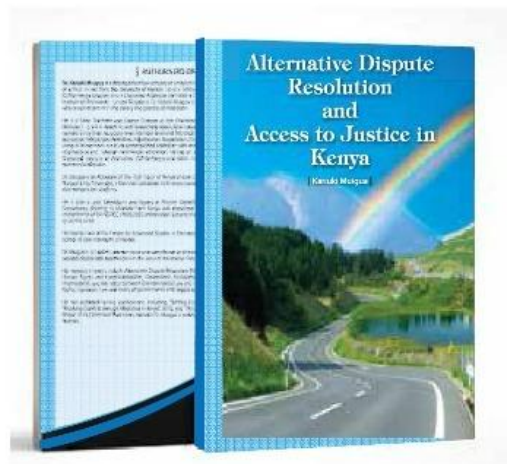
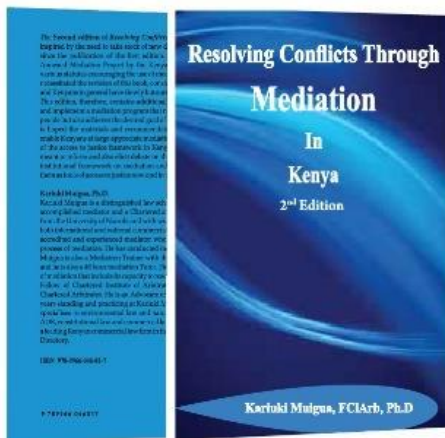
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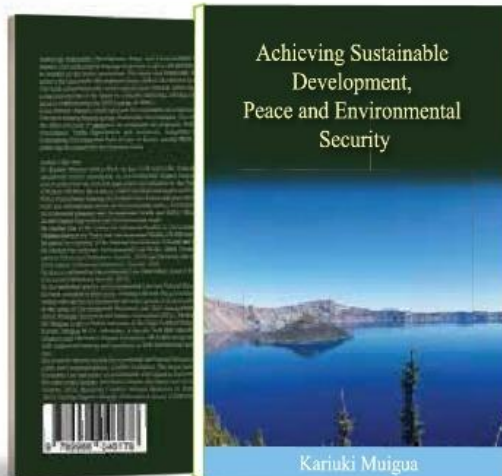
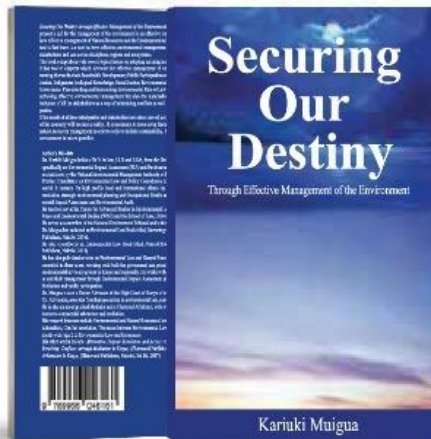
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Attaining Environmental Justice for Posterity is a book that entails a collection of papers on Environmental Justice in Kenya, Africa and the whole world. Some of the papers have been published in peer-reviewed Journals and book chapters.

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.

He is a senior law Lecturer at the University of Nairobi Faculty of Law and the Centre for Advanced Studies in Environmental Law and Policy (CASELAP). He also teaches at the Wangari Maathai Institute for Peace and Environmental Studies.

He is a distinguished law scholar, Environmental Consultant, an accredited mediator and a Chartered arbitrator. He has widespread training and experience in both international and national commercial arbitration and mediation. He has received numerous awards and honours due to his exemplary work in academia and Alternative Dispute Resolution.

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 CI Arb (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.

Dr. Muigua has on various occasions been appointed by leading arbitral institutions including the Chartered Institute of Arbitrators (CI Arb-Kenya), the Nairobi Centre for International Arbitration (NCIA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) among other institutions, as both a sole arbitrator and a member of an arbitral tribunal in arbitrations involving commercial disputes.

He is a Fellow of Chartered Institute of Arbitrators (CI Arb)-Kenya chapter. He is a member of the International Bar Association (IBA), the International Commission of Jurists, Human Rights Institute of the International Bar Association, the London Court of International Arbitration (LCIA), Chartered Institute of Arbitrators (UK) and Kenya Branch, Young International Arbitration Group, Member of Commonwealth Lawyers Association and fellow of the Institute of Certified Public Secretaries of Kenya. He served as the Branch Chairman of CI Arb-Kenya from 2012 to 2015. He was elected (unopposed) to the Chartered Institute of Arbitrators (CI Arb) Board of Trustees as the Regional Trustee for Africa, for the term beginning 1st January 2019 for a term of four years until 31st December 2022.

Dr. Muigua also serves as the Editor in Chief of two leading peer reviewed journals in East Africa, the *Alternative Dispute Resolution Journal* and the *Journal of Conflict Management and Sustainable Development*. The two journals have been hailed as leading publications in the fields of ADR, Conflict Management and Sustainable Development. The *Alternative Dispute Resolution Journal* was awarded the Arbitration Publication of the Year Award 2020 at the Africa Arbitration Awards.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, a firm that specialises in environmental and commercial law litigation and Alternative Dispute Resolution. The firm is also listed as a leading Kenyan commercial law firm in the distinguished Martindale Hubbell Directory.

He has authored the following books: *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015); *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, Nairobi, 2013); *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015); *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers, Nairobi, 2016); *Settling Disputes through Arbitration in Kenya*, 1st Edition (Glenwood Publishers, Nairobi, 2012); *Settling Disputes through Arbitration in Kenya*, 2nd Edition (Glenwood Publishers, Nairobi, 2012); *Settling Disputes through Arbitration in Kenya*, 3rd Edition (Glenwood Publishers, Nairobi, 2017); and *Settling Disputes through Arbitration in Kenya*, 4th Edition (Glenwood Publishers, Nairobi, 2022).

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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