



Nurturing Our Environment

for A Green Tomorrow

Kariuki Muigua

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Chartered Arbitrator**

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Dedication

Dedicated to the idea
that
Nurturing our Environment
for a green Tomorrow
is a viable ideal
whose time has come

That we have a duty
to take care of Mother Earth
for the sake of the present
and future generations
That
we must respect the Environment
which is our heritage
As we pursue
Sustainable Development

This book is for those
who dream
big dreams
Dreams so big
that they scare them
Yet they still pursue the
Dreams

This book is for those who
know
Deep down in their hearts
That what can be conceived
in the mind
is indeed achievable

Those who never ever give up
In the face of adversity
and pain

And to those who strive
to achieve a Clean
and Healthy Environment

It is for
those who seek
peace
And Environmental Security

To those
Who strive to live
In harmony with nature
thus securing our destiny
for generations to come

This book is for those who
know
That if we nurture our Environment
Today
Tomorrow will be Green

Acknowledgments

I am humbled that the One Above has seen it fit that I see the light of day today. I am grateful.

I extend my sincere gratitude to those who see the potential in me; those who encourage me and those who bring out the best in me.

I appreciate the child in me; that child who lives in the Universe where everything is possible – where dreams do come true.

I am deeply indebted to those who have walked with me over time and who have made it possible for this book to see the light of day.

We write for the present and future generations – This book is for you.

I am grateful to Ngararu Maina, James Njuguna, Anne Wairimu, Mwati Muriithi, the staff of Kariuki Muigua & Co. and Glenwood Publishers for being there for me during sunny days and stormy seasons.

I extend my gratitude to my family. We have come a long way. Together we have braved dark days and nights and lived. Together we shall nurture our environment for a green tomorrow.

Author's Note

In 2022 the author put together a collection of papers on Environmental Justice in Kenya and the world at large. These fell under the theme “Attaining Environmental Justice for Posterity.” The work is available in two volumes.

In this book which should ideally be Volume Three, the author presents more independent papers under the theme “Nurturing our Environment for a Green Tomorrow.”

The emphasis across the board is our duty to nurture and foster our Environment for the current and future generations and in order to achieve Sustainable Development.

We must work together to deal with challenges that threaten humanity and ecosystems.

Climate change is a threat to all biological life forms including human beings.

We have a duty to combat Climate Change for the sake of today and also for a green tomorrow.

Degradation is a problem that should be dealt with head on. Biodiversity loss remains a key concern. A Clean, Healthy and Sustainable Environment is now a human right that can be realised.

Ending poverty is one of the Sustainable Development goals – Goal number one.¹

The ideals envisaged in the 17 Sustainable Development goals are achievable if we nurture our environment for a green tomorrow.

The goals deal with, among other issues:

Equity and inclusiveness; access to energy; reduction of inequality; combating climate change; Conserving oceans, seas and marine resources; promoting peaceful and inclusive societies; and providing access to justice.²

The papers covered in this volume tackle some of these thematic areas with an emphasis on the African context.

Nurturing our Environment for a Green tomorrow is an ideal whose time is now.

Kariuki Muigua

Nairobi Kenya, April 2023.

¹ Transforming Our World: The 2030 Agenda for Sustainable Development
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² Ibid

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List of Abbreviations

GIS	Geographic Information System
SDG	Sustainable Development Goal
ISDS	Investor State Dispute Settlement
IAs	International Investment Agreements
PCA	Permanent Court of Arbitration
ICSID	International Centre for Settlement of Investment Disputes
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
BITs	Bilateral Investment Treaty's
NAFTA	North American Free Trade Agreement
RECs	Regional Economic Communities
EAC	East African Community
ECOWAS	Economic Community of West African States
SADC	Southern African Development Community
FET	Fair and Equitable Treatment
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
SDGs	Sustainable Development Goals
TDR	Traditional Dispute Resolution
TDRMs	Traditional Dispute Resolution Mechanisms
UNDP	United Nations Development Programme
UNFCCC	United Nations Framework on Climate Change Convention
UNCCD	United Nations Convention to Combat Desertification

Addressing Noise Pollution for a Clean and Healthy Environment in Kenya

Abstract

This paper discusses the general and specific effects of noise pollution on human health as the basis for addressing noise pollution in Kenya, in line with the constitutional and statutory guarantees on creating a clean and healthy environment for all persons. The author argues that noise pollution is a direct violation of this right and consequently offers recommendations on how the problem can be addressed. The paper generally discusses the legal and institutional framework on noise regulation, with a view to identifying the key players and stakeholders in tackling the vice. The author argues that unless this problem is effectively addressed, realisation of a clean and healthy environment for the Kenyan people will remain a mirage.

1. Introduction

Any sound that bothers, irritates, or potentially harm a person's ear is considered noise. Other definitions of noise include undesired, undesirable, and unpleasant sound.¹ Environmental noise, as defined by the World Health Organization (WHO), is all noise, except noise from places of employment. Any unwelcome sound or group of noises that annoys people or could be harmful to their health is considered noise.² EMCA defines “noise” as any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment.³ Notably, EMCA also defines “pollutant” as including any substance whether liquid, solid or gaseous which—(a) may directly or indirectly alter the quality of any element of the receiving environment; (b) is hazardous or potentially hazardous to human health or the environment; and includes objectionable odours, radio-activity, noise, temperature change or physical, chemical or biological change to any segment or element of the environment.⁴

Environmental noise pollution still poses a serious risk to people's health and quality of life on a global scale. Urbanization, along with the accompanying rise in mobility and industrialization, has led to an amplification of noise in densely populated areas, increasing noise exposure. In a city, as the population grows, so does industrial activity to suit the demands of the populace. Hence, noise levels rise.⁵

This paper discusses the general and specific effects of noise pollution on human health as the basis for addressing noise pollution in Kenya, in line with the constitutional and statutory guarantees on creating a clean and healthy environment for all persons. The author argues that noise pollution is a direct violation of this right and consequently offers recommendations on how

¹ Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., ‘Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software’ (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

² ‘Definition of Environmental Noise’ (*Gouvernement du Québec*)
<<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/definition-environmental-noise>> accessed 25 March 2023.

³ EMCA, Sec. 2.

⁴ EMCA, Sec. 2.

⁵ Wawa EA and Mulaku GC, ‘Noise Pollution Mapping Using GIS in Nairobi, Kenya’ (2015) 7 Journal of Geographic Information System 486, p. 487.

the problem can be addressed. The paper generally discusses the legal and institutional framework on noise regulation, with a view to identifying the key players and stakeholders in tackling the vice. The author argues that unless this problem is effectively addressed, realisation of a clean and healthy environment for the Kenyan people will remain a mirage. Kenyans have for a while suffered the menace of noise pollution especially after the promulgation of the 2010 Constitution, where there has been conflicting jurisprudence on which level of the Government between national and county governments is mandated to address noise pollution and other nuisances that affect the right to clean and healthy environment as far as far noise pollution is concerned.⁶

2. Links Between Noise and Human Health

Building sites or traffic on the roads, trains, and in the air are significant sources of environmental noise exposure. Other sources of noise exposure include wind turbines and leisure activities like playing loud music or other audio content or participating in e-sports (video and computer game competitions). In addition to increasing the risk of ischemic heart disease (IHD), hypertension, sleep disturbance, hearing impairment, tinnitus⁷, and cognitive impairment, research shows that excessive noise can be annoying. There is also mounting evidence that excessive noise can have negative effects on mental health and birth outcomes.⁸

⁶ <https://www.the-star.co.ke/authors/maureen-kinyanjui>, ‘Sakaja Thanks Ruto for Support in Curbing “noise Pollution Menace” in City’ (*The Star*) <<https://www.the-star.co.ke/news/2022-12-12-sakaja-thanks-ruto-for-support-in-curbing-noise-menace-in-city/>> accessed 24 March 2023; Okoth B, ‘Loud Music in Kenya Neighbourhoods Illegal Regardless Nature of Your Business’ (*The Standard*) <<https://www.standardmedia.co.ke/article/2001458024/loud-music-in-neighbourhood-illegal-regardless-nature-of-your-business>> accessed 24 March 2023; February 16 2020 S, ‘You Have a Right to a Quiet Environment’ (*Business Daily*, 19 September 2020) <<https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/you-have-a-right-to-a-quiet-environment-2280534>> accessed 24 March 2023; Okafor C, ‘Night Clubs in Kenya Face Closure and WhatsApp Groups Could Help Save Them’ (*Business Insider Africa*, 55:25 100AD) <<https://africa.businessinsider.com/local/markets/night-clubs-in-kenya-face-closure-and-whatsapp-groups-could-help-save-them/rsv3phk>> accessed 24 March 2023; ‘Kisumu Bans Church Crusades over Noise Pollution – Kenya News Agency’ (4 November 2022) <<https://www.kenyanews.go.ke/kisumu-bans-church-crusades-over-noise-pollution/>> accessed 24 March 2023; Chepkwony J, ‘Churches on the Spot over Noise Pollution, Court Order Them to Cease or Be Prosecuted’ (*The Standard*) <<https://www.standardmedia.co.ke/coast/article/2001459278/churches-on-the-spot-over-noise-pollution-court-order-them-to-cease-or-be-prosecuted>> accessed 24 March 2023; WAKWELO V, ‘Kileleshwa Bar Operators, Patrons Arrested after Alai’s Noise Pollution Complaint» Capital News’ (*Capital News*, 2 October 2022) <<https://www.capitalfm.co.ke/news/2022/10/kileleshwa-bar-operators-patrons-arrested-after-alais-noise-pollution-complaint/>> accessed 24 March 2023;

⁷ When a person has tinnitus, their ears or head may hiss, ring, or buzz. These sounds do not originate from an outside source; instead, a person hears them. High noise levels, such as those produced by loud music, can cause tinnitus. Tinnitus may also be brought on by loud or abrupt noises, such as an explosion or gunshot. Hearing loss frequently coexists with the hearing issue of tinnitus. It might be merely passing or permanent. A person's emotional, cognitive, psychological, or physical state is constantly disturbed by debilitating tinnitus.

Around 3% of debilitating tinnitus is caused by environmental noise exposure, primarily noise from leisure activities. <‘Effects on Physical Health - The Effects of Environmental Noise on Health’ (*Gouvernement du Québec*) <<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/effects-of-environmental-noise-on-physical-health>> accessed 25 March 2023.

⁸ ‘Guidance on Environmental Noise’

Decibels are used to measure noise level (dB). Decibel levels increase as noise levels do. To accommodate human hearing, decibels can be changed. Decibels (dBA) is the unit of measurement for noise level. As a person is exposed to different levels of noise, different impacts result. Hearing loss can occur after years of being exposed to loud noises (75 dBA for eight hours each day). The body can react to lower noise levels as well; for example, a 40 dBA outdoor noise can be enough to keep someone awake.⁹

Noise's psychosocial effects on people include annoyance, which is the discomfort and disturbance that the person exposed to the noise experiences, as well as consequences on learning.¹⁰

3. Noise Regulation in Kenya: Legal and Institutional Framework

According to the International Covenant on Economic, Social, and Cultural Rights, every person has the right to the best possible level of physical and mental health, and State Parties are required to recognise this right. The actions that must be done by the States Parties to the current Covenant in order to fully realise this right must include those required for: the advancement of all facets of industrial and environmental hygiene.¹¹

3.1 Constitution of Kenya 2010

Article 42 (a) of the 2010 Constitution¹² 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.”

Article 70 (1) of the Constitution provides: “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.” It is also worth pointing out that the Fourth Schedule [Articles 185(2), 186(1) And 187(2) to the Constitution provides for the distribution of functions between the national government and the county governments. The functions and powers of the county governments include, *inter alia*: control of air pollution, noise pollution, other public nuisances and outdoor advertising. The implication of this is that the duty of noise pollution control moved from National Environment Management Authority (NEMA) which is a national government arm, to the county governments. NEMA is just required to play an

<<https://www.who.int/tools/compendium-on-health-and-environment/environmental-noise>> accessed 24 March 2023; ‘Compendium of WHO and Other UN Guidance on Health and Environment’

<<https://www.who.int/publications-detail-redirect/WHO-HEP-ECH-EHD-22.01>> accessed 25 March 2023.

⁹ ‘Noise Measurement - The Effects of Environmental Noise on Health’ (*Gouvernement du Québec*) <<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/noise-measurement>> accessed 25 March 2023.

¹⁰ ‘Psychosocial Effects - The Effects of Environmental Noise on Health’ (*Gouvernement du Québec*) <<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/psychosocial-effects-of-environmental-noise>> accessed 25 March 2023.

¹¹ 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, Article 12 (1)(2)(b).

¹² Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

oversight role in this area, as per the Act. This is on the understanding that county governments are the lead agency in noise pollution control.¹³ EMCA defines “lead agency” to mean any Government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management or any element of the environment or natural resources.¹⁴

3.2. Environmental Management and Co-ordination Act, 1999

The Environmental Management and Co-ordination Act, 1999¹⁵ (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.¹⁶ Section 101 of EMCA gives the Cabinet Secretary the power to set standards for noise and, on the recommendation of the Authority: recommend minimum standards for emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment; determine criteria and procedures for the measurement of noise and vibration pollution into the environment; determine criteria and procedures for the measurement of sub-sonic vibrations; determine standards for the emission of sub-sonic vibrations which are likely to have a significant impact on the environment; issue guidelines for the minimization of sub-sonic vibrations, referred to in paragraph (d) from existing and future sources; determine noise level and noise emission standards applicable to construction sites, plants, machinery, motor vehicles, aircraft including sonic boom, industrial and commercial activities; determine measures necessary to ensure the abatement and control of noise from sources referred to in paragraph (f); and issue guidelines for the abatement of unreasonable noise and vibration pollution emitted into the environment from any source.¹⁷

Section 102 thereof prohibits noise in excess of established standards by providing that subject to the provisions of the Civil Aviation Act (Cap. 394), any person who emits noise in excess of the noise emission standards established under this Part commits an offence. However, exceptions exist in relation to noise levels.¹⁸ EMCA offers the broad rules and criteria to be followed in the management and conservation of several environmental issues. Hence, it is intended to be put into practice by the adoption of sector-specific laws that should concentrate on the various facets 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.

¹³ EMCA, sec. 12.

¹⁴ EMCA, sec. 2.

¹⁵ Environmental Management and Co-ordination Act, No.8 of 1999, Laws of Kenya.

¹⁶ Ibid, Preamble.

¹⁷ EMCA, sec. 101.

¹⁸ EMCA, sec. 103.

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

The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009*¹⁹ 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.²⁰ However, there are some exemptions to these prohibitions.²¹

In the case of *Pastor James Jessie Gitahi and 202 others vs Attorney General*²², the court recognized one of the components of a clean and healthy environment to be the prevention of noise and vibration pollution. 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.

3.4. National Environment Management Authority (NEMA)

In order to implement all environmental policies and to exert general oversight and coordination over all environmental issues, the National Environment Management Authority (NEMA) was established as the main government vehicle under EMCA. NEMA has the authority to create rules, specify requirements and guidelines, and issue directives for the management and preservation of the environment and natural resources in conjunction with the lead agencies. Environmental restoration orders, conservation orders, and easements are just a few of the mechanisms the Act uses to protect the environment. It also calls for environmental impact assessments, audits, and monitoring.²³

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.²⁴

3.5. County Laws

Some counties have already embraced their role under the Constitution to control noise pollution, such as the Nairobi City County Government which has since enacted the Nairobi City County Public Nuisance Act 2021.²⁵

¹⁹ Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, Legal Notice No. 61 of 2009.

²⁰ Ibid, Regulation 3 (1).

²¹ Regulation 7.

²² *Pastor James Jessie Gitahi and 202 others vs Attorney General*, [2013] eKLR, petition No. 683 of 2009.

²³ See EMCA, Part Vi – Integrated Environmental Impact Assessment; Part Vii – Environmental Audit and Monitoring.

²⁴ Sec. 12, EMCA.

²⁵ ‘The Nairobi City County Public Nuisance Act 2021 Signed into Law. | Nairobi City County’ (20 August 2021) <<https://nairobi.go.ke/nairobi-city-county-public-nuisance-act-2021-signed-law/>> accessed 25 March 2023.

3.5.1. Nairobi City County Public Nuisance Act 2021

Notably, Section 20 thereof provides that: “a person shall not in any street or in any shop, business premises or any other place adjoining any street to which the public are admitted, play, operate, cause or allow to be played or operated, any musical instrument, wireless, gramophone, amplifier or similar instrument thereby making, causing or authorising noise to be made which is loud and continuous, or repeated as to constitute a nuisance to the occupants or dwellers of any premises in the neighbourhood or to passersby on the street.”

There is a need for other county governments to follow suit and put in place laws and regulations aimed at addressing noise pollution within their counties.

4. Getting it Right: Streamlining Noise Regulation Framework in Kenya

This section offers some viable recommendations on how to address the noise pollution in the country.

4.1 Institutional Streamlining and Effective Enforcement of Laws and Regulations on Noise Pollution

As a way of curbing noise pollution, the World Health Organisation (WHO) urges countries to enact and enforce legislation/regulations/policies for limiting sound levels and exposure in entertainment venues and events such as clubs, bars, fitness centres, concerts.²⁶ WHO also advises that such legislation should focus on: limiting sounds to 100 dB(A) averaged over 15 minutes; conducting regular sound monitoring to ensure and document compliance; optimizing venue acoustics and sound system design to ascertain optimal listening conditions for all audience members in the venue/event; create quiet zones allowing audience members to rest; ensuring provision of hearing protection (earplugs); and ensuring provision of training on noise reduction strategies and information about noise.²⁷

It is worth pointing that there is still a lot of confusion on who between NEMA and the county governments should substantively deal with the noise pollution menace. This may, therefore, call for some updates and/or amendments to EMCA to capture and clarify the constitutional position on this issue.

Meanwhile, while under the Constitution of Kenya 2010, the national government, has the role of protecting the environment and natural resources,²⁸ and county governments have a role in pollution control²⁹ and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry,³⁰ the counties should work closely with the national government and other stakeholders in discharging

²⁶ ‘Compendium of WHO and Other UN Guidance on Health and Environment’ <<https://www.who.int/publications-detail-redirect/WHO-HEP-ECH-EHD-22.01>> accessed 25 March 2023, p. 152.

²⁷ Ibid, p. 152.

²⁸ Fourth Schedule, S. 22.

²⁹ S. 3 of Part II.

³⁰ Fourth Schedule, S. 10.

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.

4.2. Use of Appropriate Technology for Noise Mapping

One of the most effective methods for identifying the crucial locations in urban, suburban, and rural areas is noise monitoring under various traffic and environmental conditions.³¹ The level of noise in a given area at a given moment is depicted cartographically as a noise map. Aside from general evaluation, noise maps are also used to assess the impact of new roads and highways within metropolitan areas as well as the noise levels during various phases of any development project. As a result, noise maps are a valuable strategic tool for planning metropolitan areas and making environmental management decisions.³²

The idea that it is crucial to gauge the amount of noise coming from particular sources and communicate that information to those who are nearby the source of the noise is well-founded. This will enable the public to understand the noise levels to which they are exposed and to create mechanisms for reducing the noise to acceptable levels.³³ One of the suggested ways of doing this is geographic information system (GIS). A geographic information system (GIS) is a computer-based system that makes it possible to input, manage, analyse, produce, and disseminate geographically referenced, land-related data and information at all scales. Auditory circumstances are well-presented spatially on noise maps. GIS helps in creating a spatial decision support system that can be applied in the decision-making process and offers effective tools for visualising noise propagation. As a result, such analysis and management procedures might leverage noise maps created in GIS.³⁴ GIS offers a potent set of tools for storing and retrieving, processing, and displaying spatial data from the real world for a specific set of uses.³⁵

In order to create a graphic depiction of the distribution of sound levels over a certain location for a specific time period, noise mapping entails measuring sound levels at predetermined sites and using the generated data. Assessing compliance with permissible noise levels, putting in place noise reduction measures, and tracking the effects of such actions can all be done using noise maps.³⁶

Some authors have praised SoundPLAN Software, a software package offering a wide variety of noise and air pollution evaluation modules, developed by SoundPLAN International LLC and

³¹ Alam, P., Ahmad, K., Afsar, S.S. and Akhtar, N., 'Noise Monitoring, Mapping, and Modelling Studies—a Review' (2020) 21 *Journal of Ecological Engineering*, p.82.

³² Manojkumar N, Basha K and Srimuruganandam B, 'Assessment, Prediction and Mapping of Noise Levels in Vellore City, India' (2019) 6 *Noise Mapping* 38, p.40.

³³ Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 *Journal of Geographic Information System* 486, pp. 486-87.

³⁴ *Ibid*, p. 487.

³⁵ Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012) 6 *International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials)* 38, p.38.

³⁶ Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 *Journal of Geographic Information System* 486, p. 488.

Braunstein + Berndt GmbH. It is perhaps the world's top environmental forecast programme and is used by more than 5,000 users, including governments, consultants, and researchers in more than 40 nations.³⁷ It is suggested that the government of Kenya and/or County Governments should invest in such tools in order to enhance noise mapping in the country.

4.3. Need for Integration of Health in Urban and Territorial Planning

As already pointed, there are various sources of noise especially in urban areas. As a result, there is a need for urban and city planners to take these sources of noise into consideration. Target 3.9 of Sustainable Development Goal (SDG) 3 urges countries to ensure that by 2030, they substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.³⁸ This is closely related to SDG 11 which provides that countries should ensure that they make cities and human settlements inclusive, safe, resilient and sustainable.³⁹ Target 11.a seeks to support positive economic, social and environmental links between urban, peri-urban and rural areas by strengthening national and regional development planning. In addition, Target 11.b seeks to ensure that by 2020, countries substantially increase the number of cities and human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change, resilience to disasters, and develop and implement, in line with the Sendai Framework for Disaster Risk Reduction 2015-2030, holistic disaster risk management at all levels.⁴⁰

The Physical and Land Use Planning Act, 2019⁴¹ provides that one of the things that should be considered in the contents of local physical and land use development plans is aspects of housing, unemployment, traffic congestion, pollution, land tenure, lack of services, terrain, soils.⁴²

5. Conclusion

As discussed in this paper, noise pollution has various adverse effects on human health and thus poses a risk to the realisation of Article 42 of the Constitution of Kenya on the right to clean and healthy environment for all. As a result, it is important that all stakeholders join hands in addressing the menace for the sake of all, and promoting public health. It is not the time to point fingers and watch as the general populace suffers; both levels of government should respond to the cry for help from their citizens and address the problem of noise pollution.

³⁷ Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

³⁸ 'Goal 3 | Department of Economic and Social Affairs' <<https://sdgs.un.org/goals/goal3>> accessed 25 March 2023.

³⁹ 'Goal 11 | Department of Economic and Social Affairs' <<https://sdgs.un.org/goals/goal11>> accessed 25 March 2023.

⁴⁰ Ibid.

⁴¹ Physical and Land Use Planning Act, No. 13 of 2019, Laws of Kenya.

⁴² Ibid, sec.48; Second Schedule.

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Abstract

One of the global key drivers of development is investment, with most investors moving from the developed world to invest in the developing regions of the world which are rich in natural resources such as the African continent. These investment activities naturally come with disputes. However, most of these investors do not have faith in the ability of the domestic judicial system of the host countries to address these disputes if and when they arise. As a result, the key players put in place the investor state dispute settlement system to handle such disputes, a system that is designed to work to a large extent independent of the host country's legal and institutional framework. However, most of the host countries which are mainly from the developing world have over the years complained that the investor state dispute settlement system is unfairly designed to favour the investors at the expense of the interests of the host states. Most of them have therefore been pushing for reforms. This paper explores the role of Africa in such reforms. It calls for a more active and meaningful involvement of African countries in the ISDS reforms debate as a way of ensuring that any continued use of ISDS does not adversely affect the development agenda of the African states and the continent in general. In addition, African countries must move from being investment rule-takers to being part of the rule makers.

1. Introduction

The global economy is mainly driven by trade and investment carried out by both states and private companies in the form of Foreign Direct Investments.¹ Most investors move from the developed world to invest in the developing regions of the world which are rich in natural resources such as the African continent, a continent endowed with immense natural and human resources as well as great cultural, ecological and economic diversity.² These foreign investment activities naturally come with disputes. Thus, laws determine whether and how investments may be made in a specific country, the nature of the respective privileges of the non-national or foreign investors and the host country's government.³ Considering that most of these foreign investors do not have faith in the ability of the domestic judicial system of the host countries to address these disputes if and when

¹ James E Anderson, Mario Larch and Yoto V Yotov, 'Trade and Investment in the Global Economy' (National Bureau of Economic Research 2017); Hezron M Osano and Pauline W Koine, 'Role of Foreign Direct Investment on Technology Transfer and Economic Growth in Kenya: A Case of the Energy Sector' (2016) 5 Journal of Innovation and Entrepreneurship 31.

² 'Africa: A Continent of Wealth, a Continent of Poverty' (*War on Want*, 30 June 2015) <<https://waronwant.org/media/africa-continent-wealth-continent-poverty>> accessed 13 August 2020; Ayodele Odusola, 'Investing in Africa Is Sound Business and a Sustainable Corporate Strategy' (*Africa Renewal*, 20 August 2018) <<https://www.un.org/africarenewal/web-features/investing-africa-sound-business-and-sustainable-corporate-strategy>> accessed 13 August 2020; 'Poverty and Development in Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 13 August 2020; Pippa Morgan and Yu Zheng, 'Tracing the Legacy: China's Historical Aid and Contemporary Investment in Africa' (2019) 63 *International Studies Quarterly* 558.

³ Shirley Ayangbah and Liu Sun, 'Comparative Study of Foreign Investment Laws: The Case of China and Ghana' (2017) 3 *Cogent Social Sciences* 1355631.

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they arise⁴, the key players in international investment put in place the investor state dispute settlement system to handle such disputes, a system that is designed to work to a large extent independent of the host country's legal and institutional framework.⁵ However, most of the host countries which are mainly from the developing world have over the years complained that the investor state dispute settlement system is unfairly designed to favour the investors at the expense of the interests of the host states.⁶ According to the *World Investment Report 2019*, about 70 per cent of the publicly available arbitral decisions in 2018 were rendered in favour of the investor, either on jurisdiction or on the merits.⁷ Most of these developing world countries have therefore been pushing for reforms in the ISDS system.⁸ This paper explores the role of Africa in such reforms and the possible alternatives.

2. The Investor State Dispute Settlement System: Prospects and Challenges

Notably, the foundations of the modern international investment regime were laid in the aftermath of World War II, where International Investment Agreements (IIAs) were meant to fill the legal gap left by the breakdown of colonial systems and in light of the expropriation policies adopted in many newly independent as well as communist states that often involved the denunciation of contracts between foreign investors and host countries.⁹ The traditional investment treaties therefore included a core of substantive provisions meant to ensure foreign investors are treated without discrimination and according to a general international minimum standard, are compensated in the case of expropriation, have the right to move investment-related capital freely in and out of the host country and also included provisions that required host states to honour investment contracts between investors and host states, provisions that still persist in modern investment treaties.¹⁰

With the introduction of IIAs came Investment- State Dispute Settlement system (ISDS). This is because the majority of IIAs signed since the late 1980s include investor–state dispute settlement mechanisms that, in cases of alleged breaches of IIA provisions, allow foreign investors to sue host

⁴ Leon E Trakman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35 UNSWLJ 979.

⁵ 'About ICSID | ICSID' <<https://icsid.worldbank.org/About/ICSID>> accessed 13 August 2020.

⁶ TRALAC TRADE LAW CENTRE, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 August 2020.

⁷ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p.102.

⁸ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, Berlin < https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf> accessed 13 August 2020.

⁹ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, Berlin < https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf> accessed 13 August 2020, p.6.

¹⁰ *Ibid*, p.6.

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states before an independent international tribunal without having to rely on the diplomatic protection of its home country.¹¹ This was based on the idea that increased legal protection would stimulate foreign investment and thus lead to economic development.¹² Technically, these treaties were created as a substitute for insufficient political and legal institutions in host countries.¹³ The IIAs offer a range of substantive rights and procedural guarantees to investors: the substantive rights offered include relative standard of treatment; National Treatment and Most Favored Nation Treatment; absolute standard of treatment; rules on expropriation and compensation; and transfers of capital and returns as well as restriction against performance requirements, while the procedural guarantees relate to the question of dispute settlement which is primarily done through international arbitration.¹⁴ The International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) are the two primary institutional hosts for international investment arbitrations.¹⁵ The most commonly used arbitration rules to govern the cases are produced by ICSID and the United Nations Commission on International Trade Law (UNCITRAL).¹⁶

Some consider ISDS as probably the most extensive arbitration mechanism in international law, with the intended aim of the ISDS mechanisms initially promoted by ICSID being to ‘depoliticise’ the resolution of investment-related disputes.¹⁷ In addition, ISDS is meant to ‘delocalise’ dispute resolution and allow foreign investors to bypass the local court system of host states, thus allowing foreign investors to seek compensation for the alleged wrongdoings of host states without having to exhaust local remedies.¹⁸

Despite the earliest proponents of the ISDS system’s advantages, and as already pointed out, most of the developing world countries, especially in the African continent have in recent times complained about the unfair effects of the ISDS system on their domestic affairs.¹⁹ Specifically,

¹¹ Axel Berger, ‘Developing Countries and the Future of the International Investment Regime’ [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, p.8.

¹² Ibid, p.8; See also Gerald M Meier, ‘Legal-Economic Problems of Private Foreign Investment in Developing Countries’ (1966) 33 The University of Chicago Law Review 463; Pascal Liu and others, *Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies*. (Food and Agriculture Organization of the United Nations (FAO) 2013); Matthias Görden and others, *Foreign Direct Investment (FDI) in Land in Developing Countries* (GTZ 2009).

¹³ Axel Berger, ‘Developing Countries and the Future of the International Investment Regime’ [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, Berlin, p.10.

¹⁴ Tabitha Kiriti, ‘Strategic Consultative Meeting on Reforming Bilateral Investment Treaties (BITs) in Kenya | WTO Chairs’ <<http://wtochairs.org/kenya/outreach-activity/strategic-consultative-meeting-reforming-bilateral-investment-treaties-bits>> accessed 15 August 2020.

¹⁵ Emma Aisbett and others, ‘Rethinking International Investment Governance: Principles for the 21st Century’ [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 32.

¹⁶ Ibid, p. 32.

¹⁷ Axel Berger, ‘Developing Countries and the Future of the International Investment Regime’ [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, Berlin, pp. 15-16.

¹⁸ Ibid, p.16.

¹⁹ GRAIN, ‘Stop the Unfair Investor-State Dispute Settlement against Africa’ <<https://www.bilaterals.org/?stop-the-unfair-investor-state>> accessed 13 August 2020.

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African countries have raised concerns about the traditional investor-state dispute settlement (ISDS) system including: lack of legitimacy and transparency; exorbitant costs of arbitration proceedings and arbitral awards; inconsistent and flawed decisions; the system allows foreign investors to challenge legitimate public welfare measures of host states before international arbitration tribunals, and governments are concerned about their sovereignty or policy space as they have discouraged governments from adopting public welfare regulations, resulting in regulatory chill.²⁰ Regulatory chill is used to refer to a situation where governments do not enact or enforce legitimate regulatory measures due to concern about ISDS.²¹ It has been noted that using lawsuit threats as a bargaining chip, arbitration lawyers also encourage their clients to use the threat of investment disputes as a way to scare governments into submission.²² In addition to the above challenges, divergent interpretation by arbitral tribunals of identical treaty clauses has also led to a fragmentation of ISDS case law, thereby undermining the confidence of many countries in the system. This lack of confidence has been exacerbated by the fact that cases are litigated and decided by a small professional community of arbitrators and counsels who generally hail from western countries and elite socio-economic backgrounds. Furthermore, the systematic use of ISDS has excluded national courts from the process of hearing disputes involving public law/policy matters.²³

Notably, in a number of high-profile ISDS cases, host countries have been sued by foreign investors on the basis of a seemingly outdated treaty signed decades previously.²⁴ It is documented that there has been an unprecedented boom in the number of claims against African countries where, between 2013 and 2019 only, African States have been hit by a total of 109 recorded investment treaty arbitration claims which represents about 11% of all known investor-state disputes worldwide.²⁵

It has also been noted that the sharp increase in the number of ISDS related cases filed between 1987 and 2014 took many countries by surprise, with developed countries having started to

²⁰ TRALAC TRADE LAW CENTRE, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 August 2020; see also Michael D Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' *American University Business Law Review*, Vol. 5, No. 3, 429 <<https://papers.ssrn.com/abstract=3157420>> accessed 13 August 2020.

²¹ Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' [2020] *Indian Journal of International Law* <<https://doi.org/10.1007/s40901-020-00111-2>> accessed 13 August 2020.

²² Kavaljit Singh and Burghard Ilge, 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' [2016] New Delhi: Both Ends, Madhyam, Centre for Research on Multinational Corporations <<https://www.somo.nl/wp-content/uploads/2016/03/Rethinking-bilateral-investment-treaties.pdf>> accessed 13 August 2020, p. 248.

²³ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 33.

²⁴ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH*, p.6.

²⁵ GRAIN, 'Stop the Unfair Investor-State Dispute Settlement against Africa' <<https://www.bilaterals.org/?stop-the-unfair-investor-state>> accessed 13 August 2020.

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recalibrate the contents of their IIAs, and developing countries generally stopping to sign new treaties or even beginning to terminate existing ones.²⁶ Indeed, as a result of the highlighted concerns raised by the developing countries, some states such as Indonesia and South Africa have gone as far as unilaterally terminating IIAs on a larger scale.²⁷ Some players view ISDS as a system that "threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems" and "weakens the rule of law."²⁸

The United Nations Conference on Trade and Development (UNCTAD) observes that national investment laws operate within a complex web of domestic laws, regulations and policies that relate to investment (e.g. competition, labour, social, taxation, trade, finance, intellectual property, health, environmental, culture).²⁹ However, most of the times, it is the enforcement of these domestic laws against them that the foreign investors seek to challenge before the investor-state arbitration tribunals when they do not favour them or would result in higher operating costs.³⁰

Taking Kenya as an example, Kenya has been sued before international investment arbitration tribunals based on its Bilateral Investment Treaty's (BITs) commitments.³¹ In 2013, when Kenya considered new changes in the mining sector to ensure its people benefit from its mineral resources, some investors sued the Government. In *Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya*³², the claimants, Cortec Mining Kenya Limited (CMK), a private company constituted in Kenya, and its majority shareholders, Cortec (PTY) Limited and Stirling Capital Limited, two British holding companies, began to invest in a mining project in a niobium and rare earths exploration project located at Mrima Hill in Kenya in 2007, and obtained their Special Prospecting License (SPL 256) in 2008, which expired in December 2014 after two renewals. According to the investors, they were also granted Special Mining

²⁶ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.8.

²⁷ Ibid, p.8.

²⁸ Michael D Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' American University Business Law Review, Vol. 5, No. 3, 429 <<https://papers.ssrn.com/abstract=3157420>> accessed 13 August 2020.

²⁹ United Nations Conference on Trade and Development, World Investment Report 2018 (United Nations, 2018), p. 106 <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> Accessed 15 August 2020.

³⁰ Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework' in Gabrielle Kaufmann-Kohler and Michele Potestà (eds), *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer International Publishing 2020) <https://doi.org/10.1007/978-3-030-44164-7_3> accessed 15 August 2020; 'Issues in International Trade: A Legal Overview of Investor-State Dispute Settlement' <<https://www.everycrsreport.com/reports/R43988.html>> accessed 15 August 2020; GRAIN, 'Investor-State Dispute Settlement Using the ECOWAS Court of Justice: An Analysis and Some Proposals' <<https://bilaterals.org/?investor-state-dispute-settlement-41351>> accessed 15 August 2020.

³¹ For a list of Kenya's BITs, see 'Mapping of IIA Content | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' <<https://investmentpolicy.unctad.org/international-investment-agreements/ii-a-mapping>> accessed 15 August 2020.

³² Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29.

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License 351 (SML 351) in March 2013 based on SPL 256.³³ However, in August 2013, the newly elected Kenyan government investigated and suspended several hundred “transition period” mining licences, including the investors’ SML 351, due to “complaints regarding the process.” According to the investors, this amounted to a revocation of their licence.³⁴ In 2015, the investors filed a request for an investor-state arbitral tribunal established under a bilateral investment treaty (BIT), where they claimed that Kenya’s revocation of their SML 351 (their “key asset”) constituted a direct expropriation contrary to the United Kingdom–Kenya BIT.³⁵

The Kenyan Government’s position was that “there was no expropriation of the “purported licence [SML 351]” by the Government because the licence was *void ab initio* for illegality and did not exist as a matter of law, as held by the Courts in Kenya. As a result, the Government argued, “where there is no protected investment, there can be no expropriation.”³⁶

The International Centre for Settlement of Investment Disputes (ICSID) Tribunal held it lacked jurisdiction to hear a dispute concerning a mining project that the tribunal found did not comply with domestic environmental law.³⁷ The tribunal thus confirmed that both the ICSID Convention and the BIT protected only “lawful investments”. It held that non-compliance with the protective regulatory framework was a serious breach.³⁸ Concluding both on jurisdiction and merits that

³³ ‘Kenya Prevails in BIT Arbitration: British Investors’ Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News’ <<https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxia-lin/>> accessed 15 August 2020.

³⁴ Ibid.

³⁵ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, dated 13 September 1999; ‘Kenya Prevails in BIT Arbitration: British Investors’ Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News’ <<https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxia-lin/>> accessed 15 August 2020; see also Lorenzo Cotula and James T Gathii, ‘Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya’ (2019) 113 American Journal of International Law 574.

³⁶ Para. 4, Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya; see also Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR, ELC NO. 195 OF 2014 (Formerly Misc. Application No. 298 Of 2013 (JR)); Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR, Civil Appeal 105 of 2015. At the High Court stage, the trial court held as follows: ‘A party who flouts the law to gain an advantage cannot expect that the court will aid him to sustain the advantageous position that he acquired through the violation of the law. The acquisition by the Applicant of the Mining Licence was not in compliance with the law and the licence was void abinitio and liable to be revoked. The 1st Respondent had a duty and obligation in the interest of the public to have the licence revoked’.

Notably, while the Tribunal held that it was not bound by the decision of the Kenyan courts but it had reached the independent conclusion that SML 351 was void (para 11, Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya’).

³⁷ Lorenzo Cotula and James Gathii, ‘Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya’ (2019) 113 American Journal of International Law 574.

³⁸ ‘Kenya Prevails in BIT Arbitration: British Investors’ Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News’ <<https://cf.iisd.net/itn/2018/12/21/kenya->

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SML 351 was not a protected investment, the tribunal dismissed all of the investors' claims. The tribunal ordered the investors to pay half of the costs claimed by Kenya, in view of the unsupported "corruption objection" allegation and other blameful conduct by Kenya during the arbitral proceedings.³⁹

The Claimants in the Cortec case have, however, since applied for annulment of the award,⁴⁰ seeking partial annulment of the Award on two grounds: (i) that the Tribunal manifestly exceeded its powers (ICSID Convention, Article 52 (1)(b))' and (ii) that the Tribunal failed to state the reasons on which the Award was based (ICSID Convention, Article 52(1)(e)).⁴¹

Notably, whatever the outcome of the pending application, the award raised significant issues of public international law, including how questions of investor compliance are considered in investor-state dispute settlement and the legal implications of investor noncompliance.⁴² Should the Claimants in this case succeed in their application for annulment, it is likely to add to the complexities surrounding the ability of host countries to regulate the investors' activities that are likely to interfere with their duties under the sustainable development agenda and other regulatory laws, relating to human rights, economic, social and environmental concerns.⁴³ Thus, the abuse of Investor State Dispute Settlement System by the foreign investors and the adverse effects on host countries go beyond the huge financial burdens that it can potentially place on the losing state to affect its sovereign ability to regulate the investors' activities in protection of public interests and welfare as well as meeting its sustainable development goals.⁴⁴

3. Reforming the Investor State Dispute Settlement System

It is worth pointing out that the influx in the number of ISDS cases filed by private investors is not only directed at the developing countries only but is also affecting middle income countries as well

[prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxia-lin/](#)> accessed 15 August 2020.

³⁹ Ibid.

⁴⁰ Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Application for Annulment, 15 February 2019, 'Case Details | ICSID' <<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/29>> accessed 15 August 2020.

⁴¹ Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Application for Annulment, 15 February 2019, para. 2.

⁴² Lorenzo Cotula and James Gathii, 'Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya' (2019) 113 American Journal of International Law 574.

⁴³ Hans Christiansen, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (Organization for Economic 2002); Mohammed Aminu Aliyu, 'Foreign Direct Investment and the Environment: Pollution Haven Hypothesis Revisted'.

⁴⁴ Ridi, Niccolò. *Shifting paradigms in international investment law: more balanced, less isolated, increasingly diversified*. Vol. 27, no. 2. UK: Oxford University Press, 2016; Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018).

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as the developed countries.⁴⁵ However, the bulk of these cases still involve developing countries as the respondents.⁴⁶ More countries and policy makers have therefore been calling for reforms to the ISDS system which is still largely viewed as more investor friendly at the expense of the hosts' countries' interests.⁴⁷

It has been observed that the trend towards more balanced IIAs was, incidentally, started by the United States (US) and its North American Free Trade Agreement (NAFTA) partners, Canada and Mexico, in response to a number of high-profile ISDS cases, where the three NAFTA countries introduced a number of pioneering provisions that aimed to recalibrate the relationship between investment protection and the regulatory policy space of host countries.⁴⁸ The recalibration of IIAs sought to increase governmental policy space relating to the regulation of foreign investors featuring a more restrictive definition of the investments covered, fair and equitable treatment clauses that do not require more beneficial treatment than is granted by customary international law, and a more constrained meaning of indirect expropriation.⁴⁹ With regard to the ISDS mechanism, the US introduced transparency requirements for arbitral proceedings and provisions aimed at preventing the filing of 'frivolous' claims, and it also strengthened the role of non-disputing parties.⁵⁰ In 2017, the United States announced it would seek to excise the investor-state

⁴⁵ UNCTAD, "Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes In 2019," *IIA Issue Note*, Issue 2, July 2020 < <https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf> > accessed 13 August 2020.

⁴⁶ 'Fact Sheet on Investor-State Dispute Settlement Cases in 2018 | Publications | UNCTAD Investment Policy Hub' <<https://investmentpolicy.unctad.org/publications/1202/fact-sheet-on-investor-state-dispute-settlement-cases-in-2018>> accessed 13 August 2020.

⁴⁷ Menu, An Action. "Reforming the International Investment Regime: An Action Menu" Chapter 15: World Investment Report 2015: Reforming International Investment Governance < https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf > accessed 13 August 2020; Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing < http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf > accessed 13 August 2020; Hancock, Angus. "A Dispute about Disputes: New Zealand and the Future of ISDS." (2018) < <https://www.otago.ac.nz/law/research/journals/otago716076.pdf> > accessed 13 August 2020; Emma Aisbett, Bernali Choudhury, Olivier de Schutter, Frank Garcia, James Harrison, Song Hong, Lise Johnson, Mouhamadou Kane, Santiago Peña, Matthew Porterfield, Susan Sell, Stephen E. Shay, and Louis T. Wells, Rethinking International Investment Governance: Principles for the 21st Century (2018) < <http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf> > accessed 13 August 2020; Kavaljit Singh and Burghard Ilge, 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' [2016] New Delhi: Both Ends, Madhyam, Centre for Research on Multinational Corporations; Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018); Anthea Roberts, 'UNCITRAL and ISDS Reforms: What Are States' Concerns?' (*EJIL: Talk!*, 5 June 2018) <<https://www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/>> accessed 13 August 2020; Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 *Review of International Political Economy* 749.

⁴⁸ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.8.

⁴⁹ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.9.

⁵⁰ *Ibid.*, p.9.

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dispute settlement from NAFTA, and in 2015, the European Commission declared that an investor-state dispute settlement is not suited to resolution of investment treaty disputes, and it began publicly pursuing development of alternative models.⁵¹

According to the United Nations Conference on Trade and Development's (UNCTAD's) World Investment report 2019, forward-looking international investment agreements' reform is well under way and involves countries at all levels of development and from all geographical regions, and with almost all the treaties concluded in 2018 containing a large number of reform features.⁵² Some of the reforms are sustainable development-oriented, meant to take into account the sustainable development goals and aspirations.⁵³ The UNCTAD's Reform Package for the International Investment Regime sets out five action areas which include: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.⁵⁴

UNCTAD's World Investment Report 2019 has also pointed out that Investor-State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. As such, it has identified five principal approaches which have emerged from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism.⁵⁵ In these principal approaches to ISDS, used alone or in combination:⁵⁶

(i) No ISDS:

The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (four IIAs entirely omit ISDS and two IIAs have bilateral ISDS opt-outs between specific parties).⁵⁷

⁵¹ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 26.

⁵² United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 104.

⁵³ *Ibid*, p. 104.

⁵⁴ *Ibid*, p. 104.

⁵⁵ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁵⁶ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁵⁷ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

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(ii) Standing ISDS tribunal:

The treaty replaces the system of ad hoc investor–State arbitration and party appointments with a standing court-like tribunal (including an appellate level), with members appointed by contracting parties for a fixed term (one IIA).⁵⁸

(iii) Limited ISDS:

The treaty may include a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (19 IIAs).⁵⁹

(iv) Improved ISDS procedures:

The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings or limiting the remedial powers of ISDS tribunals (15 IIAs).⁶⁰

(v) Unreformed ISDS mechanism:

The treaty preserves the basic ISDS design typically used in old-generation IIAs, characterized by broad scope and lack of procedural improvements (six IIAs).⁶¹

Following the above highlighted approaches, countries therefore have a number of options to choose from while negotiating their IIAs with foreigners. They can settle on the approach that most favours their domestic interests while participating in international investments development.

4. Role of Africa in the Reform of Investor state dispute settlement System: Way Forward

Some authors have argued that African governments should maximize foreign investments by: eliminating corruption; improving safety and security; strengthening macroeconomic environment, investing in quality education and skill development in science, technology and innovation; and avoiding a ‘race to the bottom’ syndrome, that gives unnecessary tax holidays and waivers to foreign companies.⁶² However, as already pointed out, some African states such as South Africa have already started terminating their IIAs in favour of more favourable dispute settlement forums, such as State-State arbitration.⁶³ Thus, while some states decide to opt out of

⁵⁸ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁵⁹ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁶⁰ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁶¹ *Ibid*, p. 106.

⁶² Ayodele Odusola, ‘Investing in Africa Is Sound Business and a Sustainable Corporate Strategy’ (*Africa Renewal*, 20 August 2018) <<https://www.un.org/africarenewal/web-features/investing-africa-sound-business-and-sustainable-corporate-strategy>> accessed 13 August 2020.

⁶³ Tanaya Thakur, ‘Reforming the Investor-State Dispute Settlement Mechanism and the Host State’s Right to Regulate: A Critical Assessment’ [2020] *Indian Journal of International Law* <<https://doi.org/10.1007/s40901-020-00111-2>> accessed 13 August 2020.

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ISDS system in favour of domestic courts or regional bodies, others prefer initiating reforms to their obligations under IIAs.⁶⁴

Some authors have suggested that some of the ways in which ISDS can be made more responsive to the concerns raised would be making the system more transparent, forming a clear standard of review, and establishing a permanent arbitration forum or creating an appellate mechanism in order to strike a balance between investment protection and protecting the host states' right to regulate.⁶⁵ The appellate mechanism especially would be useful in addressing the concern regarding substantive inconsistency between arbitral decisions in investment treaty arbitration.⁶⁶

4.1 To Retain ISDS or not?

As already pointed, the mechanism allowing private investors to submit investment claims to international arbitration has come under increasing public scrutiny, with several actors criticizing its lack of legitimacy.⁶⁷ UNCTAD's World Investment Report 2019 has also pointed out that Investor–State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. As already discussed above, it has identified five principal approaches which have emerged from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism.⁶⁸ While it may not be possible yet to for African countries to agree on a single approach to these reforms, countries have these options to choose from while negotiating their IIAs with foreigners depending on their negotiating power, concerns and development needs.

4.2 'Africanization' of International Investment Law: Empowerment of Regional Dispute Settlement Bodies

In addition to the reform efforts going at the international arena, there have been efforts by the African Union aimed at what has come to be popularly known as 'Africanization' of international investment law. The first step towards this was evidenced by the drafting of *Pan-African Investment Code*⁶⁹, whose main objective is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located.⁷⁰ The Code is meant to apply as a guiding instrument to Member States as well as investors and their investments in the territory of Member States as defined by

⁶⁴ Ibid.

⁶⁵ International Bar Association, 'Consistency, efficiency and transparency in investment treaty arbitration,' *A report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration*, November 2018.

⁶⁶ Ibid.

⁶⁷ Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

⁶⁸ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁶⁹ African Union Commission, Draft Pan-African Investment Code, Draft, December, 2016 < https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf > Accessed 13 August 2020.

⁷⁰ *Pan-African Investment Code*, Article 1.

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this Code.⁷¹ In addition, this Code is meant define the rights and obligations of Member States as well as investors, and principles prescribed therein.⁷²

The Pan-African Investment Code is hailed as the first continent-wide African model investment treaty elaborated under the auspices of the African Union, drafted from the perspective of developing and least-developed countries with a view to promote sustainable development.⁷³ In an attempt to make investment activities by foreigners more responsive to the sustainable development needs of African states, the Code has introduced some of innovative features such as the reformulation of traditional investment treaty provisions and the introduction of direct obligations for investors.⁷⁴ If adopted, this Code could potentially contribute to the reforms of the international and regional investment regimes.

Some commentators within the Continent have also proposed that setting up of regional courts is the way to go. For instance, in relation to the West African region, it has been suggested that for States in West Africa there might already exist a ready-made investment tribunal in the form of the Court of Justice of the Economic Community of West African States (ECOWAS).⁷⁵ To the proponents of this position, all that is required is to activate the arbitral jurisdiction of the ECOWAS Court of Justice, considered the most successful of the African sub-regional courts, and extend its jurisdiction to cover investor-state jurisdiction.⁷⁶ This, it has been argued, given the present widespread dissatisfaction with investor-State dispute settlement, can provide an alternative to arbitration that is already up and running and would also help to cement African States' role as 'investment rule-makers' rather than 'rule-takers'.⁷⁷ This approach may also be duplicated in relation to the other regional courts such as the East African Court of Justice.⁷⁸ Currently, the African countries trade in terms of blocks, with States forming Regional Economic Communities (RECs) such as the East African Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC).⁷⁹ The debate is still ongoing with emergence of discourse on a possibility of a continental approach to the

⁷¹ Ibid, Article 2(1).

⁷² Ibid, Article 2(2).

⁷³ Makane Moïse Mbengue and Stefanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 *The Journal of World Investment & Trade* 414.

⁷⁴ Ibid.

⁷⁵ GRAIN, 'Investor-State Dispute Settlement Using the ECOWAS Court of Justice: An Analysis and Some Proposals' <<https://bilaterals.org/?investor-state-dispute-settlement-41351>> accessed 15 August 2020.

⁷⁶ Ibid.

⁷⁷ Ibid; See also 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

⁷⁸ See Muigua, K., Book Chapter: 'Effectiveness of Arbitration Institutions in East Africa,' in Onyema, E. (ed), *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, (Kluwer Law International, The Netherlands, 2016).

⁷⁹ Muigua, Kariuki, "Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges." < <http://kmco.co.ke/wp-content/uploads/2020/06/Investment-Related-Dispute-Settlement-under-the-African-Continental-Free-Trade-Agreement-Promises-and-Challenges-Kariuki-Muigua-June-2020.pdf> > Accessed 15 August 2020.

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investment debate with the drafting of such instruments as the Pan African Investment Code⁸⁰ and the African Continental Free Trade Agreement.⁸¹

4.3 Capacity Building in Investment Knowledge and Expertise

While some commentators often argue that the lopsided relations in investment law negotiations that characterise the developed-developing world relations, others have argued that in contrast to North-South relations, negotiation outcomes seem to be shaped more by expert knowledge than by power asymmetries.⁸² This, they have argued, is evidenced by a situation where powerful states like Egypt fail to dominate negotiations, while small-island-state Mauritius with its strategic investment policy agenda succeeds in setting the terms of investment agreements.⁸³ It has been observed that the foreign companies operating in Africa often 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.⁸⁴ They are more flexible in negotiations than their foreign counterparts. In exchange, they end up giving what rightfully belongs to the people to foreigners.⁸⁵ There is a need for African countries to fight corruption, which often affect these negotiations and enforcement of domestic laws⁸⁶

⁸⁰ African Union Commission, Draft Pan-African Investment Code, Draft, December, 2016.

⁸¹ Muigua, Kariuki, "Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges."

⁸² 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

⁸³ Ibid; See also 'Investing In Mauritius – Foreign Investment And Business Activity - Government, Public Sector - Mauritius' <<https://www.mondaq.com/inward-foreign-investment/560050/investing-in-mauritius-foreign-investment-and-business-activity>> accessed 15 August 2020; Zafar, Ali. "Mauritius: An economic success story." *Yes Africa can: Success stories from a dynamic continent* (2011): 91-106; Sobhee, Sanjeev K. "The economic success of Mauritius: lessons and policy options for Africa." *Journal of Economic Policy Reform* 12, no. 1 (2009): 29-42; Kalinichenko, Liudmila N., and Zinaida Novikova. "Mauritius: africa's business and financial centre." *Asia and Africa today* 4 (2020): 60-66.

⁸⁴ Jr Louis T. Wells, 'Negotiating with Third World Governments' [1977] *Harvard Business Review* <<https://hbr.org/1977/01/negotiating-with-third-world-governments>> accessed 16 August 2020; Rasmus Hundsbaek Pedersen, 'The Politics of Oil, Gas Contract Negotiations in Sub-Saharan Africa' (Danish Institute for International Studies 2014) <<https://www.jstor.org/stable/resrep15998>> accessed 16 August 2020; R Harrison Wagner, 'Economic Interdependence, Bargaining Power, and Political Influence' (1988) 42 *International Organization* 461; 'Mining to Profit Africa's People' (*Africa Renewal*, 15 April 2009) <<https://www.un.org/africarenewal/magazine/april-2009/mining-profit-africa%E2%80%99s-people>> accessed 16 August 2020.

⁸⁵ Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief <<http://uk.reuters.com/Art/2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616>> Accessed 15 August 2020.

⁸⁶ See *World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB (AF)/00/7, Award (4 October 2006) and *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29. In both cases, there were allegations of corruption by high ranking Kenyan officials. While the World Duty case was not based on any Treaty, it shows how corruption can affect the country's ability to attract genuine investment by foreigners.

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The *World Investment Report 2018* outlines challenges arising from the policymaking interaction between IIAs and the national legal framework for investment as follows: policymakers in charge of national and international investment policies might be operating in silos and create outcomes that are not mutually supportive or, worse, conflicting; incoherence (e.g. between a clearly defined Fair and Equitable Treatment (FET) clause in one or several IIAs and a broad FET clause in an investment law) may have the effect of rendering IIA reform ineffective; and incoherence between investment laws and IIAs may also create Investor-state dispute settlement (ISDS)-related risks when national laws include advance consent to international arbitration as the means for the settlement of investor-State disputes, which could result in parallel proceedings.⁸⁷ It has also been observed that post-2000, investors have increasingly relied on expansive interpretations of vaguely-drafted provisions in IIAs, national investment laws, investment contracts, and the dispute resolution provisions contained within such agreements, to sue host states for alleged violations of treaty or contractual obligations. This practice of "contract, treaty and forum shopping" has contributed to the multiplication of ISDS cases.⁸⁸ In addition, litigants place their court cases in the court system perceived most likely to find in their favour, thus affecting the legitimacy of the whole ISDS system.⁸⁹

There is therefore a need for the African Governments to invest in highly knowledgeable experts while negotiating and drafting the terms of investment agreements in order to ensure that the resultant documents are not only non-ambiguous but also guarantee that they do not adversely affect their ability to regulate the investment activities and enforcement of domestic laws.

5. Conclusion

As it has been highlighted above, IIAs grant extensive rights to a wide range of foreign investors against host states, without imposing any reciprocal obligations on those investors. Where broader concerns such as human rights or sustainable development⁹⁰ are included within IIAs, they do not, for the most part, demand action from investors or states. As a result, the legal framework for investment operates on an understanding of justice where fairness to investors is the dominant principle.⁹¹

As a result, there is a growing international consensus that more is needed from international investment treaties and the regime in general, if they are to have a meaningful future, or any future

⁸⁷ United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p.107.

⁸⁸ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 32.

⁸⁹ *Ibid*, p. 32.

⁹⁰ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁹¹ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 31.

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at all, and this consensus is increasingly revolving around the sustainable development paradigm.⁹² As it has been demonstrated in this paper, the traditional approach to ISDS and investment law as adopted in the earlier investment agreements has continually been criticized especially by the developing countries as giving private investors unfair advantage to challenge domestic public policies of the host countries. This is because from its earliest origins, investment law has often been regarded as an isolated regime intended to ensure investors' benefits.⁹³

In order to overcome the mechanism allowing private investors to submit investment claims to international arbitration, some policy-makers and negotiators have responded to these criticisms through various approaches included in recent IIAs and model agreements, namely: a reformed investor-state dispute settlement mechanism through the inclusion of new provisions, a return to diplomatic protection and state-to-state arbitration, reliance on domestic courts, Alternative Dispute Resolution Mechanisms, hybrid approaches, and an investment court system.⁹⁴

There is a need to change the current trend where African states tend to be rule-takers in North-South relations, and yet enjoy greater agency in negotiations of South-South BITs. Only few African countries, however, use their greater say in intra-African negotiations to include public policy exceptions in BITs.⁹⁵ African countries have demonstrated some efforts towards either completely ditching the ISDS system in favour of domestic courts or coming up with customised legal instruments such as the Pan-African Investment Code, designed to offer guidelines to African countries when entering into or designing investment agreements with foreign investors. These homegrown solutions are meant to achieve this by: further clarifying the content of standards of protection that are traditionally included in IIAs; limiting definition of indirect expropriation; adopting constraining provisions imposing direct obligations on foreign investors in the face of domestic regulatory measures; and limiting foreign investors' access to international independent arbitral tribunals, among others.⁹⁶

Clearly Africa has a key role in the reform of international investment law and the ISDS system: Whichever approach they choose to adopt, African countries need to play a greater role in policy and rulemaking in international investment law, especially in relation to the ISDS system to ensure that they protect their domestic policies while at the same time attracting investments into their territories to boost national and regional development.

⁹² Mann, H., "Reconceptualizing international investment law: its role in sustainable development." *Lewis & Clark Law Rev.* 17 (2013): 521, p. 536.

⁹³ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 3.

⁹⁴ Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

⁹⁵ 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

⁹⁶ Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

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Abstract

This paper critically discusses how taking care of forests can positively contribute to climate change mitigation as part of achieving sustainable development for a better tomorrow. Arguably, continued deterioration of forest areas and the ever growing threat of climate change is likely to affect human life, thus creating the need for combating both. The author argues that taking care of forests is not only important in climate change mitigation but also a key step towards conservation of the rich biodiversity to be found in forest areas and preserving source of livelihood for the people.

1. Introduction

It has rightly been pointed out that in particular, the rural poor, young people, and women, investing in forests and forestry is an investment in people and their means of subsistence. An estimated 1.6 billion people, including more than 2,000 indigenous groups, rely on forests for their survival. As the habitat for more than 80% of the terrestrial species of animals, plants, and insects, forests are the most biologically diverse ecosystems on land. In addition, they give communities that depend on the forest shelter, employment, and security.¹ The future supply of ecosystem services by forests, such as carbon storage, wood production, animal habitats, and hydrological cycle management, will be significantly impacted by how they adapt to climatic variability.² Due to climate change, there are more severe droughts happening more frequently in various parts of the world. Forest function and structure are changed by droughts.³

This paper critically discusses the relationship between climate change and forests and offers recommendations on how climate change mitigation can be promoted through enhanced sustainable forests management.

2. Climate Change and the Forests: The Link

Kenya's Climate Change Act 2016⁴ 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. 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.⁵

¹ 'Forests | Department of Economic and Social Affairs' <<https://sdgs.un.org/topics/forests#publications>> accessed 15 March 2023.

² Zhang, T., Niinemets, Ü., Sheffield, J. and Lichstein, J.W., "Shifts in tree functional composition amplify the response of forest biomass to climate." *Nature* 556, no. 7699 (2018): 99-102, at p. 99.

³ Bennett, A.C., McDowell, N.G., Allen, C.D. and Anderson-Teixeira, K.J., 'Larger Trees Suffer Most during Drought in Forests Worldwide' (2015) 1 *Nature Plants* 15139 <<https://www.nature.com/articles/nplants2015139>> accessed 17 March 2023.

⁴ Climate Change Act, No. 11 of 2016, Laws of Kenya.

⁵ Sec. 2, Climate Change Act, 2016.

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Being a major source of terrestrial biodiversity and a net sink for atmospheric carbon, forests play a crucial role in maintaining the health of global ecosystems. Many ecological services that trees offer, along with others, may be vulnerable to both short-term climatic fluctuation and climate change.⁶

The United Nations 2030 Agenda for Sustainable Development Goals under Goal 15 seeks 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’.⁷ Natural catastrophes, such as floods, droughts, landslides, and other catastrophic occurrences, are far less likely to occur when there are more forests. Forests help to maintain the air's balance of oxygen, carbon dioxide, and humidity on a global scale, as well as to safeguard watersheds that provide 75% of the world's freshwater. This is achieved through sequestering carbon from the atmosphere.⁸

3. Combating Climate Change: Saving Our Forests for Today and Tomorrow

This section offers some viable recommendations that can greatly contribute to sustainable management of forests as a step towards climate change mitigation.

3.1. Enhancement of Public-Private Collaborations in Forests Conservation and Climate Change Mitigation

Notably, the Forest Conservation and Management Act 2016 provides that the Kenya Forest Service may, whenever circumstances make it necessary or appropriate to do so, invite the private sector to participate in the sustainable management of forests under their jurisdiction. For this, the Service may issue authorisations for forestry activities in form of—a permit; a timber licence; a special use licence; a contract; a joint management agreement; or a concession agreement.⁹ It is worth exploring these collaborations as a way of enhancing sustainable forest management and conservation, where public–private partnerships are here defined as: “collaborative arrangements in which actors from two or more spheres of society (state, market, and/or civil) are involved in a non-hierarchical process, and through which these actors strive for a sustainability goal”.¹⁰

It has been argued that these collaborations can enhance all the three aspects of sustainability, albeit at different levels. Outcomes of such collaborations can thus be divided broadly into three types: social, ecological and economic. This is in line with the understanding that the concept of sustainable development has evolved over the years:

⁶ Zhang, T., Niinemets, Ü., Sheffield, J. and Lichstein, J.W., "Shifts in tree functional composition amplify the response of forest biomass to climate." *Nature* 556, no. 7699 (2018): 99-102.

⁷ ‘Goal 15: Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage Forests, Combat Desertification, and Halt and Reverse Land Degradation and Halt Biodiversity Loss — SDG Indicators’ <<https://unstats.un.org/sdgs/report/2016/goal-15/>> accessed 6 March 2023.

⁸ ‘Forests | Department of Economic and Social Affairs’ <<https://sdgs.un.org/topics/forests#publications>> accessed 14 March 2023.

⁹ Sec. 56(1) (2), Forest Conservation and Management Act 2016.

¹⁰ Bjärstig T, ‘Does Collaboration Lead to Sustainability? A Study of Public–Private Partnerships in the Swedish Mountains’ (2017) 9 Sustainability 1685.

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- a. Social aspect: Respecting human rights and providing equal opportunity for everyone in society is a key component of sustainability. With an emphasis on reducing poverty, it necessitates an equal distribution of resources. There is a focus on local communities, including preserving and enhancing their life support systems, acknowledging and respecting other cultures, and averting all forms of exploitation. Hence, social outcomes comprise social capital, trust, increased equity, and raised living standards.¹¹
 - b. "Ecological outcome" refers to the management and conservation of resources, particularly those that are finite or vital to maintaining life. Action must be taken to reduce pollution of the air, land, and water as well as to protect biological variety and the world's natural heritage. Natural resource conditions such as water quality, fish populations, biodiversity, improving green infrastructure, stopping soil erosion, etc. are examples of ecological outcomes.¹²
3. Economic success entails fostering wealth at all societal levels and addressing the cost-effectiveness of every economic activity. It is crucially about the capacity of businesses and activities to continue operating over the long term. Economic effects include the capacity of small businesses to compete locally, advancements in technology and efficiency, job prospects, and funding sources.¹³

The net effect of all these outcomes may be better living standards with alternative sources of income, which means reduced pressure on forests as well as more free land for reforestation. This will positively contribute to climate change mitigation through healthier forests as well as alleviation of poverty, which is key objective of Sustainable Development Goals. As has been correctly noted, it is crucial to recognise how intertwined the three sustainability dimensions are and how they may coexist peacefully or conflict. As such, achieving sustainable development requires finding a balance between these three sustainability aspects.¹⁴

3.2 Investments in Alternative Sources of Energy

Africa has a significant chance to fill the gap in the demand for renewable energy and it has been argued that falling clean technology costs offer new hope for the continent's future. In order to meet Africa's energy and climate targets, energy investment must more than double this decade along with a significant rise in adaptation. In the past two decades, Africa received just 2% of investments in sustainable energy. A \$25 billion yearly investment, or around 1% of current global energy investment, is needed to ensure that all Africans have access to modern energy.¹⁵ Food and

¹¹ Ibid, p. 3; Banik D, 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' (2009) 1 Hague Journal on the Rule of Law 117.

¹² Bjärstig T, 'Does Collaboration Lead to Sustainability? A Study of Public-Private Partnerships in the Swedish Mountains' (2017) 9 Sustainability 1685, p. 3.

¹³ Ibid, p. 3; see also Shuman M, *The Local Economy Solution: How Innovative, Self-Financing "Pollinator" Enterprises Can Grow Jobs and Prosperity* (Chelsea Green Publishing 2015); 'Macroeconomic Policy and Poverty Reduction' <<https://www.imf.org/external/pubs/ft/exrp/macropol/eng/>> accessed 18 March 2023.

¹⁴ Bjärstig T, 'Does Collaboration Lead to Sustainability? A Study of Public-Private Partnerships in the Swedish Mountains' (2017) 9 Sustainability 1685, p. 3.

¹⁵ 'Climate Change Puts Energy Security at Risk' (10 October 2022)

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Agriculture Organisation (FAO) rightly points out that before petroleum became widely accessible during the past 100 years, wood was historically the most significant source of energy for humans. Wood still serves as the primary source of energy for heating and cooking in many of the world's poorest nations.¹⁶ As previously said, forests offer a variety of functions, including the preservation of biodiversity and the mitigation of climate change, while also producing both timber and non-timber forest products.¹⁷

There is need for more investments alternative sources of renewable energy, away from forests, if significant progress is to be realised in restoration of forest areas especially in the rural areas of developing countries like Kenya. Investments in renewable energy sources and more efficient energy use, particularly in transportation and industrial operations, are primarily driven by climate change, rising fossil fuel prices, and the concern about the security of the energy supply.¹⁸

During the next eight years, the amount of power produced from sustainable energy sources must double in order to prevent a rise in global temperatures. According to a new multi-agency 2022 report¹⁹ from the World Meteorological Organization, if we don't act, there's a chance that climate change, more severe weather, and water stress may threaten our energy security and even threaten renewable energy sources.²⁰ According to WMO Secretary-General, Prof Petteri Taalas, Three-quarters of all greenhouse gas emissions worldwide are produced by the energy industry. If we are to survive in the twenty-first century, switching to renewable energy sources like solar, wind, and hydropower is essential. So is increasing energy efficiency. The objective is net zero by 2050. But we will not get there until we double the amount of low-emission power available in the following eight years.²¹

Reduced deforestation and health hazards linked with the usage of firewood are two benefits of diversifying energy sources. The use of renewable energy may also help to achieve SDG Goal 4

<<https://public.wmo.int/en/media/press-release/climate-change-puts-energy-security-risk>> accessed 18 March 2023.

¹⁶ Broadhead J and Killmann W, *Forests and Energy: Key Issues* (Food & Agriculture Org 2008) <<https://www.fao.org/forestry/13707-0e576ecd14f96f198d96c03149a6db0c0.pdf>> accessed 18 March 2023.

¹⁷ Gondo PC, 'Financing of Sustainable Forest Management in Africa: An Overview of the Current Situation and Experiences' [2010] Southern Alliance for indigenous resources (SAFIRE), p. 12 <https://www.un.org/esa/forests/wp-content/uploads/2014/12/Africa_case_study.pdf> accessed 18 March 2023.

¹⁸ Broadhead J and Killmann W, *Forests and Energy: Key Issues* (Food & Agriculture Org 2008), p.1.

¹⁹ Organization (WMO) WM and World Meteorological Organization (WMO), *2022 State of Climate Services: Energy (WMO-No. 1301)* (WMO 2022).

²⁰ 'Climate Change Puts Energy Security at Risk' (10 October 2022)

<<https://public.wmo.int/en/media/press-release/climate-change-puts-energy-security-risk>> accessed 18 March 2023.

²¹ 'Climate Change Puts Energy Security at Risk' (10 October 2022)

<<https://public.wmo.int/en/media/press-release/climate-change-puts-energy-security-risk>> accessed 18 March 2023.

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on education since it spares women and children from having to spend time gathering firewood, time that might be better spent on other useful activities and education.²²

3.3 Enhanced Implementation of the National Tree Planting Week

Notably, the Constitution of Kenya 2010 outlines one of the environmental obligations of the State as working to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya.²³ It is perhaps out of this constitutional requirement that the Forest Conservation and Management Act 2016 provides that the Cabinet Secretary shall plan and execute programmes necessary for observing the national tree-planting week and the International Day of Forests.²⁴ The national tree-planting day in Kenya is observed in April or May. The activities are not bound to a certain day but are confined throughout the lengthy rains season in April -May.²⁵

It is imperative that the State, through the relevant departments takes up this duty seriously and also enhance free supply of the relevant seedlings as a way of encouraging the general public to not only participate but also make it their way of everyday life to plant trees in public places as well as their own private parcels of land. This will go a long way in realisation of Kenya's President's call for reforestation of the country.²⁶

3.4 Tax and fiscal incentives

The Forest Conservation and Management Act 2016 empowers the Cabinet Secretary for the National Treasury, on the recommendation by the Cabinet Secretary, propose tax and other fiscal incentives to increase investments in forest land use and forest resource utilization in order to promote forest conservation and management, and to prevent or abate forest degradation.²⁷ The tax and fiscal incentives, may include—(a) customs and excise waiver in respect of imported capital goods or tax rebates to forest industries and other establishments investing in plants, equipment and machinery for improved resource utilization and for using other energy resources

²² Organization (WMO) WM and World Meteorological Organization (WMO), *2022 State of Climate Services: Energy (WMO-No. 1301)* (WMO 2022), p.44.

²³ Article 69 (1) (b), Constitution of Kenya 2010.

²⁴ Sec. 55, Forest Conservation and Management Act 2016.

²⁵ Macharia DA, 'National Tree Planting Day' (*Mazingira Safi*, 8 May 2014) <<https://www.mazingirasafi.com/national-tree-planting-day/>> accessed 18 March 2023.

²⁶ 'President Uhuru Sets an Ambitious 30% Target for Forest Cover by 2050 during the Launch of Kenya's Tree Growing Fund and Campaign | United Nations Development Programme' (*UNDP*) <https://www.undp.org/kenya/press-releases/president-uhuru-sets-ambitious-30-target-forest-cover-2050-during-launch-kenya%E2%80%99s-tree-growing-fund-and-campaign> accessed 18 March 2023; GROUP NK-NM, 'NTV Kenya: President Ruto Launches Tree Restoration Program to Combat Climate Change' (*NTV Kenya*) <<https://ntvkenya.co.ke/climate-change/president-ruto-launches-tree-restoration-program-to-combat-climate-change/>> accessed 18 March 2023; 'Kenya to Plant 5 Billion Trees in 5 Years - Ruto' (20 October 2022) <<https://www.pd.co.ke/news/kenya-to-plant-5-billion-trees-in-5-years-ruto-154665/>> accessed 18 March 2023; 'Plant 300 Trees and Get Certificate, Kenyans Told' (21 October 2022) <<https://www.pd.co.ke/news/plant-300-trees-and-get-certificate-154782/>> accessed 18 March 2023; 'First Lady Rachel Ruto Embarks on Reforestation Crusade – Kenya News Agency' (17 November 2022) <<https://www.kenyanews.go.ke/first-lady-rachel-ruto-embarks-on-reforestation-crusade/>> accessed 18 March 2023.

²⁷ Sec. 54(1), Forest Conservation and Management Act 2016.

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as substitutes for hydrocarbons; (b) exemption from payment of all or part of the land rates and such other charges as may be levied in respect of the land on which a private forest is established; and (c) income and other tax deductions to landowners in exchange for the establishment of a forest conservation easement.

These incentives can greatly contribute to sustainable forest management in Kenya, if efficiently implemented.

3.5 Tapping into Indigenous Knowledge

The Climate Change Act 2016 provides that ‘In formulating the National Climate Change Action Plan, the Cabinet Secretary shall be informed by, *inter alia*, indigenous knowledge related to climate change adaptation and mitigation’.²⁸ Similarly, the role of indigenous knowledge was recognised by the Court in the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*²⁹ where the Court stated as follows:

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. Article 8 (j) of the Convention places an obligation on State Parties in this respect to:

“Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

This court is also guided in this respect by several multilateral environmental agreements which now shape the strategies and approaches by governments in relation to the environment and development, including forest policy. These include the Rio Declaration on Environment and Development and Agenda 21 which are widely accepted sources of international customary environmental law. Principle 22 of the Rio Declaration on Environment and Development provides that indigenous people and their communities

²⁸ Sec. 13(5)(g), climate Change Act 2016.

²⁹ *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*, Elc Civil Suit 821 of 2012 (Os).

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and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States are encouraged to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. Chapter 26 of Agenda 21 is likewise dedicated to strengthening the role of indigenous communities in sustainable development.

The Forest Conservation and Management Act, 2016³⁰ also highlights this by providing that some of the principles of this Act shall be: public participation and community involvement in the management of forests; and protection of indigenous knowledge and intellectual property rights of forests resources.³¹

On the relationship between forests and climate change mitigation, the Forest Conservation and Management Act, 2016 provides that ‘all indigenous forests and woodlands shall be managed on a sustainable basis for purposes of, *inter alia*: conservation of water, soil and biodiversity; and carbon sequestration and other environmental services.³² There is a need to tap into and incorporate this knowledge in enhancing sustainable forests management in the country.

3.6 Diversified Financing for Sustainable Forest Management

As per part III (sections 23-29) of the Forest Conservation and Management Act, 2016, majority of the forests conservation activities in Kenya are to be funded by the government of Kenya. Naturally, this comes with its limitations due to inadequate resources and calls for diversification of funding mechanisms for these activities.

It has been argued that due to the numerous benefits and purposes of trees and forests, as well as the numerous stakeholders and actors who can and do influence forest management and management decisions, sustainable forest management should not be the exclusive domain of the government but rather of society at large. As a result, new strategies, institutional frameworks, and funding sources are required to make this a reality.³³ Aside from that, the new funding systems that are needed must take into consideration the financial requirements of various players as well as the various management objectives, taking into account the unique characteristics of various forest ecosystems and the socioeconomic circumstances of every nation.³⁴ By providing revenue, employment, food security, and shelter where it is most desperately needed, sustainable forest management may support economic growth. Sustainable forest management is all about finding a

³⁰ Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

³¹ Sec. 4 (a) (e), Forest Conservation and Management Act 2016.

³² Sec. 42(1), Forest Conservation and Management Act 2016.

³³ Gondo, P.C., ‘Financing of Sustainable Forest Management in Africa: An Overview of the Current Situation and Experiences’ 2010 <<https://www.semanticscholar.org/paper/FINANCING-OF-SUSTAINABLE-FOREST-MANAGEMENT-IN-AN-OF-Gondo/c63f5beca0178f60763046d3c0779ef6caf2a21f>> accessed 18 March 2023, p.61.

³⁴ Gondo, P.C., ‘Financing of Sustainable Forest Management in Africa: An Overview of the Current Situation and Experiences’ 2010, p. 61.

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means to strike a balance between human requirements and concerns about the long-term viability of forest resources.³⁵

Commentators have also noted that the continent's current systems for financing forests are still insufficient to create the conditions needed to stop deforestation and forest degradation processes, encourage rehabilitation and afforestation/reforestation, and increase the areas of forest under sustainable management.³⁶ It has been suggested that in order to provide the institutional framework for effective forest governance and sustainable forest management and to foster the crucial local community engagement, partnerships between a number of actors are required. The rationale behind this is that by pooling the resources, expertise, knowledge, and political influence of players operating at various scales, the parties would be able to do more together than they could alone.³⁷

Enhanced coordination at the national level would include integrating tools like national forest finance policies and information sharing, which might be handled through suitable arrangements spearheaded by governments. Also, the government should develop the necessary capacities to fully use the increasingly complex and diverse external and internal financial mechanisms for forests.³⁸

4. Conclusion

It has rightly been pointed out that woodlands and forests contribute significantly to the global carbon cycle and, as a result, to the acceleration or slowing of global climate change.³⁹ This is because around 50% of the world's terrestrial organic carbon stores are found in forests, while 80% of all terrestrial biomass is found in forests. More over two thirds of the world's terrestrial net primary output comes from forests. So, slowing down forest loss and re-establishing forest cover in deforested regions might help lessen the effects of climate change.⁴⁰ For climate change to be

³⁵ United Nations Forum on Forests, 'Enabling Sustainable Forest Management: Strategies for equitable development, for forests, for people' < https://www.un.org/esa/forests/wp-content/uploads/2015/06/Enabling_SFM_highlights.pdf> accessed 18 March 2023.

³⁶ Gondo, P.C., 'Financing of Sustainable Forest Management in Africa: An Overview of the Current Situation and Experiences' 2010, p. 61.

³⁷ Ros-Tonen, M.A., Van Andel, T., Morsello, C., Otsuki, K., Rosendo, S. and Scholz, I., 'Forest-Related Partnerships in Brazilian Amazonia: There Is More to Sustainable Forest Management than Reduced Impact Logging' (2008) 256 *Forest Ecology and Management* 1482.

³⁸ Gondo, P.C., 'Financing of Sustainable Forest Management in Africa: An Overview of the Current Situation and Experiences' 2010, p. 61; see also Besacier, C., Garrett, L., Iweins, M. and Shames, S. 2021. Local financing mechanisms for forest and landscape restoration – A review of local level investment mechanisms. Forestry Working Paper No. 21. Rome, FAO. <https://doi.org/10.4060/cb3760en>; cf. Kamara Y, 'Existing and Potential Forest Financing Mechanisms for Smallholders and Community Forestry in West Africa' [2011] Initiatives Conseil International. Burkina Faso: Food and Agriculture Organization of the United Nations; Gomez-Echeverri L, 'National Climate Funds', *Handbook of International Climate Finance* (Edward Elgar Publishing 2022); 'Developing the International Financing Facility for Forests (IFFFor) | Profor' <<https://www.profor.info/knowledge/developing-international-financing-facility-forests-ifffor>> accessed 18 March 2023.

³⁹ Shvidenko A and Gonzalez P, 'Chapter 21: Forest and Woodland Systems', p.587.

⁴⁰ Ibid.

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mitigated, fossil fuel use must be reduced, and for that, global carbon emissions must peak by 2025 and reach net zero by 2050. Sadly, the speed of carbon emissions continues to be inconsistent with the objectives of the Paris agreement (IPCC, 2021).⁴¹

According to studies conducted in a few emerging nations, the security of agriculture, water, and energy is at systemic risk due to the effects of climatic unpredictability and change, expanding economies, and rising urbanization. For disadvantaged rural communities, agricultural output is a significant source of employment. From small-scale subsistence farming to large-scale export-oriented agriculture, water availability is essential for agricultural output. In addition, the capacity for producing electricity, the control of peak supply and demand, and the safety of dams are all seriously impacted by climate change and unpredictability (including both deficiencies and surpluses in rainfall).⁴² Arguably, forests not only contribute in climate change mitigation but also in some areas act as sources of rivers, which are evidently important for agriculture and generation of hydropower. This thus calls for concerted efforts towards forests conservation and restoration not only for climate change mitigation but also to secure the future of both current and future generations. This should be done alongside employment of measures that reduce pressure on these forests, as discussed in this paper.

⁴¹ Cevik S, 'Climate Change and Energy Security: The Dilemma or Opportunity of the Century?' 2022 IMF Working Paper, WP/22/174 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224062> accessed 18 March 2023.

⁴² 'Enhancing Adaptive Capacity of Andean Communities through Climate Services (ENANDES) (Chile, Colombia, Peru) - Adaptation Fund' <<https://www.adaptation-fund.org/project/chile-colombia-peru-enhancing-adaptive-capacity-andean-communities-climate-services-enandes/>> accessed 18 March 2023.

Role of State Agencies and Communities in Achieving Effective Environmental Conflicts Management

Abstract

Environmental conflicts affect not only the stability of a country but also the livelihoods of communities. This is especially true for communities living around the environmental resources causing the conflict in question. Considering that these conflicts have different actors involved in their origin as well as their management, it calls for concerted efforts from state agencies and communities towards addressing them. This paper discusses the role of state agencies as well as communities in management of environmental conflicts.

1. Introduction

Almost every community in the world occasionally has conflicts over ecological concerns, including, but not limited to, land use, environmental quality, water allocation, waste disposal, and natural resource management.¹ Environmental variables are important in many conflicts, either as direct causes of conflict or as its main drivers. There are many different types of environmental conflicts, ranging from value-based disputes over divergent notions of location, space, and our relationship with the natural world to interest-based rivalry over limited or valuable natural resources. Conflicts involving the environmental drivers of identity, security, and health can also be based on needs.²

Notably, the management of natural resources in Africa using community-based methods has gained popularity over time.³ It has been argued that the two main ways for improving people's lives in order to create peace, stability, human security, and development are good governance and conflict management.⁴ In addition, the majority of conflicts arise as a result of the state's failure to address critical issues such as human rights, the rule of law, better economic opportunities, particularly for youths, health, educational, housing, and transportation facilities for the general public, and, most importantly, a functioning justice system. These challenges, it has been suggested, can be addressed if the government focuses on good administration and improving people's quality of life.⁵ States automatically become one of the key players in any conflict transformation process when they reframe conflict in terms of concerns relating to human rights since they have a responsibility to respect, safeguard, and uphold human rights.⁶

¹ Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms." *Journal of conflict resolution* 49, no. 4 (2005): 508-537; Bob, U. and Bronkhorst, S., "Environmental conflicts: Key issues and management implications." *African Journal on Conflict Resolution* 10, no. 2 (2010): 9-30.

² Fisher, J., "Managing environmental conflict." *The handbook of conflict resolution: theory and practice* (2014): 3, p.1.

³ See Haro, G.O., Doyo, G.J. and McPeak, J.G., "Linkages between community, environmental, and conflict management: Experiences from Northern Kenya." *World development* 33, no. 2 (2005): 285-299.

⁴ Ahmar, Moonis. "Conflict Management and Good Governance in Pakistan: Lessons from Germany." *Journal of Political Studies*, Special Conference Issue, 2019, 211:221, at 211.

⁵ *Ibid*, at 211.

⁶ Lefevre N, 'The Human Rights-Based Approach to Conflict Transformation in Indigenous Contexts' <https://www.academia.edu/9964347/The_Human_Rights_Based_Approach_to_Conflict_Transformation_in_Indigenous_Contexts> accessed 21 August 2022, p.3.

The need for concerted efforts in addressing environmental conflicts is justified by the observation that while the nation-states are the main players in global politics, they are not the only ones; the international system also includes international institutions, business entities, and non-state actors.⁷ Indigenous peoples see the deprivation of their basic human and indigenous rights as a threat to their very existence. This results in conflict between the state and its indigenous peoples and, if handled incorrectly, can result in bloodshed. Since disputes between indigenous peoples and the state are fundamentally about rights, it makes sense to think about using a human rights-based strategy to resolve disputes in these situations.⁸ This chapter discusses the place of State agencies in managing internal conflicts, non-state actors as well as the role of communities in achieving lasting peace.

2. Role of State Institutions in Environmental Conflict Management

Article 69(1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilize the environment and natural resources for the benefit of the people of Kenya. Besides, every person is obligated to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁹

In addition to helping to modify institutional norms, the law can also help to influence attitudes and behaviour.¹⁰ Due to its distinguishing characteristics, the rule of law offers a practical framework for the peaceful resolution of conflicts. These characteristics include: establishing the societal norms and thereby ensuring dependability, justice, and stability; institutions capable of resolving conflicts; laws and mechanisms protecting citizens' rights.¹¹ It goes without a saying that the State obligations relating to environmental conservation and promoting sustainable

⁷ Ataman, M., "The impact of non-State actors on world politics: a challenge to Nation-States." *Alternatives: Turkish Journal of International Relations* 2, no. 1 (2003), p. 42.

⁸ Broberg M and Sano H-O, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 *The International Journal of Human Rights* 664; Davis, M., "Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples." *Melbourne Journal of International Law* 9, no. 2 (2008): 439-471.

⁹ Article 69(2), Constitution of Kenya, 2010.

¹⁰ Muigua, K., "Securing Our Destiny Through Effective Management of the Environment", *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

¹¹ Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" <<http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844>> accessed 21 August 2022.

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development are part of the process of addressing environmental conflicts as well as preventing their emergence.

Notably, depending on the nature of the conflict, the state, including state institutions and officials, plays a strategic role in the management of domestic conflict, either as a mediator and peacekeeper or as a participant.¹² It has additionally been contended that while by and large, many (maybe most) country states emerged by success (e.g., by triumph of the most impressive primitive lord over more vulnerable adjoining medieval masters), and accordingly were brought into the world as struggle members instead of as referees, on account of Africa, imperialism assumed a significant part in using together people groups from a welter of nationalities, commonwealths, societies and areas under a solitary country state where it likewise granted struggle between people groups of various foundation, especially concerning influence and asset.¹³

Regardless of the course of state arrangement, it is the obligation of the state to guarantee the upkeep of peace and lawfulness in the public eye where in dealing with the variety of human necessities and setting up systems for overseeing questions, the state capacities as a referee. Beside administration structures, the state likewise plans strategies and projects pointed toward working with serene conjunction among its assorted residents. Experiencing the same thing of savage struggle, the state liability goes past only the stoppage of viciousness, to executing drives focused on the goal of the contention issue(s) among the disputants.¹⁴

3. Role of Communities in Conflict Management

In some African nations, violent inter - group conflict is seen on a yearly basis. It is frequently organised according to identity. The conflicts frequently revolve around local land, raw materials, or political power. These conflicts pose a serious danger to human security and development, despite the fact that they often stay localized and are not directed at the central state.¹⁵ While communal conflicts in some areas only result in a few fatalities or are resolved before any fatalities occur, in other areas, these disagreements turn violent and result in the deaths of dozens, hundreds, or even thousands of people.¹⁶ The term "communal conflict" refers to disputes between non-state organisations that are unified by a common identity.¹⁷ Since group identity is thought to be socially constructed rather than a static phenomenon, some people would equate the concept of communal identity with ethnic or religious identity, but others have purposefully left the definition more

¹² Abdulrahman, Imran, and Usman A. Tar, "Conflict management and peacebuilding in Africa: the role of state and non-state agencies," *Information, society and justice journal* 1, no. 2 (2008): 185-202, at 190.

¹³ *Ibid*, at 190.

¹⁴ *Ibid*, at 191.

¹⁵ Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation) <<http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640>> accessed 26 August 2022.

¹⁶ Brosché, Johan, 'Causes of Communal Conflicts: Government Bias, Elites and Conditions for Cooperation,' Expert group for Aid Studies, Swedish Ministry of Foreign Affairs, 2015, p.3. Available at <https://uu.diva-portal.org/smash/get/diva2:899332/FULLTEXT01.pdf> accessed 21 August 2022.

¹⁷ *Ibid*, p.4.

ambiguous. The communal identity is conceptualized as subjective group identification based on, for example, a common history, culture, or core values.¹⁸

Governments, it has been said, are rarely able to act as an impartial arbitrator in situations of intercommunal conflict since, when such a dispute arises, political leaders are frequently linked to its origin. This can happen directly through bias or provocation, or it can happen inadvertently due to poor policies and a failure to treat all individuals equally. As a result, politicians have to make an effort to find and promote conflict resolution techniques that are respected in the community. Traditional leaders, community-based organisations, and NGOs may fall under this category.¹⁹ Communities must be given the chance to describe how conflicts are manifesting in the broader socioeconomic setting. They must be given the chance to recognize external elements that fuel conflict and to create locally suitable conflict resolution techniques.²⁰

4. The Place of the State and the Communities in Addressing Environmental Conflicts: Striking the Balance

a. Addressing the Bias and legitimacy

The government's capacity to control intercommunal disputes declines if the state is biased toward the conflict players. The circumstances that support collaboration are subject to other players' influence. Because it has the power to change a number of variables crucial to intercommunal interactions, the government's behaviour is crucial. The strategic interests of the government are important when determining whether or not to interfere in a community conflict, because biased choices about property rights raise the likelihood of conflicts. Additionally, central players might form alliances with local actors engaged in conflict, which could intensify contacts between central and local elites as well as interactions among local elites, potentially leading to war.²¹

The government will be better able to control the community strife if the state has a high level of democracy. The ability of democratic institutions and procedures to support the aspects of rights, equality, and accountability is directly correlated with the degree to which government is responsive to the interests and requirements of the greatest number of individuals.²² Some academics advise using the following set of best practices when using collaborative decision-making processes: An agency should first decide if a cooperative strategy to finding agreements is necessary; Stakeholders should be able and willing to engage in the process and support it; Agency executives should encourage the process and guarantee there are enough resources to hold the

¹⁸ Ibid, p.4.

¹⁹ Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation) <<http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640>> accessed 26 August 2022.

²⁰ Frank, E., "A participatory approach for local peace initiatives: The Lodwar border harmonization meeting," *Africa Today* (2002): 69-87, p. 72.

²¹ Brosché J, 'Conflict Over the Commons: Government Bias and Communal Conflicts in Darfur and Eastern Sudan' (2022) 0 *Ethnopolitics* 1.

²² United Nations, 'Rule of Law and Democracy: Addressing the Gap between Policies and Practices' (United Nations) <<https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>> accessed 26 August 2022.

process; A collaborative procedure to find an agreement should start with an evaluation; There should be consensus among all participants about ground rules, rather than just the sponsoring organisation setting them; The sponsoring organisation ought to guarantee the facilitator's objectivity and responsibility to each participant; Planning for execution of the agreement should begin as soon as the process is initiated by the agency and participants; and these processes should be governed by guidelines rather than rigid rules.²³

b. Environmental Governance Through Civic Engagement

Institutionalized participation can go a long way in enhancing the role of communities in addressing environmental conflicts in the country. To guarantee citizens enjoy unhindered justice and the rule of law, which are essential for sustainable development, responsible and inclusive institutions guided by the law may help to promote and ensure inclusive public policymaking that leaves no one behind.²⁴

Decision-making about environmental and natural resource policies is evolving. As parties resolve policy issues, citizens and management agency staff are increasingly looking for methods to "do things differently" and to actively engage in the decision-making process. Nowadays, "doing things differently" refers to working together.²⁵

c. Capacity building for Enhancing Participatory Conflict Management

In order for less powerful parties to participate fairly in a process of consensual negotiation, it is essential to create a level playing field.²⁶ Although the terms "capacity building" and "capacity development" are frequently used to refer to a wide range of activities, in the broadest sense, capacity refers to a party's ability to solve problems and accomplish goals, and capacity building aims to improve parties' ability to collaborate for their mutual benefit by giving them the knowledge and resources they need to identify problems and formulate solutions.²⁷ Since it encompasses the total system, environment, or context in which people, organisations, and societies operate and interact, capacity building is larger than organizational development. It is seen as the process through which people, groups, organisations, institutions, and communities improve their capacity to: (1) carry out essential tasks, solve issues, set and attain goals; and (2)

²³ Walker GB and Daniels SE, 'Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work' (2019) 4 *Frontiers in Communication* <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002>> accessed 26 August 2022.

²⁴ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 July 2022.

²⁵ Daniels S and Walker G, 'Working through Environmental Conflict: The Collaborative Learning Approach' [2001] *Working through Environmental Conflict* 1.

²⁶ Warner, M., "Conflict management in community-based natural resource projects: experiences from Fiji and Papua New Guinea" (2000), p. 30.

²⁷ Corissajoy, 'Capacity Building' (*Beyond Intractability*, 6 July 2016) <<https://www.beyondintractability.org/essay/capacity-building>> accessed 20 August 2022; see also Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (MediateGuru, 20 March 2021) <<https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts>> accessed 20 August 2022.

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comprehend and address their developmental requirements in a comprehensive and sustainable manner.²⁸

It has also been correctly noted that the provision of basic human needs, such as food, clean drinking water, health care, basic education, and economic possibilities within a society, is a prerequisite for developing capacity for effective governance and conflict management.²⁹ Nevertheless, capacity building goes well beyond meeting the minimum requirements. It is an issue of development at all societal levels, which includes institutional, community, and economic development. Knowledge and technical skills, organizational and institutional capacity, and the capacity to foresee, manage, and resolve disputes are some of the key assets that people, organisations, communities, and governments need in order to reach their full potential.³⁰

Notably, capacity building is a perpetual and mutually reinforcing process of changing people's attitudes, values, and organizational practices while accumulating the necessary knowledge and skills among different partners in a partnership. The goal is to improve each partner's capacity to make wise decisions about their own lives and to fully accept the consequences of those decisions.³¹ It has also been pointed out that despite the fact that there are many different approaches to building capacity, the capacity-building strategy for resolving conflicts is essential because it gives people the tools they need to recognize conflicts, properly analyze their options for dealing with them, solve them, and prevent future ones.³²

The need for capacity building is justified on the observation that long-term, conflict resolvers help parties build better relationships with one another in order to increase institutional and interpersonal capacity to resolve or de-escalate conflict in the future and stop it from turning violent. This entails helping the parties examine their underlying presumptions and attitudes about their enemies and, if necessary, change them.³³ While acknowledging that conflict is common and frequently beneficial, conflict resolvers detest the bloodshed, suffering, and loss of life it causes. They support constructive tactics over destructive ones because they feel that there are both productive and destructive ways to handle conflict.³⁴

²⁸ Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." *The Institute of Cultural Affairs, Zimbabwe*, available at http://assets.sportanddev.org/downloads/participatory_capacity_building_full.pdf. Accessed on February 10 (2003): 2020, p. 4.

²⁹ Corissajoy, 'Capacity Building' (Beyond Intractability, 6 July 2016) <<https://www.beyondintractability.org/essay/capacity-building>> accessed 20 August 2022.

³⁰ Ibid.

³¹ Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." *The Institute of Cultural Affairs, Zimbabwe*, available at http://assets.sportanddev.org/downloads/participatory_capacity_building_full.pdf. Accessed on February 10 (2003): 2020, p. 4.

³² Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (*MediateGuru*, 20 March 2021) <<https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts>> accessed 20 August 2022.

³³ Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, p. 179.

³⁴ Ibid, p. 179.

Sustainable Development Goal (SDG) 16 seeks to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. In line with this, there is a need for the Government to invest in strengthening conflict management institutions both formal and informal. While formal institutions are mainly pegged on the state, the informal ones require strong and empowered communities for their efficiency. As such, there should be empowerment of both state institutions and the communities.³⁵

5. Conclusion

It is possible for the various parties (government agencies, stakeholder organisations, and citizens) to look for a collaborative approach as an alternative to adversarial conflicts when environmental or natural resource conflicts have arisen. By doing this, they will be able to work through conflicts to find common ground and make wise decisions.³⁶ SDG 16 and the SDGs as a whole must be accomplished through partnerships, integrated solutions, and the initiative and leadership of countries and member states in reshaping the institutional and social landscape and laying the foundation for significant reforms that support the establishment of sustainable peace.³⁷ Because marginalization and exclusion may have a destabilizing effect, it is essential to adopt an inclusive and participatory approach to development.³⁸

Better economic climates, greater per capita incomes, higher educational achievement, and more social cohesiveness have all been benefits of peaceful societies.³⁹ Better interpersonal ties within

³⁵ ‘Peacebuilding Needs Strong Communities as Well as Strong Institutions’ (Peace Insight) <<https://www.peaceinsight.org/en/articles/peacebuilding-needs-strong-communities-as-well-as-strong-institutions/>> accessed 12 September 2022; ‘4 Governance and Conflict Resolution in Multi-Ethnic Societies’ <<https://archive.unu.edu/unupress/unupbooks/uu12ee/uu12ee05.htm>> accessed 12 September 2022.

³⁶ Gregg B Walker and Steven E Daniels, ‘Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work’ (2019) 4 *Frontiers in Communication* <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002>> accessed 26 August 2022.

³⁷ ‘SDG 16 as an Accelerator for the 2030 Agenda’ (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 20 August 2022.

³⁸ ‘SDG 16 as an Accelerator for the 2030 Agenda’ (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 20 August 2022.

³⁹ The Institute for Economics and Peace (IEP), ‘Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)’, p. 2 <<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 20 August 2022.

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a community tend to promote higher levels of peace by preventing the emergence of tensions and lowering the likelihood that conflicts would turn violent.⁴⁰

It is imperative that conflict management efforts should aim at strengthening both state agencies and communities as both have a distinct role to play.

⁴⁰ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 6.

COP 27 and Biodiversity: Towards an Integrated Approach to Climate Change Mitigation and Biodiversity Conservation

Abstract

Climate change mitigation measures and biodiversity conservation have often been treated as separate. However, COP 27 for the first time, comprehensively created a platform for deliberations on tackling both as a step towards achieving sustainable development. This paper highlights the outcomes of COP 27 which took place in November 2022 in Egypt, dubbed “African COP”. Notably, the main focus of this paper as far as COP 27 is concerned was the encouragement of adoption of nature-based solutions to climate change and biodiversity loss. The author argues that there is a need for climate change mitigation efforts and biodiversity protection and conservation measures to consider the nature-based approaches and also create an opportunity for collaborative approaches in these between communities and government agencies.

1. Introduction

The need for the UN Framework Convention on Climate Change (UNFCCC)¹ was informed by, *inter alia*: the understanding that, given the global nature of climate change, all nations must cooperate as widely as possible and take part in an effective and appropriate international response, in accordance with their respective capabilities, common but differentiating responsibilities, and social and economic circumstances; affirmation that in order to prevent negative effects on social and economic development, responses to climate change should be coordinated with it in an integrated manner, taking full account of developing countries' legitimate priority needs for the achievement of sustained economic growth and the eradication of poverty; and an understanding that in order for developing nations to advance towards achieving sustainable social and economic development, their energy consumption will need to increase while taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general, including through the application of new technologies on terms which are affordable to them.²

The ultimate goal of this 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 threshold should be reached in a time period that will allow ecosystems to adjust to climate change naturally, guarantee that food supply is not jeopardized, and permit sustainable economic growth.³

The Convention's top decision-making body is the Conference of the Parties (COP). At the COP, which reviews the implementation of the Convention and any other legal instruments that the COP adopts, all States that are Parties to the Convention are represented. The COP also makes decisions

¹ UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

² *Ibid*, Preamble.

³ *Ibid*, Article 2.

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regarding institutional and administrative arrangements that are necessary to support the Convention's effective implementation.⁴

The inaugural COP conference took place in Berlin, Germany, in March 1995. The COP meets annually, unless the Parties decide differently, and unless a Party proposes to host the session, it meets in Bonn, the secretariat's home city.⁵ The issues of climate change and biodiversity are closely related. The successful conservation, restoration, and management of biodiversity is essential to achieving the goals of the Paris Climate Agreement.⁶

The 27th Session of the Conference of the Parties of the UNFCCC (COP 27) took place in Sharm el-Sheikh, Egypt, held from November 6th to 20th November, 2022.⁷ With regard to a wide variety of climate change-related concerns, the Egyptian COP27 Presidency listed a number of subjects aimed at improving implementation and boosting ambition. Additionally, Egypt set aside a number of days that were specifically themed for in-depth debates, including those that took place during side events, panel discussions, round tables, and other interactive forms for consideration and dissemination to a larger audience. These included Finance Day, Agriculture and Adaptation Day, Water Day, Decarbonization Day, Science Day, Solution Day, Gender Day, Energy Day, Biodiversity Day, Youth and Future Generations Day, and ACE and Civil Society Day.⁸

Notably, adoption of nature-based approaches to climate change mitigation and biodiversity conservation took centre on this 'biodiversity day'. The term "nature-based solutions"(NbS) refers to a variety of methods used to solve social issues, such as habitat restoration, water resource management, disaster risk reduction, and green infrastructure. The foundation of nature-based solutions is the idea that when ecosystems are healthy and well-managed, they offer crucial advantages and services to people, such as lowering greenhouse gas emissions, securing safe water supplies, improving the quality of the air we breathe, or boosting food security.⁹

This paper's main focus is on the outcomes of the discussions surrounding biodiversity and what the same portend for the future in enhancing biodiversity conservation and climate change mitigation as a step towards achieving sustainable development.

⁴ 'Conference of the Parties (COP) | UNFCCC' <<https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>> accessed 10 January 2023.

⁵ Ibid.

⁶ 'Biodiversity Day - COP27' (UNEP - UN Environment Programme) <<http://www.unep.org/events/conference/biodiversity-day-cop27>> accessed 13 February 2023.

⁷ 'Sharm El-Sheikh Climate Change Conference - November 2022 | UNFCCC' <<https://unfccc.int/cop27>> accessed 12 February 2023.

⁸ 'COP 27 | Climate-Diplomacy' <<https://climate-diplomacy.org/events/cop-27>> accessed 12 February 2023.

⁹ 'What Are Nature-Based Solutions and How Can They Help Us Address the Climate Crisis?' (World Wildlife Fund) <<https://www.worldwildlife.org/stories/what-are-nature-based-solutions-and-how-can-they-help-us-address-the-climate-crisis>> accessed 14 February 2023.

2. Biodiversity Protection and Conservation as a Tool for Achieving Sustainable Development

Environmental, social, and economic factors must all be balanced while pursuing sustainable development in order to protect natural resources (biodiversity, ecosystem services, and ecosystem function).¹⁰ The promise of providing humans with a means of subsistence in the present and the future while preserving the diversity of biological life contained in the planet's intricately woven natural eco-systems is captured by sustainable development on an idealistic level. The Sustainable Development Goals (SDGs), which were endorsed by the UN General Assembly in 2015, are a "collection of universal goals that tackle the pressing environmental, political, and economic issues facing our planet" (UNDP, 2020a).¹¹ The foundation for raising global standards of living and reducing the dangerous human-caused impacts of climate change is provided by the Sustainable Development Goals. SDG 13: Climate Action urges the incorporation of climate change mitigation strategies into development frameworks. More sustainable methods of exploiting the earth's natural resources are also urged by SDGs 14 and 15 on life below water and on land, respectively.¹²

Biodiversity is defined by the Convention on Biological Diversity as "the variability among living organisms from all sources, including, among others, 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." It is the diversity of life on earth at all scales, from genes to globally dispersed populations of the same species; from groups of species coexisting in a limited environment to global ecosystems.¹³ It is crucial to recognise the value of biodiversity in supplying vital ecosystem services and life support systems, such as water yield, water purification, waste breakdown, flood control, storm and coastal protection, sedimentation processes, nutrient cycling, carbon storage, and climatic regulation, as well as the costs of replacing these services.¹⁴ This thus makes biodiversity conservation a crucial part of the journey towards achieving sustainable development goals.

3. COP 27 and Biodiversity: Towards an Integrated Approach in Climate Change Mitigation and Biodiversity Conservation Measures.

As already pointed out, there was a biodiversity day set out during COP 27 on 16th November 2022, whose goal was to advance and institutionalize action towards valuing, conserving, restoring, and sustainably using biodiversity across terrestrial, freshwater, coastal, and marine

¹⁰ Abdo, L., Kemp, A., Coupland, G., & Griffin, S., "Biodiversity offsets can be a valuable tool in achieving sustainable development: Developing a holistic model for biodiversity offsets that incorporates environmental, social and economic aspects of sustainable development." *Journal of Sustainable Development* 12, no. 5 (2019), 65.

¹¹ Cléménçon R "Is sustainable development bad for global biodiversity conservation?" *Global Sustainability* 4 (2021), 2.

¹² United Nations, 'Sustainability' (*United Nations*) <<https://www.un.org/en/academic-impact/sustainability>> accessed 14 February 2023.

¹³ United Nations, *1992 Convention on Biological Diversity*, 1760 UNTS 79, 31 ILM 818 (1992).

¹⁴ International Association for Impact Assessment, "Biodiversity in Impact Assessment", *Special Publication Series* No. 3, July 2005 < <https://www.patagoniaalliance.org/wp-content/uploads/2014/01/BIODIVERSITY-IN-IMPACT-ASSESSMENT.pdf>> accessed 14 February 2023.

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ecosystems to lessen the effects of climate change and to use nature-based solutions to mitigate and adapt to climate change and build resilience for both people and nature.¹⁵ Notably, this was the first COP to dedicate a day to biodiversity.¹⁶

The goal of the biodiversity day was to draw attention to ecosystem- and nature-based solutions. It would also make it possible to talk about how climate change affects biodiversity and how to organise international efforts to address the problems of halting biodiversity loss and minimising the effects of pollution and climate change.¹⁷ Included in the discussions would be the effects of climate change on the oceans, endangered species, coral reefs, the sustainability of protected areas to provide ecosystem services to people, the effects of plastic waste on aquatic ecosystems and species, and ecosystem-based solutions and their relationship to climate change mitigation and adaptation.¹⁸

The Egyptian COP27 Presidency, the German Government, and the International Union for Conservation of Nature (IUCN) developed the ENACT (Enhancing Nature-based Solutions for an Accelerated Climate Transformation) initiative in recognition of the need for a more comprehensive global approach to NbS. This initiative's goal is to strengthen collaboration between already-existing NbS efforts and partnerships. Egypt and Germany are the co-chairs of ENACT, a voluntary alliance of state and non-state entities. The ENACT Secretariat, which will oversee the initiative's execution, will be housed at IUCN.¹⁹

As a beneficial outcome of ENACT, the secretariat will create an annual State of Nature-based Solutions report, which will be given to the COP Presidency prior to future UN Climate Change meetings. The study will offer the most thorough quantitative evaluation of the advancement made by state and non-state entities worldwide in putting NbS promises into practice.²⁰

The ENACT initiative aims to: enhance the protection from and resilience to climate impacts of at least 1 billion vulnerable people, including at least 500 million women and girls; secure up to 2.4 billion hectares of healthy natural and sustainable agricultural ecosystems, through protection of 45 million ha, sustainable management of 2 billion ha, and restoration of 350 million ha; and significantly increase global mitigation efforts through protecting, conserving and restoring carbon-rich terrestrial, freshwater and marine ecosystems.²¹

¹⁵ 'Biodiversity Day - COP27' (*UNEP - UN Environment Programme*)

<<http://www.unep.org/events/conference/biodiversity-day-cop27>> accessed 13 February 2023.

¹⁶ 'COP27 Dispatch - November 16, 2022 | Newsletter | EESI' <<https://www.eesi.org/newsletters/view/cop27-dispatch-november-16-2022>> accessed 14 February 2023.

¹⁷ 'COP27 Official-16 Nov, Biodiversity Day' <<http://example.com/index.htm>> accessed 14 February 2023.

¹⁸ Ibid.

¹⁹ 'Egyptian COP27 Presidency, Germany and IUCN Announce ENACT Initiative for Nature-Based Solutions' (*IUCN*) <<https://www.iucn.org/press-release/202211/egyptian-cop27-presidency-germany-and-iucn-announce-enact-initiative-nature>> accessed 14 February 2023.

²⁰ Ibid; 'ENACT Initiative' (*IUCN*) <<https://www.iucn.org/our-work/topic/nature-based-solutions-climate/our-work/enact-initiative>> accessed 14 February 2023.

²¹ Ibid.

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ENACT becomes important when you consider the connection between climate change and biodiversity loss. It has been observed that one of the primary causes of biodiversity loss is climate change, which also changes the ranges in which different species may survive and affects food webs as well as the intensity and frequency of threats like wildfires and droughts. Environmental dangers are made worse by ecosystem loss and degradation, which also diminishes ecosystems' capacity to absorb carbon from the atmosphere.²²

Consequently, it has been suggested that, when correctly used, Nature-based Solutions (NbS) can increase the resilience of ecosystems and the societies that depend on them. NbS can help communities adapt to climate hazards like sea level rise, more frequent and severe flooding, droughts, heatwaves, and wildfires while also providing significant biodiversity benefits in a way that protects and advances the rights and interests of historically marginalised and vulnerable groups.²³

It has been noted that the inclusion of the term NbS in the COP27 cover text was crucial because it gave Parties a policy lever to invest in scaling up NbS while also providing Parties with oversight to make sure that NbS adhere to the UNEA-5 definition²⁴, are not used for greenwashing²⁵, and are implemented sincerely. NbS must therefore promote biodiversity, protect human rights, be people-led, provide positive social effects locally, and be implemented in addition to, not in place of, significant reductions in greenhouse gas emissions.²⁶

The *Sharm el-Sheikh Implementation Plan*²⁷, in its preamble, underlines the crucial importance of protecting, conserving, restoring, and sustainably using nature and ecosystems for effective and sustainable climate action, as well as the urgent need to address the interconnected global crises of

²² 'COP27 Official' <<http://example.com/index.htm>> accessed 14 February 2023.

²³ Ibid.

²⁴ The overall theme for UNEA-5 was "Strengthening Actions for Nature to Achieve the Sustainable Development Goals," highlighting the pivotal role nature plays in our lives and in social, economic and environmental sustainable development. The UNEA-5 provided a platform for Member States to exchange sustainable development best practices. It sought to give nations a foundation to build on and catalyse impact on international environmental initiatives to save and restore the natural environment, which is essential to our economies and society.

See: 'Fifth Session of the United Nations Environment Assembly | Environment Assembly' <<https://www.unep.org/environmentassembly/unea5>> accessed 14 February 2023.

²⁵ See de Freitas Netto, S.V., Sobral, M.F.F., Ribeiro, A.R.B. and Soares, G.R.D.L., "Concepts and forms of greenwashing: A systematic review." *Environmental Sciences Europe* 32, no. 1 (2020): 1-12.

²⁶ 'The Agile Initiative | From Global to Local: Lessons on Scaling up Nature-Based Solutions from COP27' (*The Agile Initiative*) <<https://www.agile-initiative.ox.ac.uk/news/from-global-to-local-lessons-on-scaling-up-nature-based-solutions-from-cop27>> accessed 14 February 2023; see also 'Nature-Based Solutions Initiative | Nature-Based Solutions Included in COP27 Cover Decision Text' (*Nature-based Solutions Initiative*) <<https://www.naturebasedsolutionsinitiative.org/news/nature-based-solutions-included-cop27-cover-decision-text/>> accessed 14 February 2023.

²⁷ UNFCCC, *Sharm el-Sheikh Implementation Plan*, Sharm el-Sheikh Climate Change Conference - November 2022 Proceedings, Decision -/CP.27 <https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf> accessed 14 February 2023.

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climate change and biodiversity loss in a comprehensive and synergetic manner.²⁸ In addition, the Plan stresses the significance of safeguarding, conserving, and restoring nature and ecosystems in order to meet the Paris Agreement temperature goal, including through the protection of biodiversity, forests, and other terrestrial and marine ecosystems that act as sinks and reservoirs for greenhouse gases.²⁹

The Plan also encourages Parties to take into account ecosystem-based strategies or solutions based on nature, as appropriate, for their mitigation and adaptation actions while providing sufficient social and environmental safeguards, taking into mind United Nations Environment Assembly resolution 5/5.³⁰

An important component of the Plan is the loss and damage fund, which many people see as the pinnacle of the United Nations Climate Conference (COP 27) and the result of years of pressure from poor nations that are susceptible to climate change. The fund intends to donate funding to the countries most at risk from and affected by the consequences of climate change.³¹ The term "loss and damage" refers to the inescapable negative effects of climate change, such as increased sea levels, protracted heat waves, desertification, acidification of the oceans, and catastrophic occurrences like bushfires, extinction of species, and crop failures.³² It has been observed that Climate justice has entered a new era with the creation of the Loss and Damage Finance Fund. The cornerstone of a long delayed new fund has been set by governments in order to provide crucial assistance to disadvantaged nations and communities who are already suffering the effects of the escalating climate disaster.³³

It is now hoped that the African continent for example, which contributes the least to climate change yet is the most vulnerable to its impacts, will benefit from this fund immensely and have an opportunity to use their domestic funds on other pressing socio-economic issues affecting their populace.³⁴ It is hoped that there will be goodwill in making this climate change funding mechanism a reality.

²⁸ Ibid, Preamble.

²⁹ Ibid, Para. 15.

³⁰ Ibid, para. 48.

³¹ Ibid, paras 22-25; see also 'What You Need to Know about the COP27 Loss and Damage Fund' (UNEP, 29 November 2022) <<http://www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund>> accessed 14 February 2023.

³² 'What You Need to Know about the COP27 Loss and Damage Fund' (UNEP, 29 November 2022) <<http://www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund>> accessed 14 February 2023.

³³ Harris T, 'Africa: COP27 Loss and Damage Finance Fund a Down Payment On Climate Justice.' *Greenpeace International* (Amsterdam, 22 November 2022) <<https://allafrica.com/stories/202211220519.html>> accessed 14 February 2023.

³⁴ 'What You Need to Know about the COP27 Loss and Damage Fund' (UNEP, 29 November 2022) <<http://www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund>> accessed 14 February 2023; Zenda C, 'What Will the Loss and Damage Fund Mean for Africa's Most Vulnerable?' (*FairPlanet*) <<https://www.fairplanet.org/story/cop27-loss-and-damage-fund-for-africa/>> accessed 14 February 2023.

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Kenya can take advantage of this fund when it becomes effective, to continue with the projects that were started and managed through the Adaptation Fund Programme in Kenya, implemented through National Environment Management Authority as the National Implementing Entity under Kyoto Protocol, and which proposed to develop and implement integrated adaptive mechanisms to increase community livelihood resilience to climate change as follows: Adoption of drought tolerant crops, and promotion of value chain approaches; Development of water harvesting assets/structures; Promotion of forestry and agro forestry ecosystem-based strategies to enhance food security and resilience to climate change as well as water and soil conservation; Promotion of pastoral ecosystem-based adaptations that will increase resilience through use of pasture conservation and emergency fodder bank, storage and supply of water to improve social life of the people in the district; Rehabilitation of mangrove ecosystem in the coastal area; Disaster risk reduction and preparedness through early warning system and flood control structures; and establishment of a knowledge management system for this programme, development of institution capacity, and raising awareness on Climate Change Adaptation.³⁵ Such funding can go a long way in not only enhancing climate change mitigation measures but also narrowing the gap between climate change mitigation measures and biodiversity conservation measures as the two should be treated as related even in their implementation.

The outcome of COP 27 may thus be considered to be a step in the right direction towards adoption of an integrated approach in climate change mitigation and biodiversity conservation measures. Including all stakeholders, including communities, women, youth and children, among others, in these measures is important not only because of the direct impact of climate change and biodiversity loss on their lives but also the fact that their daily activities have a direct impact on efforts towards reversing both. Especially with climate change issues and biodiversity-related decision-making processes, inclusive governance is necessary. The term "inclusive governance" refers to the process of allowing a broad spectrum of rights holders, knowledge holders, and stakeholders to participate in decision-making in order to capture differing values, strengthen capacity, and advance accountability, legitimacy, and just results.³⁶

This indeed rhymes well with the adoption of nature-based or ecosystem based approaches towards addressing climate change. Ecosystem-based adaptation frequently produces win-win results that safeguard vulnerable communities from extreme weather while also delivering a range of ecological advantages that are essential for human well-being, such clean water and food.³⁷ Ecosystem-based adaptation, which is basically a strategy for coping with change, can decrease

³⁵ 'National Environment Management Authority (NEMA) - Kenya Adaptation Fund Program' <https://www.nema.go.ke/index.php?option=com_content&view=article&id=262&Itemid=385> accessed 14 February 2023.

³⁶ Visseren-Hamakers, I.J., Razzaque, J., McElwee, P., Turnhout, E., Kelemen, E., Rusch, G.M., Fernandez-Llamazares, A., Chan, I., Lim, M., Islar, M. and Gautam, A.P., 'Transformative Governance of Biodiversity: Insights for Sustainable Development' (2021) 53 *Current Opinion in Environmental Sustainability* 20 <<https://www.sciencedirect.com/science/article/pii/S1877343521000749>> accessed 14 February 2023.

³⁷ Environment UN, 'Ecosystem-Based Adaptation' (*UNEP - UN Environment Programme*, 4 June 2021) <<http://www.unep.org/explore-topics/climate-action/what-we-do/climate-adaptation/ecosystem-based-adaptation>> accessed 14 February 2023.

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greenhouse gas emissions caused by habitat loss and ecosystem degradation, which in turn helps to mitigate the effects of climate change.³⁸

4. Conclusion

In order to solve some of our society's most important problems, such as threats to water security, an increase in the likelihood of catastrophes, or climate change, a range of measures or policies known as "nature-based solutions" are used. These solutions entail conserving biodiversity, managing ecosystems sustainably, and protecting and restoring ecosystems in ways that strengthen their resilience and capacity to solve those social concerns.³⁹

There is a need for accelerated adoption of nature-based approaches to climate change mitigation and biodiversity conservation as a step towards achieving socio-economic rights of communities and other related rights as envisaged under sustainable development goals. The proposed funding mechanisms under COP 27 should also be well utilised, once implemented, as a way of building resilient communities and ecosystems. This will go a long way in boosting efforts towards achievement of Sustainable Development Goals.

³⁸ Ibid.

³⁹ 'What Are Nature-Based Solutions and How Can They Help Us Address the Climate Crisis?' (*World Wildlife Fund*) <<https://www.worldwildlife.org/stories/what-are-nature-based-solutions-and-how-can-they-help-us-address-the-climate-crisis>> accessed 14 February 2023.

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Abstract

Exploitation of environmental and natural resources forms the source of livelihoods for many communities across the world and particularly Kenya. However, for assured flow of such benefits for the current and future generations, the Sustainable Development agenda calls for a balance between conservation and fulfilment of human needs. It also calls for active and meaningful participation of all stakeholders, including communities in the management of such resources. This paper discusses the place of community based natural resource management approach in Kenya and makes a case for enhanced use of the same in management of various resources in the country, as way of enhancing conservation measures as well as eradication of poverty among various communities.

1. Introduction

Natural Resource Management (NRM) is used to refer to the sustainable utilization of major natural resources, such as land, water, air, minerals, forests, fisheries, and wild flora and fauna.¹ Environmental and natural resources form the main source of livelihoods for majority of Kenyan communities. It is in recognition of this relationship that the Constitution of Kenya 2010 and the statutes on natural resources provide for co-management of these resources. This is not only meant to ensure that the communities are assured of food and maybe a source of income but also gives them a chance to participate in the conservation and management of these resources for the realisation of sustainable development agenda. This paper offers a critical discussion on the place of Community Based Natural Resource Management (CBNRM) in Kenya and whether the State has effectively implemented the provisions on the same.

2. Approaches to Environmental and Natural Resources Management

Notably, natural resources provide fundamental life support, in the form of both consumptive and public-good services while ecological processes maintain soil productivity, nutrient recycling, the cleansing of air and water, and climatic cycles.² In a bid to strike a balance between the consumptive and public-good services on the one hand and ecological processes on the other hand, different approaches to resource management have been adopted.

¹ Iyyanki V Muralikrishna and Valli Manickam, 'Chapter Three - Natural Resource Management and Biodiversity Conservation' in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann 2017)

<<http://www.sciencedirect.com/science/article/pii/B9780128119891000038>> accessed 10 July 2020.

² Iyyanki V Muralikrishna and Valli Manickam, 'Chapter Three - Natural Resource Management and Biodiversity Conservation' in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann 2017)

<<http://www.sciencedirect.com/science/article/pii/B9780128119891000038>> accessed 10 July 2020.

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Policymakers often adopt one or a combination of these approaches when legislating on protection of the environment and natural resources.³ These approaches include command and control, market-based approaches, incentives (taxation and subsidies); Community based natural resource management (CBNRM) and traditional resource management institutions⁴; Ecosystem-based approaches such as integrated water resources management (IWRM) or River basin management, integrated coastal zone management (ICZM) and integrated management of land⁵.

While the different approaches to environmental and natural resources management as listed above are to be applied as complementary tools in natural resource management and not mutually exclusive as they overlap with one another in their application⁶, this paper is mainly concerned with Community-based natural resource management approach.

2.1 Community Based Approaches in Environmental and Natural Resources Management

Community-based natural resource management (CBNRM) has been defined in different ways by different authors. One of the definitions that stand out is CBNRM as ‘a people-centered approach to the integration of conservation of the natural resource base (water, soil, trees and local biodiversity) and development to overcome poverty, hunger and disease’.⁷

Community based approaches in environmental and natural resources management come in various forms which include: social and community forestry, community wildlife management, cooperative or co-management, buffer zone management, participatory multipurpose community projects, communal area management for indigenous resources, among others.⁸

Despite often important differences, all these expressions of CBNRM are associated with certain characteristics, including: a commitment to involve community members and local institutions in the management and conservation of natural resources; an interest in devolving power and authority from central and/or state government to more local and often indigenous institutions and peoples; a desire to link and reconcile the objectives of socioeconomic development and

³ Gunningham, N. & Sinclair, D., ‘Designing Smart Regulation,’ in Bridget M. Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999), p.305; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁴ See generally, Measham, T.G. & Lumbasi, J., “Success factors for Community Based Natural Resource Management (CBNRM): lessons from Kenya and Australia.” *Environmental Management*, Vol. 52 (3), 2013, pp. 649-659.

⁵ See Feeney, C. & Gustafson, P., “Integrating Catchment and Coastal Management-A Survey of Local and International Best Practice,” *Prepared by Organisation for Auckland Regional Council, Auckland Regional Council Technical Report 2009/092*, 2010.

⁶ Blanco, E. & Razzaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives*, (Edward Elgar Publishing Limited, 2011), p. 106; See also Miller, B. W. & Morissette, J. T., “Integrating research tools to support the management of social-ecological systems under climate change,” *Ecology and Society*, Vol. 19, No. 3, 2014, Art. 41.

⁷ ‘Community Based Natural Resources Management’ (*World Neighbors*) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 8 July 2020.

⁸ Stephen R Kellert and others, ‘Community Natural Resource Management: Promise, Rhetoric, and Reality’ (2000) 13 *Society & Natural Resources* 705, at pp. 705-706.

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environmental conservation and protection; a tendency to defend and legitimize local and/or indigenous resource and property rights; and a belief in the desirability of including traditional values and ecological knowledge in modern resource management.⁹

CBNRM approaches have been associated with the following key elements: multi-stakeholder collaboration that involves all participants, from communities, to government, to NGOs, and promotes coordination among them; conflict management mechanisms – support processes to manage natural resource conflicts among stakeholders; participatory action research – collaborative fact-finding and analysis generates a mutually agreed upon perspective for action; strong local organizations, such as forest-farmer groups and inter-village networks built from the bottom-up; livelihood improvement and environmental services; policy support and law enforcement are essential to curbing illegal encroachment leading to ecosystem degradation; collaborative management plans– shared responsibilities and decision-making among all stakeholders through joint management plans of natural resources; participatory monitoring and evaluation – promote learning, trust and accountability through monitoring of the natural resource base and application of the management plan; and gender and social justice in access to, and control of, natural resources as the ultimate measure of the sustainability of community-based natural resource management efforts.¹⁰

The next section offers an overview of Kenya’s regulatory framework on the adoption and implementation of CBNRM approach as far as management of environmental and natural resources in the country are concerned. It also critically discusses the effectiveness of Kenyan Government’s efforts and commitment in adoption and application of Community-based natural resource management approach as per the statutory provisions.

3. Regulatory Framework on Community Based Approaches in Environmental and Natural Resources Management in Kenya: Challenges and Prospects

The regulatory framework on management of environmental and natural resources in Kenya consists of the Constitution and various sectoral laws and policies. This section highlights some of these provisions with a bias on those that provide for the use of community based environmental and natural resources management.

To begin with, the national values and principles of governance such as sharing and devolution of power; democracy and participation of the people and sustainable development provide a basis for CBNRM.¹¹ The Constitution obligates the State to protect and enhance indigenous knowledge of biodiversity of the communities.¹² The State is also obligated to encourage public participation in

⁹ *Ibid*, at p. 706.

¹⁰ ‘Community Based Natural Resources Management’ (*World Neighbors*)

<<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 10 July 2020.

¹¹ Constitution of Kenya 2010, Art.10.

¹² *Ibid*, Art. 69(1) (c).

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the management, protection and conservation of the environment.¹³ In settling land disputes, communities are encouraged to apply recognized local community initiatives consistent with the Constitution.¹⁴ This is meant to enhance community involvement in natural resource management since these provisions encourage in one way or the other the participation of local communities in the management, use or ownership of natural resources.¹⁵

Notably, the 2010 Constitution of Kenya envisages community land which is classified as land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.¹⁶ It envisages a scenario where there is land management by communities.¹⁷ The Constitution also provides for community forests.¹⁸ The protection of community land and by extension forests is guaranteed in the Constitution in the sense that all unregistered land should be held in trust by the county governments on behalf of the communities.¹⁹ It is also provided that community land should not be disposed of or otherwise used in a manner that contravenes the rights of the members of that particular community.²⁰

Also worth mentioning is the paradigm shift towards the use of incentives to encourage community participation in wildlife management in Kenya.²¹ If private land owners and communities are given incentives to keep wildlife on their land, then they will perceive wildlife as an economic good and protect the wildlife in the same manner they protect their private property. This is important because command and control approaches to wildlife management have failed to curb loss of wildlife.

In forests management, the *Forest Conservation and Management Act 2016*²² provides for "community forest association" which means a group of local persons who have registered as an association or other organization established to engage in forest management and conservation.²³

Where a community forest association has been granted permission to participate in the management or conservation of a forest in accordance with the provisions of the Act, that

¹³ *Ibid*, Art. (1) (d).

¹⁴ *Ibid*, Art.60 (1) (g) and Art.67 (2) (f).

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

¹⁶ Constitution of Kenya 2010, Art.63(d).

¹⁷ *Ibid*.

¹⁸ Kibugi, R. *Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy*. Thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment for the Doctors of Laws (LL.D) degree, University of Ottawa (2011), p. 443.

¹⁹ Art.63(3) of the Constitution.

²⁰ *Ibid*, Art.63 (4).

²¹ One of the objectives of the *National Wildlife Conservation and Management Policy, 2012* is to promote partnerships, incentives and benefit sharing to enhance wildlife conservation and management. The Policy further proposes that the Government should provide economic incentives to induce or promote sustainable wildlife conservation and management; See also the *Wildlife Conservation and Management Act, 2013*, No. 47 of 2013, s.5.

²² Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

²³ *Ibid*, Sec. 48.

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association has obligations to: protect, conserve and manage the forest or part of the forest in accordance with an approved management agreement entered into with the Service and the provisions of the management plan for the forest; formulate and implement sustainable forest programmes that shall be consistent with the traditional forest user rights of the relevant forest community; protect sacred groves and protected trees; assist the Service or any other relevant authority in enforcing the provisions of the Act including in relation to illegal harvesting of forest products; with the approval of the Service enter into partnerships with other persons for the purposes of ensuring the efficient and sustainable conservation and management of the forest; inform the Service of any developments, changes and occurrences within the forest which are critical for the conservation of biodiversity; help in firefighting; and do any other act that is necessary for the efficient conservation and management of the forest.²⁴

On the other hand, the management agreement between the Service and the community forest association confers on the association all or any of the following forest user rights: collection of medicinal herbs; harvesting of honey; harvesting of timber or fuel wood; grass harvesting and grazing; collection of forest produce for community based industries; ecotourism and recreational activities; scientific and education activities; plantation establishment through non-resident cultivation; contracts to assist in carrying out specified forestry operations; development of community wood and non-wood forest based industries; and other benefits which may from time to time be agreed upon between an association and the Service.²⁵

This is meant to motivate communities to invest in sustainable forestry management. Participation of communities in forests management is informed by the fact that exclusion of local communities in management and conservation of natural resources tends to escalate degradation rather than conservation.²⁶ The sense of ownership by communities facilitates gainful benefits to the local communities as well as encouraging community eco-governance.²⁷

While it is commendable that the Act recognizes the constitutional provisions on public participation by incorporating participatory and collaborative management of forests, where the public can actively and meaningfully be more involved in the conservation and management of forests, it appears like the drafters only envisaged a non-residential kind of cooperation, where any person who wishes to participate in the form of Community Forests Association must first apply for a permit and then must also do so while living within the area surrounding the forest in question and not inside the forest. The question that arises in such situations is what happens when the State

²⁴ Ibid, sec. 49 (1).

²⁵ Ibid, sec. 49 (2).

²⁶ See Vyamana, V.G., *et al*, 'Participatory Forest Management in the Eastern Arc Mountain area of Tanzania: Who is benefiting?' Available at http://iasc2008.glos.ac.uk/conference%20papers/papers/V/Vyamana_134501.pdf [Accessed on 8/07/2020].

²⁷ 'Eco-social sustainability in the Murray-Darling Basin,' *Case study: regional sustainability efforts in the Murray-Darling Basin*, (Hawke Research Institute, University of South Australia, 2010).

Available at <http://w3.unisa.edu.au/hawkeinstitute/research/ecosocial/eco-case-study.asp#top> [Accessed on 8/07/2020].

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is dealing with communities that have traditionally resided in such forests. Notably, The *Forest Conservation and Management Act 2016* recognises that community forests include forests on ancestral lands and lands traditionally occupied by hunter-gatherer communities.²⁸ How the State treats such scenarios raises a number of issues. It is not clear whether the State should allocate alternative settlement for such communities in order to achieve the non-resident approach to co-management or the Government should simply evict such communities as it has been the case in the recent past.²⁹

The laws governing water resources in the country also envisage community involvement in the management of these resources. The *Water Act 2016*³⁰ provides that water resource users associations may be established as associations of water resource users at the sub-basin level in accordance with Regulations prescribed by the Authority.³¹ A water resource users association shall be a community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.³² Notably, the basin water resources committees may contract water resource users associations as agents to perform certain duties in water resource management.³³

As one of the strategies for co-management, the Water Act 2016 provides for the designation of a defined area from which rain water flows into a watercourse to be a basin area for the purposes of the Act.³⁴ In addition, the Cabinet Secretary is, by notice published in the Gazette, to establish a basin water resources committee for each respective basin area provided for under section 24.³⁵ Such a basin water resources committee shall be responsible for the management of the water resources within a respective basin area.³⁶ In appointing members of the basin water resources committee, the Authority must ensure that such persons are residents of the respective basin area and shall include: a representative of a ministry responsible for matters relating to water resources; a representative of farmers or pastoralists within the basin area concerned; a representative of a

²⁸ Forest Conservation and Management Act, No. 34 of 2016, Sec. 30 (3) (e).

²⁹ ‘Imminent Eviction of Ogiek from Homeland’

<<https://www.culturalsurvival.org/news/imminent-eviction-ogiek-homeland>> accessed 11 July 2020; ‘Mau Forest Evictions Leave Ogiek Homeless’ <<https://www.culturalsurvival.org/news/mau-forest-evictions-leave-ogiek-homeless>> accessed 11 July 2020; ‘Press Release: Kenya’s Mau Ogiek Remain Excluded from Ancestral Forest Three Years after Landmark Land Rights Win | Forest Peoples Programme’ <<https://www.forestpeoples.org/en/Kenya-Ogiek-still-excluded-from-forest-three-years-after-land-rights-win>> accessed 11 July 2020; ‘Two Years on, Kenya Has yet to Implement Judgment in Ogiek Case – MRG Statement’ (*Minority Rights Group*, 5 June 2019) <<https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/>> accessed 11 July 2020; ‘Ogiek: We Support Eviction of Illegal Settlers from Mau Forest’ (*Daily Nation*) <<https://www.nation.co.ke/kenya/counties/nakuru/ogiek-we-support-eviction-of-illegal-settlers-from-mau-forest-85436>> accessed 11 July 2020.

³⁰ Water Act, No. 43 of 2016, Laws of Kenya.

³¹ Ibid, sec. 29 (1).

³² Ibid, sec. 29 (2).

³³ Ibid, sec. 29 (4).

³⁴ Ibid, sec. 24 (1).

³⁵ Ibid, sec. 24 (2).

³⁶ Ibid, sec. 24 (3).

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public benefits organisation engaged in water resources management programmes within the basin area concerned; and a representative of the business community operating within the basin area concerned.³⁷

The powers and functions of the basin water resources committee shall be to advise the Authority and county governments, at the respective regional office, concerning: conservation, use and apportionment of water resources; the grant, adjustment, cancellation or variation of any permit; protection of water resources and increasing the availability of water; annual reporting to the users of its services and the public on water issues and their performance within the basin area; collection of data, analyzing and managing the information system on water resources; review of the basin area water resources management strategy; facilitation of the establishment and operations of water resource user associations; flood mitigation activities; information sharing between the basin area and the Authority; the equitable water sharing within the basin area through water allocation plans; and any other matter related to the proper management of water resources.³⁸

The Water Act 2016 requires that every county government must put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.³⁹ These measures shall include the development of point sources, small scale piped systems and stand pipes which meet the standards set by the Regulatory Board and which may be managed by the community associations, public benefits organizations or a private person under a contract with the county government.⁴⁰

Notably, the role of the user bodies established or appointed under the Water Act 2016 is merely to advise the Water Resources Management Authority, which is not obliged to take the advice. This was the same case in the pre-2010 constitutional era where the Water Act 2002 had similar provisions.⁴¹ The National Water Policy 1999 and the Water Act 2002, provided for a new institutional set-up for water resources management and water services provision at national and basin level. For participation of users/consumers and their empowerment, the Water Resources Users Associations (WRUAs) and Water Consumer Groups (WCGs) were established. In addition, Water Services Boards (WSBs) were established to promote asset development.⁴² Despite all these provisions in both pre and post 2010 constitutional statutes, there is little evidence that decentralized co-management approaches to water management in the country have been well utilised to ensure that all people enjoy their right to clean water while ensuring sustainable management of the water resources in the country.

³⁷ Ibid, sec. 26 (3).

³⁸ Ibid, sec. 27.

³⁹ Ibid, sec. 94 (2).

⁴⁰ Ibid, sec. 94 (3).

⁴¹ See generally, Akech M., "Governing Water and Sanitation in Kenya," in Okidi, C.O., *et al*, (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEPL, 2008), p.324.

⁴² Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, Chapter Three.

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The *Wildlife Conservation and Management Act, 2013*⁴³ envisages community participation in wildlife resources management through community wildlife associations and wildlife managers.⁴⁴ These are to be established by communities, landowners, groups of landowners and existing representative organizations. The object and purpose for which an association is established is to facilitate conflict resolution and cooperative management of wildlife within a specified geographic region or sub-region.⁴⁵ An association or wildlife manager approved by the Cabinet Secretary on the recommendation of the Kenya Wildlife Service in consultation with the county wildlife conservation committees shall: ensure that the association membership or the wildlife manager protects, conserves and manages wildlife conservancies and sanctuaries under their jurisdictions pursuant to their respective approved management plans; assist the service in combating illegal activities, including poaching and bush meat trade; keep the regional wildlife conservation area committee informed of any development changes and occurrences within their area that may adversely affect wildlife; assist in problem animal control through community wildlife scouts drawn from among their membership or employees; and do any other act that is necessary to enhance community participation in wildlife protection, conservation and management.⁴⁶

The provisions for co-management of wildlife resources are meant to address the perennial human-wildlife conflict Kenya.⁴⁷ However, the same has had little success in curbing the problem if the recent statistics are anything to go by.⁴⁸ Some authors have even argued for the adoption of collaborative management in wildlife sector on grounds that both the state-based and community-based models of managing wildlife and other natural resources have failed to successfully fulfil goals of conservation and meet the socio-economic needs of the local communities.⁴⁹ To them, the co-management approach (also sometimes referred to as joint management, multi-stakeholder management, or management in partnership) seeks to create negotiated agreements between the protected areas' managers and local resource users and, therefore, offers a possibility to overcome conflicting interests over resource exploitation.⁵⁰ The *Wildlife Conservation and Management Act 2013* also envisages this co-management approach and the same should be explored.

⁴³ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

⁴⁴ Ibid, sec. 40 (1).

⁴⁵ Ibid, sec. 40 (2).

⁴⁶ Ibid, sec. 41.

⁴⁷ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, Chapter Nine.

⁴⁸ '77 People Killed in Human-Wildlife Conflicts in 2018: Balala' (*Daily Nation*) <<https://www.nation.co.ke/kenya/news/77-people-killed-in-human-wildlife-conflicts-in-2018-balala-182650>> accessed 11 July 2020; 'Human-Wildlife Conflicts and Compensation for Losses in Kenya' (*AfricanBioServices*) <<https://africanbioservices.eu/human-wildlife-conflicts-and-compensation-for-losses-in-kenya/>> accessed 11 July 2020; Joseph M Mukeka and others, 'Human-Wildlife Conflicts and Their Correlates in Narok County, Kenya' (2019) 18 *Global Ecology and Conservation* e00620.

⁴⁹ John Mburu and Regina Birner, 'Wildlife Co-Management in Kenya: An Empirical Analysis of Landowners' Incentives for Participation'. *Deutscher Tropentag 2002 Witzhausen, October 9-11, 2002 Conference on International Agricultural Research for Development* <<https://pdfs.semanticscholar.org/8fa7/f0de16651abdf88ee91491a2c58a244c2f05.pdf>> accessed 11 July 2020.

⁵⁰ Ibid, pp. 1-2.

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In addition to the foregoing sectoral statutes, cultural and social principles applied traditionally by communities in management of environmental and natural resources are recognized under EMCA in so far as they are not inconsistent and repugnant to justice and morality or any other written law.⁵¹

Despite the statutory and constitutional provisions encouraging CBNRM approach in Kenya, there is overwhelming evidence that the State has done little if anything to implement the same. Indeed, the opposite may be said to be true if some of the State actions are anything to go by.

In this context, the Ogiek and the Endorois communities in Kenya are the main reference point. The reason for this is that they are forest dwellers and there has been an issue as to whether they should manage the forests in which they live in or it should be left to state institutions such as the Kenya Forestry Service. The Ogiek are a forest dwelling people who live in the Mau forest in Nakuru. The Endorois, on the other hand, live near the Lake Bogoria reserve. The claim of the two communities has been tenure rights within the forest and wildlife protected areas.⁵² The issue has been a subject of litigation at the African Commission on Human and Peoples Rights.⁵³ It can, therefore, be argued that the two communities have their rightful place in the forests according to the Constitution and since they manage the forests, they are part of the community-based organizations that should be meaningfully included in the management of natural resources.

4. Walking the Talk: Making Community Based Approaches in Environmental and Natural Resources Management Work in Kenya

Some commentators have argued that due to the ‘interdependence of community well-being and ecosystem health, there is a need to strengthen the capacity of communities to have a voice in decisions about planning and design of conservation initiatives affecting them’.⁵⁴ This is because ‘the natural environment plays a huge role in the health and welfare of people who rely on it as their sole source of income and food’.⁵⁵ CBNRM approach not only gives communities a voice in management of natural resources within their locality but also allows them to benefit from them and also avert any adverse effects of environmental degradation, in recognition of the right to clean and healthy environment⁵⁶. It allows them to enjoy environmental democracy. Environmental

⁵¹ S. 5(b) of the Environmental Management and Co-ordination Act, 1999.

⁵² ‘Defending Our Future: Overcoming the Challenges of Returning the Ogiek Home’ (*Minority Rights Group*, 27 May 2020) <<https://minorityrights.org/2020/05/27/defending-our-future-overcoming-the-challenges-of-returning-the-ogiek-home/>> accessed 11 July 2020.

⁵³ 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya; Application No. 006/2012 – African Commission on Human and Peoples’ Rights v. The Republic of Kenya* (The Ogiek case arose from Communication No. 381/09 – *Centre for Minority Rights Development – Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya*, which was before the African Commission on Human and Peoples’ Rights (the Commission), and later referred to the Court.)

⁵⁴ ‘Community Based Natural Resources Management’ (*World Neighbors*) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 10 July 2020.

⁵⁵ *Ibid.*

⁵⁶ See Article 42, Constitution of Kenya, 2010.

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democracy entails the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.⁵⁷ It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.⁵⁸ Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.⁵⁹ In addition, Principle 10 of the *Rio Declaration*⁶⁰ provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It further provides for access to information by the public. At the national level, each individual must have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available.⁶¹

It has rightly been pointed out that ‘many indigenous peoples are still heavily dependent on natural resources for their survival, and have, over time, developed social and cultural mechanisms that reflect the very real dynamics of natural systems’.⁶²

CBNRM approach is informed by the view that sustainable management of natural resources is most likely to be achieved where local communities are able to manage and derive benefits from natural resources.⁶³ The approach calls for a commitment to involve community members and local institutions in management of natural resources, devolution of power and authority to the grass roots, a desire to reconcile the objectives of socio-economic development and environmental conservation, the tendency to defend and legitimize local and indigenous property rights and a desire to include traditional values in modern management of natural resources.⁶⁴

⁵⁷ Hazen, S., *Environmental Democracy*, (1998). Available at <<http://www.ourplanet.com>> [Accessed on 12/7/2020]; Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), Chapter Five.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ United Nations, *Rio Declaration of 1992*, UN Doc. A/CONF.151/26 (Vol. I).

⁶¹ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

⁶² Jay Mistry, ‘Indigenous Knowledges’ In Kitchin R, Thrift N (eds) *International Encyclopedia of Human Geography*, Volume 5, pp. 371–376. Oxford: Elsevier. <https://www.academia.edu/940129/Indigenous_knowledges> accessed 10 July 2020.

⁶³ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁶⁴ Nelson F. & Agrawal, A., “Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa,” *Journal of Development and Change*, vol. 39, No.4, 2008, pp.557-585; See also Kellert, S.R., *et al*, “Community Natural Resource Management: Promise, Rhetoric and Reality,” *Society and Natural Resources: An International Journal*, Vol.13 (8), p.706; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

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It is for these reasons that the Government of Kenya and other stakeholders in the management of environment and natural resources should reconsider and address the laxity experienced in the implementation of CBNRM approach in Kenya.

Kenya can learn from other countries within and beyond Africa. For instance, in Malawi, Lake Chilwa, a tropical lake without an outlet, and the second largest lake in Malawi, is a home to large populations of breeding waterfowls and an estimated 100 bird catchers are rely economically on the birds.⁶⁵ It is worth noting that the Lake is listed as a Ramsar site. The fertile Lake Chilwa Wetland also has a lot of agricultural activities with two main crops grown, maize and rice, and sustains thousands of people through rice farming and cultivation of a variety of vegetables.⁶⁶ A number of Community-Based Natural Resources Management (CBNRM) groups have been formed to manage different resources like fish, waterfowls, soil and trees.⁶⁷ While these groups are yet to receive user rights and legal tenure, Kenya can borrow a leaf especially around swampy areas and Lake Victoria which is currently choked by the invasive water hyacinth. The community living around the lake should be allowed to work closely with the Government to not only manage fish resources but also to keep the water resource clean. Kenya can also borrow a leaf from the management of the Okavango Delta System (a Ramsar site) in Botswana. The Okavango Delta is divided into Wildlife Management Areas (WMAs). These have been further divided into: Controlled Hunting Areas (CHAs); Commercial Wildlife Utilization; Community Managed Wildlife Utilization; Community Based Natural Resources Management Programme; and Non-Consumptive/Photographic.⁶⁸

Zimbabwe's Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) also offers valuable example to Kenya. CAMPFIRE, started in the late 1980s in Zimbabwe, and subsequently widely emulated elsewhere in southern Africa, involves the sale by rural authorities of the rights to access wildlife to entrepreneurs who in turn market safaris to hunters and ecotourists.⁶⁹ CAMPFIRE was developed largely around the concept of managing wildlife and wildlife habitat in the communal lands of Zimbabwe for the benefit of the people living in these areas.⁷⁰

The Bigodi Wetland Sanctuary in Uganda is also another example where the local community has been running a successful community-based natural resource management programme (CBNRM) for the wetland for over a decade, with external visitors to the wetland providing ecotourism

⁶⁵ 'Community-Based Natural Resources Management - the Case of Lake Chilwa Wetland, Malawi | Ramsar' <<https://www.ramsar.org/news/community-based-natural-resources-management-the-case-of-lake-chilwa-wetland-malawi>> accessed 12 July 2020.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ JobeManga and Gertrude Matswiri, 'Expert Meeting: Transboundary Cooperation For Protecting The Cubango-Okavango River Basin & Improving The Integrity Of The Okavango Delta World Heritage Property,' 3-4 June, Cresta Hotel, Maun, Botswana Okavango Delta World Heritage Property –History, Governance & Current Conservation Issues < [whc.unesco.org](http://whc.unesco.org/document) > document> 12 July 2020.

⁶⁹ Peter GH Frost and Ivan Bond, 'The CAMPFIRE Programme in Zimbabwe: Payments for Wildlife Services' (2008) 65 *Ecological economics* 776.

⁷⁰ Ibid.

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revenues and majority of households collecting a wide variety of plant and fish resources and water from the wetland for household use and livestock.⁷¹

Australia's Indigenous land and sea management projects, a funding program by the Australian Federal Government in recognition of the ecological value of Indigenous land management can also offer valuable lessons. Notably, the Australian programs provide funds to Indigenous people to support Indigenous land management activities) and are also known to generate social and economic benefits in addition to the ecological ones.⁷² They are thus considered as important economic vehicles for elimination of poverty in Northern Australia.⁷³ Notably, Australia was emerging from a tradition of oppression of the indigenous peoples' rights to exploitation of natural resources.⁷⁴

While Kenya's legal framework on natural resource management may have provisions that envisage similar establishments, the implementation of the same has largely remained a challenge. Even where established, the same receive little, if any, support from the state agencies. Their establishment may therefore be argued to be a mere formality, with little involvement in the actual management of resources.

There is a need for the various state organs to work closely with stakeholders in the various natural resource sectors to establish the legal and institutional frameworks provided for under the statutes to ensure effective CBNRM. As things stand now, the statutes make provisions for the use of CBNRM but the actual implementation of these provisions is yet to be witnessed.

If water scarcity issues, logging problems, environmental degradation, poverty, human-wildlife conflicts and other social ills facing the natural resources sector in the country are to be eliminated, there is a need to revisit the above provisions and come up with ways on how best the same can be implemented. It is worth pointing out that the implementation of specific approaches under CBNRM may differ based on other factors, but the end result should be achieving conservation, poverty eradication and achievement of the sustainable development agenda. CBNRM is an important approach in the achievement of Sustainable Development Goals (SDGs). This is because it seeks to achieve several of the SDGs at a go. It seeks to achieve environmental conservation, economic and social empowerment through encouraging participation of communities in management of environmental and natural resources. This gives such a community a source of livelihood thus eliminating poverty while at the same time achieving conservation goals: all key

⁷¹ A Gosling, Charlie M Shackleton and J Gambiza, 'Community-Based Natural Resource Use and Management of Bigodi Wetland Sanctuary, Uganda, for Livelihood Benefits' (2017) 25 *Wetlands Ecology and Management* 717.

⁷² Diane Jarvis and others, 'Indigenous Land and Sea Management Programs: Can They Promote Regional Development and Help "Close the (Income) Gap"?' (2018) 53 *Australian Journal of Social Issues* 283.

⁷³ *Ibid*, p. 299; See also Diane Jarvis and others, 'Are Indigenous Land and Sea Management Programs a Pathway to Indigenous Economic Independence?' [2018] *The Rangeland Journal*.

⁷⁴ See *Mabo v. Queensland* (No. 1) (1988) 166 CLR 186 F.C. 88/062; *Mabo and others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992).

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goals of the sustainable development agenda as envisaged under the United Nations *2030 Agenda for Sustainable Development*⁷⁵.

5. Conclusion

CBNRM approach is not only considered as a response to the challenges of a decentralized management system which occasions natural resources degradation but also as a modern attempt to revive traditional mechanisms for the conservation of natural resources.⁷⁶ Giving local communities the rights to manage, use or own resources, creates incentives for them to collectively invest in natural resources management.⁷⁷ It is against this background that this paper advocates for renewed efforts in the full implementation of CBNRM in Kenya as a step towards eradication of poverty and enhancing community participation in environmental and natural resources management as a means to an end, that is, for the achievement of sustainable development agenda.

⁷⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁷⁶ Nelson F. & Agrawal, A., "Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa," *Journal of Development and Change*, vol. 39, No.4, 2008, p.558.

⁷⁷ *Ibid*, p.558.

Delivering Clean and Affordable Energy for All

Abstract

Energy is considered to be an important component of social and economic needs of any society. Indeed, the integral role of energy is recognised under Sustainable Development Goal 7 of the United Nations 2030 Agenda for Sustainable Development Goals which seeks to 'ensure access to affordable, reliable, sustainable and modern energy for all'. The United Nations has observed that while 'energy is central to social and economic well-being, 1.1 billion people have no access to electricity, while 2.9 billion have to cook with polluting, inefficient fuels such as firewood'. This is despite the fact that Affordable and Clean Energy is seen as an important means towards achieving many of the SDGs – from poverty eradication via advancements in health, education, water supply, and industrialization to mitigating climate change'. Most of the people without access to affordable and clean energy are within the African continent. These people still rely on non-renewable sources of energy which are not only inefficient but also a danger to their health. This paper explores the ways through which the Government of Kenya can work with other stakeholders to ensure that there is a transition to cleaner and affordable energy sources for all its population, as a step towards achieving sustainable development agenda.

1. Introduction

It has been observed that energy and more precisely, access to energy—represents one of Africa's greatest obstacles to social and economic development.¹ Notably, the Continent is largely divided into three regions namely: North Africa, which is heavily dependent on oil and gas, South Africa, which depends on coal and the rest of Sub-Saharan Africa, which is largely reliant on biomass.² Kenya falls within the Sub-Saharan Africa which also means that most of its citizens especially within the rural regions rely mainly on biomass, (unprocessed wood, charcoal, agricultural residues and animal waste), with adverse effects on their health.³ Thus, while the UN Secretary-General Ban Ki-Moon launched the Sustainable Energy for All Initiative (SE4All) in 2011 where he also declared 2012 the year for sustainable energy for all⁴, this has largely remained a mirage especially for the African region.

The *Kenya Sustainable Energy for All (SE4All) Action Plan*, was launched by the Ministry of Energy and Petroleum as an Action Agenda (AA) with an energy sector-wide long-term vision spanning the period 2015 to 2030, which outlines how Kenya will achieve her SE4All goals of 100% universal access to modern energy services, increase the rate of energy efficiency and increase to 80% the share of renewable energy in her energy mix, by 2030.⁵ In addition, the updated

¹ Hafner M, Tagliapietra S and de Strasser L, 'The Challenge of Energy Access in Africa' in Manfred Hafner, Simone Tagliapietra and Lucia de Strasser (eds), *Energy in Africa: Challenges and Opportunities* (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-92219-5_1> accessed 19 April 2021.

² Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In *workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative, June*, pp. 2-4. 2003, 2.

³ See Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 Journal of Energy.

⁴ Republic of Kenya, *Kenya Sustainable Energy for All (SE4All) Action Plan*, January 2016<https://www.seforall.org/sites/default/files/Kenya_AA_EN_Released.pdf> accessed 18 April 2021.

⁵ Ibid.

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Least cost power development plan 2017-2037 developed by the Ministry of Energy and Petroleum, which is an update of the 2015-2035 electricity Sector Master plan estimated peak demand for the period 2017-2037 ranges from 1,754MW to 6,638MW in the reference case scenario, 1,754MW to 9,790MW in the high case and between 1754MW in 2017 to 4,763MW in 2037 in the low case scenario.⁶ The energy sources considered in the system expansion plan for the different cases in the report included: Geothermal, nuclear, Wind, Solar, Import, Petrol-thermal plants, Hydropower, Coal and Natural gas.⁷ However, while Kenya has made significant steps towards increasing the power production, sustainability of some of these sources as well as affordability remains a challenge.⁸ The challenges facing Kenya's energy sector have been summarized as including: low electrification rate, reliance on imported fossil fuels, transmission inefficiencies, frequent power outages, high cost of rural electrification, demand for electricity outstripping generation capacity, and inability of the power utility agency to connect all customers who apply for connection to the national grid.⁹ It has been noted that the energy use of human societies has historically been marked by four broad trends: Rising consumption as societies industrialize, gain wealth and shift from traditional sources of energy (mostly biomass-based fuels such as wood, dung and charcoal) to commercial forms of energy (primarily fossil fuels); steady increases in both the power and efficiency of energy-producing and energy-using technologies; decarbonization and diversification of fuels, especially for the production of electricity, throughout most of the 20th century; and a reduction in the quantities of conventional pollutants associated with energy use.¹⁰ Arguably, Kenya's energy sector is still struggling with problems that hinder the smooth transition through the stated trends, thus exposing its people to poverty and the potential adverse health effects.

This paper explores how Kenya can fast-track its efforts towards ensuring that it achieves sustainable and affordable energy for all its people in line with the United Nations 2030 Agenda for Sustainable Development Goals (SDGs)¹¹ Goal 7 which is based on this. The paper thus mainly focuses on addressing these challenges and offer solutions to promote the uptake, access and use of sustainable and affordable renewable energy for the Kenyan people in line with SDG Goal 7.

⁶ Republic of Kenya, *Least cost power development plan 2017-2037*, p. xv < <http://gak.co.ke/wp-content/uploads/2019/02/Updated-Least-Cost-Power-Development-Plan-2017-2022-min.pdf>> accessed 18 April 2021.

⁷ Ibid.

⁸ See Samoita D and others, 'Barriers and Solutions for Increasing the Integration of Solar Photovoltaic in Kenya's Electricity Mix' (2020) 13 *Energies* 5502.

⁹ Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 *Journal of Energy*, 2.

¹⁰ Dilip Ahuja and Marika Tatsutani, 'Sustainable energy for developing countries' [2009] S.A.P.I.E.N.S. Surveys and Perspectives Integrating Environment and Society <<http://journals.openedition.org/sapiens/823>> accessed 24 April 2021.

¹¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

2. Place of Clean and Affordable Energy in Sustainable Development Agenda

Right to energy is so important that some authors have argued that ‘food and energy are the two essential resources to support the modern and civilized society of the mankind’.¹²

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs) Goal 7 seeks to ‘ensure access to affordable, reliable, sustainable and modern energy for all’. The associated targets that are meant to create action to ensure universal access to sustainable energy include: By 2030, ensure universal access to affordable, reliable and modern energy services; by 2030, increase substantially the share of renewable energy in the global energy mix; by 2030, double the global rate of improvement in energy efficiency; By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology; and by 2030, expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all in developing countries, in particular least developed countries, small island developing States and landlocked developing countries, in accordance with their respective programmes of support.¹³ This goal was informed by the fact that ‘the world has experienced a rapid demand of energy sources, both fossil fuels and renewables’.¹⁴ In addition, ‘as the population continues to grow, so will the demand for cheap energy, and an economy reliant on fossil fuels is creating drastic changes to our climate’.¹⁵ Urbanization and ambitions of economic development will also demand more energy.¹⁶

The United Nations rightly points out that while ‘energy is central to social and economic well-being, 1.1 billion people have no access to electricity, while 2.9 billion have to cook with polluting, inefficient fuels such as firewood’.¹⁷ Some commentators have observed that ‘SDG 7 Affordable and Clean Energy ensures access to affordable, reliable, and sustainable energy and is crucial in achieving many of the SDGs – from poverty eradication via advancements in health, education, water supply, and industrialization to mitigating climate change’.¹⁸

Access to cleaner and affordable energy sources is thus an important part of the journey towards achieving the sustainable development goals.

¹² Tomabeche K, ‘Energy Resources in the Future’ *Energies* 2010, 3, 686-695, 686.

¹³ ‘Goal 7: Affordable and Clean Energy’ (*The Global Goals*) <<https://www.globalgoals.org/7-affordable-and-clean-energy>> accessed 18 April 2021.

¹⁴ Franco IB, Power C and Whereat J, ‘SDG 7 Affordable and Clean Energy: EWisely: Exceptional Women in Sustainability Have Energy to Boost–Contribution of the Energy Sector to the Achievement of the SDGs’.

¹⁵ ‘Goal 7: Affordable and Clean Energy’ (*UNDP*) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html>> accessed 18 April 2021.

¹⁶ Hafner M, Tagliapietra S and de Strasser L, ‘The Challenge of Energy Access in Africa’ in Manfred Hafner, Simone Tagliapietra and Lucia de Strasser (eds), *Energy in Africa: Challenges and Opportunities* (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-92219-5_1> accessed 19 April 2021

¹⁷ Valencia M, ‘Sustainable Energy for All Shifts Gear to Speed Delivery of Affordable, Clean Energy’ (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/blog/2016/06/sustainable-energy-for-all-shifts-gear-to-speed-delivery-of-affordable-clean-energy/>> accessed 18 April 2021.

¹⁸ Franco IB, Power C and Whereat J, ‘SDG 7 Affordable and Clean Energy: EWisely: Exceptional Women in Sustainability Have Energy to Boost–Contribution of the Energy Sector to the Achievement of the SDGs’, 106.

3. Accessing Clean and Affordable Energy Needs for All: The Kenyan Experience

Most developing countries are struggling with growing population and it is expected that today's world population will increase 1.26 times to reach 9.7 billion in 2050 with most of the world's population which include 90% of the population growth belonging to the developing countries.¹⁹ Kenya, just like many other developing countries in Africa, is dealing with the burden of a growing population, environmental pollution, poverty, corruption and legal and policy framework inadequacies, among others, which all affect the achievement of clean and sustainable energy for all.²⁰ In addition, cultural perceptions (including myths about the flavour of food cooked on traditional stoves and the relative safety and cost of clean alternatives) have also been identified as a significant barrier to wider uptake of clean cooking fuels.²¹

These challenges informed the drafting of the sustainable development goals and the related targets. As a result, the environment which is being increasingly polluted because of rapid industrialization and human work is critical in the sustainable development agenda where sustainable development mainly covers the use of renewable energy, energy security, energy pricing, energy policy, renewable energy applications and smart grid technologies.²² The World Health Organization in a 2018 Household Energy Assessment Rapid Tool (HEART) developed in Kenya highlights human health issues from non-renewable energy sources where it points out that 'household air pollution (HAP) from inefficient fuel combustion is one of the most important global environmental health risks today' especially in low- and middle income countries such as Kenya, where majority of the population still rely on solid fuels (wood, animal dung, charcoal, crop wastes and coal) burnt in inefficient, highly polluting stoves for cooking and heating.²³ Indeed, this trend is expected to go on for longer if the latest reports are anything to go by. It is reported that Kenyans are expected to pay higher for liquefied petroleum gas from 1st July 2021 following the reinstatement of value-added tax (VAT) on liquefied petroleum gas (LPG) through the Finance Act 2020, but the implementation of the charges was deferred to the second half of 2021 due to the Covid-19 crisis.²⁴ This is a retrogressive move by the Government from the earlier development

¹⁹ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²⁰ Painuly JP, 'Barriers to Renewable Energy Penetration; a Framework for Analysis' (2001) 24 *Renewable energy* 73.

²¹ Ngeno G and others, 'Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)', *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), 1.

²² Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²³ Ngeno G and others, 'Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)', *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), vi.

²⁴ April 23 2021 F, 'Cooking Gas Prices to Rise Sh350 on New Tax' (*Business Daily*) <<https://www.businessdailyafrica.com/bd/economy/cooking-gas-prices-rise-sh350-on-new-tax-3373296>> accessed 23 April 2021; Kerubo MJ and B, 'Higher Gas Costs: What You'll Pay to Refill Your Cylinders

where ‘Kenyan households had since June 2016 been enjoying low cooking gas prices after the Treasury scrapped the tax on LPG to cut costs and boost uptake among the poor who rely on dirty kerosene and charcoal for cooking’, a move that was in line with the country’s commitment to achievement of SDG Goal 7.²⁵ With affordability being a key access barrier to clean cooking fuels, such as liquefied petroleum gas (LPG), this move is likely to erode the gains made in transitioning the country to cleaner technologies.²⁶

It has been suggested that while many developing countries have been apparently trying to restructure their energy sectors it is difficult to realize innovations in the energy sector as they struggle with cost, market share and policy as the main barriers for the development of renewable energy.²⁷ This is especially important since the reserves of fossil fuels are naturally expected to come to an end.²⁸

Kenya’s major sources of energy for the main economic production are oil, geothermal and hydro resources for electricity production where oil-based electricity generation is environmentally harmful, expensive and a burden to the national trade balance; the rivers for hydropower and their tributaries are found in arid and semi-arid areas with erratic rainfall leading to problems of supply security, and geothermal exploitation has cost and risk issues, amongst others.²⁹ The cost of electricity generation and supply is also affected by the overdependence on Hydroelectric Power (HEP) as the main source of renewable energy, which is weather dependent and the unpredictable weather, due to climate change has made power rationing a common phenomenon in a number of Sub-Saharan Africa countries during the dry seasons.³⁰ It has been observed that while ‘Renewable Energy Technologies (RETs) provide attractive environmentally sound technology options for Africa’s electricity industry, the success of RETs in the region has been limited by a combination of factors which include: poor institutional framework and infrastructure; inadequate RET planning policies; lack of co-ordination and linkage in the RET programme; pricing distortions which have placed renewable energy at a disadvantage;

Beginning July’ (*The Standard*) <<https://www.standardmedia.co.ke/nairobi/article/2001410538/kenyans-to-pay-more-for-cooking-gas-beginning-july>> accessed 23 April 2021.

²⁵ June 11 2020 T, ‘Kenyans to Pay Sh300 More for Cooking Gas’ (*Business Daily*) <<https://www.businessdailyafrica.com/bd/economy/kenyans-to-pay-sh300-more-for-cooking-gas-2292630>> accessed 23 April 2021.

²⁶ Shupler M and others, ‘Pay-as-You-Go Liquefied Petroleum Gas Supports Sustainable Clean Cooking in Kenyan Informal Urban Settlement during COVID-19 Lockdown’ [2021] *Applied Energy* 116769.

²⁷ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²⁸ Ibid.

²⁹ Samoita D and others, ‘Barriers and Solutions for Increasing the Integration of Solar Photovoltaic in Kenya’s Electricity Mix’ (2020) *13 Energies* 5502, 1.

³⁰ ISSAfrica.org, ‘Monopoly on Electricity Supply Contributes to Deforestation’ (*ISS Africa*, 9 March 2010) <<https://issafrica.org/amp/iss-today/monopoly-on-electricity-supply-contributes-to-deforestation>> accessed 22 April 2021.

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high initial capital costs; weak dissemination strategies; lack of skilled manpower; poor baseline information; and, weak maintenance service and infrastructure'.³¹

The challenges of energy cost and reliability in Kenya are made worse by the energy transmission and distribution virtual monopoly currently existing in Kenya.³² Kenya Electricity Generating Company (KenGen), generates about 70% of Kenya's electricity.³³ On the same breadth, Kenya Power owns and operates most of the electricity transmission and distribution system in the country and sells electricity to over 8 million as at end of June 2020.³⁴ The Government of Kenya has a controlling stake at 50.1% of shareholding with private investors at 49.9%.³⁵ Lack of competition in the electricity generation and supply sector has been blamed for inefficiency and high costs of energy.³⁶

The *Energy Act, 2019*³⁷ was enacted to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes.³⁸ While the citizenry was hoping that the enactment of this law would liberalize the energy market in Kenya and eliminate Kenya Power's monopoly in transmission and distribution of electricity in the country through licensing of other companies, the Government seemed to only affirm the same.³⁹

³¹ Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In *workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative, June*, pp. 2-4. 2003, 1.

³² Owiro, D., Poquillon, G., Njonjo, K. S., & Oduor, C., 'Situational Analysis of Energy Industry, Policy and Strategy for Kenya' [2015] Institute of Economic Affairs.

³³ 'Who We Are' <<https://www.kengen.co.ke/index.php/our-company/who-we-are.html>> accessed 22 April 2021.

³⁴ 'Who We Are | Kplc.Co.Ke' <<https://www.kplc.co.ke/content/item/14/about-kenya-power>> accessed 22 April 2021.

³⁵ Ibid.

³⁶ ISSAfrica.org, 'Monopoly on Electricity Supply Contributes to Deforestation' (*ISS Africa*, 9 March 2010) <<https://issafrika.org/amp/iss-today/monopoly-on-electricity-supply-contributes-to-deforestation>> accessed 22 April 2021.

³⁷ Energy Act, No. 1 of 2019, Laws of Kenya.

³⁸ Ibid, Preamble.

³⁹ 'Now Government Reaffirms Kenya Power's Monopoly' (*The East African*) <<https://www.theeastafrican.co.ke/tea/business/now-government-reaffirms-kenya-power-s-monopoly-1408382>> accessed 22 April 2021.

KenGen is among the companies that have been seeking to enter the retail market and sell electricity directly to consumers.⁴⁰ However, to the disappointment of many Kenyans, the Government declined to license other companies, as yet.⁴¹

In summary, therefore, Kenya's energy sector still suffers from consistent power outages especially during dry seasons, high electricity tariffs specially exacerbated by high poverty and employment rates, energy retail sector monopoly, and cultural issues and biases that affect uptake of cleaner energy technologies, among others.⁴² Notably, as far as the use of clean energy is concerned, it is estimated that two-thirds of Kenya's energy currently comes from bioenergy.⁴³ In addition, as Kenya seeks to move from non-renewable energy sources to renewable energy sources as envisaged under the United Nations 2030 Agenda for Sustainable Development Goals, moving an economy which relies heavily on wood fuel and biomass as its largest energy source, to achieve sustainable energy use through the gradual increase in the use of renewable energy sources that are often expensive due to the technology deployed, in the face of oil and coal discoveries that could be more readily accessible in spite of its known effects on the environment is a great challenge.⁴⁴ This is mainly due to higher poverty levels in many households in developing countries, such as Kenya thus making it nearly impossible to afford the renewable and cleaner energy sources.⁴⁵ This is what is also mainly referred to as energy poverty, which the World Economic Forum in 2010 defined as 'the lack of access to sustainable modern energy services and products'.⁴⁶ Related to this definition is the observation that 'it is not only a matter of sustainability: energy poverty can be found in all conditions where there is a lack of adequate, *affordable*, reliable, quality, safe and environmentally sound energy services to support development.(emphasis added).⁴⁷ The connection between energy poverty and socio-economic development is that 'insufficient energy usually translates into the impossibility to develop agriculture and manufacturing, thus keeping the

⁴⁰ 'KenGen Moves to End Kenya Power's Monopoly by Selling Electricity Directly to Consumers' (*Sun-Connect East Africa News*, 26 November 2020) <<https://sun-connect-ea.org/kengen-moves-to-end-kenya-powers-monopoly-by-selling-electricity-directly-to-consumers/>> accessed 22 April 2021; Siele M, 'Kengen to Begin Direct Power Sales Ending KPLC Monopoly - Business Today Kenya' <<https://businesstoday.co.ke/kengen-to-begin-direct-power-sales-ending-kplc-monopoly/>> accessed 22 April 2021;

⁴¹ 'Now Government Reaffirms Kenya Power's Monopoly' (*The East African*) <<https://www.theeastafrican.co.ke/tea/business/now-government-reaffirms-kenya-power-s-monopoly-1408382>> accessed 22 April 2021.

⁴² Avila, N., Carvallo, J. P., Shaw, B., & Kammen, D. M., "The energy challenge in sub-Saharan Africa: A guide for advocates and policy makers." *Generating Energy for Sustainable and Equitable Development, Part 1* (2017): 1-79.

⁴³ 'Kenya Energy Outlook – Analysis' (IEA) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

⁴⁴ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015), p. 7.

⁴⁵ Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In *workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative, June*, pp. 2-4. 2003; Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 Journal of Energy.

⁴⁶ 'Energy Poverty' (*Habitat For Humanity*) <<https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>> accessed 23 April 2021.

⁴⁷ Ibid.

poorest countries trapped in a vicious circle: they cannot afford the energy that can drive them out of poverty'.⁴⁸

It is, therefore, possible to conclude that as the situation currently stands, majority of Kenyan population are suffering from energy poverty that needs to be addressed.

4. Delivering Clean and Affordable Energy for All: The Global Trends and the Lessons

While it has been argued that there is no “one size fits all” approach to successful clean household energy initiatives, some commentators have observed that a suite of options targeted to different sociocultural environments is likely to have wider acceptance.⁴⁹

4.1 Transition to Cleaner Energy Models

It has been observed that ‘one of the biggest limitations to achieving the SDGs is linked to the geography: the population in need is mostly located in rural areas, where there is no grid-electricity, and its expansion is often financially and logistically infeasible’.⁵⁰ In light of this, it has been suggested that ‘off-grid power has been instrumental in addressing this problem, notably stand-alone solutions, such as solar panels, hydro mini-grids, biogas mini-grids, among others, all of which comes from renewable sources, and which makes it the perfect alternative to obtain a reliable and sustainable energy service, at a considerably low price’.⁵¹ As such, ‘off-grid renewables give developing countries the opportunity to erase the electricity gap without passing through a phase of fossil fuels that would be hard to sustain in terms of cost, natural resources, and global environment’.⁵²

There has been calls for ‘pro-poor access to electricity measures that will ensure that there is access that provides poor people with energy services enabling poverty reduction, which services include, for example: light, information and communications technologies, mechanical power for productive uses, and refrigeration or water pumping, as their poverty impacts may consist of income generation, female empowerment, or better education and health’.⁵³ This can be achieved in what is referred to as ‘energy transition’, defined as the global energy sector’s shift from fossil-based systems of energy production and consumption — including oil, natural gas and coal — to renewable energy sources like wind and solar, as well as lithium-ion batteries.⁵⁴

⁴⁸ Ibid.

⁴⁹ Ngeno G and others, ‘Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)’, *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), 1.

⁵⁰ ‘Energy Poverty’ (Habitat For Humanity) <<https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>> accessed 23 April 2021.

⁵¹ Ibid.

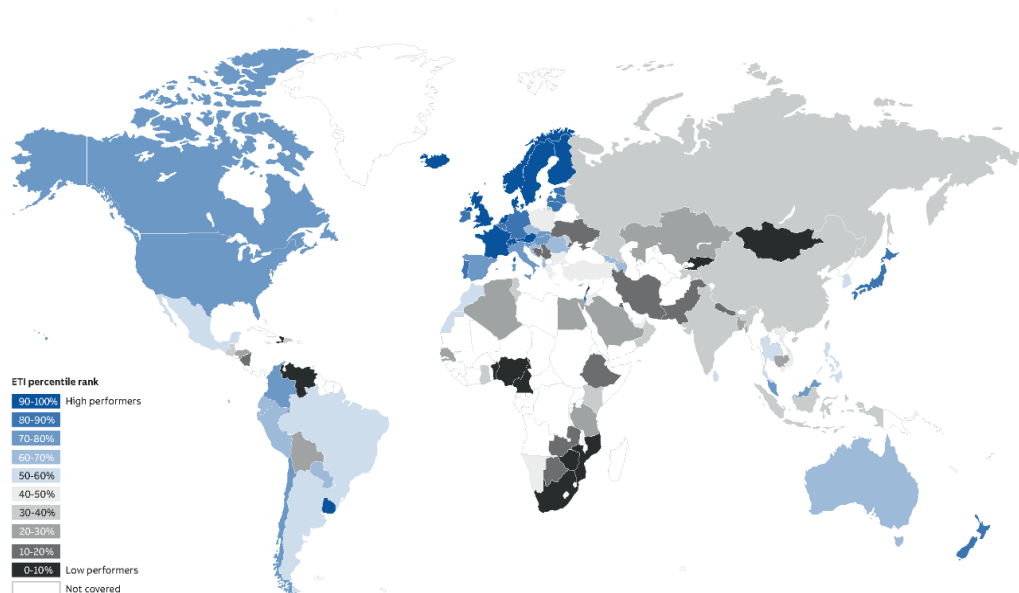
⁵² Ibid.

⁵³ Pueyo, A., *Pro-poor access to green electricity in Kenya*. No. IDS Evidence Report; 135. IDS, 2015, 3.

⁵⁴ ‘Global Energy Transition Index, 2020 and Its Highlights – Civildaily’ <<https://www.civildaily.com/news/global-energy-transition-index-2020-and-its-highlights/>> accessed 19 April 2021.

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Notably, Sweden was listed in 2020 Energy Transition Index (ETI) ranking for the third consecutive year as the country most ready to transition to clean energy, followed by Switzerland and Finland.⁵⁵ The ETI analyzes each country's readiness to adopt clean energy using three criteria: energy access and security; environmental sustainability; and economic development and growth.⁵⁶ Conspicuously, the top ten countries in the ranking were from the developed world, showing their readiness to transition.⁵⁷ Most African countries were ranked lowly or not considered at all, as demonstrated in the map below.



Source: World Economic Forum, *Fostering Effective Energy Transition 2020*⁵⁸

Currently, Sweden boasts of about 54% energy that comes from renewable energy sources, with the country having attained the government's 2020 target of 50 per cent in 2012, while the power sector targeting to get to 100 per cent renewable electricity production by 2040.⁵⁹ Notably, Sweden's high share of renewable energy is attributed to hydropower (water) and bioenergy which are the top renewable sources in Sweden – hydropower mostly for electricity production and bioenergy for heating.⁶⁰ Sweden's success has been attributed to, inter alia, its market-based approach to energy policy, which is focused on creating well-functioning and competitive

⁵⁵ 'These Countries Are Leading the Transition to Sustainable Energy' (*EcoWatch*, 14 May 2020) <<https://www.ecowatch.com/sustainable-energy-countries-2645997492.html>> accessed 19 April 2021.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ 'Energy Transition Index 2020' <<https://new.abb.com/news/detail/67960/energy-transition-index-2020>> accessed 19 April 2021.

⁵⁹ 'Energy Use in Sweden' (*sweden.se*, 23 December 2015) <<https://sweden.se/nature/energy-use-in-sweden/>> accessed 19 April 2021.

⁶⁰ Ibid.

energy markets.⁶¹ The Swedish energy policy agreement of 10 June 2016 set the path for the current success, based on reconciling: ecological sustainability; competitiveness; and security of supply.⁶² In addition, the Policy was meant to create a basis for ensuring that ‘Sweden achieves a robust electricity system with high reliability, low environmental impact and with access to electricity at competitive prices and also create long-term perspectives and clarity for market participants and bring new jobs and investments to Sweden.’⁶³ Kenya can learn a lot from the Swedish experience and it is high time that the stakeholders embark on the necessary steps to move the country towards consistent transition towards cleaner renewable energy sources for all.

4.2 Investing in Science, Technology and Innovation for Provision of Sustainable Energy for All

It has been agreed by many commentators that in order to meet the ever escalating energy needs of the growing population, energy solutions should be supported by utilizing renewable energy sources even though currently, the contribution of renewable energy to the world primary energy is not high to meet the primary energy and electricity supplies.⁶⁴ It has been observed that ‘energy markets across the world are in the middle of a revolution, triggered by the pursuit of decarbonization and fueled by innovation’.⁶⁵

Some commentators have pointed out that ‘new enabling technologies related to renewable energies will help to reduce environmental costs, and thus the energy systems will be operated as both securely and economically without environmental problems, making new renewable energy markets a necessity in both the wholesale and retail markets.’⁶⁶

Kenya has been making some commendable steps towards its transition to cleaner energy technologies since June 2016 when the Ministry of Finance zero-rated LPG gas to boost uptake by the poorer households. Notably, this has also seen the introduction of Pay-As-You-Go (PAYG) LPG smart meter technology in Kenya, enabling more Kenyans to embrace and enjoy the use of

⁶¹ International Energy Agency, *Energy Policies of IEA Countries: Sweden 2019 Review* <https://www.connaissancedesenergies.org/sites/default/files/pdf-actualites/Energy_Policies_of_IEA_Countries_Sweden_2019_Review.pdf> accessed 19 April 2021.

⁶² Swedish Nuclear Society and Analysgruppen, *The Swedish energy policy agreement of 10 June 2016 – unofficial English translation* <https://balticbrilliantproject.eu/onewebmedia/Swedish_political_energy_agreement_2016.pdf> accessed 19 April 2021.

⁶³ Ibid.

⁶⁴ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

⁶⁵ Woodhouse S and Bradbury S, ‘Chapter 2 - Innovation, Disruption, and the Survival of the Fittest’ in Fereidoon P Sioshansi (ed), *Innovation and Disruption at the Grid’s Edge* (Academic Press 2017) <<https://www.sciencedirect.com/science/article/pii/B9780128117583000024>> accessed 22 April 2021.

⁶⁶ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

LPG for cooking and lighting as a cleaner and cheaper energy option.⁶⁷ Notably, across the world digitisation has driven and enabled the transformation of energy systems with many new companies entering the market with innovative products based on digital solutions, and companies from the information and communication sector and other companies from outside the industry increasingly driving the change.⁶⁸

There is also a need for continued investment in fuel efficient cook stoves improvements in developing countries as part of efforts to reduce indoor pollution and improve cooking efficiency.⁶⁹ This calls for a greater role of the Government and private sector to encourage use of energy efficient stoves and other related innovations.⁷⁰

Decarbonisation, decentralisation and digitalisation have been flaunted as part of the future of the global energy sector.⁷¹ Decarbonisation is defined as the reduction of carbon dioxide emissions through the use of low carbon power sources, achieving a lower output of greenhouse gasses into the atmosphere.⁷² Notably, decarbonisation involves increasing the prominence of low-carbon power generation, and a corresponding reduction in the use of fossil fuels which means increased use of renewable energy sources like wind power, solar power, and biomass.⁷³ Decarbonising the power sector is used to mean reducing its carbon intensity: that is, reducing the emissions per unit of electricity generated (often given in grams of carbon dioxide per kilowatt-hour).⁷⁴

It is important to point out that the Paris Agreement was created to hold nations accountable in their efforts to decrease carbon emissions, with the central goal of ensuring that temperatures do not rise 2 degrees Celsius above pre-industrial level.⁷⁵ It has been observed that the growth of

⁶⁷ Shupler M and others, 'Pay-as-You-Go Liquefied Petroleum Gas Supports Sustainable Clean Cooking in Kenyan Informal Urban Settlement during COVID-19 Lockdown' [2021] *Applied Energy* 116769.

⁶⁸ Johannes Giehl and others, 'Survey and Classification of Business Models for the Energy Transformation' (2020) 13 *Energies* 2981, 12.

⁶⁹ Manibog, Fernando R. "Improved cooking stoves in developing countries: problems and opportunities." *Annual Review of Energy* 9, no. 1 (1984): 199-227.

⁷⁰ 'The Livelihoods Carbon Fund Doubles Its Investment in an Energy Efficiency Project to Reach 600,000 People in Kenya – Livelihoods Funds' <<https://livelihoods.eu/the-livelihoods-carbon-fund-doubles-its-investment-in-an-energy-efficiency-project-to-reach-600000-people-in-kenya/>> accessed 24 April 2021; Lucy Stevens and others, 'Market Mapping for Improved Cookstoves: Barriers and Opportunities in East Africa' (2020) 30 *Development in Practice* 37; 'Improved Cookstoves, Kenya | Natural Capital Partners' <<https://www.naturalcapitalpartners.com/projects/project/kenya-improved-cookstoves>> accessed 24 April 2021.

⁷¹ 'Decarbonisation, Decentralisation and Digitalisation: The Big Drivers at PowerGen 2017' <<https://www.power-technology.com/features/featuredecarbonisation-decentralisation-and-digitalisation-the-big-drivers-at-powergen-2017-5856615/>> accessed 23 April 2021.

⁷² 'What Is Decarbonisation?' <<https://www.twi-global.com/technical-knowledge/faqs/what-is-decarbonisation.aspx>> accessed 24 April 2021.

⁷³ Ibid.

⁷⁴ 'What Is "Decarbonisation" of the Power Sector? Why Do We Need to Decarbonise the Power Sector in the UK?' (*Grantham Research Institute on climate change and the environment*) <<https://www.lse.ac.uk/granthaminstitute/explainers/what-is-decarbonisation-of-the-power-sector-why-do-we-need-to-decarbonise-the-power-sector-in-the-uk/>> accessed 24 April 2021.

⁷⁵ 'What Is Decarbonisation?' (*Drax*, 21 August 2020) <<https://www.drax.com/sustainability/what-is-decarbonisation/>> accessed 24 April 2021.

renewable sources of power, such as wind turbines, solar panels and coal-to-biomass upgrades as well as other innovations, such as using batteries and allowing homes to generate and share their own power, can also lead to higher rates of decarbonisation.⁷⁶

Arguably, new digital tools can promote sustainability, including satellites to verify greenhouse gas emissions and technologies to track air pollution at the neighbourhood level.⁷⁷ The digitalization of the power sector is associated with greater transparency into operations, which greatly increases efficiency and reliability while decreasing costs and consequently; consumers will not only see the benefits of digitalization through lower monthly utility bills but also reduced outages and faster response times.⁷⁸

It has been observed that ‘the digitalisation of the power sector has already begun, with block chain and smart meters becoming commonplace as well as there being a possibility of virtual power plants replacing traditional ones, interlinking small scale solar and wind with base load to create a reliable power system.’⁷⁹

The International Energy Agency recommends some policy actions that governments can take to prepare for digitalisation which include: Build digital expertise within their staff; ensure appropriate access to timely, robust, and verifiable data; build flexibility into policies to accommodate new technologies and developments; experiment, including through ‘learning by doing’ pilot projects; participate in broader inter-agency discussions on digitalisation; focus on the broader, overall system benefits; monitor the energy impacts of digitalisation on overall energy demand; incorporate digital resilience by design into research, development and product manufacturing; provide a level playing field to allow a variety of companies to compete and serve consumers better; and learn from others, including both positive case studies along with more cautionary tales.⁸⁰

4.3 Newer Business Models in Energy Sector: Opening Up the Energy Sector

It has been argued that ‘the ongoing energy system transformation across the world, and especially in developed world, and the growth of renewable energies are changing the structure and value creation of the energy industry with adopted business model classes showing that traditional

⁷⁶ Ibid.

⁷⁷ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (*ESI-Africa.com*, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

⁷⁸ ‘What Could Digitalization Achieve in the Power Sector?’ (*Alliance to Save Energy*, 10 December 2020) <<https://www.ase.org/blog/what-could-digitalization-achieve-power-sector>> accessed 23 April 2021.

⁷⁹ ‘Decarbonisation, Decentralisation and Digitalisation: The Big Drivers at PowerGen 2017’ <<https://www.power-technology.com/features/featuredecarbonisation-decentralisation-and-digitalisation-the-big-drivers-at-powergen-2017-5856615/>> accessed 23 April 2021.

⁸⁰ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (*ESI-Africa.com*, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

business models are affected by the decarbonisation, decentralisation and digitisation of the energy system in all segments and economic sectors.⁸¹

There is a need for the stakeholders in the energy sector to adopt business models that ensure that consumers get value, one that encourages consumers to pay for value, and one that converts those payments to profits.⁸² Liberalization and energy system transformation can arguably significantly increase the pace of change and have impact on the business model landscape substantially.⁸³ In many countries around the world, especially in the developed world, there has been a trend of liberalization, unbundling and deregulation of the energy sector in order to improve access to energy.⁸⁴ The liberalization of the energy market is defined to mean the opening of the electricity and gas market to free competition where existing monopolies are broken and the market is opened to more participants.⁸⁵

Liberalization in regard to the energy markets and specifically electricity and gas mainly refers to “the opening up of an industry to more competition, often involving the relaxing of government restrictions to break up existing monopolies and open the market to more participants.”⁸⁶ Liberalization has been characterized as involving the introduction of competition (via structural changes such as the removal of subsidies, vertical unbundling of integrated utilities to facilitate non-discriminatory access to monopoly networks and horizontal unbundling of incumbents to create viable competitors) and the establishment of independent energy sector regulators.⁸⁷ Expressed differently, in electricity and downstream gas supply, liberalization has often involved privatization (and/or the introduction of new private entrants) and structural reform of national industries to create competitive wholesale and retail markets with regulated non-discriminatory third party access to monopoly transmission and distribution networks.⁸⁸

Where liberalization has been achieved such as the European Union energy markets, it was done to benefit consumers through; raising employment levels, increasing business efficiency and increasing a country's potential economic development and GDP growth.⁸⁹ Thus, “opening up

⁸¹ Johannes Giehl and others, ‘Survey and Classification of Business Models for the Energy Transformation’ (2020) 13 *Energies* 2981, 12.

⁸² Fuentes-Bracamontes R, ‘Is Unbundling Electricity Services the Way Forward for the Power Sector?’ (2016) 9 *The Electricity Journal* 16.

⁸³ Giehl J and others, ‘Survey and Classification of Business Models for the Energy Transformation’ (2020) 13 *Energies* 2981.

⁸⁴ Fuentes-Bracamontes R, ‘Is Unbundling Electricity Services the Way Forward for the Power Sector?’ (2016) 29 *The Electricity Journal* 16.

⁸⁵ ‘Liberalization & Unbundling of Energy Markets | Definition’ (25 March 2020) <<https://www.next-kraftwerke.com/knowledge/liberalization-energy-markets>> accessed 22 April 2021.

⁸⁶ ‘GRIN - Liberalisation of Energy Markets. Effects on Gas and Electricity Generation, Distribution and Supply’ <<https://www.grin.com/document/323337>> accessed 23 April 2021.

⁸⁷ Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 *Energy policy* 128.

⁸⁸ Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 *Energy policy* 128, 3.

⁸⁹ ‘GRIN - Liberalisation of Energy Markets. Effects on Gas and Electricity Generation, Distribution and Supply’ <<https://www.grin.com/document/323337>> accessed 23 April 2021.

these markets to competition allows consumers to benefit from lower prices and new services...more efficient and consumer-friendly than before” and consumers benefit because a breaking up of a monopoly and introducing competition will help give consumers savings in price but also choice of what service they demand.⁹⁰ It has also been argued that ‘potential economic development and GDP growth is likely to occur as shown by the benefits to consumers, employment and efficiency because of increased employment which will cause more people to spend disposable income; an increase in companies also increases employment but also the reduction in market prices will result in consumers having more disposable income to be spent on other goods and services, and this will lead to economic development in other industries and businesses and is likely to increase GDP.’⁹¹ It has also been observed that ‘the introduction of competition in downstream energy sectors, such as electricity and gas supply, facilitates competition in upstream gas and coal production sectors; while the general increase in energy trading facilitates the introduction of emissions markets’.⁹²

Notably, while Kenya may have attained some milestone as far as unbundling (encouraging private generators of power, and separating generation from distribution) is concerned, the same cannot be said about liberalization (which is visibly missing from the Vision 2030). Notably, the electricity sector is unbundled and generation by independent power producers is permitted by law and is regulated, whereas at 2018, it was estimated that the private sector produces 28% of Kenya’s centralised electricity supply.⁹³ This was enabled through Feed-in tariffs (FITs) Regulations which were introduced in 2008 and revised in 2010 and 2012 to enable independent power producers to sell electricity to KPLC at a fixed price for a fixed term of 20 years.⁹⁴ Despite the commendable considerable success of this development, there has been challenges in uptake of this generated power. For instance, it is estimated that Kenya's Lake Turkana wind farm and its 365 turbines make for a generating capacity of more than 300MW, creating one of the most productive projects anywhere in the world.⁹⁵ Wind power has become a key contributor to the national grid to the extent that where there is interruption in its production, consumers have ended paying more for electricity in the country.⁹⁶ Notably, the Lake Turkana Wind Power (LTWP) has been allocated a maximum production quota of 210MW, against an installed capacity of 310MW.⁹⁷ While

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 Energy policy 128, pp. 2-3.

⁹³ Kees Mokveld & Steven von Eije, *Final Energy report Kenya*, Commissioned by the Netherlands Enterprise Agency 2018, 13 < <https://www.rvo.nl/sites/default/files/2019/01/Final-Energy-report-Kenya.pdf>> accessed 19 April 2021.

⁹⁴ Ibid, 13.

⁹⁵ ‘What’s Driving Wind Power in Kenya and What Challenges Lie in Wait?’ <<https://www.nsenergybusiness.com/features/wind-power-kenya-challenges/>> accessed 24 September 2020.

⁹⁶ ‘Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African’ <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 19 April 2021.

⁹⁷ ‘Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African’ <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

independent power producers have made considerable efforts to produce enough power to run the country, there have been problems with uptake of the same by the Kenya Power and Lighting Company Plc (KPLC). For instance, in the recent times and partly due to the Corona Virus (Covid-19) pandemic, there have been reports that measures to contain the pandemic have led to reduced demand for power especially among the commercial consumers who account for over 65% of the power use in the country.⁹⁸ Reports also indicate that KPLC has prioritized the uptake of geothermal at 39.5 per cent, hydro at 33.9 per cent, wind at 14 per cent, diesel at 9.7 per cent with other sources like solar, imports from Uganda and co-generation accounting for about three per cent.⁹⁹ This has thus left some of the producers with excess power.¹⁰⁰ This shows that Kenya's main consumers of electricity are commercial businesses and when these run into difficulties, the independent power producers are left stranded.¹⁰¹ This happens while there are still reports that there are homes in Kenya still not connected to the grid despite the Government's best efforts to do so.¹⁰² Thus, even as the Government looks for ways to produce cleaner power, there is also a need to address the disconnect between production and distribution of the power possibly through liberalization of the energy sector.¹⁰³

While this has been attributed to the Covid-19 pandemic that afflicted almost the whole world in 2020, it raises a concern as to whether the power producers' major customers are only the commercial users.¹⁰⁴ This is because, it has already been pointed out that there are households in Kenya that still mainly rely on kerosene and biomass (firewood and charcoal) as their main source of energy for their inability to afford electricity.¹⁰⁵ Thus, even as we vouch for increased transition to renewable energy by way of increased production, this scenario points out the fact that there is more than availability of the renewable energy: the same must not only be made available but must also be made affordable to the local 'mwananchi' (citizen). Affordability of energy is key. While the Energy Ministry had expressed optimism of introducing net metering for customer-sites generation (dependent on the enactment of the energy bill), establish regulations for mini-grids,

⁹⁸ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

⁹⁹ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

¹⁰⁰ Ibid.

¹⁰¹ "The Seven Major Threats to Kenya's Power Sector." *Energy For Growth*, <https://www.energyforgrowth.org/memo/the-seven-major-threats-to-kenyas-power-sector/>. Accessed 24 Apr. 2021; Avila, Nkiruka, Juan Pablo Carvallo, Brittany Shaw, and Daniel M. Kammen. "The energy challenge in sub-Saharan Africa: A guide for advocates and policy makers." *Generating Energy for Sustainable and Equitable Development, Part 1* (2017): 1-79.

¹⁰² *Kenya Energy Situation - Energypedia.Info*. https://energypedia.info/wiki/Kenya_Energy_Situation. Accessed 24 Apr. 2021.

¹⁰³ 'Liberalization & Unbundling of Energy Markets | Definition' (25 March 2020) <<https://www.next-kraftwerke.com/knowledge/liberalization-energy-markets>> accessed 22 April 2021.

¹⁰⁴ "The Seven Major Threats to Kenya's Power Sector." *Energy For Growth*, <https://www.energyforgrowth.org/memo/the-seven-major-threats-to-kenyas-power-sector/>. Accessed 24 Apr. 2021.

¹⁰⁵ *Kenya Energy Situation - Energypedia.Info*. https://energypedia.info/wiki/Kenya_Energy_Situation. Accessed 24 Apr. 2021.

and had started exploring the idea of local-currency-denominated tariffs in a bid to encourage local commercial banks to participate in energy projects,¹⁰⁶ this was however not achieved after the enactment of the Energy Act, 2019¹⁰⁷. Liberalization of the sector would make all of these easier to actualize, for the benefit of consumers.

Arguably, the current unbundling structure has not achieved a lot for the Kenyan people as the high cost and unreliability of electricity supply in the country are still major issues, as these are greatly affected by state monopoly mainly through Kenya Power, a vertically integrated company.¹⁰⁸ Liberalization would ensure that for all forms of energy - gas, electricity, coal and oil - industrial and domestic consumers would be free to choose their supplier.¹⁰⁹ Kenya needs to borrow a leaf from some of the most successful countries in this sector such as Sweden and Singapore, among others.

In order to improve energy security and affordability, Singapore began to deregulate its electricity market since 2003, with the creation of the National Electricity Market of Singapore (NEMS) allowing for bid-ask offers to be made for the dispatch of electricity supply on the wholesale side and subsequently, the retail market liberalized in tranches, with 80% of electricity consumers currently already given an option to select their electricity retailers since late 2014.¹¹⁰ As result, as at 2018, it was reported that ‘supply competition and the retail liberalization efforts had possibly led to a combinatorial decrease in wholesale electricity prices by up to 9.11%, accounting for the influence of oil prices and volatility components’.¹¹¹ The country has also attracted investors in the sector making it more competitive for the retail consumer as far as choice of energy supplier is concerned.¹¹² Notably, 14 electricity providers participated in the pilot phase, including units of infrastructure companies.¹¹³

Kenya should follow in the footsteps of Singapore and other countries that have liberalized their energy markets in order to address the gap between generation, transmission and distribution of energy and particularly electricity and consequently ensure that all people in the country have access to cleaner, affordable energy.

¹⁰⁶ Kees Mokveld & Steven von Eije, *Final Energy report Kenya*, Commissioned by the Netherlands Enterprise Agency 2018, 13.

¹⁰⁷ Act No. 1 of 2019, Laws of Kenya.

¹⁰⁸ Tarver, Evan. “Horizontal vs. Vertical Integration: What’s the Difference?” *Investopedia*, <https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp>. Accessed 24 Apr. 2021.

¹⁰⁹ World Trade Organization, “The Social Effects of Energy Liberalisation: The UK Experience,” *Launching a Common European Energy Market*, Lisbon 5/6 June 2000, 2 <https://www.wto.org/english/tratop_e/serv_e/symp_mar02_uk_social_effects_energy_lib_e.pdf> accessed 19 April 2021.

¹¹⁰ Loi TSA and Jindal G, ‘Electricity Market Deregulation in Singapore – Initial Assessment of Wholesale Prices’ (2019) 127 *Energy Policy* 1.

¹¹¹ *Ibid.*

¹¹² ‘Singapore Electricity Market Deregulation Attracts DBS, StarHub’ (*Nikkei Asia*) <<https://asia.nikkei.com/Business/Markets/Nikkei-Markets/Singapore-electricity-market-deregulation-attracts-DBS-StarHub>> accessed 19 April 2021.

¹¹³ *Ibid.*

4.4 Enhancing the Role of Private Sector in Renewable Energy Sector

Notably, *Energy Act, 2019* provides for the establishment of the Rural Electrification and Renewable Energy Corporation which is charged with, *inter alia*, harnessing opportunities offered under clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources.¹¹⁴ The Nuclear Power and Energy Agency is also mandated to, *inter alia*, put in place mechanisms to attract private sector funding in research and human resource development for matters relating to energy.¹¹⁵

With introduction of market liberalization in Kenya's energy sector, a robust carbon credit trading system in Kenya could achieve the twin goals of raising funds and climate change mitigation in the energy sector.¹¹⁶ According to the International Finance Corporation (IFC), the estimated total investment potential for the climate-smart needs of Côte d'Ivoire, Kenya, Nigeria, and South Africa is \$783 billion by 2030.¹¹⁷ Sixteen percent of this potential is for renewable energy generation (\$123 billion), while well over half (\$499 billion) is for the transportation sector.¹¹⁸ Regarding clean energy access in Sub-Saharan Africa, it is estimated that 600 million people in the region have no access to basic electricity services, and this number will increase with a projected 2.3 percent annual population growth, with only seven Sub-Saharan countries presently having electricity-access rates exceeding 50 percent; the rest have an average grid access rate of just 20 percent.¹¹⁹ In addition, the annual investment in the Sub-Saharan African power system is currently estimated at around \$8 billion per year, or 0.5 percent of GDP while electricity demand in Africa is projected to triple by 2030, representing huge potential for investment in renewable energy.¹²⁰ It is also estimated that Africa's power sector requires investments of \$70 billion per year, on average, between now and 2030, which can be split into about \$45 billion per year for generation capacity and \$25 billion for transmission and distribution, creating a huge opportunity for investments.¹²¹ Kenya would greatly benefit from this opportunity considering that it requires huge investments in the energy sector, especially in the area of renewables considering that

¹¹⁴ Sec. 44(1) (q), Energy Act, No. 1 of 2019, Laws of Kenya.

¹¹⁵ Sec. 55(2) (k), Energy Act, No. 1 of 2019

¹¹⁶ 'Kenians Earn First Ever Carbon Credits From Sustainable Farming' (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2014/01/21/kenyans-earn-first-ever-carbon-credits-from-sustainable-farming>> accessed 23 April 2021; Yiting Wang and Catherine Corson, 'The Making of a "charismatic" Carbon Credit: Clean Cookstoves and "Uncooperative" Women in Western Kenya' (2014) 0 *Environment and Planning A* 0; Kioko Nzuki Mwanja, 'Carbon Trading In Kenya: A Critical Review'; Kanyinke Sena, 'Carbon Credit Schemes and Indigenous Peoples in Kenya: A Commentary' (2015) 32 *Ariz. J. Int'l & Comp. L.* 257.

¹¹⁷ International Finance Corporation, *Climate Investment Opportunities in Emerging Markets: An IFC Analysis*, 2016, 60.< https://www.ifc.org/wps/wcm/connect/59260145-ec2e-40de-97e6-3aa78b82b3c9/3503-IFC-Climate_Investment_Opportunity-Report-Dec-FINAL.pdf?MOD=AJPERES&CVID=IBLd6Xq> accessed 19 April 2021.

¹¹⁸ International Finance Corporation, *Climate Investment Opportunities in Emerging Markets: An IFC Analysis*, 2016, 60.< https://www.ifc.org/wps/wcm/connect/59260145-ec2e-40de-97e6-3aa78b82b3c9/3503-IFC-Climate_Investment_Opportunity-Report-Dec-FINAL.pdf?MOD=AJPERES&CVID=IBLd6Xq> accessed 19 April 2021.

¹¹⁹ *Ibid*, 61.

¹²⁰ *Ibid*, 61.

¹²¹ *Ibid*, 61.

Kenya's development blueprint, Vision 2030 which seeks to create "a globally competitive and prosperous country with a high quality of life by 2030" and it aims to transform Kenya into "a newly-industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment".¹²² Notably, one of the foundations for Kenya Vision 2030 upon which the economic, social and political pillars of Kenya Vision 2030 will be anchored on include energy where the 'the Government of Kenya committed to continued institutional reforms in the energy sector, including a strong regulatory framework, encouraging private generators of power, and separating generation from distribution, with new sources of energy will be found through exploitation of geothermal power, coal, renewable energy sources, and connecting Kenya to energy-surplus countries in the region'.¹²³

There is a need for the Government of Kenya to recognise and reach out to the private sector through creating a conducive legal and policy environment for investments in the country's energy sector in order to enable it achieve its objectives in the energy sector for achievement of clean and affordable energy for its people.¹²⁴ This is because, as it has been suggested that 'that effective policies and institutions are the best way to enable developing countries, and the private sector operating in those countries, to attract private finance to drive sustained growth'.¹²⁵ Arguably, 'the private sector is critical to economic growth and poverty reduction, where sustainable and inclusive private sector-led growth can contribute to reducing poverty'.¹²⁶ In addition, 'partnerships between donors, partner governments and the private sector are being used to achieve private sector development objectives which enables governments to access private sector ideas, innovations and business models in search of solutions to intractable development problems'.¹²⁷

4.5 Promoting Energy Efficiency in Kenya

While availability and affordability of energy is an important step towards attaining energy security for all, there is also a need to put equal emphasis on enhancing energy efficiency in the country.¹²⁸ Arguably, energy-efficiency or 'demand-side management' programs can provide a number of benefits in developing countries, including lower costs to customers, an fewer electrical supply problems, greater system reliability and a more moderate growth in demand.¹²⁹ Energy efficiency

¹²² Government of the Republic of Kenya, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya* (Government Printer Nairobi 2007).

¹²³ Ibid.

¹²⁴ Tewes-Grادل, Christina, Anna Peters, Karin Vohla, and L. Lütjens-Schilling. "Inclusive Business Policies: How Governments can Engage Companies in Meeting Development Goals." *Endeva UG, Berlin* (2013).

¹²⁵ Tess ewton Cain, 'The Role of the Private Sector in Promoting Economic Growth and Reducing Poverty in the Indo-Pacific Region', 1.

¹²⁶ Ibid, 1.

¹²⁷ Ibid, 2.

¹²⁸ Patterson, Murray G. "What is energy efficiency? Concepts, indicators and methodological issues." *Energy policy* 24, no. 5 (1996): 377-390.

¹²⁹ Dilip Ahuja and Marika Tatsutani, 'Sustainable energy for developing countries' [2009] S.A.P.I.EN.S. Surveys and Perspectives Integrating Environment and Society <<http://journals.openedition.org/sapiens/823>> accessed 24 April 2021.

can be achieved through use of more energy efficient gadgets and appliances as well as employing everyday power saving practices especially in households.¹³⁰

4.6 Addressing Barriers in Renewable Energy Uptake in Kenya

Renewable energy technologies (RETs) have been defined as energy-providing technologies that utilize energy sources in ways that do not deplete the Earth's natural resources and are as environmentally benign as possible.¹³¹ Some of the earliest barriers to embracing renewable energy technologies have been identified as cost-effectiveness, technical barriers, and market barriers such as inconsistent pricing structures, institutional, political and regulatory barriers, and social and environmental barriers where some may be specific to a technology, while others may be specific to a country or a region.¹³²

Some of the barriers that are relevant to Kenya and ought to be taken up include: highly controlled energy sector where governmental monopoly of energy sector restricts private sector entry; monopoly of energy supplier and/ or distributor, electricity generation, transmission and distribution; controlled and lack of private sector investment.¹³³ There is also the problem of lack of involvement of stakeholders in decision leading to clash of interests where stakeholders' consultation culture is missing, stakeholders are dispersed, there is difficulty in communication, and there is fear of opposition.¹³⁴ Related to this and relevant to Kenya is the observation that there is also renewable energy technologies competing with conventional energy, leading to them being treated as a threat to utility dominance, threat to utility profit, powerful lobbies against renewable energy technologies, threat of transfer of control over energy, powerful lobbies for conventional energy and decoupling of investor–consumer interests.¹³⁵ It has been documented that while the government of Kenya has a history of welcoming private investment in the energy sector, the nature of the political system presents challenges –not least over corruption and access to land thus making investments carry higher risks for large, on-grid projects than they are for off-grid and micro-grid investments.¹³⁶

While Kenya has made some impressive steps towards investing in renewable energy technologies such as wind power and geothermal, and which has seen electricity tariffs reduce during certain

¹³⁰ Attendant, An Automated, et al. *How You Can Help Reduce Greenhouse Gas Emissions at Home - Point Reyes National Seashore (U.S. National Park Service)*. https://www.nps.gov/pore/learn/nature/climatechange_action_home.htm. Accessed 24 Apr. 2021.

¹³¹ Jim Watson, Oliver Johnson and Dong Wu, 'Renewable Energy Technologies for Rural Development' [2010] UNCTAD Current Studies on Science, Technology and Innovation.

¹³² Painuly JP, 'Barriers to Renewable Energy Penetration; a Framework for Analysis' (2001) 24 *Renewable energy* 73, 75.

¹³³ *Ibid*, 83.

¹³⁴ *Ibid*, 83.

¹³⁵ *Ibid*, 83.

¹³⁶ Gordon E, 'The Politics of Renewable Energy in East Africa' (2018), 15<
<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/08/The-politics-of-renewable-energy-in-East-Africa-EL-29.pdf>> accessed 19 April 2021.

periods,¹³⁷ the reduction in prices has not been consistent.¹³⁸ There is a need for the country to continually invest in renewable sources of energy to boost reliability and hopefully reduce the cost of electricity due to reduction in production costs.¹³⁹ The legal, policy, institutional and technical barriers should be addressed to tap into the benefits of using renewable energy sources.¹⁴⁰ There is also a need for digitalization, liberalization, civic education and deregulation of energy sector, among others in order to address the above mentioned challenges.¹⁴¹

5. Conclusion

The United Nations Development Programme (UNDP) has rightly pointed out that ‘investing in solar, wind and thermal power, improving energy productivity, and ensuring energy for all is vital if we are to achieve SDG 7 by 2030’. In addition, ‘expanding infrastructure and upgrading technology to provide clean and more efficient energy in all countries will encourage growth and help the environment’.¹⁴²

It has also been observed that ‘policy and market design are vital to steering digitally enhanced energy systems onto an efficient, secure, accessible and sustainable path’.¹⁴³ It is time for the stakeholders and especially the Government to consider liberalization of the country’s energy sector, especially in electricity generation, transmission and distribution. Liberalization of Kenya’s energy sector also calls for ‘a strong framework for regulation which is essential together with the

¹³⁷ ‘KENYA: 8% Reduction in Electricity Rates Thanks to Renewable Energies’ (*Afrik 21*, 30 July 2018) <<https://www.afrik21.africa/en/kenya-8-reduction-in-electricity-rates-thanks-to-renewable-energies/>> accessed 22 April 2021; October 23 2020 F, ‘Uhuru Tariff Cut Dims Kenya Power Revenue by Sh4.8bn’ (*Business Daily*) <<https://www.businessdailyafrica.com/bd/economy/uhuru-tariff-dims-kenya-power-revenue-by-sh4-8bn-2719632>> accessed 22 April 2021; <https://www.the-star.co.ke/authors/gilbertkoech>. “Kenya Keen to Prioritise Clean, Renewable Energy.” *The Star*, <https://www.the-star.co.ke/sasa/technology/2020-04-24-kenya-keen-to-prioritise-clean-renewable-energy/>. Accessed 24 Apr. 2021; Mactilda Mbenywe, “Uhuru addresses world forum, commits to mitigate climate change”, *Saturday Standard*, 24 April 2021. < <https://www.standardmedia.co.ke/kenya/article/2001410702/uhuru-commits-to-renewable-energy>> 24 April 2021.

¹³⁸ November 05 2020 T, ‘Regulator Agrees to Kenya Power 20pc Electricity Bill Increase’ (*Business Daily*) <<https://www.businessdailyafrica.com/bd/economy/regulator-kenya-power-20pc-electricity-bill-hike-2731164>> accessed 22 April 2021; Theuri P, ‘Rising Electricity Bills Push Manufacturers to the Wall’ (*The Standard*) <<https://www.standardmedia.co.ke/business/business-news/article/2001385332/rising-electricity-bills-push-manufacturers-to-the-wall>> accessed 22 April 2021;

¹³⁹ June 15, and 2018 Lora Shinn. “Renewable Energy: The Clean Facts.” *NRDC*, <https://www.nrdc.org/stories/renewable-energy-clean-facts>. Accessed 24 Apr. 2021.

¹⁴⁰ *Barriers to Renewable Energy Technologies | Union of Concerned Scientists*. <https://ucsusa.org/resources/barriers-renewable-energy-technologies>. Accessed 24 Apr. 2021.

¹⁴¹ “The General Framework for Liberalization and Regulation of Public Utilities in Countries of Ex-Yugoslavia.” *Florence School of Regulation*, 21 Mar. 2017, <https://fsr.eui.eu/n19-1-liberalization-ex-yugoslavia/>.

¹⁴² ‘Goal 7: Affordable and Clean Energy’ (*UNDP*) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html>> accessed 18 April 2021.

¹⁴³ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (*ESI-Africa.com*, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

Delivering Clean and Affordable Energy for All

benefits of a more efficient, innovative, and customer-focused industry'.¹⁴⁴ There is a need for rethinking the current approaches in energy generation, transmission and distribution if the goal and dream of cleaner and affordable energy sources for all Kenyans are to be achieved as part of realisation of the 2030 Agenda on SDGs as well as Kenya's Vision 2030. Without implementing radical changes in the sector, SDG Goal 7 will remain a mirage.

Delivering Clean and Affordable Energy for all is a noble dream that is achievable.

¹⁴⁴ 'How Strong Regulatory Frameworks Support Development' (NARUC) <<https://www.naruc.org/international/news/how-strong-regulatory-frameworks-support-development/>> accessed 24 April 2021.

Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya

Abstract

The paper critically examines the extent to which Environmental, Social and Governance (ESG) principles have been embraced in Kenya. It argues that ESG has emerged as arguably the most important tool of corporate governance. ESG seeks to shape corporate decision making by advocating for sustainable, responsible and ethical investments. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards embracing ESG principles for sustainable development in Kenya.

1. Introduction

The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making¹. At the same time, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever². The growth of social media has also increased the public risks associated with socially irresponsible behavior due to more scrutiny on companies and the emergence of socially conscious consumers³. Further, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

Consequently, how companies handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. ESG is an acronym for Environmental, Social and (Corporate) Governance, the key aspects of sustainable, responsible or ethical investment⁵. It has been defined as “a generic term used in capital markets and used by investors to evaluate corporate behaviour and to determine the future financial performance of companies⁶. ESG “is a subset of non-financial performance indicators which include sustainable,

¹ De Francesco. A.J., ‘The impact of sustainability on the investment environment.’ *Journal of European Real Estate Research* (2008).

² Cedric.R., ‘Accountability of Multinational Corporations for Human Rights Abuses.’ *Utrecht Law Review* 14.2 (2018): 1-5.’

³ Mariarosaria. S & Scarpato. D ‘Sustainable Consumption: How Does Social Media Affect Food Choices?’ *Journal of Cleaner Production* 277 (2020): 124036.

⁴ Martin.C et al., ‘Corporate governance and the 2008–09 Financial Crisis.’ *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide.” *Journal of corporate finance* 18.2 (2012): 389-411.

⁵ Stuart. L.G et al., ‘Firms and social responsibility: A review of ESG and CSR research in corporate finance.’ *Journal of Corporate Finance* 66 (2021): 101889.

⁶ The Financial Times Lexicon, Available at: <https://markets.ft.com/glossary/searchLetter.asp?letter=E> (accessed on 21/07/2022)

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ethical and corporate governance issues such as managing a company’s carbon footprint and ensuring there are systems in place to ensure accountability⁷.” ESG has also been defined as standing for the three broad categories, or areas, of interest for “socially responsible investors” who consider it important to incorporate their values and concerns (such as environmental concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity.⁸

Globally, the importance of Environmental, Social and Governance (ESG) issues is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders. Increasingly, the investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁹. Issues touching on climate change and sustainability dominate current ESG focus. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention¹⁰. Many projects investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding¹¹.

According to the Organisation for Economic Co-operation and Development (OECD), the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the Sustainable Development Goals (SDGs)¹². This has seen the incorporation of climate transition factors into investment decisions and the growth of what has come to be known as ESG investing as a leading form of sustainable finance for long-term value and alignment with societal values. OECD defines ESG investing as generally referring to the process of considering Environmental, Social and Governance (ESG) factors when making investment decisions. Bloomberg estimates that the value of ESG investing around the world has risen to almost USD 40 trillion in 2021¹³. At the same time, as at 2020 ESG ratings were being applied to companies representing around 80% of market capitalization¹⁴.

This paper seeks to critically examine the extent to which ESG principles have been embraced in Kenya. It analyses each of the ESG principles and the progress made towards embracing this

⁷ Ibid

⁸ CFI, ESG (Environmental, Social and Governance), Available at: <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

⁹ Muigua.K., ‘Introduction to ESG (Environmental, Social and Governance) available at <https://thelawyer.africa/2022/02/04/esg-environmental-social-and-governance/> (accessed on 22/07/2022)

¹⁰ Ibid

¹¹ Norton Rose Fulbright, “Environmental, Social and Governance,” Available at: <https://www.nortonrosefulbright.com/en/services/203f40d1/environmental-social-and-governance-esg> (accessed on 21/07/2022)

¹² OECD., ‘Environmental Social and Governance (ESG) Investing’ available at <https://www.oecd.org/finance/esg-investing.htm> (accessed on 21/07/2022)

¹³ Ibid

¹⁴ Ibid

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concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards realising ESG tenets for sustainable development in Kenya.

2. Environment Social and Governance (ESG) Principles

The Environmental ‘E’ pillar of ESG is being increasingly used as a tool to align investments and capital flows with a low-carbon transition and to unlock valuable forward-looking information on firms’ climate transition risks and opportunities¹⁵. The environmental considerations in areas such as climate risk, water scarcity, extreme temperatures and carbon emissions are now considered as key issues that can impact competitive positioning for businesses. Companies are expected to appreciate their role as stewards of the natural or physical environment and to take into account the utilisation of natural resources and the impact of their overall operations on the environment, both locally and across its global supply chains¹⁶. Companies are now required to take precautions against environmental incidents such as oil spills or pollution from mining operations as safeguards against damage to their reputation and shareholder value¹⁷. At the same time, more than 13,000 companies and 3,000 non-business signatories in 160 countries that are signatories of the United Nations Global Compact (UNGC), which helps businesses contribute positively toward some or all of the 17 United Nations (UN) sustainable development goals (SDGs) by 2030¹⁸.

The COVID-19 pandemic, and its diverse implications including healthcare access, workplace safety, cybersecurity and other issues related to the communities that businesses , have proven to be a watershed moment for the often-underappreciated ‘S’ pillar of environmental, social and governance (ESG) considerations with the need to tackle the inequalities exposed and exacerbated by the pandemic becoming a key reason for investors to make allocations for socially conscious investments despite intangibility of social facts¹⁹. Companies are beginning to appreciate the role taking social responsibility can play in mitigating issues such data theft, worker strikes, litigation, workplace accidents and other people-related disruptions that can hurt a business reputation and finances. The repercussions of work-related injuries and deaths on families including on their financial security are also acknowledged as having a bearing on the United Nations Sustainable Development Goals (SDGs) of no poverty, zero hunger, good health and well-being, decent work and economic growth even as many investors are aligned with these goals²⁰.

¹⁵ OECD (2021), ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations, OECD Paris, <https://www.oecd.org/finance/ESG-investing-and-climatetransition-Market-practices-issues-and-policy-considerations.pdf> (accessed on 21/07/2022)

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ojiambo, S., “Leadership of the UN Global Compact: Message of CEO and Executive Director,” Available at: <https://www.unglobalcompact.org/about/governance/executive-director> (accessed on 21/07/2022)

¹⁹ Create Research, “Passive Investing 2021: Rise of the social pillar of ESG,” Available at: <https://cdn.e-fundresearch.com/files/RcfPdrQdAaVI9tiBgrgLq4baO7Wciz6eepZTODEO.pdf> (accessed on 21/07/2022)

²⁰ Standard Chartered Singapore, “The S in ESG,” Available at: <https://www.sc.com/sg/wealth/insights/the-s-in-esg/> (accessed on 21/07/2022)

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The “G” Pillar in ESG is the oldest as governance has been an integral part of robust investment for ages²¹. However, what is considered effective governance keeps evolving and the speed of evolution has quickened as institutional investors’ definition of stakeholders continues to broaden beyond shareholders²². While older forms of Governance focused on serving and protecting shareholders, the newer approaches stretch beyond basic dimensions related to financial and accounting misconduct as well as legal and regulatory non-compliance, such as transparency, corporate structures and ethics²³. Investors are also aligning Governance with the 17 United Nations Sustainability Development Goals (SDGs), where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)²⁴.

3. Environment, Social and Governance (ESG) Disclosure and Reporting Requirements in Kenya

The Nairobi Securities Exchange has developed an ESG Disclosure Manual to guide listed companies in Kenya on ESG reporting. The Manual (ESG Manual) provides that ESG reporting should be on a materiality basis²⁵. In financial reporting, materiality is the threshold for influencing the economic decisions of those using an Organisation’s financial statements²⁶. A similar concept is also important in ESG reporting. In ESG reporting, “materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them²⁷.” It is necessary to undertake materiality analysis because not all ESG topics are of equal importance to an organization and an ESG report has to reflect their relative priority of the various topics²⁸.

The ESG Manual requires that listed companies have a structured, documented process on assessment of materiality for ESG disclosure topics²⁹. It is recommended that a materiality assessment exercise be conducted at least on an annual basis and as part of every new ESG reporting season. The ESG Manual also requires that every organization discloses its approach to materiality within the ESG report³⁰. The Global Reporting Initiative (GRI) gives guideline for what is material by providing that the ESG report should cover topics that Reflect the reporting organisation’s significant economic, environmental, and social impacts; or substantively influence

²¹ Muigua.K., ‘Introduction to ESG (Environmental, Social and Governance) Op Cit

²² RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 21/07/2022)

²³ Ibid

²⁴ United Nations, Department of Economic and Social Affairs, ‘Sustainable Development’ available at <https://sdgs.un.org/goals> (accessed on 21/07/2022)

²⁵ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’, available at <https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf> (accessed on 21/07/2022)

²⁶ Ruth.J., ‘The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream.’ *American Business Law Journal* 56.3 (2019): 645-702.’

²⁷ Muigua. K., ‘What are the Material Issues for ESG Reporting in Kenya?’ available at <https://thelawyer.africa/2022/06/05/material-issues-for-esg-reporting-in-kenya/> (accessed on 21/07/2022)

²⁸ Ibid

²⁹ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

³⁰ Ibid

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the assessments and decisions of stakeholders. In other words, for a topic to be relevant and potentially material, it should be based on only one of these dimensions³¹.

It is recommended that a materiality assessment grid be used as a structured guide in prioritizing ESG topics to report on³². That way, by applying an internally developed rating criteria, organisations can plot ESG topics on a grid or heat map indicating the assessed level of importance considering both dimensions of materiality³³. In that regard, materiality is dependent on whether a topic is of low or high importance to the stakeholders and the significance of ESG impacts on economy, environment and/or society. GRI gives detailed guidance that listed companies can refer to when identifying material topics³⁴. The starting point is using the sector standards to understand the sector's content and then deduce the organization content from it³⁵.

The next step is to consider the topics and impact as described in the sector standard and then identify the actual and potential impact to the organization stakeholders, economy, environment and society³⁶. It takes the engagement of the relevant stakeholders and experts on ongoing basis to achieve assessment of the impact of the topics. In the aftermath, the material topics should be tested against the sector standard to prioritize the most significant impacts for reporting³⁷. After this, the material topics should be tested with experts and information users to determine and come up with a comprehensive list of material topics for ESG reporting for the respective organization.

The approach applied for each step will vary according to the specific circumstances of the organisation, such as its business model; sector; geographic, cultural and legal operating context; ownership structure; and the nature of its impacts³⁸. Given these specific circumstances, the steps should be systematic, documented, replicable, and used consistently in each reporting period. The organisation should document any changes in its approach together with the rationale for those changes and their implications. The organisation's highest governance body should oversee the process and review and approve the material topics³⁹.

The ESG Manual proposes mandatory ESG disclosures for NSE listed companies to help achieve comparability and to facilitate compliance with the CMA Code, relevant international treaties, ESG standards and local regulations⁴⁰. Further, the Capital Markets Authority (CMA) Code of

³¹ Global Reporting Initiative., 'ESG Standards, Frameworks and Everything in Between' available at <https://www.globalreporting.org/media/jxkgrgd/gri-perspective-esg-standards-frameworks.pdf> (accessed on 21/07/2022)

³² Ibid

³³ Ibid

³⁴ GRI., 'The Global Standards for Sustainability Reporting' available at <https://www.globalreporting.org/standards/> (accessed on 21/07/2022)

³⁵ Ibid; See also Fonseca.A et al., 'Sustainability reporting among mining corporations: a constructive critique of the GRI approach.' *Journal of cleaner production* 84 (2014): 70-83.'

³⁶ Ibid

³⁷ Ibid

³⁸ Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' Op Cit

³⁹ Ibid

⁴⁰ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

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Corporate Governance Practices for Issuers of Securities to the Public in 2015 provides examples of topics that the Boards of listed companies should treat as material⁴¹. As per CMA code, material information means any information that may affect the price of an issuer's securities or influence investment decisions⁴². Listed firms are advised to refer to the Code when selecting material topics for disclosure⁴³. The ESG Manual also recommends the Sustainable Development Goals (SDGs) as helpful guide in the identification of material topics and or impact as by aligning organisational objectives with the SDGs, organisations can identify significant impact areas that affect their contribution to the SDGs⁴⁴.

The concept of double-materiality is the latest introduction in the discussions around assessment of materiality in ESG reporting. According to the European Commission Guidelines on Non-financial Reporting, “double-materiality refers to assessing materiality from two perspectives, namely, the extent necessary for an understanding of the company's development, performance and position” and “in the broad sense of affecting the value of the company”; and environmental and social impact of the company's activities on a broad range of stakeholders⁴⁵. The concept of double-materiality implies the need to assess the interconnectivity of the two.

A GRI research on how double-materiality is implemented in ESG reporting, and the benefits and challenges found that identification of financially materiality issues are incomplete if companies do not first assess their impacts on sustainable development⁴⁶. The GRI white paper also revealed that reporting material sustainable development issues can enhance financial performance, improve stakeholder engagement and enable more robust disclosure⁴⁷. Further, it was established that focusing on the impacts of organisations on people and planet, rather than financial materiality, increases engagement with the Sustainable Development Goals (SDGs)⁴⁸. The ESG Manual thus encourages listed companies to assess impact of ESG issues to their organisations (such as climate change and human rights) in addition to their organisations own ESG impacts to society (such as material resource use and emissions) when determining material ESG impacts for disclosure. ESG reporting is thus essential in promoting sustainable development.

4. The ESG Reporting Frameworks Applicable in Kenya

In addition to the ESG Disclosure Manual formulated by the Nairobi Securities Exchange, there are several other organizations that have adopted ESG reporting requirements relevant to listed

⁴¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 , Legal Notice No. 1420

⁴² Ibid

⁴³ Ibid

⁴⁴ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

⁴⁵ European Commission ‘Guidelines on Non-Financial Reporting’, available at https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en (accessed on 21/07/2022)

⁴⁶ Adams, C.A., Alhamood, A., He, X., Tian, J., Wang, L. and Wang, Y. (2021) The Double-Materiality Concept: Application and Issues, published by the Global Reporting Initiative (GRI) as a White Paper, Available at: <https://www.globalreporting.org/media/jrbntbyv/griwhitepaper-publications.pdf> (accessed on 21/07/2022)

⁴⁷ Ibid

⁴⁸ Ibid

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companies in Kenya⁴⁹. These include the Capital Markets Authority, the United Nations Global Compact, various investment groups, the Carbon Disclosure Programme (CDP) and industry level reporting requirements like those imposed by the Central Bank of Kenya touching on the operations of licensed Banks⁵⁰. This part explores the basics of each of these ESG reporting requirements and how listed companies in Kenya comply with them.

4.1 The Capital Markets Authority

The Capital Markets Authority (CMA) published the Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015⁵¹. It requires listed companies to explain in their annual reports how they have applied the recommendations contained in the Code⁵². Within the Code, the CMA also provides examples of topics that the Boards of listed companies should treat as material⁵³. The ESG Manual gives guidelines on how the ESG reporting approach suggested in it can be used to meet the reporting requirements of the CMA code⁵⁴. These include by identifying the CMA as a key stakeholder for listed companies within the situational analysis and stakeholder engagement phases⁵⁵. Second, it involves analysing the CMA's expectations of the organisation and the reporting requirements contained in the CMA Code⁵⁶

Third, complying with the CMA code under the ESG Manual means including disclosures requirements on the Code as part of the assessed material ESG topics for disclosure⁵⁷. These have been proposed as a mandatory disclosure topic for all listed companies, that is, governance under general disclosure topics. In addition, it takes generating content on the organisation's performance around these topics using the guide proposed in this manual and reference to the GRI Standards on governance disclosures. It also entails submitting extracts or the full ESG report discussing performance on these indicators to the CMA within the agreed timelines with the CMA. In this case, the ESG report should be published within the reporting timelines required for CMA submissions.

4.2 Investor groups

As a way of managing assessed environmental and social risk in debt and equity investments, some institutional investors typically require the implementation of an environmental and social

⁴⁹ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁰ Ibid

⁵¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015, Legal Notice No. 1420

⁵² Ibid

⁵³ Ibid

⁵⁴ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁵⁵ Ibid; See also Magale. E., 'Developing a green bond market in Kenya: perspectives from practitioners and lessons from developing markets.' *Journal of Sustainable Finance & Investment* (2021): 1-18.

⁵⁶ Ibid

⁵⁷ Ibid

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management system⁵⁸. Thus, depending on the assessed risk profile, beneficiary organisations are required to report at least annually on performance on several pre-identified environmental and social performance metrics⁵⁹. Through such reporting process, investors should be able to develop content around the organisation's approach to these topics and demonstrate performance during the reporting period⁶⁰. It is noteworthy that environmental and social risk management is one of the mandatory ESG topics proposed for all listed companies. The International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability is one example of ESG indicators and metrics that investors commonly refer to when evaluating investments⁶¹.

4.3 United Nations Global Compact

There are more than 200 Organisations in Kenya, including some listed companies, that are participants of the Global Compact Network Kenya, the local arm of the United Nations Global Compact (UNGC)⁶². The UNGC has developed a set of 10 principles that organisations can voluntarily adopt and integrate into their own strategies and operations⁶³. These principles cover four issue areas including Human Rights, Labour, Environment and Anti-corruption⁶⁴. In turn, the Ten Principles of the United Nations Global Compact is a key guideline in that regard.

The UNGC encourages participants to self-assess, prepare, and submit a Communication on Progress report to the UNGC on their performance around these four topical areas⁶⁵. According to the UNGC, the Communication on Progress report should be fully integrated into a company's main stakeholder communications, most often the annual or sustainability report⁶⁶. By developing an annual ESG report discussing organisational performance around these topics, listed companies can submit an extract of the ESG report to fulfil the requirements of the annual Communication on Progress report submissions to the UNGC. Further, applying the Global Reporting Initiative standards ensures compliance to the Communication on Progress reporting requirements⁶⁷. Organisations can also refer to the UNGC guidance document on Using GRI's Guidelines to Create a CoP.

⁵⁸ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ International Finance Corporation., 'Performance Standards on Environmental and Social Sustainability' available at https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk (accessed on 21/07/2022)

⁶² United Nations Global Compact: available at <https://www.unglobalcompact.org/engage-locally/africa/kenya> (accessed on 21/07/2022)

⁶³ Ibid

⁶⁴ Ibid; See also Global Compact Network Kenya., 'The Ten Principles of the United Nations Global Compact' available at <https://www.globalcompactkenya.org/what-we-do/ten-principles> (accessed on 22/07/2022)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

4.4 The Carbon Disclosure Project (CDP)

The CDP is a non-profit charity helps in promoting transparency in environmental reporting by cities and companies around the world⁶⁸. Signatory companies provide performance data on climate change, water security and deforestation on a self-disclosure basis⁶⁹. This self-reported data is then used by investors and other stakeholders to make informed data driven decisions with regards to the reporting company's environmental impacts⁷⁰. For example, investors can use data in the CDP database to calculate the carbon intensity of their portfolio⁷¹. Investors can also select entities that demonstrate climate resilience by evidenced implementation of strategies that future proof their organisations against climate related policies and regulations⁷². There is need to consider that the CDP and GRI use common metrics on reporting on carbon emissions. ESG reporting can be used to collect and report data to the CDP. Organisations can select any or all the disclosure topics as part of their materiality assessment exercise and build reporting content within the ESG report that meets the CDP self-disclosure requirements.

4.5 Industry level reporting

Certain industry groups in Kenya have developed voluntary ESG related guidelines for consideration by member organisations. For example, in the banking sector in Kenya, the Kenya Bankers Association, the trade association for banks in Kenya, has developed the Sustainable Finance Initiative (SFI) industry principles for the banking sector⁷³. Further, recently the Central Bank of Kenya (CBK) has developed Guidance on Climate Related Risk Management for the banking sector⁷⁴. The aim of the Guidance is to sensitize the banking sector on mitigation of climate-related risks and harnessing of opportunities⁷⁵. It also offers guidance on the development and implementation of appropriate climate-related strategies and policies⁷⁶. Given the current trajectory of ESG and emphasis placed by investors on ESG integration, it is expected that more trade associations and industry groupings in Kenya will develop specific ESG guidelines for adoption by their members. Industry guidelines provide relevant insights on ESG issues impacting the industry and listed companies can refer to such guidelines when identifying material ESG topics for disclosure using the framework proposed in this manual.

5. ESG Concerns in Kenya

The concept of ESG acknowledges some of the Environmental, Social and Governance concerns that arise from the activities of corporations. From an environmental perspective, the activities of

⁶⁸ Carbon Disclosure Project, available at <https://www.cdp.net/en> (accessed on 21/07/2022)

⁶⁹ Ibid; See also Matisoff.D et al., 'Convergence in environmental reporting: assessing the Carbon Disclosure Project.' *Business Strategy and the Environment* 22.5 (2013): 285-305.'

⁷⁰ Ibid

⁷¹ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

⁷² Ibid

⁷³ Sustainable Finance Initiative, available at <https://sfi.kba.co.ke/> (accessed on 22/07/2022)

⁷⁴ Central Bank of Kenya., 'Guidance on Climate-Related Risk Management' October 2021, available at <https://www.centralbank.go.ke/wp-content/uploads/2021/10/Guidance-on-Climate-Related-Risk-Management.pdf> (accessed on 22/07/2022)

⁷⁵ Ibid

⁷⁶ Ibid

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corporations have resulted in direct and indirect greenhouse gas emissions contributing to the climate change menace⁷⁷. Further, the activities of multinational corporations especially those involved in the exploration of natural resources have resulted in environmental concerns such as environmental degradation, extinction of biodiversity, contamination and destruction of soil and air pollution affecting the socio-economic lives of indigenous populations⁷⁸.

In the social context, ESG acknowledges some of the challenges that organization's face in their relationship with stakeholders. Some of these challenges include unfair labour practices and standards. In Kenya, there have been accusations of human right abuses such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices and land injustices against the neighbouring communities perpetrated by certain multinational corporations⁷⁹. The activities of an organization can also impact the communities where such an organization operates resulting in social concerns such as land injustices and displacement of people.

Governance challenges have also impacted the profitability and sustainability of organizations. These challenges include mismanagement of organizations, lack of transparency, accountability by the board of directors, conflict of interest and poor internal controls⁸⁰. These challenges have resulted in failure of some of the leading organizations in Kenya. ESG acknowledges these challenges and seek to integrate good governance practices in the affairs of organizations.

6. Way Forward

There is need for corporations to embrace the concept of ESG in Kenya in order to promote sustainable development. According to the Nairobi Securities Exchange, listed companies in Kenya have a general awareness of ESG issues and corporate sustainability but there is need for capacity building on how to integrate ESG into business strategies of listed companies and how to report ESG performance in a consistent, transparent and principle-based approach that meets stakeholder expectations⁸¹. The ESG Disclosures Guidance Manual (ESG Manual) is thus designed to guide listed companies in Kenya and other organizations interested in ESG reporting on how to collect, analyse, and publicly disclose important ESG information in a way that meets international sustainability reporting standards⁸².

⁷⁷ Peterdy.K., 'ESG (Environment, Social and Governance): A Framework for Understanding and Measuring How Sustainably an Organization is Operating' available at <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

⁷⁸ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review Vol. 3 (1), 2009. Pp. 111-124*

⁷⁹ Kenya Human Rights Commission., 'Heavy price for Kakuzi's egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 21/07/2022)

⁸⁰ Seth.A., 'Corporate governance challenges in emerging economies.' *Corporate Governance: An International Review, Forthcoming* (2017).

⁸¹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁸² Ibid

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The ESG Manual is proposed to act as a guide on how to progressively integrate ESG in strategy, operations, and performance management. It recommends the adoption of the Global Reporting Initiatives (GRI) Standards as the common framework for ESG Reporting for listed companies in Kenya to help reduce uncertainties⁸³. For an organization to claim that it has prepared information in accordance with the GRI Standards, it is required to have applied the GRI Reporting Principles. This is a set of reporting principles which guide organizations in ensuring the quality and proper presentation of the reported information⁸⁴. The principles include accuracy, balance, clarity, comparability, completeness, sustainability context, timeliness and verifiability⁸⁵.

According to a 2020 Global Survey on Sustainability reporting conducted by KPMG, the GRI Standards are the most widely used framework for sustainability reporting⁸⁶. The listed companies on the NSE that were reporting on ESG performance had already settled on and were using the GRI standards as their preferred framework for ESG Reporting even before the ESG Manual⁸⁷. The ESG Manual proceeds to propose a common set of ESG metrics for reporting by all listed companies to help facilitate comparability of ESG performance of listed companies in Kenya. It is also projected that over time, upon maturity of the ESG disclosures, it will become possible for stakeholders to correlate financial performance with specific ESG indicators such as diversity and air emissions⁸⁸.

Further, applying the ESG Manual is expected to assist listed companies comply with reporting requirements for other organizations such as the Carbon Disclosure Project (CDP) and UN Global Compact (UNGC). The manual also includes a guide on how to meet corporate governance reporting requirements contained in the Capital Markets Authority (CMA) Corporate Governance Code. The ESG Manual also includes examples of sector specific ESG disclosures for reference by listed companies in its Annex 6⁸⁹. The ESG Manual is expected, with time, to make it possible to compare the ESG performance of organizations reporting within the same sectors including adopting common reporting framework for the respective sectors. The ESG Manual also seeks to support future plans for a responsible investment index by the Nairobi Securities Exchange (NSE). The ESG criteria proposed in the Manual is also anticipated to be applied in investment selection given the momentum the trend has gained in recent years which is expected to continue in the future⁹⁰. According to the Manual, along with national policies and directives, ESG considerations in investments have become the most important driving force for ESG integration and disclosure in capital markets. As such, companies seeking to attract responsible investors are incentivized to

⁸³ Ibid

⁸⁴ GRI., 'The Global Standards for Sustainability Reporting' Op Cit

⁸⁵ Ibid

⁸⁶ KPMG, "The Time has Come: The KPMG Survey on Sustainability Reporting 2020," Available at: https://assets.kpmg/content/dam/kpmg/be/pdf/2020/12/The_Time_Has_Come_KPMG_Survey_o (accessed on 22/07/2022)

⁸⁷ Ibid

⁸⁸ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁸⁹ Ibid

⁹⁰ Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' available at <https://thelawyer.africa/2022/06/04/benefits-of-esg-reporting-in-kenya/> (accessed on 22/07/2022)

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ensure that they adopt the top ESG metrics commonly sought by investors⁹¹. These include having an overarching ESG policy, assigning ESG management responsibility, having a Corporate code of ethics, presence of litigation on matters touching on environmental, social and ethical affairs, the presence or absence of People diversity among employees, Board and management, net employee composition including ratio of part-time and full-time employees, having formal environmental policy and estimation of carbon footprint, data and cybersecurity incidents if any that can put the company at risk and health and safety events that affect ability to provide safe working environments for employees, contractors and the wider value chain⁹².

The expected benefits for Listed Companies adopting the ESG Manual include ensuring transparency in ESG disclosures which helps in building integrity and trust in the capital markets thus enhancing competitiveness to attract investment to the capital markets. The adoption and promotion of ESG reporting by the NSE is expected to enhance trust and integrity of the capital markets in Kenya by providing valuable information that is of increasing importance to investors, thus contributing to more efficient capital allocation⁹³. Other key benefits of integrating and disclosing ESG performance by listed companies in Kenya include the fact that it ensures investors can assess and preferentially invest in issuers that demonstrate better ESG linked financial performance, resulting in more efficient capital allocation⁹⁴. Further, implementation of the ESG Manual is geared to ensure that organisations that demonstrate responsible investment practices are able to access new sources of capital from sustainability conscious investors such as Development Finance Institutions (DFIs) and Private Equity firms⁹⁵.

In addition, a holistic view of corporate value facilitates product innovation by enabling consideration and management of the embodied environmental and social impacts of products and services. Measuring and reporting ESG performance also enables organisations embed circularity in their operating models and achieve operational efficiencies by optimizing energy and raw costs in production⁹⁶. By adding and demonstrating ESG integration into their supply chains, production systems and service delivery, the listed companies applying the manual will benefit from preferential access to new markets. ESG value creation framework also helps organisations to proactively address non-financial but critical environmental and social risks, thereby preserving and creating long term value for stakeholders. ESG integration enhances regulatory compliance and helps anticipate the impact of future ESG related regulations and policies. Finally,

⁹¹ Ibid

⁹² Broderick, S., "The Top 10 ESG Metrics Private Equity Funds Should Collect," IHS Markit, 2019; Available at: <https://cdn.ihsmarkit.com/www/pdf/0720/ESGTop10-Digital-Final-HiRes.pdf> (accessed on 22/07/2022)

⁹³ Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' Op Cit

⁹⁴ Ibid

⁹⁵ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁹⁶ Ibid

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organizations are perceived as responsible corporate citizens and achieve brand value enhancement by systematically identifying and responding to stakeholder needs and expectations⁹⁷.

The implementation timelines of the ESG Manual for listed companies on the NSE includes the requirement of issuing a public report on their ESG performance at least annually⁹⁸. The steps outlined in the ESG Disclosures Guidance Manual are expected to guide such reporting. In addition, the manual is also made available as a public good for other organisations in Kenya that would be interested in ESG reporting. On their part, listed companies have been given a grace period of one year from the date of issuance of the guidelines (29th November 2021) to interact and familiarize themselves with the ESG reporting steps contained in these guidelines for implementation⁹⁹. Thus, listed companies will after 29th November 2022 be expected to include a sustainability/ESG report in their annual integrated reports¹⁰⁰. The Sustainability/ESG Report under the NSE ESG Manual must at minimum contain the mandatory ESG disclosures discussed in Chapter 6 of the manual. Issuers can also choose to publish a separate ESG/sustainability report. Adopting and adhering to the ESG manual will thus be an important step in promoting ESG in Kenya.

7. Conclusion

Environment, Social and Governance (ESG) has emerged as arguably the most important tool of corporate governance in the current era. It acknowledges the environmental, social and governance concerns faced by corporations and seeks to integrate these concerns in corporate decision making in order to promote sustainable, responsible and ethical investments. There is need for organizations to continue embracing ESG in order to promote corporate sustainability. Embracing ESG as a pillar of sustainable development is an ideal whose time has come.

⁹⁷ Ibid; See also Africa Sustainability Matters., ‘What do ESG guidelines mean for corporates?’ available at <https://africasustainabilitymatters.com/what-do-esg-guidelines-mean-for-corporates/> (accessed on 22/07/2022)

⁹⁸ Ibid

⁹⁹ Nairobi Securities Exchange, ‘ESG Disclosures Guidance Manual’ Op Cit

¹⁰⁰ Ibid

Enforcing the Right to Clean and Healthy Environment in Kenya Through the Polluter Pays principle

Abstract

This paper makes a case for the enforcement of the right to clean and healthy environment in Kenya through the internationally recognised polluter pays principle. The author argues that though this right has been legally recognised, placing the obligation to enforce it solely on the state agencies may delay the full realisation of this right for all persons. Effective enforcement of this principle is also important in reducing the economic cost of environmental restoration on the state agencies and acting as an incentive for inculcating a sense of environmental ethics through the precautionary principle.

1. Introduction

The main goal of the environmental law is to ensure the sustainable use of natural resources in accordance with a set of fundamental principles that have been established through time via both local and global procedures. The use of land and resources derived from it should, in an ideal situation, abide by a number of rules. They include intergenerational equity, the precautionary principle, the polluter pays principle, and public engagement. They also include the principles of sustainability and prevention.¹ This paper is mainly concerned with the polluter pays principle. The polluter pays principle was the main topic of debate during a symposium on environmental economics sponsored by the Organization for Economic Co-operation and Development in Paris in 1971. This was the first time the polluter pays notion had been brought up in a global setting. The polluter pays concept was formally recommended by the Organization for Economic Co-operation and Development to be the "Guiding Principle Concerning the International Economic Aspects of Environmental Policy" on May 26, 1972.²

An important era in the evolution of Kenya's environmental policy was opened with the proclamation of the Constitution in 2010. There are complex provisions in the Constitution that have a big impact on sustainable development. They include the Bill of Rights' guarantee of the right to a clean, safe environment as well as environmental ethics. Land and the environment are the only topics covered in Chapter V of the Constitution. The right to water, food, and shelter are only a few of the many social and economic rights that the Constitution incorporates that are also of an environmental nature.³

The preamble of the Constitution states that "We, the People of Kenya... Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations..." This acknowledges the necessity for cautious handling of environmental issues. Clearly implying respect for sustainable development are these lines from the Constitution's

¹ *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others [2017] eKLR*, ELC Civil Case 283 of 2016, para. 17.

² Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l JL Mgmt. & Human. 77.

³ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 272.

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preamble.⁴ Today's international environmental law encompasses the idea that whomever pollutes the environment and wastes natural resources is to blame for the harm done and must shoulder the cost. Every producer or consumer who harms a third party is subject to this kind of "social tax."⁵ It is certain that Article 42 of the Constitution, which declares that everyone has the right to a clean and healthy environment, contains a specific environmental right. This includes the rights to: (a) the environment being safeguarded for the benefit of current and future generations by legislative and other actions, including those envisioned in Article 69; and (b) the environment-related duties under Article 70 to be met.⁶

As per Article 69 of the Constitution of Kenya, all persons must work in collaboration with State agencies in upholding environmental rights for all.

This paper makes a case for the enforcement of the right to clean and healthy environment in Kenya through effectively putting into practice the internationally recognised principle of polluter pays. The author argues that though this right has been legally recognised both domestically and internationally, placing the obligation to enforce it solely on the state agencies may delay the full realisation of this right for all persons. It thus explores how the polluter pays principle can be used to advance the realisation of the right to clean and healthy environment. This is in recognition of the fact that most developing countries have limited financial resources which are necessary in implementation of the right to clean and healthy environment and hence, the need for tapping into resources from the private sector and other persons who interact with the environment and subsequently cause harm to the environment.

2. The Right to Clean and Healthy Environment: Legal Foundation

Kenya's main environmental regulating statute is called the Environmental Management and Coordination Act (EMCA). The law contains general requirements (such as environmental management principles) that apply to all environmental sectors and all public and private acts that may have an impact on the environment. The Act defines the "environment" as follows:⁷

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

This definition goes beyond purely ecological concerns. It expressly takes into account components of the environment that go beyond the biophysical ones, such as the relationships

⁴ Ibid, para. 273.

⁵ 'The Polluter Pays, a Pillar Principle of Stockholm | Green Growth Knowledge Partnership' <<https://www.greengrowthknowledge.org/blog/polluter-pays-pillar-principle-stockholm>> accessed 22 February 2023.

⁶ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 274.

⁷ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 275.

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between people, the natural environment, and the socioeconomic and cultural foundations of such relationships.⁸

A person who asserts that their rights to a clean and healthy environment have been violated has standing under Article 70 of the Constitution. This means that "the environmental right is sufficiently extensive and all-encompassing to provide 'everyone' with the prospect of seeking legal remedy in the event that any of many conceivable components relating to the right or guarantee derived therefrom is breached. It is undeniable that Kenya's constitution protects environmental preservation."⁹

The State is subject to environmental commitments under Article 69 of the Constitution. The duty to guarantee sustainable exploitation, utilisation, management, and conservation of the environment and natural resources is one of the duties imposed on the State. The State must also make sure that the benefits are distributed fairly. Encouragement of public involvement in environmental management, preservation, and protection is also necessary. Lastly, the State must prevent using processes and engaging in activities that might threaten the environment.¹⁰

Article 42 states; ***“Every person has the right to a clean and healthy environment which includes the right;***

- “(a) 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 obligations relating to the environment fulfilled under Article 70”.***

The Constitution confers standing upon a person who alleges that a right to a clean and healthy environment has been violated. It provides: -

- 70. (1) If a person alleges that a right to a clean and healthy environment recognized 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.*
- (2) 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.*

⁸ Ibid, para. 276.

⁹ Ibid, para. 277.

¹⁰ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 278.

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(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

Section 13 of the Environment and Land Court Act outlines the jurisdiction of the court, stating that it has both original and appellate jurisdictions to hear and resolve all environmental and land-related disputes in accordance with Article 162(2)(b) of the Constitution, the provisions of this Act, and any other Kenyan laws that may be applicable. Subsection (2) provides that in exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.

The ELC also has powers 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. Regionally and internationally, there are legal instruments that also recognise the right to clean and healthy environment.

Article 12(2)(b) of the *International Covenant on Economic, Social and Cultural Rights (ICESR)*¹¹ is to the effect that ‘The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right (the right of everyone to the enjoyment of the highest attainable standard of physical and mental health) shall include those necessary for: the improvement of all aspects of environmental and industrial hygiene.

Article 24 of the *African Charter on Humans and People’s Rights (ACHPR)*¹² states that ‘All peoples shall have the right to a general satisfactory environment favourable to their development’. Article 24(1) of the *Convention on the Rights of the Child*¹³ is to the effect that ‘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 strive to ensure that no child is deprived of his or her right of access to such health care services’. Article 24 (2) requires that ‘States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures, *inter alia*:(c) 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; (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are

¹¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹² 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).

¹³ UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74.

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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 (emphasis added).

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*¹⁴ under Article 4(2) (c) states that ‘each Party shall take the appropriate measures to: ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment’. Article 4(4) also requires that ‘Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention’.

Article 25 (1) of the *Universal Declaration on Human Rights*¹⁵ states 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’.

Principle 1 of the *1992 Rio Declaration on the Environment and Development*¹⁶ states 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”.

It is worth pointing out that most of these international legal instruments captured the right to clean and healthy environment in a very generic manner and was mostly to be implied. However, in 2022, the United Nations General Assembly (UNGA) adopted a resolution declaring a clean, healthy & sustainable environment as a human right.¹⁷ The General Assembly noted that the right to a clean, healthy and sustainable environment is related to other rights and existing international law.¹⁸ It also affirmed that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under

¹⁴ United Nations, *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.

¹⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁶ UN General Assembly, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 1, Resolutions adopted by the Conference: corrigendum*, A/CONF.151/26/Rev.1(Vol.I)/Corr.1.

¹⁷ United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution* / adopted by the General Assembly, UN. General Assembly (76th sess.: 2021-2022); ‘In Historic Move, UN Declares Healthy Environment a Human Right’ (*UNEP*, 28 July 2022) <<http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>> accessed 22 February 2023; ‘UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right | UN News’ (28 July 2022) <<https://news.un.org/en/story/2022/07/1123482>> accessed 22 February 2023.

¹⁸ United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution* / adopted by the General Assembly, UN. General Assembly (76th sess.: 2021-2022), para. 2.

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the principles of international environmental law.¹⁹ Finally, the UNGA called upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.²⁰

It has been noted that some scientists believe that the "triple planetary catastrophe" of human-caused climate change, widespread biodiversity loss, and unchecked pollution currently threatens to cross the planetary boundaries necessary to live securely on Earth. These dangers, as well as air pollution, polluted water, pollution from plastics, and chemical pollutants, can jeopardise the right to life, dignity, and health. Advocates urged that the U.N. should establish a right to a clean, healthy, and sustainable environment as a result.²¹ Notwithstanding eight nations' abstentions—Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, and Syria—the resolution on the right to a clean, healthy, and sustainable environment was accepted unanimously.²²

For the 193 UN Member States, the resolution has no official force. Advocates, however, are optimistic that it will have a domino effect, pushing nations to codify the right to a healthy environment in national constitutions and regional accords and incentivizing governments to put such laws into action. Advocates claim it would offer environmental activists greater tools to fight against laws and initiatives that harm the environment.²³

3. The Polluter Pays Principle: The Scope

The Polluter Pays Principle is part of the customary law and general principles relating to the environment. Before the Organization for Economic Co-operation and Development (OECD) formally recognised it as a fundamental tenet of environmental law in 1972, the notion of polluter pays already existed.²⁴ According to OECD, the so-called "Polluter-Pays Principle" should be applied when determining how to distribute the costs of pollution prevention and control measures in order to promote the wise use of finite environmental resources and prevent distortions in global commerce and investment. According to this concept, the cost of implementing the aforementioned actions determined upon by public authorities to guarantee that the environment is in an acceptable state should be borne by the polluter. In other words, the price of goods and services that contribute to pollution through production and/or consumption should reflect the cost of these actions.

¹⁹ Ibid, para. 3.

²⁰ Ibid, para. 4.

²¹ 'The UN Just Declared a New Human Right' (*World Economic Forum*, 9 August 2022) <<https://www.weforum.org/agenda/2022/08/the-un-just-declared-a-universal-human-right-to-a-healthy-sustainable-environment-here-s-where-resolutions-like-this-can-lead/>> accessed 22 February 2023.

²² Ibid.

²³ 'In Historic Move, UN Declares Healthy Environment a Human Right' (*UNEP*, 28 July 2022) <<http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>> accessed 22 February 2023.

²⁴ Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l J.L Mgmt. & Human. 77; Misra S and Nanda H, 'A Complete Perusal of Polluter Pays Principle "Incorporation and Application in India"' (2020) 14 *Indian Journal of Forensic Medicine & Toxicology* 419.

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Subsidies that would significantly distort global commerce and investment should not be used in conjunction with such policies.²⁵

The polluter pays concept is a foundational economic tenet that requires the incorporation of environmental costs into decision-making for economic and other development plans, programmes, and initiatives that are likely to have an impact on the environment. Hence, the idea is a mechanism to distribute the costs of pollution. It has received a lot of attention in international law and is now recognised as one of the fundamental concepts of that body of law.²⁶

By including the cost of waste disposal into the price of the product, the "polluter pays" principle, also known as "Extended Polluter Responsibility" (EPR), aims to transfer the burden of dealing with pollutants from governments to the organisations that produce them. In order to reduce waste and increase opportunities for reuse and recycling, manufacturers will be encouraged to enhance the waste management profile of their businesses.²⁷

The *Rio Declaration* passed 27 principles to guide the protection of the environment for the present and future generations. *Inter alia*, principle 8 and 18 states thus; *Principle 8: 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.*" The duty is explained in principle 13 which provides thus; "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction".

According to the EMCA, the "polluter-pays concept" states that the person found guilty of polluting under the Act or any other relevant legislation should pay or bear the expense of restoring any aspect of the environment that has been harmed by pollution. The polluter should essentially pay the costs associated with preventing pollution or covering any harm it does. This is what the "polluter pays" idea says.²⁸

In the case of *Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impresa Construzioni Giuseppe*

²⁵ OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, OECD/LEGAL/0102 (OECD 1972).

²⁶ Elvis-Imo G, 'An Analysis of The Polluter Pays Principle In Nigeria' (2017) 1 *Ajayi Crowther University Law Journal* <<https://aculj.acu.edu.ng/index.php/lj/article/view/4>> accessed 22 February 2023.

²⁷ *Ibid*, p. 3.

²⁸ *Kenya Association of Manufacturers & 3 others v Cabinet secretary, Ministry of Environment and Natural Resources & 3 others [2018] eKLR*, Petition 32 & 35 of 2017 & Judicial Review Application 30 of 2017 (Consolidated), para. 150.

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Maltauro SPA & 2 others [2019] eKLR, Constitutional Petition 1 of 2012, the Court stated as follows:

64. *On the issue, as to who is liable to pay, this court is called upon to apply environmental law principles under Kenyan Law jurisprudence. Environmental law is principally concerned with ensuring sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both domestic and international processes. Ideally, the utilization of land and land-based resources should adhere to the principles of sustainability, intergeneration equity, prevention, precautionary, polluter pays and public participation.*

65. *The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.*

In the Kenyan case of *Dobs Entertainment Limited v National Environment Management Authority [2021] eKLR*, Tribunal Appeal 016 of 2019, the National Environment Tribunal quoted a Ugandan case as follows:

33. *In the Supreme Court of Uganda, at Kampala Constitutional Appeal No. 05 Of 2011 Amooti Godfrey Nyakaana and National Environment Management Authority & Attorney General, Advocates Coalition for Development & Environment Alert Vs Greenwatch, Uganda Wildlife Authority Quoting the Environmental Action Network & Attorney General –Vs- Salvatori Abuki Supreme Court Const. App. No. 1/98,*

“The principle applicable is that in determining the Constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining Constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, the sense of the legislation’s object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation’s object and thus its validity. See THE QUEEN –Vs- BIG DRUG MARK LTD 1996 CLR 332.”

The Petitioner is not challenging the Constitutionality of these restrictions. In my view, it is these restrictions which gave the first respondent power to carry out inspection on the petitioner’s property to ascertain whether the activities he was

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carrying out on the land was in conformity with the provisions of the section – hence the service of the Restoration Order. The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a Police Officer does not give a hearing to a suspect before charging him or her. The purpose of the Act is to give the first Respondent power to deal with and protect the environment for the benefit of all including the Petitioner. The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28.”

*In the same case the court went on and stated that; “The Petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing. I have not been persuaded that the Petitioner’s proprietary rights were infringed by the acts of the first respondent. What was taken away from him was misuse of the land and this was done to protect the environment.” The Court discussed the concept of sustainable development as it has evolved in international law and adopted the definition contained in the report of the **WORLD COMMISSION ON ENVIRONMENT and DEVELOPMENT** (the “Brundtland Report). That Report defined “Sustainable Development” as “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.” The Court stated thus: -*

“We have no hesitation in holding that “sustainable Development” as a balancing concept between ecology and development has been accepted as part of the customary international law though its salient features have yet to be finalized by the international law jurists.....

We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of “Sustainable Development.” The “Precautionary Principle” – in the context of municipal law – means:

(i) The Environmental measures – by the State Government and the Statutory authorities must anticipate, prevent, and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The “Onus of proof” is on the actor or the developer/industrialist to show that his action is environmentally benign.”

34. In the same case, on “the Polluter Pays Principle” the court had this to say: -

“The “Polluter Pays Principle” as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “sustainable Development” and as such the Polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.”.

According to the OECD, there are four aspects that must be considered in the enforcement of the polluter-pays principle, which are: First, is the issue of identifying the polluter. This is crucial to

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the allocation of costs and making the polluter take responsibility for his pollution, as stipulated by the OECD definition given above; It is necessary to ascertain the extent of damage done to the environment and establish the extent of the polluter's liability so that precise monetary value can be attached to the degradation; Pollution caused must be identifiable. This is necessary to prove that the polluter is responsible for that resulting pollution; and, there must be a damage that must be compensated. The damage caused must be real and identifiable as compensable under a compensatory regime provided by the relevant laws.²⁹

4. Enforcing the Right to Clean and Healthy Environment in Kenya Through the Polluter Pays principle for Sustainable Development

Section 3(3) of the Environmental Management and Coordination Act 1999, gives any party who alleges that his right to a clean and healthy environment has been or is likely to be violated to apply to the Environment and Land court for redress. According to Article 70 of the Constitution, anybody who believes that their right to a clean environment is being denied, violated, threatened, or infringed upon in violation of Article 42 may seek recourse from the court. Kenyans have recourse to the courts under the Constitution even when there are merely implied violations.³⁰

In *Waweru v. Republic* (2006) eKLR, the applicants—property owners—were accused of violating the Public Health Act's regulations by dumping raw sewage into a public water source. The court agreed with the petitioners, but it then began to consider how the applicants' conduct would affect sustainable development and environmental management on its own. The court determined that Section 71 of the Kenyan Constitution contains the right to life, which also includes the right to a clean and healthy environment.³¹

In the LAPSSET case, also known as the case of Mohamed Ali Baadi and others vs. A.G. & 11 others (2018) eKLR, the project proponent agreed to pay Kshs. 1,760,424,000 in monetary compensation to the individuals who were impacted. The petitioners and the other residents of Lamu Island were to be consulted regarding how the LAPSSET project might affect their culture as a district indigenous community and how to mitigate any negative effects on culture. Because this project was still in progress, the court ordered the project proponent to include a demonstrably specific consultation plan.³²

The Court in *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016*, cited *Rylands Vs Fletcher* (1861-73) ALL ER REPI case on strict liability as follows:

165. Further the rule of strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land set in the Case of *Rylands Vs Fletcher (1861-73) ALL ER REPI* is in favour of the petitioners' case. The court held thus, **"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects**

²⁹ Elvis-Imo G, "An analysis of the polluter pays principle in Nigeria," *Ajayi Crowther University Law Journal* 1, no. 1 (2017), pp. 4-5.

³⁰ *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016, para. 134.*

³¹ *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016, para. 163.*

³² *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016, para. 164.*

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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 reasonable and just that the neighbour who has brought something on his own 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."

166. The Supreme Court of India in *M C Mehta Vs Union of India (1987) 1 SCC 395* introduced the concept of absolute liability where the defendant is engaged in industrial activities resulting in pollution. The court stated thus,

"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 such hazardous or inherently dangerous activity regardless of

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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-à-vis the tortious principle of strict liability under the rule in Rylands Vs. Fletcher (1986) LR 3 HL 330, (1861 – 73)."

In the case of *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others [2020] eKLR*³³, the Environment and Land Court at Kakamega, while making a determination on whether orders for costs and restoration of the environment issued by the National Environment Tribunal were inordinately too high, harsh and punitive for a public project funded by donors, made the following observation:

In this case it is the 2nd appellant who undertook the project and the Tribunal used its discretion judiciously in this matter. In the case of *Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impresa Construzioni Giuseppe Maltauro SPA & 2 others (2019) eKLR* the court held that;

"The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.

Similarly, in the case of *Mohamed Ali Baadi and others v Attorney General & 11 others[2018] eKLR*³⁴, the case underscored the importance of public participation as follows:

227. The involvement of the public in environmental decision and policy making must be regarded as important for various reasons. First, the utilization of the views gathered from the public in governmental decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development. This is because the resultant decisions raise an expanded knowledge base on the nature of

³³ *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others [2020] eKLR*, Environment and Land Appeal 5 of 2019.

³⁴ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012.

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environmental problems that are to be met by the decision. The decisions help to enrich and cross-fertilize environmental rights.

228. Secondly, developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with appropriate authorities, environmental threats and violations.

229. Thirdly, public participation can help identify and address environmental problems at an early stage. This helps to save reaction-time, energy and the scarce financial resources, at least in the long run. In addition, it improves the reactive and, often, adversarial nature of government action which operates by promising solutions to environmental problems mostly *post-facto*, and only following an actual complaint by a citizen.

254. The importance of being informed of basic facts about the quality of their environment is, therefore, well established in different international conventions. Increasing access to environmental information also allows for competing interests to be balanced. Access to information permits all relevant factors to be taken into account as part of decision making process. Environmental information is a self-standing regulatory instrument and serves to inform the public of environments risks. Citizens must not only have access to information but must also be entitled to participate in decision-making and have access to justice in environmental matters. Only this way will they be able to assert their right to live in a safe environment, and fulfil their duty to protect, and improve the environment for the benefit of future generations. In addition to enhancing the quality and implementation of decisions, improved access to information and public participation contributes to public awareness of environmental issues and provides more opportunities for the public to express their concerns to relevant authorities.

256. In addition, if rights are to be effective, the public must have a way of seeking justice when those rights are accidentally, or deliberately, denied. For purposes of enforcement of environmental rights, Article 70 of the Constitution provides a framework to meet this need. It highlights rights of a citizen to move to Court citing violation of rights to clean and healthy environment. For a citizen to exercise these rights, access to environmental information is a necessity.

Under EMCA, any individual who has harmed the environment or who is still doing so may be subject to an environmental restoration order from the court.³⁵

³⁵ S. 111(1), Act No. 8 of 1999.

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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).³⁶ The Act also prescribes penalties for these offences.³⁷ Offences under EMCA relate among other things, failing to submit to inspection³⁸, offences relating to Environmental Impact Assessment³⁹; offences relating to records⁴⁰; offences relating to standards⁴¹; offences relating to hazardous waste⁴²; offences relating to pollution⁴³; and offences relating to restoration orders⁴⁴.

The effectiveness of the polluter pays principle is also captured under Section 108 of EMCA which provides for restoration orders to be issued by the National Environment Management Authority (NEMA) to violators under the Act. Notably, the command and control mechanism involves the ‘command’ of the law and the legal authority of the State. This entails regulatory law, backed by criminal sanctions.⁴⁵ It is based on potential coercion rather than voluntary goodwill and on penalties rather than positive incentives.⁴⁶ The command and control mechanism is what has predominantly informed the development of Kenya’s natural resources protection regime.⁴⁷

The criminality component of regulation is what makes command and control methods successful.⁴⁸ It establishes a form of societal control over the use of natural resources. Under command and control approaches, criminal law is used as a preventative tool by use of punitive sanction.⁴⁹ This is because from an economic perspective, criminal sanctions when effectively enforced raise the cost of certain conduct and therefore encourages compliance with laws.⁵⁰ The EMCA proposes further sanctions in addition to fines, including the seizure of used products and the cancellation of licences.⁵¹

³⁶ EMCA, s. 137-146.

³⁷ *Ibid.*

³⁸ Sec. 137, EMCA.

³⁹ Sec. 138, EMCA.

⁴⁰ Sec. 139, EMCA.

⁴¹ Sec. 140, EMCA.

⁴² Sec. 141, EMCA.

⁴³ Sec. 142, EMCA.

⁴⁴ Sec. 143, EMCA.

⁴⁵ Hutter, B.M., ‘Socio-Legal Perspectives on Environmental Law: An Overview,’ *op. cit.*, pp.3 & 5.

⁴⁶ Davies J.C. & Mazurek, J., *Pollution Control in the United States: Evaluating the System*, *op. cit.*, p.15.

⁴⁷ Ochieng’, B.O., ‘Institutional Arrangements for Environmental Management in Kenya,’ in Okidi C.O., et al, *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers Ltd, 2008), p.200.

⁴⁸ Hutter, B.M., ‘Socio-Legal Perspectives on Environmental Law: An Overview,’ *op. cit.*, pp. 3 & 5; cf. Ashworth, A., ‘Conceptions of Over criminalization,’ *Ohio State Journal of Criminal Law*, Vol. 5, 2008. pp. 407-425.

⁴⁹ Mbote, P.K. ‘The Use of Criminal Law in Enforcing Environmental Law’ in Okidi, C.O., et al, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Ltd, 2008) 110, p.112.

⁵⁰ *Ibid*, p. 110.

⁵¹ S.146, Act No. 8 of 1999.

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The nexus between sustainable development and the right to clean and healthy environment, as well as the place of the polluter pays principle in enhancing this connection, was captured in the case of *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR⁵² in the following excerpt:

83. Indeed, Section 18 of the Environment and Land Court Act and Section 3(5) of the Environmental Management and Co-ordination Act provides that this court should be guided by the principle of *intergenerational* equity while resolving environmental disputes. Section 2 of the Environmental Management and Co-ordination Act defines *intergenerational* equity as follows:

“intergenerational equity” means that the present generation should ensure that in exercising its rights to beneficial use of the environment the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”

84. The quality of life for the future generation depends on our decisions today. The need for change in human development for them to lead happy lives has been debated for decades. The sustainability discourse started in the 1970s, and the 1992 UN Conference on the Environment and Development recognized intergenerational equity as central for policymaking that safeguards the future - this principle is now found in the constitutions of many countries, including Kenya.

85. Indeed, the World Commission on Environment and Development noted as follows: *“We borrow environmental capital from future generations with no intention or prospect of repaying.... We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.”*

86. Some countries, most notably Israel and Hungary, have created their own guardian or commissioner for future generations, independent voices for the long term that act as temporal checks and balances. Based on the human right to a healthy environment (*Hungary*) and on a basic law concerning sustainable development (*Israel*), the Commissioners in each country have unrestrained access to the information behind policymaking; respond to citizens’ concerns; and publicly expose the long-term implications of current decisions.

105. The right to a clean and healthy environment is bestowed on every person, and has been considered by the courts and eminent authors to be essential for the existence of mankind. In *Adrian Kamotho Njenga vs. Council of Governors & 3 others* [2020] eKLR, it was held that:

⁵² *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR, ELC. Petition No. E06 of 2020.

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“18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.”

107. This position was elaborately considered in the case of *Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 others* [2018] eKLR where the court adopted the decision in *Communication No.155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria* where the African Commission on Human and People’s Rights stated as follows:

“These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”

The right to general satisfactory environment, as guaranteed under article 24 of the Africa Charter or the right to healthy environment, as it is widely known therefore imposes clear obligations upon a government. It requires the State to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”

123. *Sustainable Development* is one of the national values and principles of governance in the Constitution that bind all State organs, State officers, public officers and all persons. In its report, *Our Common Future*, the *Brundtland Commission* defined Sustainable as *development that meets the needs of the present without compromising the ability of future generations to meet their own needs*’.

124. Under Section 2 of the Environmental and Management Co-ordination Act, sustainable development is defined as follows:

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“sustainable development” means 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.”

125. In the *Case Concerning the Gabčíkovo-Nagymaros Project*, (*Hungary v Slovakia*), 1997 WL 1168556 (ICJ), it was held as follows:

“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed [and] set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.”

126. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among the present generation and *inter-generation equity*, that is equity between generations. As opined in *Gabčíkovo* case (*supra*), sustainable development reaffirms the need for both development and environmental protection, and neither can be neglected at the expense of the other.

127. The four (4) recurring elements that comprise the concept of ‘*sustainable development*’ is the need to preserve natural resources for the benefit of future generations (*the principle of intergenerational equity*); exploiting natural resources in a manner which is ‘*sustainable*’, ‘*prudent*’, ‘*rational*’, ‘*wise*’ or ‘*appropriate*’ (*the principle of sustainable use*); the ‘*equitable*’ use of natural resources, and the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, (*the principle of integration*).

128. The principle of sustainable development seeks to limit environmental damage arising from anthropogenic activities and lessen the depletion of natural resources and pollution of the environment (See Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003) pp 8-9).

129. Sustainable development is a principle with a 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 right to development and the right to protecting the environment.

In the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR⁵³, the Court stated as follows:

48. I have considered the petition, the evidence both in support and opposition to it and the submissions. That a clean and healthy environment is a fundamental prerequisite for life is not a matter that needs belabouring. It is for this reason that the drafters of the Constitution of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at **Article 42** within the Bill of Rights. Needless to state, Kenyans voted overwhelmingly in favour of the draft, thus giving their seal of approval to its provisions. **Article 42** states as follows:

Every person has the right to a clean and healthy environment, which includes the right—

(a) 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 obligations relating to the environment fulfilled under Article 70.

49. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under **Article 69** which among others requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, 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. In short, the obligation to ensure a clean and healthy environment imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.

50. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by Article 42, **Article 70** of the constitution provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed

⁵³ *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.

51. Provisions similar to those at **Article 42** are found at **Section 3** of the **Environmental Management and Co-ordination Act, 1999** (EMCA). Under **Section 3 (3)** of EMCA, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to 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 to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.

52. I have outlined all these provisions to underscore the importance placed by the constitution and statute law on protection of the right to a clean and healthy environment and conservation of the environment generally.

It is thus recommended that the country and courts actively enforces the polluter-pays principle as a way to not only restore the environmental areas that have been degraded but also as an incentive to curb environmental degradation.

5. Conclusion

While the Rio Declaration which in Principle 16 embodies the polluter pays principle, does not impose any obligation on states to enforce those principles, Kenya, under section 3 (5) of EMCA and other various laws have incorporated this principle as part of the guiding principles that must be considered in enforcement of environmental law in Kenya. What is now required is for the Courts to strictly enforce it and hold more violators of environmental law culpable in order to enforce positive change towards environmental protection and conservation. Making violators bear the cost of environmental restoration will go a long way in not only guaranteeing the right to clean environment but also in achieving sustainable development.

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.

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

¹Sec. 2, Environmental (Management and Coordination) Act, No. 8 of 1999, Laws of Kenya.

²United 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].

³Barbara A Cosens, et. al, 'The Role of Law in Adaptive Governance' (2017)

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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

⁴Article 10, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

⁵Para. 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.

⁷Sec. 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].

¹⁰Lemos, 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.

¹¹Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *Ecological economics*, 63, no. 1 (2007): 93-103, at p.94.

¹²United 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].

¹³United 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].

¹⁴Bell, 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).

¹⁷Art. 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] eKLR*²¹, 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,

¹⁸Constitution of Kenya, Art. 69(1).

¹⁹The 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).

²⁰Constitution 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.

²³Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *op cit.*, at p.95.

environmental democracy, environmental justice, environmental security, public participation, 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] eKLR*²⁷, 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.

²⁶United 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.

²⁹United 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

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

13/1/2020].

³⁰Ibid.

³¹Paavola, J., "Institutions and environmental governance: A reconceptualization," *Ecological economics*, vol.63, no. 1 (2007): 93-103 at p.98.

³²Ibid., p. 97.

³³United Nations, "Environmental Rule of Law", op. cit.

³⁴Articles 20, 22, 23, Constitution of Kenya 2010.

sustenance for the benefit of future generations.³⁵ In addition, it also spells out and guarantees the right of every person to a clean and healthy environment and the need to have the same respected and protected.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

³⁵Preamble, Constitution of Kenya, (Government Printer, 2010).

³⁶Art. 42, Constitution of Kenya 2010.

³⁷Sands, 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.

⁴⁰No. 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).

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 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] eKLR⁵² 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....

⁴⁵*Ibid*, S. 13(1).

⁴⁶*Ibid*, S. 13(3).

⁴⁷*Ibid*, Preamble.

⁴⁸EMCA, S. 3(5).

⁴⁹SS. 125-136, No. 8 of 1999.

⁵⁰S. 125, No. 8 of 1999.

⁵¹S. 126, No. 8 of 1999.

⁵²*Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

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.

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

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].

⁵⁵Boyd, 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.

⁵⁶See *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd*, Misc. Cause No. 181 of 2004 (High Court of Uganda).

⁵⁷Twinomugisha, B.K., "Some Reflections on Judicial Protection of the Right to a

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 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

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.

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.

development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.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

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.

⁶⁸S. 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].

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.

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

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.,

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.

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

'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.

⁷⁶UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

⁷⁷Art. 69(1) Constitution of Kenya 2010.

⁷⁸Para. 18, *Republic v Kenya Forest Service Ex-parte Clement Kariuki & 2 others* [2013] eKLR, Judicial Review Case 285 of 2012.

⁷⁹See also para. 53, *Milimani Splendor Management Limited v National Environment Management Authority & 4 others* [2019] eKLR, Petition 61 of 2018.

⁸⁰Art. 22(1), Constitution of Kenya 2010.

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. 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

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.

⁸²United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁸³No. 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.

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.

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

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.

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.

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 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

⁹⁴ No. 5 of 2015, Laws of Kenya.

⁹⁵ S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

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.

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 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

¹⁰² Ibid.

¹⁰³ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

¹⁰⁴ Ibid, Preamble.

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).

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 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.

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).

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%2F\\$file%2Fdp35.pdf](http://www.unrisd.org/80256B3C005BCCF9%2F(httpAuxPages)%2F53024E4A3BAA768480256B67005B6396%2F$file%2Fdp35.pdf) [Accessed on 28/07/2016].

¹¹⁷ Ibid.

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 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

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.

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/~wwwceec/special/AgiBookSection2002.pdf> [Accessed on 14/1/2020]

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, 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,

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.

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

*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

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

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.

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).

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

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.

¹³⁹ Forest Conservation and Management Act, 2016(Government Printer, Nairobi, 2016), sec. 3.

¹⁴⁰ Ibid, Sec. 5.

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].

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.

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.

¹⁴⁹ Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 14/1/2020].

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].

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

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

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.

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].

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.

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

¹⁶⁴ Ibid.

¹⁶⁵ (Article 185 (2), 186 (1) and 187 (2)), Constitution of Kenya.

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.

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 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

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 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].

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.

3. Role of Corporations in Environmental Conservation and Sustainable Development in Kenya

3.1 Introduction

The vast majority of economic activities around the world are organized through corporations.¹⁷⁵ Corporations have often faced the dilemma of striking a balance between economic development and environmental conservation.¹⁷⁶ 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.¹⁷⁷

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.¹⁷⁸ 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.¹⁷⁹ It has been argued that the concept of environmental governance is an important aspect of corporate social and environmental responsibility.¹⁸⁰

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

¹⁷⁵Rauterberg, 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].

¹⁷⁶ 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.

¹⁷⁷Kamweti 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].

¹⁷⁸ Ibid.

¹⁷⁹ Buckley, P 'Can Corporations Contribute directly to society or only through regulated behaviour' Journal of the British Academy, 6 (sl), p. 323-374.

¹⁸⁰ 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].

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.

3.2 Legal and Institutional Framework for Corporate Environmental Compliance

3.2.1 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 obligations under international law especially on environmental matters.

The *United Nations Framework Convention on Climate Change, Paris Agreement 2015*¹⁸¹, 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.¹⁸² 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*¹⁸³ 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*¹⁸⁴ 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, 1999¹⁸⁵ which imposes both civil and criminal liability for environmental damage.

¹⁸¹ 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].

¹⁸² Ibid, Art. 2.

¹⁸³ Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987).

¹⁸⁴ 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].

¹⁸⁵ Act No. 8 of 1999, Laws of Kenya.

*The Rio Declaration on Environment and Development*¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ The existence of such standards is important since it allows organisations to gauge their environmental efforts against the generally accepted international criteria.

3.2.2 National Legal Framework

a) Constitution of Kenya, 2010

The Constitution of Kenya accords every person the right to a clean and healthy environment¹⁸⁹, 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.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

¹⁸⁶ 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].

¹⁸⁷ 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].

¹⁸⁸ Ibid.

¹⁸⁹ Art. 42, Constitution of Kenya 2010, (Government Printer, 2010, Nairobi).

¹⁹⁰ Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, Government Printer, Nairobi.

¹⁹¹ Ibid, s. 3 (2A).

¹⁹² Ibid, Part V.

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).¹⁹³

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).

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.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷ *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).¹⁹⁸ 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.¹⁹⁹

e) Water Act, 2016

This is an Act of Parliament to provide for the regulation, management and development of water resources.²⁰⁰ 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.

¹⁹³ Ibid, s. 135.

¹⁹⁴ Companies Act, No. 17 of 2015 (Government Printer, 2015, Nairobi), s. 143 (1) (d).

¹⁹⁵ Ibid, s. 655 (4) (b).

¹⁹⁶ *Climate Change Act, No. 11 of 2016*, Laws of Kenya (Government Printer, 2016, Nairobi).

¹⁹⁷ Ibid, s. 3.

¹⁹⁸ Ibid, s. 16.

¹⁹⁹ Ibid, s. 17.

²⁰⁰ *Water Act, No. 43 of 2016*, (Government Printer, 2016, Nairobi).

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*²⁰¹ provide for a system governing the Environmental Impact Assessment process and environmental audits. *The Air Quality Regulations 2014*²⁰² 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*²⁰³ 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*²⁰⁴ 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)*.²⁰⁵ 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)*.²⁰⁶

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.²⁰⁷ The Regulations require a proponent

²⁰¹ The Environmental (Impact Assessment and Audit) Regulations, Legal Notice No. 101 (June 13, 2003),

²⁰² 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].

²⁰³ Legal Notice No. 120 (September 4, 2006), Environment Management and Co-ordination Water Quality Regulations, 2006.

²⁰⁴ Legal Notice, No. 121 (September 4, 2006), Environmental Management and Co-Ordination (Waste Management) Regulations, 2006.

²⁰⁵ 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].

²⁰⁶ Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

²⁰⁷ The Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No.101 (June 13, 2003), Government Printer, Nairobi.

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.²⁰⁸

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.’*²⁰⁹

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.

i. 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.²¹⁰ 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.²¹¹

j. 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.²¹² 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*

²⁰⁸ Ibid, Regulation 7.

²⁰⁹ *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.

²¹⁰ EMCA, s. 57 A (3).

²¹¹ 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].

²¹² Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.

*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).*²¹³

k. 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.²¹⁴ 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.’²¹⁵

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.²¹⁶

l. Sustainable Development

Sustainable development has been enshrined as one of the national values and principles under the Constitution.²¹⁷ The principle has also been captured under EMCA and includes public participation, inter and intra generational equity, polluter pays principle, precautionary principle *inter alia*.²¹⁸ 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.²¹⁹ 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.²²⁰ Corporations can assist towards promoting sustainable development through compliance with the targets set out under the SDGs.

²¹³ EMCA, s. 68 & 69.

²¹⁴ Constitution of Kenya, 2010, Art. 10.

²¹⁵ *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].

²¹⁶ EMCA, s. 3 (5) (a).

²¹⁷ Constitution of Kenya, 2010, Art. 10 (2) (d).

²¹⁸ EMCA, s. 3 (5).

²¹⁹ 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].

²²⁰ *Ibid.*

3.3 Challenges Related to Corporate Environmental Compliance in Kenya

3.3.1 Environmental Pollution

EMCA defines pollution as ‘the direct or indirect alteration of any part of the environment through discharge, emission or deposition of wastes’.²²¹ 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’.²²² *Environmental pollution occurs in various forms including water pollution, air pollution, noise pollution and land pollution (emphasis added)*.²²³ Environmental pollution has become a major challenge across the world due to the rapid economic development to cater for the rising human population.²²⁴

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.²²⁵ 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.²²⁶ These incidences of pollution have recently been highlighted by the media resulting in crackdown by the National Environment Management Authority (NEMA) against the perpetrators.²²⁷

In addition to water pollution through discharge of effluent, other forms of environmental pollution by corporations have also been reported in Kenya.²²⁸ Further, studies have also indicated that this has contributed to soil pollution in the area.²²⁹

²²¹ EMCA, s. 2, Government Printer, Nairobi.

²²² 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/a9595bab30d7ea8771553353c53f7452811.pdf> [Accessed on 14/1/2020].

²²³ 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.

²²⁴ 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].

²²⁵ 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].

²²⁶ 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].

²²⁷ 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].

²²⁸ 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 14/1/2020].

²²⁹ Caravanos, ‘Conflicting Conclusions or Competing Methodologies? Documenting Soil Lead Pollution in Owino Uhuru, Kenya’ *Journal of Health & Pollution*, Vol. 9, No. 21, March 2019.

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.

3.3.2 Human Rights Violation

It has been noted that environmental rights are intertwined with other human rights especially the economic and social rights.²³⁰ 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.²³¹ 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.²³² 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*²³³.

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.²³⁴ Civil remedies for environmental protection can be classified according to their intended function which could be preventive, compensatory, reparatory or natural restitution.²³⁵ In addition to enshrining the right to clean and healthy environment, the Constitution sets out obligations in respect of the environment.²³⁶ Breach of these obligations may result in enforcement of environmental rights under article 70 of the

²³⁰ 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].

²³¹ Art. 43, Constitution of Kenya, 2010.

²³² 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".

²³³ *Peter K. Waweru –v- Republic*, (2006) 1 KLR (E&L) 677 at 691.

²³⁴ Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

²³⁵ Muigua, K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

²³⁶ Constitution of Kenya, 2010, Art. 42 & 69, Op Cit.

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.²³⁷

Consequently, corporations in Kenya found liable for environmental breaches have been imposed with civil consequences.²³⁸ 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*²³⁹ 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.²⁴⁰ 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)*.²⁴¹ The Act also prescribes penalties for these offences.²⁴² 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)*.²⁴³

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.²⁴⁴ Companies want to reduce pollution, engage in cleaner production, conserve the environment and generally engage in environmentally responsible corporate behaviour.²⁴⁵ Some companies even go

²³⁷EMCA, Part IX (Sec. 108-116).

²³⁸ John Mutungu Waititu –vs- China Wuyi (Kenya) Co. Ltd, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR.

²³⁹ *Rylands vs Fletcher* [1861-73] ALL ER REP 1.

²⁴⁰ *Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited*, High Court of Kenya at Nakuru, Civil Suit No. 144 of 2009 (2016) eKLR.

²⁴¹ EMCA, s. 137-146.

²⁴² *Ibid.*

²⁴³ EMCA, s. 118 (b).

²⁴⁴ '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].

²⁴⁵ 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.

to the extent of incorporating environmental goals into their vision and mission statements.²⁴⁶ 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.²⁴⁷ The Company Secretary who is a member of the management finds herself engaged in environmental issues at both policy and operational levels.²⁴⁸ The survival of the corporate body may well depend on how environmental issues are handled.²⁴⁹ 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 regard.

Indeed, it has been observed that many private firms across the world are have adopted different forms of private environmental governance to improve their environmental footprints, going beyond mere compliance with rules of traditional environmental law.²⁵⁰ 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.²⁵¹ This is affirmed under the Companies Act, 2015²⁵² 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.²⁵³

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.

²⁴⁶Marie 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.

²⁴⁷Raimi, 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.

²⁴⁸ 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;

²⁴⁹ Beate Sjafjell, 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board' (2018) 23 Deakin Law Review 41.

²⁵⁰ Light, S.E., "The Law of the Corporation as Environmental Law." *Stanford Law Review* 71, no. 1 (2019), p.139.

²⁵¹ Constitution of Kenya 2010, Article 10.

²⁵² Companies Act, No. 17 of 2015, Laws of Kenya.

²⁵³ Sec. 143(1), Companies Act, 2015; See also Sec. 655 (1); Sec. 655 (4) (b); Sec. 655 (6) (b).

Securing Our Destiny through Effective Management of the Environment

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.²⁵⁴

The penalties under EMCA are harsh and can include imprisonment and fines that ran into hundreds of thousands of shillings.²⁵⁵ Offences under EMCA relate among other things, failing to submit to inspection²⁵⁶, offences relating to Environmental Impact Assessment²⁵⁷; offences relating to records²⁵⁸; offences relating to standards²⁵⁹; offences relating to hazardous waste²⁶⁰; offences relating to pollution²⁶¹; and offences relating to restoration orders²⁶².

The Act imputes personal liability even where the offence complained of was committed on account of another person (corporate body)²⁶³; 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.²⁶⁴

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.²⁶⁵

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 law²⁶⁶. 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

²⁵⁴ '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.

²⁵⁵ S 138.

²⁵⁶ Sec. 137, EMCA.

²⁵⁷ Sec. 138, EMCA.

²⁵⁸ Sec. 139, EMCA.

²⁵⁹ Sec. 140, EMCA.

²⁶⁰ Sec. 141, EMCA.

²⁶¹ Sec. 142, EMCA.

²⁶² Sec. 143, EMCA.

²⁶³ 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.

²⁶⁵ Lord, R., Goldberg, S., Brunnée, J., & Rajamani, L. (Eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012), pp. 315-316.

²⁶⁶ Sec s 58 (7) EMCA; See also Sec. 43, Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.

EMCA or the regulations made thereunder.²⁶⁷ It also follows that the Company Secretary²⁶⁷ 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.²⁶⁸ Similarly, a Company Secretary should ensure that hazardous waste and other chemicals and radioactive materials are handled properly to avoid liability.²⁶⁹

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.

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.²⁷⁰

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.²⁷¹ 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.²⁷²

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.²⁷³

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.²⁷⁴ According to proponents of CSR, a

²⁶⁷Sec. 68 (3), EMCA.

²⁶⁸ Sec. 140, EMCA.

²⁶⁹ Sec. 141, EMCA.

²⁷⁰ EMCA, s. 145 (1).

²⁷¹Art. 10 (2) (d), Constitution of Kenya, 2010.

²⁷² EMCA, s. 3 (5).

²⁷³Arora, R., & Richa, G. D. (2013). 'Corporate Social Responsibility—Issues and Challenges in India.' *International Journal of Research in Finance & Marketing*, 3 (2).

²⁷⁴Freeman. E, and Velamuri. R, 'A New Approach to CSR: Company Stakeholder Responsibility' available at

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.²⁷⁵ 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)*.²⁷⁶ 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. 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.²⁷⁷ Some insurance providers have packages on environmental liability covering environmental damage and clean-up costs for pollution.²⁷⁸ 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*²⁷⁹ was enacted in 2016 to give effect to Article 71 of the Constitution of Kenya and for connected purposes.²⁸⁰ 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 exploitation²⁸¹ of any natural resource of Kenya; and is entered into on or after the effective date.²⁸² This Act was thus enacted in 2016 in line with

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186223 [Accessed on 14/1/2020].

²⁷⁵ Ibid.

²⁷⁶ 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.

²⁷⁷ Muigua. K. 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

²⁷⁸ <https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability> [Accessed on 11/1/2020].

²⁷⁹ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, No. 41 of 2016, Laws of Kenya.

²⁸⁰ Ibid, Preamble.

²⁸¹ 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.

²⁸² Article 71(1), Constitution of Kenya 2010.

the constitutional requirement that Parliament should enact legislation providing for the classes of transactions subject to ratification under clause (1).²⁸³

This provision is similar to the one found in the Constitution of Ghana²⁸⁴ 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.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸

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.²⁸⁹ 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

²⁸³ Article 71(2), Constitution of Kenya 2010.

²⁸⁴ Article 268.

²⁸⁵ 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.

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> [11/1/2020].

²⁸⁷ 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].

²⁸⁸ Sec. 3(1), *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*.

²⁸⁹ *Ibid*, sec. 3(2).

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*²⁹⁰, 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.²⁹¹

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.²⁹² The Act spells out the transactions relating to natural resources, which are subject to the Act.²⁹³

The Act, however, exempts some transactions from ratification by Parliament.²⁹⁴ 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?²⁹⁵ 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.²⁹⁶ 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

²⁹⁰ *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).

²⁹¹ *Ibid*, para. 104.

²⁹² *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016, sec. 4 (1).

²⁹³ Schedule [Section 4(1), 4(2)(e)].

²⁹⁴ *Ibid*, sec. 4 (2).

²⁹⁵ Constitution of Kenya 2010, Article 62 (1) (f) (3).

²⁹⁶ *Ibid*, sec. 7.

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.²⁹⁷

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.²⁹⁸ 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, 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 exploitation²⁹⁹, 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.³⁰⁰ They have been feeling marginalised and sometimes outright ignored as far as benefit sharing is concerned.³⁰¹ 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

²⁹⁷ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 9.

²⁹⁸ *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*, sec. 13 (1).

²⁹⁹ 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*.

³⁰⁰ 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].

³⁰¹ 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].

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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.³⁰²

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.³⁰³ 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*.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶

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-

³⁰² *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016, sec. 9.

³⁰³ Article 10(1), Constitution of Kenya 2010.

³⁰⁴ See Article 260; and Section Five of the Constitution of Kenya.

³⁰⁵ For instance, the agreements on exploitation of the oil and gas in Turkana; Titanium mining in Kwale, among others.

³⁰⁶ Sec. 16, *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016.

making and benefit sharing.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹

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.³¹⁰ 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

³⁰⁷Masinde, 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].

³⁰⁸ 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].

³⁰⁹ 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 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.

³¹⁰ 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 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.

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)³¹¹ which set the global standard to promote the open and accountable management of oil, gas and mineral resources.³¹² Through reviews, there may be demonstrated accountability and transparency which is important for the contractors, the government and the communities at large.³¹³ 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.³¹⁴

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.³¹⁵ Some of the laws such as the Natural Wealth and Resources Contracts (*Review and Re-negotiation of Unconscionable Terms*) Act, 2017³¹⁶ are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.³¹⁷ 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.³¹⁸ The question that arises is whether, where such a transaction is later rendered unconscionable due to the

³¹¹ 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 11/1/2020].

³¹² Extractives Industries Transparency Initiative, "Who we are," available at <https://eiti.org/who-we-are> [Accessed on 11/1/2020].

³¹³ 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).

³¹⁴ 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.

³¹⁵ "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].

³¹⁶ 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].

³¹⁷ "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].

³¹⁸ Sec. 16, *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016.

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.³¹⁹ 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.³²⁰

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.³²¹ Sound environmental governance and natural resources management ought to consider these values and principles.³²² 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.³²³ 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

³¹⁹Sturesson, 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.

³²⁰Mandelbaum, 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.

³²¹Article 10(1), Constitution of Kenya 2010.

³²²Prno, 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.

³²³Mui 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)

contribute to the realisation of the sustainable development goals.³²⁴ 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 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.³²⁵

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.³²⁶ 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

³²⁴ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

³²⁵ 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.

³²⁶ 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_Envntal_Dem_Kenya.pdf [Accessed on 15/1/2020].

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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.³²⁷ 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.³²⁸ 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.³²⁹

‘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.³³⁰ 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 participate meaningfully in decision-making; and the right to seek enforcement of environmental laws or compensation for harm.³³¹

Democratic participation of citizenry in political processes is considered as one of the tenets of an open and just society around the world.³³² 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’.³³³ 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.’³³⁴

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.³³⁵ Environmental democracy is therefore an important element in effective environmental governance.

³²⁷Jeffery, Michael I, "Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice," *Journal of South Pacific Law* 9, no. 2 (2005).

³²⁸Ibid.

³²⁹“Part II: State of the environment,” 54. Available at https://www.environment.gov.za/sites/default/files/docs/part2_environmental_governnce.pdf [Accessed on 15/1/2020].

³³⁰Environmental Democracy Index, ‘Background and Methodology: Environmental Democracy Background,’ available at http://environmentaldemocracyindex.org/about/background_and_methodology [Accessed on 15/1/2020].

³³¹ Ibid.

³³²See 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.

³³³ Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 64.

³³⁴ Ibid, at 65.

³³⁵Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.2. Available at

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.³³⁶ Principle 10 of the 1992 *Rio Declaration on Environment and Development*³³⁷ 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.'³³⁸

Although not directly applicable to Kenya, the *Aarhus Convention*³³⁹ 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 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").³⁴⁰

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'.³⁴¹

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.³⁴² Sustainable Development Goal (SDGs) 16 aims to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective,

http://environmentaldemocracyindex.org/sites/default/files/files/EDI_Technical%20Note%20Final%207_9_15.pdf [Accessed on 15/1/2020].

³³⁶Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 99.

³³⁷Report 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.

³³⁸ *Rio Declaration on Environment and Development the United Nations Conference on Environment and Development*.

³³⁹ 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.

³⁴⁰European Commission, *The Aarhus Convention: What is the Aarhus Convention?* Available at <http://ec.europa.eu/environment/aarhus/> [Accessed on 15/1/2020].

³⁴¹Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 102.

³⁴²Gellers, 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.

accountable and inclusive institutions at all levels'.³⁴³ The SDGs also seek to promote participation of local communities in natural resource management.³⁴⁴ 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.³⁴⁵

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.³⁴⁶

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 it is the correct thing that you have this empowerment.³⁴⁷ Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.³⁴⁸

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.³⁴⁹ Sustainable development needs to draw upon the best knowledge available from the relevant scientific and stakeholder communities.³⁵⁰ 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.³⁵¹

³⁴³United Nations, *transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

³⁴⁴Ibid, Goal 6b.

³⁴⁵Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.1.

³⁴⁶Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online*, Vol. 2, No 1, 2009, p.121.

³⁴⁷The 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].

³⁴⁸Miller, 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.

³⁴⁹Petts, 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.

³⁵⁰Daniels, 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].

³⁵¹Ibid, p.4.

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.³⁵²

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.³⁵³ The State is however obligated to publish and publicise any important information affecting the nation.³⁵⁴ These constitutional provisions are buttressed by the *Access to Information Act, 2016*³⁵⁵ 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.³⁵⁶

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*³⁵⁷ 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.³⁵⁸

³⁵²Article 10(2), Constitution of Kenya 2010.

³⁵³Article 35(1), Constitution of Kenya 2010.

Article 35(3), Constitution of Kenya 2010.

³⁵⁵*Access to Information Act*, No. 31 of 2016, Laws of Kenya.

³⁵⁶Section 18, *Environment and Land Court Act*, No. 19 of 2011, Laws of Kenya.

³⁵⁷*Public Participation (No. 2) Act, 2019*, Nairobi, 11th October, 2019), Kenya Gazette Supplement No. 170 (National Assembly Bills No. 71).

³⁵⁸Preamble, *Public Participation (No. 2) Act, 2019*.

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.*”³⁵⁹

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.³⁶⁰

Environmental democracy is a means to an end; the aim is to achieve environmental justice.³⁶¹ 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’.³⁶²

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.³⁶³ 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.

³⁵⁹ See also *County Public Participation Guidelines 2016*.

³⁶⁰ *In The Matter of the National Land Commission [2015] eKLR*, para. 21; See also Muigua, K., *et al*, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

³⁶¹ 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].).

³⁶² Article 22(1), Constitution of Kenya 2010.

³⁶³ 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.

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.³⁶⁴ 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’.³⁶⁵

In addition, ‘achieving environmental justice requires that vulnerable communities have opportunities to participate meaningfully in decision-making processes’.³⁶⁶ Equipping underrepresented groups with environmental information and avenues for influencing policy decisions is also believed to strengthen the values and practices associated with democracy’.³⁶⁷ Different forms of participatory processes have also been suggested as a way of improving environmental governance.³⁶⁸

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’.³⁶⁹ Courts have also commented on this right and affirmed its importance in expressing personal views as part of a democratic society.³⁷⁰

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.³⁷¹ 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..³⁷²

³⁶⁴World Resources Institute, “The Access Initiative (TAI),” available at <http://www.wri.org/our-work/project/access-initiative-tai/commissions> [Accessed on 15/1/2020].

³⁶⁵Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 100.

³⁶⁶ Ibid, at 100.

³⁶⁷ Ibid, at 100.

³⁶⁸ Ibid, at 102.

³⁶⁹ Article 37, Constitution of Kenya 2010.

Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others [2016] eKLR, Petition 169 of 2016.

³⁷¹ Ibid.

³⁷² Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 65.

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.³⁷³ 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.³⁷⁴

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.³⁷⁵ 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.³⁷⁶

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.³⁷⁷

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.³⁷⁸ 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.³⁷⁹

³⁷³Article 118 (1), Constitution of Kenya 2010.

³⁷⁴See 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.

³⁷⁵Dyck, 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].

³⁷⁶ Ibid, at 11.

³⁷⁷ 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.

³⁷⁸Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 103.

³⁷⁹Hazen, S., "Environmental democracy," *Our Planet* 8.6-March 1997, op cit.

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.³⁸⁰ 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*³⁸¹ 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***³⁸²(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 through public participation. Competition for scarce resources may lead to a ‘survival of the fittest’ situation.³⁸³

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.³⁸⁴ Environmental justice ensures equitable treatment of people in ensuring access to and sharing of environmental resources and justice in environmental matters.³⁸⁵

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the Constitution.³⁸⁶ This is the true essence of environmental democracy; affording communities guaranteed and

³⁸⁰GH, Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* para. 20.

³⁸¹Petition No. 1 of 2014; [2014] eKLR.

³⁸²See also *in the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference No. 2 of 2014, Para. 340.

³⁸³ See generally, “Section 5: Survival at Stake: Violent Land Conflict in Africa,” *Small Arms Survey 2013*, available at <http://www.smallarmsurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Section-5-EN.pdf> [Accessed on 15/1/2020].

³⁸⁴Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), p. 332.

³⁸⁵United States Environmental Protection Agency, ‘Environmental Justice Analysis’, available at <http://www.epa.gov/sustainability/analytics/environmental-justice.htm> [Accessed on 15/1/2020]. .

³⁸⁶See Art. 60(1) (g); Art. 159.

meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.³⁸⁷

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.

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.³⁸⁸

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

³⁸⁷Ristanić, 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].

³⁸⁸International 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].

considerations through its judgments and declarations.³⁸⁹ 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).³⁹⁰

Section 3 (5) of *Environment (Management and Coordination) Act 1999*³⁹¹ (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 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”.³⁹²

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.³⁹³

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

³⁸⁹Gupta, 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.

³⁹⁰United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

³⁹¹No. 8 of 1999, Laws of Kenya.

³⁹²Para 22, *Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others* [2017] eKLR.

³⁹³International 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].

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.

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.³⁹⁴ 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.³⁹⁵ These mineral resources come with great hopes of boosting the country's development agenda.³⁹⁶

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 2010.³⁹⁷

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.³⁹⁸

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.³⁹⁹

³⁹⁴KPMG, "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].

³⁹⁵Scola 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.

³⁹⁶Ndemo, 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.

³⁹⁷See Articles 10; 60, 69, Constitution of Kenya 2010.

³⁹⁸EITI 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.

³⁹⁹Gary, 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].

Despite this commitment, Kenya is currently neither compliant nor a candidate country.⁴⁰⁰ 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.⁴⁰¹ 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.⁴⁰²

The Mining Act 2016⁴⁰³ is to apply to the minerals specified in the First Schedule⁴⁰⁴. Notably, the Act does not apply to petroleum and hydrocarbon gases⁴⁰⁵. 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.

The Mining Act has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits⁴⁰⁶; structures for negotiating mineral agreements⁴⁰⁷; terms and conditions for minimum activity and work programs, structure for payments⁴⁰⁸; and artisanal and small scale mining operations⁴⁰⁹. Previously, these have been the subject of several court matters hence the need to settle the same by way of substantive statutory provisions.⁴¹⁰

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 sector⁴¹¹, as part of the efforts to improve resource exploitation in the country, and this is the Ministry of

⁴⁰⁰EITI, "Base Titanium," available at <https://eiti.org/supporter/base-titanium> [Accessed on 16/1/2020].

⁴⁰¹Open Government Partnership, "Kenya: Publish Oil and Gas Contracts (KE0013)," available at <https://www.opengovpartnership.org/members/kenya/commitments/KE0013/> [Accessed on 16/1/2020].

⁴⁰²Ibid.

⁴⁰³Mining Act, No. 12 of 2016, Laws of Kenya.

⁴⁰⁴The 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.

⁴⁰⁵These 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.

⁴⁰⁶Part ix—Surface Rights Compensation and Disputes (sections 151-157).

⁴⁰⁷Part VII—Mineral Agreements (sections 117-142).

⁴⁰⁸Part XII—Financial Provisions (sections 182-190).

⁴⁰⁹Act, 2016, Sections 92-100.

⁴¹⁰See 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.

⁴¹¹Ministry of Mining, Available at

<http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 16/1/2020].

Mining and Petroleum⁴¹². 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*⁴¹³. 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).⁴¹⁴

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, 2019⁴¹⁵ 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.⁴¹⁶

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.⁴¹⁷

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*.⁴¹⁸

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.⁴¹⁹ 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.⁴²⁰ This includes any decision-making or implementation of any law affecting the mining

⁴¹²<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.

⁴¹⁴<http://www.mining.go.ke/index.php/about-us/about-ministry> [Accessed on 16/1/2020].

⁴¹⁵ Petroleum Act, Act No. 2 of 2019, Laws of Kenya.

⁴¹⁶ Ibid, Preamble.

⁴¹⁷ Sec. 3, Petroleum Act, 2019.

⁴¹⁸ See Article 260; and Section Five of the Constitution of Kenya 2010.

⁴¹⁹ Constitution of Kenya, Art. 69.

⁴²⁰ Article 10(1), Constitution of Kenya.

sector.⁴²¹ 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.⁴²²

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.⁴²³

c) Mining Act, 2016

To realise the vision of hope and growth in the mining sector, the *Mining Act 2016*⁴²⁴ 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.⁴²⁵ 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.⁴²⁶ 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 Schedule⁴²⁷. Notably, the Act does not apply to petroleum and hydrocarbon gases⁴²⁸. The Act establishes a state mining corporation which shall be the investment arm of the national government in respect of minerals.⁴²⁹ 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

⁴²¹For instance, see *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR, Civil Appeal 105 of 2015.

⁴²²Republic of Kenya, *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, p. 1.

⁴²³*Ibid*, p.7.

⁴²⁴Mining Act, No. 12 of 2016, Laws of Kenya.

⁴²⁵*Ibid*, preamble.

⁴²⁶Mining Act, 2016, sec. 223.

⁴²⁷The 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.

⁴²⁸These 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.

⁴²⁹ Mining Act, 2016, Sec. 22(1).

agreements.⁴³⁰ 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.⁴³¹

The *Mining Act, 2016* has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits⁴³²; structures for negotiating mineral agreements⁴³³; terms and conditions for minimum activity and work programs, structure for payments⁴³⁴; and artisanal and small scale mining operations⁴³⁵.

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.

d) Mining Regulations and Guidelines

i. *Mining (Dealings in Minerals) Regulations, 2017*

The *Mining (Dealings in Minerals) Regulations, 2017*⁴³⁶ 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.⁴³⁷ However, these Regulations are not to apply to the export and import of rough diamonds.⁴³⁸

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.⁴³⁹ 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.⁴⁴⁰ 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.⁴⁴¹ Traders still find a way of bypassing these rules to continue with the illegal trading

⁴³⁰ Ibid, secs. 30 & 31.

⁴³¹ Mining Act, 2016, Sec. 17.

⁴³² Part ix—Surface Rights Compensation and Disputes (sections 151-157).

⁴³³ Part VII—Mineral Agreements (sections 117-142).

⁴³⁴ Part XII—Financial Provisions (sections 182-190).

⁴³⁵ Mining Act, 2016, Sections 92-100.

⁴³⁶ 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].

⁴³⁷ *Mining (Dealings in Minerals) Regulations, 2017*, Regulation 3(1).

⁴³⁸ Ibid, Regulation 3(2).

⁴³⁹ *Mining (Dealings in Minerals) Regulations, 2017*, Regulation 9(5).

⁴⁴⁰ 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].

⁴⁴¹ 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

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.⁴⁴² 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.⁴⁴³

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.

ii. Mining (Licence and Permit) Regulations, 2017

The *Mining (Licence and Permit) Regulations, 2017*⁴⁴⁴ 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.⁴⁴⁵

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.⁴⁴⁶ 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.⁴⁴⁷ 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.⁴⁴⁸ This is mainly attributed to the fact that being a nascent, capital intense and high-risk sector, it is difficult for local

<https://www.standardmedia.co.ke/article/2001292787/kenya-losing-billions-to-minerals-smuggling-cartels> [Accessed on 16/1/2020].

⁴⁴²Senelwa, 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].

⁴⁴³Ibid.

⁴⁴⁴*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].

⁴⁴⁵*Mining (Licence and Permit) Regulations, 2017*, Regulation 3.

⁴⁴⁶*Mining (Licence and Permit) Regulations, 2017*, Regulation 4.

⁴⁴⁷Part ix — Artisanal Mining Permit.

⁴⁴⁸Komu, 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].

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.⁴⁴⁹

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

The *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*⁴⁵⁰ were enacted by the Cabinet Secretary in exercise of the powers conferred by section 221 (1)⁴⁵¹ 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.⁴⁵²

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, 2016⁴⁵³.

iv. Mining (State Participation) Regulations, 2017

The *Mining (State Participation) Regulations, 2017*⁴⁵⁴ were enacted by the Cabinet Secretary in exercise of Section 48(4)⁴⁵⁵ of the Mining Act, 2016. The purpose of these Regulations is to provide

⁴⁴⁹Ibid.

⁴⁵⁰*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].

⁴⁵¹221. (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.

⁴⁵²Clause 3, *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*.

⁴⁵³Access to Information Act, No. 31 of 2016, Laws of Kenya.

⁴⁵⁴*Mining (State Participation) Regulations, 2017*, Legal Notice No. 84 of 2017, Laws of Kenya.

⁴⁵⁵(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.

for State participation in prospecting or mining operations carried out by a holder of a mineral right.⁴⁵⁶

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.⁴⁵⁷

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.⁴⁵⁸ 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.⁴⁵⁹ 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.⁴⁶⁰

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

The *Mining (Use of Local Goods and Services) Regulations, 2017*⁴⁶¹ 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.⁴⁶²

⁴⁵⁶*Mining (State Participation) Regulations, 2017*, Regulation 3.

⁴⁵⁷*Ibid*, Regulation 4.

⁴⁵⁸*Ibid*, Regulation 5 (1).

⁴⁵⁹Sanga, 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].

⁴⁶⁰Kamau, 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].

⁴⁶¹*Mining (Use of Local Goods and Services) Regulations, 2017*, Legal Notice No. 83 of 2017, Laws of Kenya.

⁴⁶²*Ibid*, Regulation 3.

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.⁴⁶³ 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.⁴⁶⁴ The plan, if approved, shall form part of the conditions or obligations under the licence.⁴⁶⁵

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.⁴⁶⁶ 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.

vi. *Mining (Employment and Training) Regulations, 2017*

⁴⁶³Ibid, Regulation 5.

⁴⁶⁴Ibid, Regulation 6(1).

⁴⁶⁵Ibid, Regulation 6(4).

⁴⁶⁶See 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.

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The *Mining (Employment and Training) Regulations, 2017*⁴⁶⁷ were enacted by the Cabinet Secretary in exercise of powers conferred by sections 46(3)⁴⁶⁸ 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.⁴⁶⁹

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.⁴⁷⁰ 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.⁴⁷¹

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.⁴⁷² For

⁴⁶⁷*Mining (Employment and Training) Regulations, 2017*, Legal Notice No. 82, Laws of Kenya.

⁴⁶⁸(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.

⁴⁶⁹*Mining (Employment and Training) Regulations, 2017*, Regulation 3.

⁴⁷⁰*Ibid*, Regulation 4.

⁴⁷¹*Ibid*, Regulation 5 (1).

⁴⁷²Matthysen, 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

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.⁴⁷³ 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.⁴⁷⁴

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”.

vii. Mining (Use of Assets) Regulations, 2017

The *Mining (Use of Assets) Regulations, 2017*⁴⁷⁵ were enacted by the Cabinet Secretary in exercise of the powers conferred by Section 149(6)⁴⁷⁶ 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.⁴⁷⁷

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

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].

⁴⁷³Masinde, 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].

⁴⁷⁴Rodgers 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.

⁴⁷⁵*Mining (Use of Assets) Regulations, 2017*, Legal Notice No. 80 of 2017, Laws of Kenya.

⁴⁷⁶The Cabinet Secretary shall prescribe Regulations on the use of the assets.

⁴⁷⁷*Mining (Use of Assets) Regulations, 2017*, Regulations 3 & 4.

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.⁴⁷⁸ 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.⁴⁷⁹ The extractive or mining industries generally have long been touted as key to anchor 'development' or 'economic growth' to alleviate poverty in developing countries.⁴⁸⁰

Despite this, African countries have largely exhibited low levels of development and poor standards of living.⁴⁸¹ 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.⁴⁸²

At the continental level, the *Africa Mining Vision*⁴⁸³ 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.⁴⁸⁴

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

⁴⁷⁸Abuya, 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 16/1/2020].

⁴⁷⁹ Ibid, p.63.

⁴⁸⁰Murombo, 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.

⁴⁸¹African 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].

⁴⁸²Ibid, 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].

⁴⁸³African 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].

⁴⁸⁴See 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_frasier_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.

communities are also yet to boast of any significant benefits from the mining activities going on within their regions.⁴⁸⁵

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 2009.⁴⁸⁶ 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).⁴⁸⁷

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.⁴⁸⁸ 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.⁴⁸⁹

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*

⁴⁸⁵Ndemo, 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].

⁴⁸⁶Trading Economics, "Kenya GDP from Mining," available at <https://tradingeconomics.com/kenya/gdp-from-mining> [Accessed on 16/1/2020].

⁴⁸⁷Republic 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].

⁴⁸⁸Michira, 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].

⁴⁸⁹*Ibid.*

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.*⁴⁹⁰ 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.

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.⁴⁹¹ 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.⁴⁹²

The oil and gas sector is mainly governed by the Petroleum Act, 2019⁴⁹³ 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.⁴⁹⁴ The 2019 Act came into effect on 28 March

⁴⁹⁰*Mining (Use of Local Goods and Services) Regulations, 2017, Regulation 5.*

⁴⁹¹National Oil, "Wells Drilled," available at <https://nationaloil.co.ke/wells-drilled/> [Accessed on 16/1/2020].

⁴⁹²Oxford 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].

⁴⁹³Petroleum Act, Act No. 2 of 2019, Laws of Kenya.

⁴⁹⁴*Ibid*, Preamble.

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.⁴⁹⁵

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.⁴⁹⁶ 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.⁴⁹⁷ 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.⁴⁹⁸

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.⁴⁹⁹ A person who refuses to furnish the information requested under section 47 or who makes a false statement or a statement which he 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.⁵⁰⁰

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.⁵⁰¹ 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.⁵⁰² 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.⁵⁰³

The Act also provides for revenue sharing among the National Government, county governments and the local communities.⁵⁰⁴ The *Petroleum Act, 2019* also includes a Model Production Sharing Contract ("Model PSC")⁵⁰⁵ to be used by the Cabinet Secretary when entering into a petroleum

⁴⁹⁵Sec. 3, Petroleum Act, 2019.

⁴⁹⁶Sec. 18, Petroleum Act, 2019.

⁴⁹⁷Sec. 45, Petroleum Act, 2019.

⁴⁹⁸Ibid, Sec. 46.

⁴⁹⁹Ibid, Sec. 47.

⁵⁰⁰Ibid, Sec. 48.

⁵⁰¹Ibid, Sec. 50.

⁵⁰²Ibid, Sec. 53(1).

⁵⁰³Sec. 53(2), Petroleum Act, 2019.

⁵⁰⁴Sec. 57 & 58, Petroleum Act, 2019.

⁵⁰⁵https://www.ketraco.co.ke/opencms/export/sites/ketraco/learn/maps/Legal_

agreement.⁵⁰⁶ The Act defines the specific minimum contents of the model PSC.⁵⁰⁷ 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.⁵⁰⁸ 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.⁵⁰⁹ Over the years, and with the recognition of the potentially positive and negative effects of the extractives, there has been an evolution at the international level to establish hard and soft rules to govern the impacts of the extractive industries.⁵¹⁰

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.⁵¹¹ 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.⁵¹²

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.⁵¹³ Apart from the oil and gas resources,

Documents/Model_PSC_2015.pdf [Accessed on 16/1/2020].

⁵⁰⁶Schedule to the Act.

⁵⁰⁷Ibid.

⁵⁰⁸United 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].

⁵⁰⁹The World Bank, "Extractive Industries: Overview," available at <https://www.worldbank.org/en/topic/extractiveindustries/overview> [Accessed on 16/1/2020].

⁵¹⁰Van 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.

⁵¹¹United 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].

⁵¹²Ibid, p.7.

⁵¹³Tullow 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].

the other notable mining activities in the country include: Soda ash; magnesite; fluorspar; titanium; diatomite; gold; and carbon dioxide, among others.⁵¹⁴

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.⁵¹⁵

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.⁵¹⁶ Currently, there are about 52 implementing countries, and the EITI is supported by a coalition of government, companies, and civil society.⁵¹⁷

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.⁵¹⁸ 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.⁵¹⁹

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.⁵²⁰ 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.⁵²¹

⁵¹⁴ 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].

⁵¹⁵ Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ 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].

⁵¹⁹ 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].

⁵²⁰ Open Government Partnership, "Extractive Industry Transparency Initiative (EITI)," 18th June 2018.

⁵²¹ Ibid.

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.⁵²²

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.⁵²³ 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.⁵²⁴ 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 seen as a neoliberal instrument and thus not in accord with the ideological position of the government.⁵²⁵

5.4.3 Accountability and Transparency in Benefit Sharing: Avoiding the Resource Curse

a. The Natural Resources (Benefit Sharing) Bill, 2018

The *Natural Resources (Benefit Sharing) Bill, 2018*⁵²⁶ 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.⁵²⁷

Notably, the legislation shall apply to the following natural resources— sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.⁵²⁸ The

⁵²²EITI 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].

⁵²³Ibid, p.9.

⁵²⁴Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

⁵²⁵Ibid.

⁵²⁶Kenya Gazette Supplement No.130 (Senate Bills No.31).

⁵²⁷Memorandum of Objects and Reasons, Natural Resources (Benefit Sharing) Bill, 2018.

⁵²⁸ Clause 3, Natural Resources (Benefit Sharing) Bill, 2018.

legislation, if enacted, will also amend the Mining Act 2016 by amending section 83 thereof in order to review the royalties payable.⁵²⁹

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.⁵³⁰ 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.⁵³¹

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 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.⁵³²

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.⁵³³

⁵²⁹ Clause 19, Natural Resources (Benefit Sharing) Bill, 2018.

⁵³⁰ 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].

⁵³¹ Ibid.

⁵³² 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].

⁵³³ 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].

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.⁵³⁴ 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.⁵³⁵ 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.⁵³⁶ 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.⁵³⁷

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 on accountability and transparency, we are yet to see the publication of such contracts touching on oil and gas agreements in the country.⁵³⁸ It is estimated that so far, out of the 44 Production Sharing Contracts signed by the government of Kenya, only 10 have been publicised.⁵³⁹ 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.⁵⁴⁰ 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

⁵³⁴Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

⁵³⁵EITI, "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].

⁵³⁶EITI, "How We Work," <https://eiti.org/about/how-we-work#upholding-the-standard-internationally-validation>

⁵³⁷Wahome, 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].

⁵³⁸See 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].

⁵³⁹Kidunduhu, 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].

⁵⁴⁰*Ibid.*

non-existent.⁵⁴¹ 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.⁵⁴²

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.⁵⁴³ 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.⁵⁴⁴ 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.⁵⁴⁵

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.⁵⁴⁶ 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.

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.⁵⁴⁷ 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.⁵⁴⁸ The details of such deals remain few.

⁵⁴¹Ibid.

⁵⁴²Ibid.

⁵⁴³Makore, 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].

⁵⁴⁴Ibid.

⁵⁴⁵Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 109.

⁵⁴⁶Munyua, 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.

⁵⁴⁷Petroleum Act 2019, sec. 36-39.

⁵⁴⁸Presidential 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].

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.⁵⁴⁹

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.⁵⁵⁰

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 in the world at the time of independence in 1966 to an upper-middle income country.⁵⁵¹ Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.⁵⁵²

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

⁵⁴⁹Welimo, 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].

⁵⁵⁰Kenya 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://kcspong.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.

⁵⁵¹Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

⁵⁵²Ibid, p.61.

sustainable economic development.⁵⁵³ The EITI Requirements are minimum requirements and implementing countries are encouraged to go beyond them where stakeholders agree that this is appropriate.⁵⁵⁴

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 consultations⁵⁵⁵, 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 2018⁵⁵⁶, this section explores ways in which Kenya can tap into its diverse blue resources, with the 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.⁵⁵⁷

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

⁵⁵³Claudine 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].

⁵⁵⁴EITI 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.

⁵⁵⁵*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.

⁵⁵⁶Conference 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].

⁵⁵⁷Guleid, M., "True value of the blue economy to Kenya," *Standard Digital*, 29th Nov 2018. Available at <https://www.standardmedia.co.ke/article/2001304390/true-value-of-the-blue-economy-to-kenya> [Accessed on 17/1/2020].

ocean ecosystem."⁵⁵⁸ 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.⁵⁵⁹

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.⁵⁶⁰

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.

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.⁵⁶¹ 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.⁵⁶²

⁵⁵⁸The 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].

⁵⁵⁹World 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].

⁵⁶⁰UNDP, “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.

⁵⁶¹UNDP, “Leveraging the Blue Economy for Inclusive and Sustainable Growth,” *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.5.

⁵⁶²See 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].

Furthermore, Kenya is confronted with border disputes, the dispute with Somalia over the maritime boundary⁵⁶³, 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.⁵⁶⁴ 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.⁵⁶⁵

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.⁵⁶⁶ 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.⁵⁶⁷

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.⁵⁶⁸ Kenya has not yet invested in this potentially lucrative area thus occasioning loss of income and opportunities for the Kenyan people. It is also a potential solution to the food insecurity problem in Kenya through maximizing on the seafood harvesting.⁵⁶⁹

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 2017.⁵⁷⁰ During the Blue Economy Conference, there was emphasis on the need to

⁵⁶³Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

⁵⁶⁴UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.5.

⁵⁶⁵USAID, "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].

⁵⁶⁶UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.5.

⁵⁶⁷Ibid, p.5.

⁵⁶⁸Ibid, p.5.

⁵⁶⁹USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," op. cit.

⁵⁷⁰Benkenstein, A., "Prospects for the Kenyan Blue Economy," South African Institute of International Affairs, Policy Insights 62, July, 2018, p.1.

Available at https://saiaa.org.za/wp-content/uploads/2018/07/saia_spi_62_benkestein_20180718.pdf [Accessed on 17/1/2020].

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.⁵⁷¹

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.

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.⁵⁷² 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.⁵⁷³

Effective Natural Resources Management (NRM) contemplates the use, access of resources to preserve and conserve for the good of all generations.⁵⁷⁴ The NRM role is bestowed upon the state

⁵⁷¹Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya, p.4.

⁵⁷²Lohde, 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 21/01/2020].

⁵⁷³Ibid.

⁵⁷⁴Child, B., et al, *Zimbabwe's CAMPFIRE Programme: Natural Resource Management by the People*. (1997) IUCN-ROSA Environmental Issues Series No. 2

but with duty on cooperation from everyone to ensure that there is sound use of the natural resource.⁵⁷⁵ 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.⁵⁷⁶ The issue of benefit sharing has been a great challenge.⁵⁷⁷

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.⁵⁷⁸ Expanding extractive industries, particularly in sub-Saharan Africa, is characterized by increasing levels of political, social, technical and environmental risk.⁵⁷⁹ 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.⁵⁸⁰ 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.⁵⁸¹ 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.⁵⁸²

⁵⁷⁵See Article 69, Constitution of Kenya 2010.

⁵⁷⁶See 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].

⁵⁷⁷Ochola, 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].

⁵⁷⁸Kagwe, 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].

⁵⁷⁹Alstine, J.V., et al, Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

⁵⁸⁰Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 55.

⁵⁸¹Samndong, 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 21/01/2020].

⁵⁸²See '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].

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.⁵⁸³ 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.⁵⁸⁴

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.⁵⁸⁵ Turkana County has been documented as one of the Counties with the highest level of poverty in Kenya.⁵⁸⁶ The distrust between local communities around the region against each other⁵⁸⁷ has led to constant conflicts as well as cross border conflicts.⁵⁸⁸ The conflict is largely sparked by livestock rustling, harsh climate and boundary dispute. Due to low literacy levels,⁵⁸⁹ other communities have subsequently been employed as locals had no skills for drilling and seismic work.⁵⁹⁰

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.⁵⁹¹ Pegging hopes of development on the extractive resources only may mean that the region remains under-developed or

⁵⁸³Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of ‘New Oil’ In Uganda, op cit, p. 48.

⁵⁸⁴Ibid, p. 48.

⁵⁸⁵See 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/Security1.authcheckdam.pdf [Accessed on 21/01/2020].

⁵⁸⁶*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].

⁵⁸⁷Bollig, 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].

⁵⁸⁸Johannes, 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.

⁵⁸⁹Chikwanha, 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].

⁵⁹⁰See 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/-/vvpnq1z/-/index.html> [Accessed on 21/01/2020].

; Kenya National Bureau of Statistics, *Exploring Kenya’s Inequality: Pulling Apart or Pooling Together?*

⁵⁹¹Sigam, 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 21/01/2020]

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.⁵⁹² Failed economies result in conflicts,⁵⁹³ as a result of natural resources bad governance or mismanagement.⁵⁹⁴

Skewed distributions of benefits from natural resources can fuel social exclusion and conflict, threatening sustainability.⁵⁹⁵ 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.⁵⁹⁶ 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.⁵⁹⁷ 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.⁵⁹⁸

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.⁵⁹⁹ 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.⁶⁰⁰

The principle of equitable benefit sharing is acknowledged in several international environmental and natural resources law instruments⁶⁰¹ some of which are highlighted in this section. As a potentially major importer of oil in future,⁶⁰² the discovery of oil is deemed as a major boost to the Kenyan economy.⁶⁰³ The economic value of oil is expected to be high and central to the

⁵⁹²See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012.)

⁵⁹³Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

⁵⁹⁴Billion, 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].

⁵⁹⁵Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' *World Development*, Vol. 72, pp. 408–418, 2015, p. 408.

⁵⁹⁶Herbling, D., 'Tullow's Sh 150bn Exploration bill Raises Queries on Costing methods,' *Business Daily*, Monday, AQRil 18, 2016 (Nation Media Group Publication No. 2331), pp. 1 & 4.

⁵⁹⁷Ibid, p. 1.

⁵⁹⁸Ibid, p. 4.

⁵⁹⁹Jonge, B., *What is Fair and Equitable Benefit Sharing?* *Journal on agricultural and environmental ethics*, vol. 24, issue 2, 2011.

⁶⁰⁰UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1.

⁶⁰¹*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].

⁶⁰²The 2015 Economic Survey Report by Kenya National Bureau of Statistics.

⁶⁰³<http://www.tradingeconomic.com/kenya/imports> [Accessed on 21/01/2020].

development of the local community, though it has its benefits and challenges in equal measure.⁶⁰⁴ 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.⁶⁰⁵ 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 in accordance with the laid down constitutional principles.⁶⁰⁶ Land in Kenya is also classified as public, community or private.⁶⁰⁷ 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.⁶⁰⁸

The *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016*⁶⁰⁹ is meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.⁶¹⁰ Notably and as already discussed in a previous section, the Act outlines the relevant considerations in deciding whether or not to ratify an agreement.⁶¹¹

The proposed legislation *Natural Resources (Benefit Sharing Bill), 2018*⁶¹² 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

⁶⁰⁴BBC (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.

⁶⁰⁵Kenya 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].

⁶⁰⁶Art. 60(1), Constitution of Kenya 2010.

⁶⁰⁷Art. 61(2), Constitution of Kenya 2010.

⁶⁰⁸Art. 62(1) (f) (i), Constitution of Kenya 2010.

⁶⁰⁹ Act No. 41 of 2016, Laws of Kenya.

⁶¹⁰See also S. 124A, *Environment (Management and Coordination) Act*, No.8 of 1999, Laws of Kenya.

⁶¹¹Sec. 9, *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016*.

⁶¹²*Natural Resources (Benefit Sharing) Bill, 2018*, 23rd October, 2018 (Government Printer, Nairobi, 2018), Kenya Gazette Supplement No.130 (Senate Bills No.31).

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.⁶¹³ 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.⁶¹⁴

The *Environmental Management and Co-ordination (Amendment) Act, 2015*⁶¹⁵ 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.⁶¹⁶ 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, 2016⁶¹⁷ 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*⁶¹⁸ provides that the relationship between the Government and an exploration and production company is governed by a Production Sharing Contract (PSC).⁶¹⁹ 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.⁶²⁰

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.⁶²¹ 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.⁶²² 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

⁶¹³Clause 4, *Natural Resources (Benefit Sharing Bill), 2018*.

⁶¹⁴Clause 6, *Natural Resources (Benefit Sharing Bill), 2018*.

⁶¹⁵No. 5 of 2015, Laws of Kenya.

⁶¹⁶S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

⁶¹⁷Mining Act, No. 12 of 2016, Laws of Kenya

⁶¹⁸Petroleum Act, No. 2 of 2019, Laws of Kenya.

⁶¹⁹Ibid, sec. 18.

⁶²⁰See Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 248-251; Petroleum Act, 2019, Schedule.

⁶²¹Sec. 50(1), *Petroleum Act, 2019*.

⁶²²Sec 50(3) *Petroleum Act, 2019*.

incidentals thereto.⁶²³ 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.⁶²⁴ 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.⁶²⁵ 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.⁶²⁶

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.

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.⁶²⁷ 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.⁶²⁸ 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.⁶²⁹

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.⁶³⁰ It is however noteworthy that even in Ghana, it has been observed that as is

⁶²³Preamble, *National Sovereign Wealth Fund Bill*, 2019.

⁶²⁴*National Sovereign Wealth Fund Bill*, 2019, Clause 5.

⁶²⁵Preamble, *Community Land Act*, No. 27 of 2016, Laws of Kenya.

⁶²⁶Sec. 35, *Community Land Act*, 2016.

⁶²⁷Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *Resources Policy*, vol. 40, 2014, pp.74–82, p. 74.

⁶²⁸*Ibid*, p. 75; See S. 25, *Minerals and Mining Act*, 2006 (Act 703), Laws of Ghana.

⁶²⁹*Ibid*, p. 75.

⁶³⁰Standing, 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*

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.⁶³¹ 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.⁶³² 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”.⁶³³ One such country is Nigeria, one of the largest economies of the African continent and one of the leading oil producers in the world.⁶³⁴ 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.⁶³⁵ 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.⁶³⁶ 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.⁶³⁷

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.⁶³⁸ 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.⁶³⁹

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].

⁶³¹Ibid, p. 75.

⁶³²Ibid.

⁶³³Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,’ *Resources Policy*, 38(2013), pp.181–195, p. 181.

⁶³⁴See 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.

⁶³⁵Ibid, p. 3.

⁶³⁶Ibid, p. 2.

⁶³⁷Africa 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].

⁶³⁸Ibid, 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].

⁶³⁹Africa Progress Panel, ‘Equity in Extractives: Stewarding Africa’s natural resources for all,’ *Africa Progress Report 2013*, p. 33.

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.⁶⁴⁰ 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.⁶⁴¹ 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.⁶⁴²

The social and economic development is essential to enable a favourable living and working environment.⁶⁴³ 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.⁶⁴⁴

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.⁶⁴⁵

⁶⁴⁰Ibid.

⁶⁴¹Talbott, 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]

⁶⁴²Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 12.

⁶⁴³ Principle 8, UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

⁶⁴⁴ 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.

⁶⁴⁵Muigua K., et al, *Natural Resources and Access to Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

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.⁶⁴⁶ 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.⁶⁴⁷

Arguably, resource funds (RF) may provide, even to a limited degree, a track record of windfalls.⁶⁴⁸ 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.⁶⁴⁹ 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.⁶⁵⁰ 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.

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 measures⁶⁵¹, and reports on the implementation of environmental legislation and so forth.⁶⁵² 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.⁶⁵³ Communities are also likely to understand the implications of extractive industries on their day to day lives as far as the environment is concerned.

⁶⁴⁶Myrers, 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].

⁶⁴⁷Ibid, p.1.

⁶⁴⁸Tsani, 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.

⁶⁴⁹Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, op cit, p. 50.

⁶⁵⁰Ibid.

⁶⁵¹Convention on Environment Impact Assessment in a Transboundary Context, 1991, calls for the establishment of EIA procedures that involves public participation.

⁶⁵²http://www.citizensinformation.ie/en/environment/environmental_law/access_to_environmental_information.htm[Accessed on 21/1/2020].

⁶⁵³Muigua, 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.

Access to Information Act 2016⁶⁵⁴ 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.⁶⁵⁵ 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.⁶⁵⁶

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.⁶⁵⁷ Ideally, local communities should be allowed to access natural resources for them to be able to uphold their responsibilities for future generations.⁶⁵⁸ 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.

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*,⁶⁵⁹ 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).⁶⁶⁰

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

⁶⁵⁴*Access to Information Act*, 2016, Laws of Kenya (Government Printer, Nairobi, 2016).

⁶⁵⁵*Ibid*, S. 4(1).

⁶⁵⁶*Ibid*, s.2.

⁶⁵⁷Article 6, Constitution of Kenya, 2010.

⁶⁵⁸Article 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*.

⁶⁵⁹Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

⁶⁶⁰*Ibid*, para. 45.

may promote co-existence among indigenous communities and allow investors to carry out their activities peacefully.⁶⁶¹

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.⁶⁶² Corruption has been termed as a threat to protected human security.⁶⁶³ It calls for global effort to combat corruption.⁶⁶⁴ Resources have fostered corruption, undermined inclusive economic growth, incited armed conflict and damaged the environment.⁶⁶⁵ For the governments managing significant resource rents, rent appropriation may be preferable when compared to the promotion of wealth creation policies.⁶⁶⁶ 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.⁶⁶⁷

7.8 Conclusion

Effective management of these resources and equitable benefit sharing are essential.⁶⁶⁸ 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.⁶⁶⁹ Natural resources law represents a

⁶⁶¹See 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.

⁶⁶²Tsani, S., 'Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 184.

⁶⁶³Alao, A., *Natural Resource Management and Human Security in Africa*, in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010).

⁶⁶⁴Lawson, 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].

⁶⁶⁵Aled, 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].

⁶⁶⁶Ibid.

⁶⁶⁷Ibid.

⁶⁶⁸United Nations, transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

⁶⁶⁹Helen 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.

major and perhaps one of the most important regulatory regimes in most countries.⁶⁷⁰ One of the crucial issues addressed by natural resources law is how to avoid harm and serious damage to resources.⁶⁷¹ Therefore, policymakers have a variety of approaches available when legislating to enable holistic protection and management of the environment and natural resources.⁶⁷² 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.⁶⁷³ 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.⁶⁷⁴

Notably, the relationship between development and environment is central to the sustainable development concept.⁶⁷⁵ 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 the year 2030.⁶⁷⁶

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.⁶⁷⁷ 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.⁶⁷⁸ Command and

⁶⁷⁰Hutter, 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.

⁶⁷¹Gunningham, N. & Sinclair, D., 'Designing Smart Regulation,' in Bridget M. Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999), p.305.

⁶⁷²*Ibid*, p.305.

⁶⁷³See 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.

⁶⁷⁴See 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.

⁶⁷⁵'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].

⁶⁷⁶ 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].

⁶⁷⁷Neumayer, 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].

⁶⁷⁸Blanco, E. & Razzaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives*, (Edward Elgar Publishing Limited, 2011), p. 106; See also Miller, B. W. & Morissette, J. T.,

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.⁶⁷⁹ Some argue that ⁶⁸⁰ 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.⁶⁸¹

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 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.⁶⁸² 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.⁶⁸³ 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*⁶⁸⁴ 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

“Integrating research tools to support the management of social-ecological systems under climate change,” *Ecology and Society*, Vol. 19, No. 3, 2014, Art. 41.

⁶⁷⁹Hanks, 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.

⁶⁸⁰Swaney, J.A., “Market versus Command and Control Environmental Policies,” *Journal of Economic Issues*, Vol. 26, No. 2, Jun., 1992, pp. 623-633, p. 624.

⁶⁸¹*Ibid.*

⁶⁸²Fisher, A.D., ‘A Human Rights Based Approach to the Environment and Climate Change’ *A GI-ESCR Practitioner’s Guide*, March 2014.

⁶⁸³*Ibid.*

⁶⁸⁴UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

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.⁶⁸⁵

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.⁶⁸⁶ 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.⁶⁸⁷ Under the ecocentric approach, there is a moral concern for nature.⁶⁸⁸ Some scholars have rightly argued that we should give legal rights to forests, oceans, rivers⁶⁸⁹ and other so-called "natural objects" in the environment-indeed, to the natural environment as a whole.⁶⁹⁰

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.⁶⁹¹ 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.⁶⁹² 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

⁶⁸⁵Ibid, Preamble.

⁶⁸⁶See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers Limited, 2016).

⁶⁸⁷See 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].

⁶⁸⁸See Carter, A., "Towards a multidimensional, environmentalist ethic," *Environmental Values* 20, no. 3 (2011): 347-374.

⁶⁸⁹The 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].

⁶⁹⁰See 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.

⁶⁹¹Bellù, 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].

⁶⁹²Their focus on eliminating poverty and other social ills afflicting the human society in Kenya.

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.⁶⁹³

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.⁶⁹⁴ 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.⁶⁹⁵

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.

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.⁶⁹⁶ 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

⁶⁹³Ojomo, P.A., "Environmental Ethics: An African Understanding," *African Journal of Environmental Science and Technology* 5, no. 8 (2011): 572-578.

⁶⁹⁴World Charter for Nature, Principle 1.

⁶⁹⁵Ibid, Principle 2.

⁶⁹⁶Wilcove 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].

regions.⁶⁹⁷ 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.⁶⁹⁸ 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 2010⁶⁹⁹.

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.

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

Pollinators are important for the provision of ecosystem services.⁷⁰⁰ 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.⁷⁰¹ 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.⁷⁰² 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,

⁶⁹⁷Kluser, 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.

⁶⁹⁸"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].

⁶⁹⁹Constitution of Kenya, 2010, Art. 43.

⁷⁰⁰Dolf 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].

⁷⁰¹Kluser, 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.

⁷⁰²Ibid.

world economies, and human quality of life'.⁷⁰³ 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*⁷⁰⁴ was adopted during the Earth Summit in Rio de Janeiro, with the objective of conservation of biological diversity.⁷⁰⁵ 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'.⁷⁰⁶

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.⁷⁰⁷

The *Agenda 21*⁷⁰⁸ also contains provisions under section 15 thereof on the conservation of biological diversity. Agenda 21 specifically acknowledges that our planet's essential goods and 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.⁷⁰⁹

The *Environmental Management and Co-ordination Act 1999*⁷¹⁰ (EMCA) calls for conservation of 'biological diversity'.⁷¹¹ Notably, EMCA provides for conservation of biological resources in situ and ex-situ.⁷¹² Other provisions in EMCA that are germane to protection of pollinators relate to standards of pesticides and toxic substances.⁷¹³ EMCA further provides for the registration of the pesticide or toxic substance, before importing, manufacturing, processing or reprocessing of pesticides or toxic substance.⁷¹⁴

⁷⁰³San Luis Obispo County, 'Pollinator Information & Resources', op cit., p.1.

⁷⁰⁴United Nations Environment Programme, *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), United Nations, Treaty Series, vol. 1760, p. 79.

⁷⁰⁵*Convention on Biological Diversity*, Art. 1.

⁷⁰⁶*Convention on Biological Diversity*, Art. 2.

⁷⁰⁷Ibid., Art. 6. General Measures for Conservation and Sustainable Use Each Contracting Party.

⁷⁰⁸*Agenda 21* (A/CONF.151/26, vol.II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.

⁷⁰⁹Aichi Biodiversity Targets - Convention on Biological Diversity (CBD), <https://www.cbd.int/sp/targets/> [Accessed on 21/1/2020].

⁷¹⁰*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.

⁷¹¹Ibid., sec. 2.

⁷¹²Ibid., sec. 51; sec. 53(1).

⁷¹³*Environmental Management and Co-ordination Act, 1999*, sec. 94.

⁷¹⁴Ibid., sec. 94(1).

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'.⁷¹⁵ '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.'⁷¹⁶

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.⁷¹⁷ 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.⁷¹⁸ 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.⁷¹⁹

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.⁷²⁰

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

⁷¹⁵Republic of Kenya, *National Environment Policy 2012*, (Government printer, 2012, Nairobi), para. 2.1.

⁷¹⁶Ibid, para. 2.2.

⁷¹⁷See 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.

⁷¹⁸Vanbergen, A.J., "Threats to an ecosystem service: pressures on pollinators," *Frontiers in Ecology and the Environment*, Vol.11, No. 5, 2013, pp.251-259.

⁷¹⁹Ibid, p. 251.

⁷²⁰Rey 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.)

enabling them make informed decisions that would contribute positively to environmental sustainability.⁷²¹

The *Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006*⁷²², 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.

ii. 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.⁷²³ 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.⁷²⁴ This calls for closer working relationship between farmers and the agricultural extension services officers for sensitisation and education on the same.

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.⁷²⁵ Additionally, conventional farmers are advised to be extremely cautious in the choice, timing, and application of insecticides and other chemicals.⁷²⁶ 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.⁷²⁷

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.⁷²⁸ Such a Board ought to closely work with the scientific and technology community and the general public especially

⁷²¹Muigua, 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].

⁷²²Environmental Management and Co-ordination Act, No. 8 of 1999, Legal Notice No. 160 of 2006.

⁷²³Food 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].

⁷²⁴Kings River Conservation District (KRCD), "Agricultural Management Practices," available at http://www.krkd.org/water/water_quality/ag_mgt_practices.html [Accessed on 21/1/2020].

⁷²⁵Nicholls, 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.

⁷²⁶*Ibid.*, p.257.

⁷²⁷*Ibid.*, p.258.

⁷²⁸*Ibid.*, Sec. 5 & 6.

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.

iii. 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.⁷²⁹ The local communities would be able to actively engage potential investors in ensuring environmental sustainability. Principles of public participation in governance and environmental democracy⁷³⁰ as envisaged in the current Constitution of Kenya becomes easier to implement.

iv. 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 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.⁷³¹ 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.

⁷²⁹Heila 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.

⁷³⁰See 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_Envtal_Dem_Kenya.pdf.

⁷³¹Convention on Biological Diversity Secretariat, "TARGET 7 - Technical Rationale extended (provided in document COP/10/INF/12/Rev.1)," op. cit.

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.⁷³²

v. Addressing Climate Change

Scholars have rightly suggested that climate change may be one of the biggest anthropogenic disturbance factors imposed on ecosystems today.⁷³³ 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.⁷³⁴ The *Agenda 2030 on Sustainable Development* urges countries to take urgent action to combat climate change and its impacts.⁷³⁵

8.4 Conclusion

The quest for sustainability and sustainable development requires integrating economic, social, cultural, political, and ecological factors.⁷³⁶ 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.⁷³⁷ 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

⁷³²Thakuria, 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.

⁷³³Pudasaini, 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.

⁷³⁴Ibid.

⁷³⁵United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Goal 13.

⁷³⁶Gallopin, 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.

⁷³⁷Nuta, 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.

out of company's internal commitment to environmental safeguards.⁷³⁸ 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.⁷³⁹

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.⁷⁴⁰ 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.⁷⁴¹

Despite the progressive Kenyan Constitution making great strides in promoting environmental conservation and protection⁷⁴², there is still no evidence of strict environmental culpability in cases of environmental damage, with many of the environmental restoration and protection initiatives being left to the state.⁷⁴³

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*⁷⁴⁴ 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.⁷⁴⁵

⁷³⁸Ibid, at p.47.

⁷³⁹See 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.

⁷⁴⁰Health and Environment Linkages Initiative – HELI, *Health and Environment Linkages Initiative*, available at <http://www.who.int/heli/en/> [Accessed on 21/01/2020].

⁷⁴¹Higenbottam, 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].

⁷⁴²See Section Five of the Constitution, Part 2 (Articles 69-72).

⁷⁴³Article 69 of the Constitution of Kenya 2010.

⁷⁴⁴United 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.

⁷⁴⁵Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," op. cit., at p. 1167.

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The *Montreal Protocol*,⁷⁴⁶ 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.⁷⁴⁷

*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*⁷⁴⁸ 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.⁷⁴⁹

Also relevant is the *Minamata Convention on Mercury*⁷⁵⁰ is a global treaty to protect human health and the environment from the adverse effects of mercury.⁷⁵¹

The International Court of Justice, in the 1997 case concerning the *Gabcikovo-Nagymaros Project* (Hungary and Slovakia)⁷⁵², 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*⁷⁵³ 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.⁷⁵⁴ 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.⁷⁵⁵ 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

⁷⁴⁶Montreal 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.

⁷⁴⁷Arts. 2A-I.

⁷⁴⁸Basel, 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.

⁷⁴⁹Preamble.

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

⁷⁵¹https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-17§ion=27&clang=_en [Accessed on 21/1/2020].

⁷⁵²GabCikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7.

⁷⁵³UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (the Aarhus Convention), 1998

⁷⁵⁴Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Art. 7.

⁷⁵⁵Article 42, Constitution of Kenya 2010 (Government printer, Nairobi, 2010).

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.⁷⁵⁶ 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)*⁷⁵⁷, there are corresponding provisions and requirements under the various sectoral laws on water⁷⁵⁸, land⁷⁵⁹, forests⁷⁶⁰, mining⁷⁶¹, public health⁷⁶², agricultural production⁷⁶³ and energy⁷⁶⁴ 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.

a. 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.⁷⁶⁵ 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).⁷⁶⁶

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.

b. Criminal Liability in Environmental Matters

⁷⁵⁶Shelton, 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].

⁷⁵⁷*Environmental Management and Coordination Act (EMCA)*, Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015).

⁷⁵⁸*Water Act, No. 43 of 2016*, Laws of Kenya.

⁷⁵⁹*Land Act, No. 6 of 2012*, Laws of Kenya.

⁷⁶⁰*Forests Management and Conservation Act, No. 34 of 2016*, Laws of Kenya.

⁷⁶¹*Mining Act, No. 12 of 2016*, Laws of Kenya.

⁷⁶²*Public Health Act, Cap 242*, Laws of Kenya; *Health Act, No. 21 of 2017*, Laws of Kenya.

⁷⁶³*Agriculture, Fisheries and Food Authority Act, 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.

⁷⁶⁴*Energy Act, No. 1 of 2019*, Laws of Kenya.

⁷⁶⁵Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176, 1163.

⁷⁶⁶*Ibid*, at p. 1163.

Criminal law enforces the protection of society from crime, so that the most favorable protection of the environment is achieved in this way.⁷⁶⁷

The *Environmental Management and Coordination Act (EMCA)*, 1999, provides for criminal liability in environmental matters under various sections.⁷⁶⁸ Part XIII of EMCA on environmental offences carries more elaborate provisions on criminal liability in environmental matters.⁷⁶⁹

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.⁷⁷⁰ 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.⁷⁷¹

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.⁷⁷² The *Environment (Management and Conservation) Act (EMCA) 1999*⁷⁷³ 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.⁷⁷⁴

⁷⁶⁷Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

⁷⁶⁸S. 118, EMCA.

⁷⁶⁹Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146.

⁷⁷⁰*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.

⁷⁷¹Birnie, 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].

⁷⁷²Birnie, P. & Boyle, A., *International Law and the Environment*, (2nd ed., Oxford University Press, 2002), p.131-132.

⁷⁷³Act No. 8 of 1999, Laws of Kenya.

⁷⁷⁴Jenje, 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.

d. 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.⁷⁷⁵

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.⁷⁷⁶

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.⁷⁷⁷

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 decision-making and reform, and the World has even demonstrated its commitment to promoting the use of SEA as a tool for sustainable development.⁷⁷⁸

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).⁷⁷⁹ 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.⁷⁸⁰

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.⁷⁸¹

⁷⁷⁵Brown, A.L. & Thérivel, R., 'Effective methodologies: Principles to guide the development of strategic environmental assessment methodology,' op cit, at p. 184.

⁷⁷⁶Ibid; See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42 & 43.

⁷⁷⁷Notably, 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*.

⁷⁷⁸The 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].

⁷⁷⁹*Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya.

⁷⁸⁰Mutui, 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.

⁷⁸¹S. 42, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

The *Environmental (Impact Assessment and Audit) Regulations, 2003*⁷⁸² 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.⁷⁸³ 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.⁷⁸⁴

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.⁷⁸⁵

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.⁷⁸⁶ 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.⁷⁸⁷ The *Environment (Assessment and Audit) Regulations, 2003*⁷⁸⁸ 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.⁷⁸⁹

f. Implementation of Principles of Sustainable Development

The principles of sustainable development as captured in EMCA⁷⁹⁰ 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.

⁷⁸²Legal Notice No. 101 of 2003.

⁷⁸³*Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice No. 101, Regulation 2.

⁷⁸⁴*Ibid*, Regulation 42(3); 43 (1).

⁷⁸⁵Fischer, T.B., 'Strategic environmental assessment in post-modern times,' op cit, at p. 163.

⁷⁸⁶Constitution of Kenya, 2010, Art. 69(1) (f).

⁷⁸⁷The 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].

⁷⁸⁸*Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Laws of Kenya (Government Printer, Nairobi, 2003).

⁷⁸⁹See *Johnson Kamau Njuguna & another v Director of Public Prosecutions* [2018] eKLR, Judicial Review No 9 of 2018.

⁷⁹⁰EMCA, S. 3(5).

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.⁷⁹¹ 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.⁷⁹²

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.⁷⁹³ 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.⁷⁹⁴ 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.⁷⁹⁵ 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

⁷⁹¹Ibid, para. 50.

⁷⁹²International 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.

⁷⁹³ Ibid.

⁷⁹⁴ Ibid.

⁷⁹⁵Schoemaker, P. J., & Schoemaker, J. A., "Estimating environmental liability: Quantifying the unknown," *California Management Review*, Vol.37, no. 3 (1995): 29-61, at p.29.

management practices (think green); articulate a comprehensive risk management program; improve public relations and public citizenship; and assess hidden risks in takeovers and acquisitions.⁷⁹⁶ 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.⁷⁹⁷ There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same.⁷⁹⁸ 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.⁷⁹⁹ 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.⁸⁰⁰

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. 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.⁸⁰¹

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)*).⁸⁰²

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

⁷⁹⁶Ibid, at pp. 29-30.

⁷⁹⁷Article 69(2), Constitution of Kenya.

⁷⁹⁸Preamble, Constitution of Kenya.

⁷⁹⁹Article 69(2), Constitution of Kenya.

⁸⁰⁰See 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].

⁸⁰¹International 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].

⁸⁰²Ibid.

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.⁸⁰³ 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.⁸⁰⁴

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 development policy, rules, plans, investment and action.⁸⁰⁵ 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.⁸⁰⁶ 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.⁸⁰⁷ Traditional knowledge incorporates belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment.⁸⁰⁸

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,

⁸⁰³<https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability> [Accessed on 21/1/2020].

⁸⁰⁴Smith Jr, T.T., "Environmental Damage Liability Insurance—A Primer," *The Business Lawyer* (1983): 333-354, at p.336.

⁸⁰⁵Dalal-Clayton, D. B., & Bass, S., *The challenges of environmental mainstreaming: Experience of integrating environment into development institutions and decisions*, No. 1. IIeD, 2009.

⁸⁰⁶African Regional Intellectual Property Organization, available at <http://www.aripo.org/index.php/services/traditional-knowledge> [Accessed on 22/1/2020].

⁸⁰⁷Ibid.

⁸⁰⁸Ibid.

there were attempts at mainstreaming traditional environmental knowledge in policy, law and action plans as a way of promoting sustainable development.⁸⁰⁹

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.⁸¹⁰

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.⁸¹¹ 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.

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.⁸¹² 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.⁸¹³

Traditional knowledge or traditional ecological knowledge is believed to represent experience acquired over thousands of years of direct human contact with the environment.⁸¹⁴ 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.⁸¹⁵ One of the fields that embraced the use of traditional knowledge is the environment.

⁸⁰⁹WCED, *Our common future: Report of the World Commission on Environment and Development*, G. H. Brundtland, (Ed.). Oxford: Oxford University Press, 1987.

⁸¹⁰Owen, 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.

⁸¹¹The *Rome World Food Summit*, Commitment No. 3.

⁸¹²Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 66.

⁸¹³*Ibid.*

⁸¹⁴Inglis, J., ed., *Traditional ecological knowledge: concepts and cases*, IDRC, 1993, at p. 1.

⁸¹⁵*Ibid.*, p.2.

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.”⁸¹⁶ Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.⁸¹⁷

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.⁸¹⁸ They are thus interested parties when it comes to efforts towards achieving sustainable development and should thus be included.⁸¹⁹

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.⁸²⁰ 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.⁸²¹

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*,⁸²² 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

⁸¹⁶Whyte, 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.

⁸¹⁷Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 67.

⁸¹⁸Crawhall, 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].

⁸¹⁹Ibid, p.8.

⁸²⁰Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p.67.

⁸²¹Ibid, p.67.

⁸²²61/295. *United Nations Declaration on the Rights of Indigenous Peoples*.

of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.⁸²³

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.⁸²⁴

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.⁸²⁵ 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).⁸²⁶ 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.⁸²⁷ 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 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.⁸²⁸ 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.⁸²⁹ This is because such people have the traditional skills needed to help the Government conserve the forests.⁸³⁰ 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.⁸³¹

⁸²³*United Nations Declaration on the Rights of Indigenous Peoples*, Art. 31(1).

⁸²⁴Food 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.

⁸²⁵Art. 11(1), Constitution of Kenya 2010.

⁸²⁶*Ibid*, Art. 11(2) (b) & (3) (b).

⁸²⁷*Ibid*, Art. 69(1) (c),

⁸²⁸See 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].

⁸²⁹Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

⁸³⁰*Ibid*.

⁸³¹Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy*, 2012, p.2.

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.⁸³²

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.⁸³³ 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 of forests and the associated resources.⁸³⁴ During evictions, people have been accused of illegal logging and clearing of forests for settlement and farming.⁸³⁵ In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*⁸³⁶, 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.⁸³⁷ This is compared to situations throughout the world where environmental co-management is said to be taking place between

⁸³²See *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016*, No. 33 of 2016, (Government Printer, Nairobi, 2016).

⁸³³Muigua, 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].

⁸³⁴Soi, 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].

⁸³⁵Murage, 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.

⁸³⁶ELC Civil Suit No. 821 of 2012 (OS).

⁸³⁷Goldman, 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.

scientists and local communities.⁸³⁸ 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.⁸³⁹

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.⁸⁴⁰ It has been argued that 'while trust and community are equally necessary in addressing complex environmental problems, building institutions that foster knowledge and trust, participation and community, is one of the greatest challenges confronting today's human societies'.⁸⁴¹

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'.⁸⁴²

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.⁸⁴³ In Africa, environmental justice mostly entails the right to have access to, use and control over natural resources by communities.⁸⁴⁴

⁸³⁸Ibid.

⁸³⁹African Regional Intellectual Property Organization, *op cit*.

⁸⁴⁰Mohammad, 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.

⁸⁴¹Jasanoff, Sheila, "The dilemma of environmental democracy," *op cit.*, at 65.

⁸⁴²Brundtland, GH, *Our Common Future: report of the World Commission on Environment and Development*, Oxford University, 1987, A/RES/42/187, para. 77.

⁸⁴³Scottish 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].

⁸⁴⁴Obiora, L., "Symbolic Episodes in the Quest for Environmental Justice," *Human Rights Quarterly*, Vol.21, No. 2, 1991, p. 477.

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.⁸⁴⁵ Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.⁸⁴⁶

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.⁸⁴⁷ 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.⁸⁴⁸

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.⁸⁴⁹

10.5 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.⁸⁵⁰ This will improve

⁸⁴⁵Ellis, 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.

⁸⁴⁶Ibid at p. 67.

⁸⁴⁷Gorjestani, 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].

⁸⁴⁸Retnowati, 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.

⁸⁴⁹Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

⁸⁵⁰Whyte, 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.

cooperative environmental and natural resources stewardship and management between indigenous and non-indigenous institutions.⁸⁵¹

11. Effective Environmental Management and Governance for Peace Building in Kenya

11.1 Introduction

SDG Goal 16 of the *2030 Agenda for Sustainable Development*⁸⁵² 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.⁸⁵³ 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.⁸⁵⁴

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 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.⁸⁵⁵

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.⁸⁵⁶

⁸⁵¹Ibid,p. 3.

⁸⁵²UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁸⁵³Goal 16,

⁸⁵⁴Target 35, *Transforming our world: the 2030 Agenda for Sustainable Development*.

⁸⁵⁵Martin, 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].

⁸⁵⁶ 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].

‘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...⁸⁵⁷ 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.”⁸⁵⁸

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-making institutions and processes, and provides mechanisms for accountability and conflict-resolution.⁸⁵⁹

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.⁸⁶⁰ 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.⁸⁶¹

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.⁸⁶²

⁸⁵⁷IUCN 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].

⁸⁵⁸Ibid.

⁸⁵⁹Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability* IUCN, Gland, Switzerland, 2016, at p. 1.

⁸⁶⁰Cosens, 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.

⁸⁶¹Moore, P., *et al*, *Natural Resource Governance Trainers' Manual*, (IUCN, RECOFTC, SNV, Bangkok, Thailand, 2011), p. 119.

⁸⁶²Ibid, at p. 1.

In Kenya, there are intricate and detailed frameworks and sectoral laws in place to ensure proper conservation and protection of natural resources.⁸⁶³ 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.⁸⁶⁴

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-being, and agreement.⁸⁶⁵ Notably, 'peace is not just the absence of violence, it is much more.'⁸⁶⁶ 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.⁸⁶⁷

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.⁸⁶⁸ 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.⁸⁶⁹

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.

⁸⁶³See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁸⁶⁴See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁸⁶⁵Spring, 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.

⁸⁶⁶Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

⁸⁶⁷Herath, 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].

⁸⁶⁸Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

⁸⁶⁹Ibid, pp.106-107.

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.⁸⁷⁰ Peacebuilding approaches can also be geared towards either ‘positive’ or ‘negative’ peace.⁸⁷¹

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.⁸⁷² 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.⁸⁷³

Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.⁸⁷⁴ Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.⁸⁷⁵ 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.⁸⁷⁶ 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.⁸⁷⁷

Also notable is the assertion that peacebuilding is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments,

⁸⁷⁰International Alert, “What is Peace Building?” Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [Accessed on 22/01/2020].

⁸⁷¹Ibid.

⁸⁷²Maiese, 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].

⁸⁷³Institute 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].

⁸⁷⁴Ibid, p. 2.

⁸⁷⁵Ibid, p. 6.

⁸⁷⁶Ibid.

⁸⁷⁷IDLO, “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].

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.⁸⁷⁸ 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.⁸⁷⁹ 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.

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.⁸⁸⁰

Environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.⁸⁸¹ 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.⁸⁸² 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.⁸⁸³ 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.⁸⁸⁴

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,

⁸⁷⁸International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [Accessed on 22/01/2020].

⁸⁷⁹Peace 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].

⁸⁸⁰Nafees, 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.

⁸⁸¹Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," *International security* 19, No. 1 (1994): 5-40 at p. 6.

⁸⁸²*Ibid.*, p.6.

⁸⁸³United 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.

⁸⁸⁴*Ibid.*, p.8.

economic stagnation, and violent conflict over access to revenues.⁸⁸⁵ 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.⁸⁸⁶

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.⁸⁸⁷ Poor and low economic development⁸⁸⁸ and consequently, failed economies result in conflicts,⁸⁸⁹ as a result of environmental and natural resources’ bad governance or mismanagement.⁸⁹⁰

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.⁸⁹¹

The Constitution of Kenya, 2010 provides for both the state and personal obligations in respect of the environment.⁸⁹² 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.⁸⁹³ The law is a necessary part

⁸⁸⁵United 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.

⁸⁸⁶Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of ‘New Oil’ In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

⁸⁸⁷Sigam, 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 22/01/2020].

⁸⁸⁸See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012).

⁸⁸⁹Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

⁸⁹⁰Billion, 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].

⁸⁹¹United 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].

⁸⁹²Art. 69 Constitution of Kenya 2010.

⁸⁹³Art. 69(1) (d).

of the solution to sustainability challenges.⁸⁹⁴ 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.⁸⁹⁵ 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.

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*⁸⁹⁶ 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.⁸⁹⁷

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.⁸⁹⁸ As already pointed, people who feel meaningfully engaged in governance matters are more likely to

⁸⁹⁴Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability*IUCN, Gland, Switzerland, 2016, at p.ix.

⁸⁹⁵Art.67 (2) (f); Article 159(2), Constitution of Kenya.

⁸⁹⁶United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁸⁹⁷Art. 22(1), Art. 42, Art. 69(2), Constitution of Kenya.

⁸⁹⁸Art. 10(2), Constitution of Kenya.

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.⁸⁹⁹

11.5.3 Inclusive Education for Sustainable Livelihoods and Societies

There exists several regional legal instruments which promote the right to education for all.⁹⁰⁰ 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.⁹⁰¹

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.⁹⁰² In the Kenyan case of *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*⁹⁰³, 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.⁹⁰⁴

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.⁹⁰⁵

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

⁸⁹⁹United 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.

⁹⁰⁰The 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).

⁹⁰¹UNESCO, ‘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].

⁹⁰²Ibid.

⁹⁰³[2013] eKLR, Petition No. 133 of 2013.

⁹⁰⁴Goal 4.7, *Transforming our world: the 2030 Agenda for Sustainable Development*.

⁹⁰⁵United States Environmental Protection Agency, ‘What is Environmental Education?’ available at <http://www2.epa.gov/education/what-environmental-education> [Accessed on 22/1/2020].

of and appreciation for the environment.⁹⁰⁶ By applying environmental education to real-life problems, children are also given authentic opportunities to provide service for their communities and solve local problems.⁹⁰⁷

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.⁹⁰⁸ 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 environment.⁹⁰⁹ 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.⁹¹⁰

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

⁹⁰⁶California Department of Education, 'The Case For Environmental Education: Education and the Environment/ Strategic Initiatives for Enhancing Education in California', 2002, p. 5.

⁹⁰⁷Ibid, p. 6.

⁹⁰⁸UNESCO (2008), 'The Right to Education', p.2.

⁹⁰⁹See 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].

⁹¹⁰UNESCO, '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].

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

12. Conclusion

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 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.⁹¹¹ 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 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*⁹¹² 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.

⁹¹¹United 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.

⁹¹²*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.

Securing Our Destiny through Effective Management of the Environment

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.

Green Arbitration: Aligning Arbitration with Sustainable Development

Abstract

Conflict management and access to justice are considered to be an important element of sustainable development agenda. To this effect, the same are well captured in the United Nations 2030 Agenda for Sustainable Development Goals under Goal 16 which seeks to promote peaceful and inclusive societies, providing access to justice for all and building effective, accountable and inclusive institutions at all levels. Arbitration is one of the most popular methods of conflict management globally due to its close resemblance to litigation, without being encumbered by the challenges that affect litigation. This paper discusses how the concept of green arbitration can be promoted as a two pronged approach-achieving sustainable justice while promoting environmental sustainability. The author argues that this is a concept worth embracing in Kenya and internationally.

1. Introduction

Since the 1980s, sustainable development has played a role in influencing local public policy. According to the World Commission on Environment and Development, sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."¹ Thus, the widespread adoption of public policy agendas, such as localizing the United Nations Sustainable Development Goals, and the thousands of local governments worldwide creating sustainability plans reflect the need for a collective effort to overcome the social, ecological, and economic difficulties inherent in achieving sustainability.²

The 2030 Agenda for Sustainable Development was adopted by the United Nations in 2015 and includes 17 Goals (SDGs).³ Conflict management and access to justice are considered to be an important element of sustainable development agenda.⁴ For human civilization to continue, peace and harmony are necessary. According to the United Nations (2016), SDG 16 demands for equal access to information and judicial services while creating inclusive, peaceful societies with access to justice.⁵

Arbitration is one of the most popular methods of conflict management especially by the commercial and business community globally due to its close resemblance to litigation, without being encumbered by the challenges that affect litigation.⁶ Arguably, commercial and business

¹ MacDonald, A., Clarke, A., Ordonez-Ponce, E., Chai, Z. and Andreasen, J., 'Sustainability Managers: The Job Roles and Competencies of Building Sustainable Cities and Communities' (2020) 43 *Public Performance & Management Review* 1413, p.2.

² *Ibid*, p. 39.

³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁴ Muigua, D., 'Understanding the Place of Conflict Management in Sustainable Development Agenda' (27 September 2022) <<https://papers.ssrn.com/abstract=4371703>> accessed 31 March 2023.

⁵ Leal Filho, W., Tripathi, S.K., Andrade Guerra, J.B.S.O.D., Giné-Garriga, R., Orlovic Lovren, V. and Willats, J., 'Using the Sustainable Development Goals towards a Better Understanding of Sustainability Challenges' (2019) 26 *International Journal of Sustainable Development & World Ecology* 179.

⁶ Nevisandeh M, 'The Nature of Arbitration Agreement' (2016) 36 *Procedia Economics and Finance* 314.

activities contribute a great deal to climate change and other ills that lead to environmental degradation.⁷

While the environmental effects of these economic activities are often mitigated through corporate social responsibility (CSR) activities, these may not at times be sufficient in tackling the resultant increased rates of degradation. Indeed, many of the top scientists in the world believe that human-caused climate change is the "defining issue of our time." Many people now prefer to use the term "Climate Crisis" to emphasise how quickly and severely the world's climate is changing and how urgently we need to take action to create a sustainable future.⁸ According to the Intergovernmental Panel on Climate Change (IPCC), global CO₂ emissions must decrease over the next ten years to around half of 2010 levels and achieve net zero by 2050. According to the IPCC, in order to keep global warming to 1.5 °C, all facets of society would need to undergo quick, significant, and unheard-of adjustments.⁹ In addition to climate change, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) of the United Nations found equally alarming results in its 2019 assessment report on biodiversity and ecosystem services.¹⁰

It has also been observed that strong evidence exists for the unsettling relationship between environmental injustice, conflict, and transformation, which is most obviously evident in the numerous instances of environmental conflict detailed in the Environmental Justice Atlas¹¹. These stories therefore offer persuasive evidence that environmental protection mobilisation is most usually started by local communities and indigenous peoples and frequently takes the shape of opposition to resource extraction methods that are viewed as being both unfair and unsustainable.¹² This paper discusses how the concept of green arbitration can be a proactive approach by the business community, promoted as a two pronged approach-achieving sustainable justice for commercial and business community while promoting environmental sustainability.

2. The Concept of Green Arbitration in International Arbitrations

An effort to lessen the effect that international arbitrations have on the environment is called the Campaign for Greener Arbitrations. In order to dramatically reduce the carbon footprint of the arbitration community, international arbitrator Lucy Greenwood established the campaign in 2019.¹³

A Steering Committee was formed by the Campaign for Greener Arbitrations in 2020 and is made up of individuals with an interest in the development of international arbitration, including

⁷ 'Trade and the Environment - OECD' <<https://www.oecd.org/trade/topics/trade-and-the-environment/>> accessed 1 April 2023.

⁸ McGregor D, Whitaker S and Sritharan M, 'Indigenous Environmental Justice and Sustainability' (2020) 43 Current Opinion in Environmental Sustainability 35, p.35.

⁹ Ibid, p.35.

¹⁰ Ibid, p.35.

¹¹ EJOLT, 'EJAtlas | Mapping Environmental Justice' (*Environmental Justice Atlas*) <<https://ejatlas.org/>> accessed 31 March 2023.

¹² Martin, A., Armijos, M.T., Coolsaet, B., Dawson, N., AS Edwards, G., Few, R., Gross-Camp, N., Rodriguez, I., Schroeder, H., GL Tebboth, M. and White, C.S., 'Environmental Justice and Transformations to Sustainability' (2020) 62 Environment: Science and Policy for Sustainable Development 19.

¹³ 'Campaign for Greener Arbitrations' (*Campaign for Greener Arbitrations*, 19 March 2023) <<https://www.greenerarbitrations.com>> accessed 31 March 2023.

practitioners, institutions, and legal service providers.¹⁴ The creation of a Framework and a set of Protocols to encourage better environmental behaviour through a number of action items was one of the Steering Committee's main goals. The Protocols provide useful advice for putting the Guiding Principles' principles into practice.¹⁵

3. International Framework for the Adoption of the Green Protocols

The Framework observes that the international arbitration community's activities have a sizable environmental legacy. A large-scale international arbitration was the subject of an initial research by the Campaign for Greener Arbitrations, and the results suggested that just under 20,000 trees could be needed to offset all of the carbon emissions generated by just one adjudication.¹⁶

According to the Campaign's research, practitioners can significantly reduce these carbon emissions by concentrating on just three areas: (i) adopting clean forms of energy, (ii) reducing long-haul travel, and (iii) reducing waste. For instance, by completely ceasing to use hard copy filings, practitioners could significantly reduce these carbon emissions. Everyone in the arbitration community has a stake in lowering the carbon footprint of our sector.¹⁷

The "Green Protocols" are a series of guidelines created by the Campaign for Greener Arbitrations to nudge other stakeholders towards adopting more environmentally friendly behaviours and cutting back on carbon emissions. This Framework offers recommendations for implementing the Green Protocols, which are the Green Protocol for Arbitral Proceedings, the Green Protocol for Law Firms, Chambers, and Legal Service Providers Working in Arbitration, the Green Protocol for Arbitrators, the Green Protocol for Arbitration Conferences, the Green Protocol for Arbitral Hearing Venues, and the Green Protocol for Arbitral Institutions.¹⁸

The Green Protocols provide practical ways to implement the Campaign for Greener Arbitrations' Guiding Principles, which asks the arbitration community to commit to: Creating a workspace with a reduced environmental footprint, by looking for opportunities to reduce energy consumption and waste; Corresponding electronically, unless hard copy correspondence is expressly needed in the circumstances, while also being mindful that email has a carbon footprint; Encouraging the use of video-conferencing facilities as an alternative to travel (including for the purposes of conducting fact finding or interviews with witnesses); Avoiding printing, requesting the use of electronic rather than hard copies of documents and promoting the use of electronic bundles at hearings; Using, where possible, suppliers and service providers who are committed to reducing their environmental footprint (including for the purposes of arranging an arbitration hearing); Considering and/or suggesting, where appropriate, that witnesses or experts give evidence through video-conferencing facilities, rather than attend hearings in person; Avoiding unnecessary travel and using video-

¹⁴ 'Green Protocols' (*Campaign for Greener Arbitrations*) <<https://www.greenerarbitrations.com/green-protocols>> accessed 31 March 2023.

¹⁵ Ibid.

¹⁶ 'Framework and Green Protocols' (*Campaign for Greener Arbitrations*) <<https://www.greenerarbitrations.com/green-protocols/complete-set>> accessed 31 March 2023.

¹⁷ Ibid.

¹⁸ Ibid.

conferencing facilities as an alternative; and Considering and questioning the need to fly at all times and offsetting carbon emissions for any arbitration-related travel.¹⁹

Notably, this Framework and the Green Protocols are not binding and are not intended to displace applicable rules or derogate from the arbitration agreement, unless and to the extent the Parties so agree (either in the arbitration agreement or subsequently) or the Tribunal so orders. This Framework and the Green Protocols do not establish liability or a liability standard for legal or regulatory purposes.²⁰

3.1 Green Protocol for Law Firms, Chambers and Legal Service Providers

The Green Protocol for Law Firms, Chambers, and Legal Service Providers Working in Arbitration ("Legal Advisors") contains suggested Sustainability Measures for minimising the impact of Legal Advisors and their employees on the environment, which can either be integrated into Legal Advisors' operations and/or adopted on a case-by-case basis by individuals at those Legal Advisors or be adopted by Legal Advisors individually or in their entirety, as appropriate.²¹

Additionally, it has been suggested that, while all of the Sustainability Measures outlined in this Protocol will contribute to reducing the environmental impact of Legal Advisors' practices, special attention should be paid to those that encourage the use of clean energy as a primary energy source and the reduction of air travel, as these two actions will have the largest proportional impact on the overall decline in emissions related to Legal Advisors' practices.²²

3.2 Green Protocol for Arbitrators

The Green Protocol for Arbitrators offers suggested sustainability measures that can be adopted in part or whole, as necessary, by arbitrators to reduce their particular impact on the environment during arbitral proceedings.²³ The Protocol proposes that arbitrators should make an effort to: Prefer electronic communications and letters over paper form when communicating with other Tribunal members, institutions, and Parties, unless it is absolutely essential; Use electronic tools to annotate papers, create and complete orders or awards, and prepare reports; Consider printing documents carefully, try to print just what is absolutely essential, and save electronic case files rather than hard copy files.²⁴

Arbitrators are also required to encourage Parties at the outset of the case to adopt Sustainability Measures, to reduce the environmental footprint of the arbitration, in particular Sustainability Measures aimed at reducing travel and paper waste.²⁵ They are also to encourage sustainable hearing, improve the energy efficiency of their home or outside offices to reduce their environmental footprint, encourage recycling, travel responsibly, and also, however, give due

¹⁹ Ibid.

²⁰ Ibid.

²¹ 'Green Protocol for Law Firms, Chambers and Legal Service Providers' (*Campaign for Greener Arbitrations*) <<https://www.greenerarbitrations.com/green-protocols/law-firms-chambers-legal-service-providers>> accessed 31 March 2023.

²² Ibid.

²³ 'Green Protocol for Arbitrators.Pdf' (*Google Docs*) <https://drive.google.com/file/d/1A6JEh7470Sc3ppNxGc2R5BnDss3ahPDZ/view?usp=embed_facebook> accessed 31 March 2023.

²⁴ Ibid.

²⁵ Ibid.

consideration to offsetting any residual emissions caused by their conduct, including through travel.²⁶

3.3 Green Protocol for Arbitration Conferences

The proposed Sustainability Measures in this Green Protocol for Arbitration Conferences are intended to reduce the environmental impact of arbitration conferences.²⁷ This Green Protocol for Arbitration Conferences should be adopted by conference planners in advance of the event.²⁸ If possible, organisers should choose a location that has sustainability certifications or an environmental policy in place. If none of these features are present, organisers should work with venue facilitators to implement the greener solutions outlined below.²⁹ Organisers are also required to endeavour to conduct all conference planning meetings remotely via virtual platform.³⁰ Additionally, organisers must pledge to use digital registration and payment options for sponsors and attendees, reduce or stop using paper for mailings, send conference materials electronically to attendees or make them scannable with QR codes, stop using paper for handouts, and make an effort to limit the amount of other materials distributed.³¹ Organisers are also required to endeavour to implement electronic platforms or QR codes for daily check-in at conferences.³²

Wherever possible, organisers must take into account employing clean or renewable energy sources. Additionally, or in any case, the organisers shall make every effort to use energy suppliers that support renewable energy and/or have solid Environmental, Social, and Governance (ESG) credentials.³³ Also, organisers must choose host locations that strive to lower their energy usage and environmental impact.³⁴

Organisers must also convey to conference sponsors their preference for using digital marketing materials and minimising the usage of printed materials whenever possible.³⁵ The protocol includes a non-exhaustive list of items that organisers should use as a guide to limit or eliminate the use of single-use and/or plastic items whenever possible and where it is deemed safe, with alternatives suggested as needed. Organisers should in addition make an effort to choose host venues that follow environmentally friendly disposal practices.³⁶

The organisers must make an effort to work with vendors who follow or aim to follow similar sustainability measures, such as the use of locally sourced materials, ecologically friendly products, and alternatives to single-use packaging. Caterers, printers, organisations that produce documents, couriers, cleaners, marketing and advertising experts, off-site event venues, and

²⁶ Ibid.

²⁷ 'Green Protocol for Arbitration Conferences.Pdf' (*Google Docs*)
<https://drive.google.com/file/d/1DwneSKq5KjaHOeXwqS4ejHzKwAXEA3G-/view?usp=embed_facebook> accessed 31 March 2023.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

utilities providers are a few examples of these vendors.³⁷ Organisers are also to travel responsibly, obtain electronic feedback and offset carbon emissions.³⁸

3.4 The Green Protocol for Arbitral Hearing Venues

The recommended Sustainability Measures in this Green Protocol for Arbitral Hearing Venues are intended to reduce the environmental impact of arbitration facilities and hearing venues.³⁹ This Protocol, or any of its component elements, must be adopted by facilitators as standard operating procedure. Alternately, parties may ask that a venue comply with this Protocol or any of its component sections before to and throughout the course of a certain matter.⁴⁰

Wherever possible, facilitators must think about employing clean or renewable energy sources. Additionally, or in any case, Facilitators must make an effort to use energy suppliers who support renewable energy and/or have solid ESG credentials.⁴¹ To lessen their environmental impact, facilitators must work to cut energy use and increase the energy efficiency of their premises and equipment.⁴² Where possible, communication and correspondence between Facilitators, Parties, and the Tribunal must be done online or through audio or video conferencing. The use of technology platforms and devices for evidence display during hearings is the responsibility of the Facilitators.⁴³

Facilitators must also minimise use of printers and paper, encourage recycling, to eliminate or limit the use of single-use and / or plastic items, where possible and where deemed safe, partner with 'green' organisations and suppliers, travel responsibly, and offset carbon omissions.⁴⁴

3.5 The Green Protocol for Arbitral Institutions

The proposed Sustainability Measures in this Green Protocol for Arbitral Institutions are intended to reduce the environmental impact of Arbitral Institutions.⁴⁵ Arbitral Institutions are required to make a commitment to collaborating with their staff and leadership groups in order to assess current environmental policies and procedures and, if necessary, take into account and put into practice this Protocol's suggestions. Arbitral Institutions may also appoint "Green Ambassadors," whose responsibility it is to assist their organisation in creating policies and best practices based on the suggestions made in this Green Protocol. The impact of these rules and best practices should be frequently reported to high management via Green Ambassadors.⁴⁶

³⁷ Ibid.

³⁸ Ibid.

³⁹ 'Green Protocol for Arbitral Hearing Venues.Pdf' (*Google Docs*)

<https://drive.google.com/file/d/1J2sLfRbT8aU5UCmxS10_t58sy0SS2ToP/view?usp=embed_facebook> accessed 31 March 2023.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ 'Green Protocol for Arbitral Institutions (1).Pdf' (*Google Docs*)

<https://drive.google.com/file/d/1YPcSgRzS2rHTJvYtPltTL6jA0f7B6oJ/view?usp=embed_facebook> accessed 31 March 2023.

⁴⁶ Ibid.

Arbitral Institutions are also to use clean or renewable energy sources wherever possible, improve the energy efficiency of facilities and equipment to reduce their environmental footprint, encourage the use of technology for the conduct of proceedings to minimise printing, the use of paper and travel where appropriate, minimise printing and use of paper, encourage recycling, eliminate or limit the use of single-use and/or plastic items, where possible and where deemed safe to do so, partner with “green” organisations, travel responsibly, incentivise their staff through schemes that encourage greener behaviours, consider allowing their staff a permitted amount of hours each year, where business/operational needs allow, to volunteer with organisations involved in sustainability initiatives, offset carbon emissions and when implementing this Protocol shall consider publicly reporting on targets and achievements, in order to track progress, promote accountability, and encourage other institutions to adopt Sustainability Measures which reporting may also include any costs savings resulting from the implementation of Sustainability Measures.⁴⁷

4. Green Arbitration: Aligning Arbitration with Sustainable Development Agenda

The foregoing section has outlined the measures and efforts that the international arbitration community seeks to employ in order to align arbitration practice with sustainable development goals of climate change mitigation through responsible and sustainable utilisation of resources. The proposed protocols hold the promise of aligning arbitration with the SDGs. The Sustainable Development Goals (SDGs), which were established by the United Nations (UN) in 2015, are largely acclaimed as a major accomplishment since they reflect a worldwide understanding of an all-encompassing approach to deal with the social and environmental problems facing people throughout the world.⁴⁸

In addition, the Sustainable Development Goals (SDGs) envision a world where democracy, good governance, and the rule of law are essential for sustainable development, which includes inclusive and sustained economic growth, social development, environmental protection, and the eradication of poverty and hunger.⁴⁹ In this sense, "steering"—which comprises both procedures and institutions—is referred to as "governance" since it entails a certain amount of power. Process refers to how choices are made on priorities, how disagreements are handled, if at all, and how coordination of people's actions with regard to resource usage is made simpler. The structural part, on the other hand, deals with the organisation and 'management' of these operations.⁵⁰

Addressing conflict of whatever nature is part of the social aspects of sustainability that must be put into consideration if sustainable development agenda is to be achieved. Thus, the sustainable development agenda advocates for an integrated approach to tackling environmental management challenges as well as social problems affecting the society.⁵¹ The Organisation for Economic Co-operation and Development(OECD) calls for an integrated approach to the implementation of

⁴⁷ Ibid.

⁴⁸ 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 1 April 2023.

⁴⁹ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 1 April 2023.

⁵⁰ Vatn, Arild, *Environmental governance: institutions, policies and actions*, Edward Elgar Publishing, 2015, p. 133.

⁵¹ See Hussein Abaza and Andrea Baranzini, *Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes* (Edward Elgar Publishing 2002).

sustainable development and argues that many SDGs are interconnected with each other; an integrated approach implies managing trade-offs and maximising synergies across targets.⁵² The fundamental action principle of Sustainable Development is integrated decision-making, which is the process of taking environmental, social, and economic goals and issues into consideration when making decisions.⁵³

Sustainable Development's environmental component must be considered in its economic, social, and governance facets. This is due to the fact that fostering sustainable economic growth depends on environmental protection, as the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon sequestration, water purification, managing flood risks, and nutrient cycling.⁵⁴ 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.⁵⁵ 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.⁵⁶

Corporations, through following ESG frameworks or guidelines, 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.⁵⁷ 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

⁵² Rizza Ambra, ‘An Integrated Approach to the Sustainable Development Goals’ (*Assembly of European Regions, 4 March 2019*) <<https://aer.eu/integrated-approach-sdgs/>> accessed 1 April 2023.

⁵³ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. *Sustainability*, 3 (3), 531-540." (2011), 532.

⁵⁴ *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 1 April 2023.

⁵⁵ 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>. 1 April 2023.

⁵⁶ *Ibid.*

⁵⁷ ‘(10) Global ESG Disclosure Regulations: From Awareness to Practice towards Sustainability | LinkedIn’ <<https://www.linkedin.com/pulse/global-esg-disclosure-regulations-from-awareness-dr-mahendra/>> accessed 1 April 2023; Boffo R and Patalano R, ‘ESG Investing: Practices, Progress and Challenges’ [2020] Editions OCDE, Paris; ‘What ESG Reporting Is and How to Do It | A MovingWorlds Guide’ (*MovingWorlds.org*) <<https://movingworlds.org/esg-reporting-guide>> accessed 1 April 2023; PricewaterhouseCoopers, ‘ESG Reporting and Preparation of a Sustainability Report’ (*PwC*, 26 January 2021) <<https://www.pwc.com/sk/en/environmental-social-and-corporate-governance-esg/esg-reporting.html>> accessed 1 April 2023.

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.⁵⁸ 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.⁵⁹

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).⁶⁰ 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.⁶¹

According to some arbitration specialists, using new "green" arbitration rules will cut arbitration costs for businesses and improve the environment.⁶² The use of these protocols in arbitration processes will promote actions that not only save clients' money but also allow the firms to achieve their goal of going net zero.⁶³ A carbon offset is a reduction or removal of one metric tonne of carbon dioxide (CO₂) from the atmosphere that is used to compensate for emissions that occur elsewhere.⁶⁴ With the implementation of the protocols, arbitration practitioners are urged to interact online, use videoconferencing rather than face-to-face meetings wherever it is appropriate and viable, and work with electronic bundles rather than paper papers at hearings.⁶⁵

One method that businesses may reduce ESG risks is through proper contract management. The exceptional supply chain disruption caused by the Covid-19 epidemic has given businesses the chance to assess their current supply chains and try to integrate ESG principles into their contract portfolio. These ESG tenets may come from a company's own ESG objectives and policies or from

⁵⁸ Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., 'Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences' (2020).

⁵⁹ 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 1 April 2023.

⁶⁰ Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 *Journal of Environmental Protection* 211.

⁶¹ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), p.89.

⁶² "'Green' Protocols Can Cut Cost of Arbitration for Businesses' (*Pinsent Masons*, 30 March 2023) <<https://www.pinsentmasons.com/out-law/news/green-protocols-cost-of-arbitration>> accessed 1 April 2023.

⁶³ *Ibid.*

⁶⁴ 'Don't Forget Green Arbitration Protocols as in-Person Hearings Return' (*Pinsent Masons*, 30 March 2023) <<https://www.pinsentmasons.com/out-law/analysis/dont-forget-green-arbitration-protocols-as-in-person-hearings-return>> accessed 1 April 2023.

⁶⁵ "'Green' Protocols Can Cut Cost of Arbitration for Businesses' (*Pinsent Masons*, 30 March 2023) <<https://www.pinsentmasons.com/out-law/news/green-protocols-cost-of-arbitration>> accessed 1 April 2023.

governing legislation. When there are disparities in norms, rules, or degrees of openness across several nations throughout the supply chain, ESG contractual terms will be particularly important. Contractual arrangements mandating all counterparties to adhere to specified ESG-related requirements can be used to resolve jurisdiction-based differences.⁶⁶

Courts have traditionally been the venue for most ESG disputes, but as ESG-related contract clauses have increased and ESG provisions have been incorporated into international investment treaties, commercial and investor state arbitration is anticipated to play a much larger role in ESG dispute resolution in the future.⁶⁷ It has been suggested that if the international arbitration community is to stay relevant, it needs to address environmental concerns as they relate to international disputes and as they relate to each individual's practice.⁶⁸

It has been observed that almost 93% of the emissions that have been detected are associated with travel, notably air travel in business class, which, depending on the size and area of the seat, typically consumes two to three times as much energy as flying in economy class. Both the elimination of hard copy submissions and the reduction of one long-distance aircraft for each arbitration would significantly reduce carbon emissions.⁶⁹ It is crucial for arbitrators and other stakeholders to consider the actions they might take to lower the carbon emissions generated by the field of arbitration given the rising attention that businesses and clients are placing on Environmental, Social, and Corporate Governance (ESG) problems.⁷⁰

Arbitration practitioners should think about putting suitable Green Protocols provisions into practice. The Framework identifies a number of variables to take into account when determining whether a measure is appropriate, such as the relevant procedural rules, the relevant laws, the burden and costs of implementation, the accessibility and usefulness of electronic resources, the impact on diversity, the cultural expectations of the parties, and the availability of cybersecurity measures. Separately, people should think about making the broad tenets of the Green Pledge a commitment, as should law firms. Given the urgency of climate change, now is the moment for actions, not words, according to the slogan of the Campaign.⁷¹

⁶⁶ 'ESG Disputes in International Arbitration'

(<https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration>) <<https://www.nortonrosefulbright.com/en/knowledge/publications/e01e3d5a/esg-disputes-in-international-arbitration>> accessed 1 April 2023.

⁶⁷ Ibid.

⁶⁸ 'New Report: Green Technology Disputes at the SCC Arbitration Institute | Hem - Stockholms Handelskammars Skiljedomsinstitut' <<https://sccarbitrationinstitute.se/en/new-report-green-technology-disputes-scc-arbitration-institute>> accessed 1 April 2023.

⁶⁹ 'The Green Pledge: No Talk, More Action' (*Kluwer Arbitration Blog*, 20 March 2020) <<https://arbitrationblog.kluwerarbitration.com/2020/03/20/the-green-pledge-no-talk-more-action/>> accessed 1 April 2023.

⁷⁰ 'The Campaign for Greener Arbitrations: Encouraging Sustainable Practices in International Arbitration | Jus Mundi Blog' (11 August 2021) <<https://blog.jusmundi.com/the-campaign-for-greener-arbitrations-encouraging-sustainable-practices-in-international-arbitration/>> accessed 1 April 2023.

⁷¹ 'The Campaign for Greener Arbitrations: Encouraging Sustainable Practices in International Arbitration | Jus Mundi Blog' (11 August 2021) <<https://blog.jusmundi.com/the-campaign-for-greener-arbitrations-encouraging-sustainable-practices-in-international-arbitration/>> accessed 1 April 2023.

It is worth noting that adoption of green arbitration will not only contribute positively to climate change mitigation but will also potentially increase profitability by saving certain costs. This is because the Green Protocols primarily focus on three critical areas in which changes in the behavioural practices of arbitration practitioners could have the largest impact in substantially reducing our carbon emissions. Specifically, the community is encouraged to: (i) adopt clean forms of energy, (ii) reduce or eliminate long-haul travel and (iii) minimize waste, for example by eliminating hard copy filings altogether. Arbitration stakeholders who are committed to effectuate change should begin by reviewing the Protocol(s) which are most relevant to their practices.⁷² This is a practice shift in future practice of arbitration that is worth embracing in both domestic and international arbitration across all countries as part of implementation of SDGs.

5. Conclusion

Green arbitration is thus a concept worth embracing in Kenya and internationally. This is important considering that the key principles of the Green Pledge consist of: encouraging the use of electronic correspondence and electronic submissions; avoiding printing unnecessarily and promoting the use of electronic bundles at hearings; encouraging the use of videoconferencing facilities as an alternative to travel, where appropriate (including for the purpose of fact-finding interviews with witnesses and cross-examination of witnesses or experts); selecting suppliers and service providers that are committed to reducing their environmental impact; and avoiding unnecessary travel and offsetting carbon emissions for arbitration-related travel.⁷³ This is a huge step towards achieving sustainability in all aspects of the economy, and requires the concerted efforts of all stakeholders. Aligning arbitration with Sustainable Development is an ideal whose hour is now.

⁷² ‘The Campaign for Greener Arbitration’s Green Protocols: Actions Not Words’ (*Kluwer Arbitration Blog*, 22 April 2021) <<https://arbitrationblog.kluwerarbitration.com/2021/04/22/the-campaign-for-greener-arbitrations-green-protocols-actions-not-words/>> accessed 1 April 2023.

⁷³ ‘The Campaign for Greener Arbitrations: Encouraging Sustainable Practices in International Arbitration | Jus Mundi Blog’ (11 August 2021) <<https://blog.jusmundi.com/the-campaign-for-greener-arbitrations-encouraging-sustainable-practices-in-international-arbitration/>> accessed 1 April 2023.

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 leaving no room for future amendments

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.

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

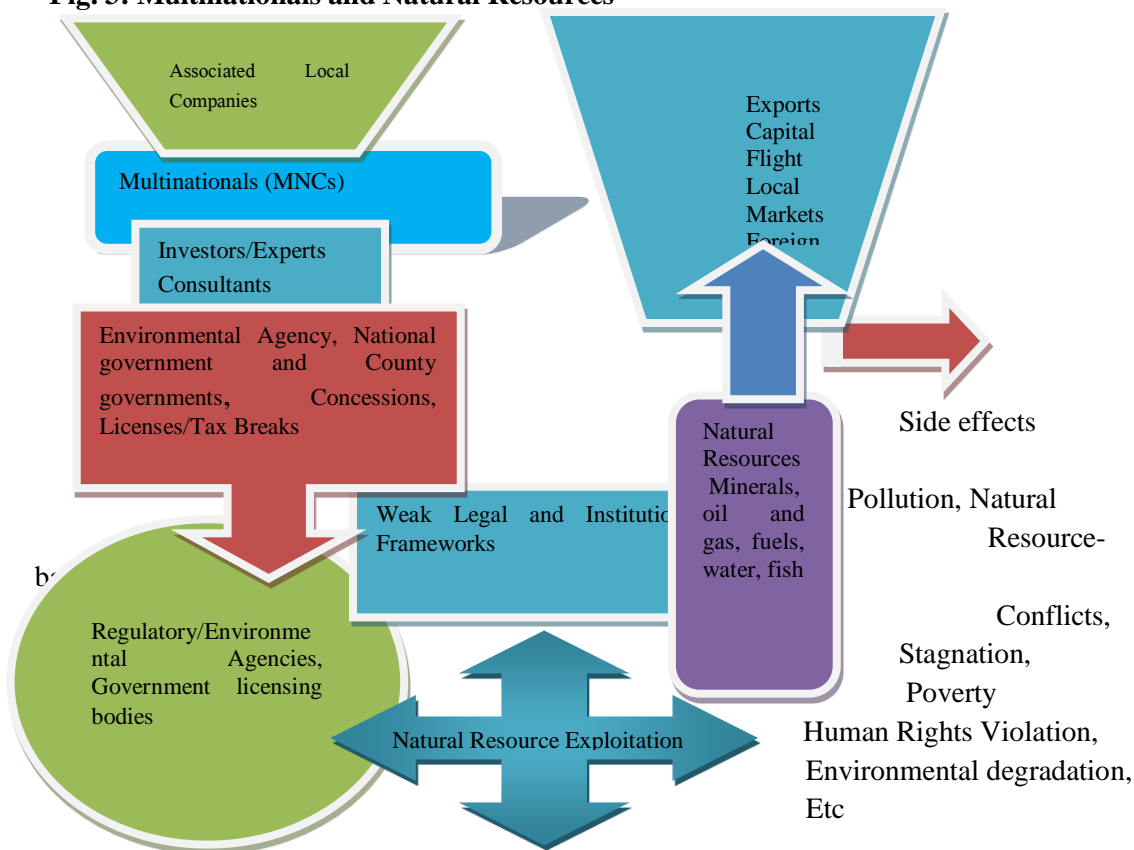


Fig. 4.0 Source: Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015

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 economic transformation and development.¹⁹ The role of natural resources in economic

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].

¹⁹ Kojima, K., 'A Macroeconomic Approach to Direct Foreign Investment,' *Hitotsubashi Journal of Economics*, June 1973, p. 3.

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 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

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.

²⁷ *Ibid*.

²⁸ Brown, R., 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources,' *op. cit*, p. 218.

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 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

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.

³⁶ Ballard, C., & Bank, G., 'Resource Wars: The Anthropology of Mining,' *Annual Review of Anthropology*, Vol. 32, 2003, pp. 287-313, p. 289.

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 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

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).

‘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 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.

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.

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 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.

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.

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 consensus on transfer pricing, i.e. on the valuation, for tax purposes, of cross-border transactions

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 Model Tax Convention on Income and on Capital (usually referred to as the OECD Model Treaty or Model Convention).

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.

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

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].

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.

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

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].

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*, 1999¹¹⁶ 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*, 2016¹¹⁸ 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

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.

that preceded their entry, they demanded from the Kenya government import barriers and market protection.¹²³

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.

¹²³ Jansen, K., "Multinational Corporations in the Political Economy of Kenya by Steven W. Langdon," *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*.

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 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

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].

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 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.

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.*

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 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

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.

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’ 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

¹⁴⁴ *Ibid*, para. 218 & 224-228.

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.

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 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.

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-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.

Exploring Heritage Impact Assessment in Kenya

Abstract

The paper critically discusses the concept of Heritage Impact Assessment (HIA) in Kenya. It conceptualizes Heritage Impact Assessment and its role in the Sustainable Development Agenda. The paper further highlights the legal framework on HIA at both the global and national level. It discusses the extent to which HIA has been embraced in Kenya and challenges thereof. Finally, the paper suggests recommendations towards embracing heritage impact assessment for Sustainable Development in Kenya.

1. Introduction

World Heritage has been defined as the designation for places on Earth that are of outstanding universal value to humanity and as such, have been inscribed on the World Heritage List to be protected for future generations to appreciate and enjoy¹. The Convention Concerning the Protection of the World Cultural and Natural Heritage defines World Heritage to entail cultural and natural heritage². Cultural heritage includes monuments; architectural works; archeological sites; inscriptions, cave dwellings and buildings that are of outstanding value from the point of view of history, art and science³. Natural heritage on the other hand includes natural features consisting of physical and biological formations; geological and physiographical formations and natural sites of outstanding value from the point of view of science, conservation or natural beauty⁴. UNESCO lists World Heritage sites in Kenya to include Lake Turkana National Park; Mount Kenya National Park and Natural Forest; Lamu Old Town; Fort Jesus; the Sacred Mijikenda Kaya Forests and the Lake System in the Great Rift Valley among others⁵.

Conservation of World Heritage is a key component of sustainability. The Sustainable Development Goals seek to promote sustainable cities and communities among other goals⁶. Among the targets under this goal is strengthening efforts to protect and safeguard the world's cultural and natural heritage⁷. Conservation of World Heritage is thus a key component of the Sustainable Development agenda. Further, the Convention Concerning the Protection of the World Cultural and Natural Heritage recognizes the importance of world heritage and the need to preserve it as part of the world heritage of mankind as a whole⁸. It calls upon state parties to take measures towards protection and conservation of World Heritage and its transmission to future generations⁹. The Constitution of Kenya anchors the importance of protection and conservation of cultural and natural heritage. It acknowledges the important role the environment plays in sustaining our

¹ United Nations Educational, Scientific and Cultural Organisation (UNESCO), 'World Heritage Conservation' available at <https://whc.unesco.org/en/faq/19> (accessed on 19/10/2022)

² UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' available at <https://whc.unesco.org/archive/convention-en.pdf> (accessed on 19/10/2022)

³ Ibid

⁴ Ibid

⁵ UNESCO., 'World Heritage List' available at <https://whc.unesco.org/en/list/> (accessed on 19/10/2022)

⁶ Sustainable Development Goal 11., available at <https://www.undp.org/sustainable-development-goals#sustainable-cities-and-communities> (accessed on 19/11/2022)

⁷ Ibid

⁸ UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

⁹ Ibid, article 4

heritage and is determined to protect it for the benefit of future generations¹⁰. The Constitution further recognizes the role of culture as the foundation of the nation and mandates the state to promote and protect cultural heritage in the country¹¹.

The conservation of world heritage is threatened by certain factors including modernization and urban growth¹². Further, cultural and natural heritage is threatened by traditional causes of decay and emerging social and economic conditions including developments and construction¹³. Consequently, the concept of Heritage Impact Assessment has emerged as a conservation tool to improve World Heritage in line with the Sustainable Development Goals¹⁴. It is aimed at promoting the protection and management of world heritage from adverse effects of developments and construction¹⁵.

The paper seeks to critically discuss the concept of Heritage Impact Assessment. The paper further discusses the extent to which heritage impact assessment has been embraced in Kenya and proposes interventions towards promoting heritage impact assessment for Sustainable Development in Kenya.

2. Framework for Heritage Impact Assessment

Heritage Impact Assessment is conducted within the framework of Environmental Impact Assessment (EIA). EIA is a tool for integrating environmental and social concerns in decision making processes¹⁶. Environmental impact assessment (EIA) is the process of identifying potential environmental effects of proposed development and the required mitigation measures¹⁷. EIA has also been defined as a procedure for evaluating the likely impact of a proposed activity on the environment¹⁸. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed¹⁹. It is also aimed at identifying, predicting, evaluating and mitigating the biophysical, social and other relevant environmental effects of development proposals prior to major decisions being taken and commitments being made²⁰.

The concept of Heritage Impact Assessment has emerged in order to identify and evaluate the impacts of human activities on world heritage towards striking a balance between the protection

¹⁰ Constitution of Kenya, 2010, Preamble

¹¹ Ibid, Article 12

¹² Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' *Journal of Cultural Heritage* 47 (2021) 199–207

¹³ UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

¹⁴ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' available at <http://publications.rwth-aachen.de/record/839877/files/839877.pdf> (accessed on 19/10/2022)

¹⁵ Ibid

¹⁶ Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf> (accessed on 19/10/2022)

¹⁷ Mandelik. Y et al., 'Planning for Biodiversity: the Role of Ecological Impact Assessment' available at https://www.researchgate.net/publication/227495149_Planning_for_Biodiversity_the_Role_of_Ecological_Impact_Assessment (accessed on 19/10/2022)

¹⁸ Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' Op Cit

¹⁹ Ibid

²⁰ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

of world heritage and promoting economic and social development²¹. It entails the requirement to undertake Environmental Impact Assessment at the project level or more strategic level in order to assist decision makers in identifying and preventing approval of developments that may destroy cultural and natural heritage²². Heritage Impact Assessment explores the damage or benefits that may accrue on cultural and natural heritage as a result of human activities such as economic development²³. HIA is anchored in the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. The Convention requires state parties to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to *integrate the protection of that heritage into comprehensive planning programmes* (emphasis added)²⁴. It further requires state parties to *develop scientific and technical studies and research* and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage (emphasis added)²⁵. The Convention thus acknowledges the role of Heritage Impact Assessment as a planning tool towards conservation and protection of world heritage.

The process of Heritage Impact Assessment follows similar steps as the EIA process. The first phase of the HIA process entails understanding the potential impacts of development projects on world heritage as well as existing gaps that may negatively affect cultural and natural heritage²⁶. This involves screening of proposed projects, scoping and examination of different alternative stages in implementing projects towards mitigating their impact on world heritage²⁷. The second phase entails carrying out the assessment process in order to identify and predict threats emanating from proposed projects and their impact on world heritage²⁸. Mitigation measures ought to be proposed in order to minimize adverse impacts as well as enhancing positive effects of developments of cultural and natural heritage²⁹.

The third phase involves preparation of a Heritage Impact Assessment Report for critical and technical review³⁰. The report should capture all relevant information including the impact of the proposed development on cultural and natural heritage and the proposed mitigation measures towards mitigating the impacts³¹. The final phase involves decision making in relation to the project. The project may be disapproved if it may result in significant harm to world heritage or

²¹ Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' Op Cit

²² Pereira Roders. A & Van Oers. R., 'Guidance on Heritage Impact Assessments: Learning from its application on World Heritage site management' *Journal of Cultural Heritage Management and Sustainable Development* Vol. 2 No. 2, 2012

²³ Ibid

²⁴ The Convention Concerning the Protection of the World Cultural and Natural Heritage' Article 5 (a)

²⁵ Ibid, article 5 (c)

²⁶ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

²⁷ International Association for Impact Assessment and UK (IEA) Institute for Environmental Assessment. Principles of Environmental Impact Assessment Best Practice. 1999. Available at http://www.iaia.org/publicdocuments/specialpublications/Principles%20of%20IA_web.pdf (accessed on 19/10/2022).

²⁸ Ibid

²⁹ Ibid

³⁰ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

³¹ Ibid

where the mitigation measures proposed are not appropriate³². The project may also be approved and subsequently implemented. In this case, there is need for monitoring in order to ensure that the project adheres to the mitigation strategies set out in the HIA report³³.

3. Heritage Impact Assessment in Kenya

Kenya has in the recent past experienced rapid industrialization and growth in population which puts pressure on both cultural and natural heritage³⁴. These developments affect both the natural environment and heritage resources creating the need for heritage impact assessment within the EIA framework for sustainability. Protection of cultural and natural heritage in Kenya is recognized under the *Environmental Management and Co-Ordination Act* which creates the legal framework for environmental management and conservation in Kenya³⁵. EMCA provides for the formulation of national environment action plan which takes into account all monuments and protected areas under the National Museums and Heritage Act³⁶. EMCA thus envisions protection of cultural and natural heritage as a key process in environmental management³⁷.

Protection and conservation of natural and cultural heritage in Kenya is governed by the *National Museums and Heritage Act*³⁸. The Act recognizes the role of environmental impact assessment in the conservation and protection of natural and cultural heritage in Kenya. It requires the National Museums of Kenya to conduct environmental impact assessments within the framework of EMCA towards fulfilling its mandate which includes the protection, conservation and transmission of cultural and natural heritage in Kenya³⁹. Development projects whose implementation may affect heritage resources need to be subjected to Heritage Impact Assessment as envisioned under the National Museums and Heritage Act.

Heritage Impact Assessment has been undertaken in a number of projects in Kenya involving the National Museums of Kenya. Cultural Heritage Impact Assessment was conducted in relation to the optical fibre cable project at Fort Jesus Museum in Mombasa which is listed as a world heritage site by UNESCO⁴⁰. Subsequently, during implementation of the project mitigation measures were adopted in order to minimize impacts on both marine and terrestrial cultural resources⁴¹. A number of cultural materials were excavated and stored for prosperity as result of the Heritage Impact Assessment⁴². Heritage Impact Assessment was also conducted during the proposed construction

³² UNESCO. Convention Concerning the Protection of the World Cultural and Natural Heritage. In Proceedings of the General Conference at Its 17th Session, Paris, France, 17 October–21 November 1972. available at: <http://whc.unesco.org/archive/convention-en.pdf> (accessed on 19/10/2022)

³³ Ibid

³⁴ Kiriama. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' available at https://www.researchgate.net/publication/306118471_Impact_assessment_and_heritage_management_in_Africa_An_Overview/link/5bd529992851c6b27931ba6/download (accessed on 20/10/2022)

³⁵ Environmental Management and Co-Ordination Act, No. 8 of 1999, Government Printer, Nairobi

³⁶ Ibid, S 38

³⁷ Ibid

³⁸ National Museums and Heritage Act, No. 6 of 2006, Government Printer, Nairobi

³⁹ Ibid, S 5 (1) (n)

⁴⁰ Busolo. N., 'Archaeological Impact Assessment for the Optical Fibre Cable at Swahili Cultural Centre, Mombasa' National Museums of Kenya

⁴¹ Ibid

⁴² Kiriama. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' Op Cit

of children's park at Mama Ngina Heritage Site in Mombasa⁴³. After the HIA, the project was halted after it emerged that it would result in adverse impacts on cultural heritage at the site⁴⁴. The HIA established that the site was a cemetery of an ancient Tuaca settlement, an ancient civilization in the island of Mombasa thus amounting to significant cultural heritage⁴⁵. Further, Heritage Impact Assessment was also conducted in relation to the Lamu Port South Sudan-Ethiopia Transport (LAPSSET) Corridor project in order to determine its impacts on the Lamu World Heritage Site⁴⁶. The HIA report revealed that the project may have adverse impacts on heritage resources linked to the Lamu World Heritage Site, ancient settlements along the Lamu coastline and islands and marine conservation in the area. Mitigation measures were recommended in order to reduce the direct and indirect impacts caused by the project.

Despite attempts to promote the protection and conservation of world heritage in Kenya, challenges still exist in striking a balance between development and conservation of heritage. In the course of development projects touching on world heritage, artefacts have been seized and sold and monuments destroyed due to the failure to fully appreciate the importance of world heritage⁴⁷. There is need to effectively implement Heritage Impact Assessment towards Sustainable Development in Kenya.

4. Way Forward: Exploring Heritage Impact Assessment for Sustainable Development in Kenya

Protection and conservation of cultural and natural heritage is a key component of the Sustainable Development agenda. Both the *Sustainable Development Goals* and the *Convention Concerning the Protection of the World Cultural and Natural Heritage* envisage the importance of world heritage and the need for its protection for the benefits of the present and future generations⁴⁸. Heritage Impact Assessment is an important tool in the protection and conservation of world cultural and natural heritage.

In order to effectively promote HIA, there is need for a more systematic and integrated approach in the EIA framework⁴⁹. Concerns involving cultural and natural heritage should be fully addressed within the EIA process in order to effectively identify and evaluate impacts of projects on world heritage and the need to come up with effective mitigation measures⁵⁰. Further, there is need for involving an interdisciplinary team with sufficient knowledge in cultural and natural heritage in order to effectively conduct a comprehensive HIA. The HIA in relation to the LAPSSET project

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ UNESCO., 'World Heritage Committee on Lamu Old Town World Heritage Site: State of Conservation Report' available at <https://www.google.com/search?q=State+of+conservation+report+lamu+old+town&oq=State+of+conservation+report+lamu+old+town&aqs=chrome..69i57j33i160.12156j0j7&sourceid=chrome&ie=UTF-8> (accessed on 20/10/2022)

⁴⁷ Kiriyama. H et al., 'Cultural Heritage Impact Assessment in Africa: An Overview' Op Cit

⁴⁸ See Sustainable Development Goal 11 and article 4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage

⁴⁹ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

⁵⁰ Ibid

involved experts including those from UNESCO World Heritage Centre and local experts in cultural and natural heritage in order to effectively conduct the process⁵¹.

Further, there is need to promote public participation in order to fully embrace HIA. Public participation plays an important role in the EIA process since it guarantees acceptability of development projects and prevents disputes between developers and local communities⁵². Public participation can play a central role conservation and protection of world heritage due to the sentimental value that communities may attach to cultural and natural heritage sites.⁵³ Communities may possess traditional indigenous knowledge concerning management of such sites⁵⁴. Thus, there is need to promote public participation and public sensitization in order to fully promote HIA.

Finally, there is need to effectively capture the framework of HIA in national legislation in order to guarantee its adoption⁵⁵. The Environmental Management and Co-ordination Act (EMCA) restricts the definition of environment to the natural and biophysical environments only comprising of air, land, fauna, flora and water⁵⁶. This definition does not capture cultural heritage. Further, the Environmental (Impact Assessment and Audit) Regulations, 2003 do not capture the concerns related to cultural and natural heritage. There may be need to capture cultural and natural heritage concerns in these legislations in order to fully promote HIA. Through these measures, HIA will be promoted in the quest towards Sustainable Development.

5. Conclusion

World heritage sites are of universal value to humanity for both present and future generations⁵⁷. Protection and conservation of cultural and natural heritage is a key component of the Sustainable Development agenda⁵⁸. However, the conservation of world heritage is threatened by certain factors including modernization and urban growth⁵⁹. Further, cultural and natural heritage is threatened by traditional causes of decay and emerging social and economic conditions including developments and construction⁶⁰. The concept of Heritage Impact Assessment has emerged as key

⁵¹ UNESCO., 'World Heritage Committee on Lamu Old Town World Heritage Site: State of Conservation Report' Op Cit

⁵² M. Hasan., 'Public participation in EIA: A comparative study of the projects run by government and non-governmental organizations.' *Environmental Impact Assessment Review* 72 (2018): 12-24.; Art.69(d) of The Constitution of Kenya, Government Printer 2010

⁵³ Siamak. S et al 'Managing world heritage site stakeholders: A grounded theory paradigm model approach." *Journal of Heritage Tourism* 14.4 (2019): 308-324.; See the case of Mohamed Ali Baadi and others v Attorney General & 11 others, Petition No. 22 of 2012, [2018] eKLR; See also the case of Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another, Tribunal Appeal NET 196 of 2016, [2019] eKLR

⁵⁴ Ibid; See Art.69(c) of the Constitution of Kenya on protection of indigenous knowledge.

⁵⁵ Ashrafi. B et al., 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' Op Cit

⁵⁶ EMCA, No.8 of 1999, S 2

⁵⁷ UNESCO, 'World Heritage' available at <https://whc.unesco.org/en/about/> (accessed on 20/10/2022)

⁵⁸ Ibid; See Art.10 (2)(d) of the Constitution of Kenya-Sustainable Development is a National Value and Principle of Governance.

⁵⁹ Ashrafi. B et al., 'Heritage Impact Assessment, Beyond an Assessment Tool: A comparative analysis of urban development impact on visual integrity in four UNESCO World Heritage Properties' Op Cit

⁶⁰ UNESCO., 'The Convention Concerning the Protection of the World Cultural and Natural Heritage' Op Cit

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tool in the conservation and protection of world cultural and natural heritage by ensuring that heritage concerns are captured in the EIA process as envisaged under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*⁶¹. There is need to fully embrace and promote Heritage Impact Assessment for Sustainable Development in Kenya.

⁶¹ Convention Concerning the Protection of the World Cultural and Natural Heritage, article 5 (a)

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

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.

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 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

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

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].

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’ 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

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).

Constitution of Kenya outlines the national values and principles of governance as including: (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.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

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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.

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).

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.

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 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

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.

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 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

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

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.*

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 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

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.

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).

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 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.

Harnessing the Blue Economy: Challenges and Opportunities for Kenya

Abstract

The blue economy holds great potential for Kenya's economy as well as the livelihoods of various communities working and living within these areas. Documented evidence has shown that Kenya's resources in this sector are enormous and have been contributing to different sectors of the economy as well as proving employment for a huge group of people in the country. Despite this, the sector is still greatly under exploited due to a number of challenges that affect the country's potential in this area. This paper discusses these challenges and suggests ways through which Kenya's Blue Economy can be unlocked to boost national development agenda. This is in light of the outcome of the Nairobi Blue Economy Conference held in Nairobi in November 2018.

1. Introduction

Partly based on the recently concluded first ever Global Sustainable Blue Economy Conference held in Nairobi, Kenya in November 2018¹, this paper explores ways in which Kenya can tap into its diverse blue resources, with the 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. This is in recognition of the fact that 'there is a direct correlation between blue economy and livelihoods and food security'.²

Kenya's oceanic territory has vast resources that can assist Kenya grow economically, eradicate poverty and achieve sustainable development. However, there exist challenges in harnessing these resources.

The paper critically analyses these challenges, how they can be surmounted and recommends measures within the policy, legal and institutional framework to assist Kenya effectively harness these resources. These are meant to enable the country expand her economy and improve her people's livelihoods through tapping into the enormous resources contained within its blue resources.

2. Blue Economy: The Definition and Scope

Blue economy has been defined as:

... a sustainable ocean-based economic model that is largely dependent on coastal and marine ecosystems and resources, but one that employs environmentally-sound and innovative infrastructure, technologies and practices, including institutional and financing arrangements, for meeting the goals of: (a) sustainable and inclusive development; (b) protecting the coasts and oceans, and reducing environmental risks and ecological scarcities; (c) addressing water, energy and food security; (d) protecting the

¹ 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 17/12/2018].

² Guleid, M., "True value of the blue economy to Kenya," *Standard Digital*, 29th Nov 2018. Available at <https://www.standardmedia.co.ke/article/2001304390/true-value-of-the-blue-economy-to-kenya> [Accessed on 17/12/2018].

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*health, livelihoods and welfare of the people in the coastal zone; and (e) fostering an ecosystem-based climate change mitigation and adaptation measures.*³

The World Bank also 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."⁴ 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.⁵

Blue Economy thus encompasses diverse but related issues surrounding the exploitation of ocean resources, as captured in the theme of the Global Sustainable Blue Economy Conference 2018, which was ‘*the Blue Economy and the 2030 Agenda for Sustainable Development*’ broken down into nine distinct but mutually reinforcing sub-themes: smart shipping, ports, transportation and global connectivity, employment, job creation and poverty eradication, cities, tourism, resilient coasts and infrastructure, sustainable energy and mineral resources and innovative industries, management and sustaining marine life, conservation and sustainable economic activities, ending hunger, securing food supplies, promoting good health and sustainable fisheries, climate action, agriculture, waste management and pollution-free oceans, maritime security safety and regulatory enforcement and people, culture, communities, the inclusive blue economy.⁶

With its great potential the blue economy holds a lot of promise for Kenya’s economy. 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,

³ UNDP, “Leveraging the Blue Economy for Inclusive and Sustainable Growth,” *Policy Brief, Issue No: 6/2018*, April, 2018, p.2. Available at <http://www.ke.undp.org/content/dam/kenya/docs/UNDP%20Reports/Policy%20Brief%20%202018%20-%206-%20%20Blue%20Economy%20for%20Inclusive%20and%20Sustainable%20Growth.pdf> [Accessed on 17/12/2018].

⁴ 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 17/12/2018].

⁵ 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 17/12/2018].

⁶ *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.

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ocean energy, and seabed mining.⁷ 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.

3. Towards A Sustainable Blue Economy for Economic and Social Development: Challenges and Prospects for Kenya

3.1 Achieving Sustainable Blue Economy in Kenya: Challenges

The United Nations Development Programme has observed that as far as exploitation of the blue resources is concerned, 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.⁸ 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.⁹

Furthermore, Kenya is confronted with piracy in the Indian Ocean, illegal fishing and border disputes, the dispute with Somalia over the maritime boundary¹⁰, 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.¹¹ 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.¹²

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.¹³ Some of the threats highlighted include climate change, pollution and waste management, illegal activities at seas including Illegal

⁷ UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.2.

⁸ Ibid, p.5.

⁹ 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 20/12/2018].

¹⁰ Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

¹¹ UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.5.

¹² 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 20/12/2018].

¹³ *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.4.

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Unregulated and Unreported fishing, piracy and terrorism, destruction of marine ecosystems and management of resource in areas beyond national jurisdiction.¹⁴

The challenges facing exploitation of Kenya's coastal and marine resources have also been highlighted in the *Integrated Coastal Zone Management (ICZM) Policy 2014*¹⁵ as follows: uncoordinated sectoral policies; and population increase and society placing many legitimate, but often competing, demands on the resource base and the environment, with the sectoral management approaches have failed to achieve the objectives of coastal planning and sustainable development.¹⁶ This has been attributed to: limited understanding of coastal and marine resources, natural processes and opportunities; institutional weaknesses, single sector planning, bureaucracy, competing interests among institutions and misplaced priorities; inadequate legislation and enforcement; inadequately trained personnel, use of inappropriate technologies and equipment, and limited experience in integrated coastal planning, development and management.¹⁷ The result of all these has been deficient pollution management, over-extraction of resources and unsustainable livelihoods, unsustainable use patterns, resulting in wide spread degradation and loss of critical habitats and loss of development opportunities.¹⁸

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.¹⁹ 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.²⁰ 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.²¹ Kenya has not yet invested in this potentially lucrative area thus occasioning loss of income and opportunities for the Kenyan people. It is also a potential solution to the food insecurity problem in Kenya through maximizing on the seafood harvesting.²²

The global Sustainable Blue Economy Conference (SBEC 2018) came up with several forward looking resolutions as captured in the outcome Report.²³ The Conference captured concrete

¹⁴ Ibid, p.4.

¹⁵ Sessional Paper No. 13 of 2014, Republic of Kenya.

¹⁶ *Integrated Coastal Zone Management (ICZM) Policy 2014*, p.1.

¹⁷ Ibid, pp.1-2.

¹⁸ Ibid, p.2; See also Odhyambo, G., "Tapping blue economy benefits takes commitment," in Kenya School of Government, "Unpacking the Big Four," *Weekly Bulletin*, Vol. 7 Issue 20, 2nd - 8th June, 2018, p.3. Available at https://www.ksg.ac.ke/images/bulletin/KSG_Bulletin_2nd-8th_June_2018.pdf [Accessed on 20/12/2018].

¹⁹ UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.5.

²⁰ Ibid, p.5.

²¹ Ibid, p.5.

²² USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," op. cit.

²³ *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.

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commitments and practical actions that can be taken today to help the world transition to the blue economy.²⁴ However, 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. While the next section highlights some of the outcomes of the Blue Economy, it also makes further recommendations on the way forward on how these challenges can be overcome.

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 2017.²⁵

The Conference was as a result of a collaboration between Kenya and its co-hosts Canada and Japan whose main objective was to help the participants learn how to build a blue economy that: Harnesses the potential of our oceans, seas, lakes and rivers to improve the lives of all, particularly people in developing states, women, youth and Indigenous peoples; and leverages the latest innovations, scientific advances and best practices to build prosperity while conserving our waters for future generations.²⁶ This was a great opportunity for marketing Kenya not only as a respectable global player in the sector but also a chance to highlight its ecotourism potential. This should not stop and the stakeholders in the marine wildlife as well as the hospitality sector should use the same to their advantage to maximize on the tourism generated income in Kenya.

Considering that the Conference brought together 16,320 participants from 184 countries, including 7 Heads of State and Government, 84 Ministers, several Heads of International Organizations, Mayors and Governors, the business and private sector, community leaders, the civil society, and women and youth organizations,²⁷ it creates the perfect platform to launch an integrated approach with the concerted efforts of all the stakeholders. The community leaders present in the Conference should continually be engaged in bringing coastal communities on board through empowerment measures such as funding mechanisms for building of capacity and technical knowhow as far as fishing and exploitation of other marine resources is concerned. This should of course be done within the principles of sustainable development to achieve the twin goals of environmental conservation and sustainable livelihoods.

²⁴ Ibid.

²⁵ 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 17/12/2018].

²⁶ 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 17/12/2018].

²⁷ *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. Available at <http://www.blueeconomyconference.go.ke/wp-content/uploads/2018/12/SBEC-FINAL-REPORT-8-DECEMBER-2018-rev-2-1-2-PDF2-3-compressed.pdf> [Accessed on 17/12/2018].

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SBEC 2018 resulted in among others the *Nairobi Statement of Intent on Advancing a Sustainable Blue Economy*²⁸ which contains a number of key political messages, including, the need to; promote action-oriented global strategies that places people and the blue economy resources at the centre of sustainable development; promote collaboration for sustainable partnerships and projects in the various sectors of the blue economy; mobilize finance from the public and private sources, promote access to technologies and innovations, share best practices, capacity building; promote gender equality, the role and participation of women and youth in the blue economy; strengthen science and research to generate and disseminate evidence-based knowledge and information as well as to inform policy and decision making; strengthen governance mechanisms; and promote synergies within and between different levels of governments.²⁹ Incorporating these resolutions in the national policy, legal and institutional frameworks will go a long way in enhancing Kenya's capacity to harness the blue resources for the realisation of its sustainable development needs.

One of the challenges facing exploitation of the blue resources in Kenya is the lack of capital. Notably, during the Conference, participants also committed to put aside money to protect oceans, seas, lakes and rivers and the ecosystems they support.³⁰ Participants made numerous voluntary non-monetary and monetary commitments amounting to approximately USD172.2 billion in the various sectors of the blue economy, covering new partnerships and networks for joint investments in projects, financing, technology development and transfer and capacity building, among others.³¹ Kenya can capitalize on this to enter into mutually beneficial cooperation that will help it build capacity for exploitation of these resources.

There were also strategic discussions predicated on the two pillars of production; accelerated economic growth, job creation and poverty alleviation, and sustainability; climate change and controlling pollution.³² Through mutually beneficial alliances as well as meaningful inclusion of all the stakeholders, including communities, Kenya can tap into its blue resources as one of the ways of achieving the Agenda 2030 on Sustainable Development as well as the Vision 2030 development blueprint.

²⁸ *The Nairobi Statement of Intent on Advancing the Global Sustainable Blue Economy*, available at <http://www.fao.org/fi/static-media/MeetingDocuments/SustainableBlueEconomy/3.pdf> [Accessed on 18/12/2018].

²⁹ *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, p.3.

³⁰ *Ibid*, p.3.

³¹ *Ibid*, p.3.

³² *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.).

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The outcomes are expected to galvanize and deepen collaboration between and among governments and stakeholders on blue economy, and to help align the blue economy with the needs of the society.³³

The blue economy resources hold great promise and opportunity to build greater prosperity for all through such opportunities as: deep-sea mining, fisheries development, smart shipping, aquaculture, training more women in maritime related sectors, blue financing, establishment of regional centers for ship owners, research and technology development, mainstreaming climate change and environmental sustainability in the blue economy, developing blue economy observatory mechanism, raising awareness on the importance and value of maritime resources.³⁴ In addition to the foregoing, there is a need for conscious efforts aimed at curbing pollution of the water bodies. This must start from the highlands where the agricultural residue chemicals and soil erosion originate from. Farmers 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 to ensure full implementation of the ICZM policy, which is a forward looking policy that holds potential in enhancing the country's capacity in not only conserving and protecting the coastal and marine resources but also tapping into these resources for national development and improving the livelihoods of the coastal communities.

As already noted, climate change also threatens the profitability of the blue economy and thus specific measures as envisaged in Kenya's *Climate Change Act 2016*³⁵ should proactively be implemented to avert and reverse the adverse effects of climate change on these resources.

As pointed out elsewhere in this paper, most African countries, including Kenya, lack advanced industries for processing and value addition of raw materials. This can be attributed to high capital requirements to set up such industries and the technology gap.³⁶ The lack of capacity and technology knowhow as well as capital negatively affects the country's ability to tap into these resources. There should be conscious efforts from the Government of Kenya to not only source for strategic partnerships to acquire the capital and the technical knowhow required for the exploitation of these resources but also make budgetary allocation to develop the sector due to its high potential in enhancing the lives of communities as well as its contribution to the national GDP. Funding mechanisms would not only build capacity for the experts but also facilitate the community's efforts to venture into this area of economy.

³³ *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.3.

³⁴ *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.4.

³⁵ 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 mechanisms and measures to achieve low carbon climate development, and for connected purposes. The Act also establishes the National Climate Change Council to coordinate the country's climate change efforts.

³⁶ Ngwenya, S., "Africa has to Shed off the Resource Curse Stigma" *The Star Newspaper*, Friday January 3, 2014.

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In order to tap into the blue economy as a solution to the food insecurity problem in the country, there is a need for the various communities to be sensitised on the need to venture into seafood business both as a source of food as well as a source of income. Supplying them with the knowledge as well as the required resources for startup should now be a priority for the government as it will also mean that the country's status as a consumer and producer or exporter of seafood will be enhanced internationally.

As already pointed out, the successful exploitation of the blue resources in Kenya requires the concerted efforts of all. A clear stakeholder mapping of all the potential beneficiaries as well as the interested parties, such as communities that directly rely on these resources for their livelihoods is needed so that they can work closely with the government bodies in charge of these resources as well as environmental conservation to ensure that they all work towards improving the lives of the people, economic development as well as environmental conservation. The Government (Executive, Judiciary and Parliament) can work closely with the county governments, Non-Governmental Organisations, scientists and other professionals as well as the specific committees or offices charged with coming up with the policy blueprint for the development of the country's blue economy to ensure that there is not only in place practical measures laid down by way of legal and policy frameworks but that the same are also fully implemented and enforced to protect the resources from degradation and pollution as well as Illegal Unregulated and Unreported fishing from foreigners.

If the foregoing proposed measures are considered as well as the full implementation of the Blue Economy Conference resolutions, Kenya would be well on its way to realisation of the sustainable development goals and the country's Vision 2030.

4. Conclusion

The sustainable development agenda calls for economic development that is both inclusive and environmentally sound, and undertaken in a manner that does not deplete the natural resources that societies depend on in the long-term, and this includes the oceans, making it a key component of the *blue economy*.³⁷

Kenya can reap 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.

³⁷ UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.6.

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Abstract

This paper is a commentary and highlights the contents of the proposed United Nations High Seas Treaty and discusses how the Treaty, when adopted can enhance environmental protection of the marine life in the open areas of international waters. The author also discusses the current international regulatory framework on management of marine resources and highlights the gaps especially in environmental conservation. The author argues that this Treaty is a step towards achieving Sustainable Development Goal 14 on conservation of marine resources that lie beyond national jurisdictions.

1. Introduction

For a long time, there has been no universal legal instrument specifically aimed at protecting the high seas beyond the national jurisdictions as defined by the United Nations Convention on the Law (UNCLOS). As a result, there has been a painful time of excessive exploitation, which has been carried out with utter impunity and with little regard for the health of the natural resources in its harbours. It has been a case of humanity metaphorically shooting itself in the foot or seemingly not caring about future generations who will depend on a healthy ocean for their survival.¹ Worldwide oceans make up about two-thirds of international waters. This implies that all nations have the freedom to fish, ship, and conduct research there. As a result, problems including climate change, overfishing, and shipping traffic pose a threat to the marine species that inhabit the vast bulk of the high seas.²

States have since moved to correct this situation by coming up with a High Seas Treaty, aimed at conserving resources lying within these international waters. This paper highlights some of the positive aspects of this Treaty and how the same can enhance environmental responsibilities of those seeking to explore these resources.

2. Marine Protection and Conservation: The Current Regulatory Framework

The Convention on the Law of the Sea (UNCLOS), which was developed under the supervision of the United Nations and ratified in 1982 by 117 States, is the international instrument most frequently linked to the law of the sea. UNCLOS came into force in 1994.³ UNCLOS is a framework Convention that addresses a wide range of ocean-related issues. The treaty, which is divided into seventeen parts and nine appendices, outlines states' rights and responsibilities with regard to: (1) the territorial sea and contiguous zone; (2) straits used for international navigation; (3) archipelagic states; (4) the exclusive economic zone; (5) the continental shelf; (6) the high seas;

¹ Owen-Burge C, 'Why the High Seas Treaty Is a Breakthrough for the Ocean and the Planet' (*Climate Champions*, 10 March 2023) <<https://climatechampions.unfccc.int/why-the-high-seas-treaty-is-a-breakthrough-for-the-ocean-and-the-planet/>> accessed 20 March 2023.

² 'What Is the UN High Seas Treaty and Why Is It Needed?' *BBC News* (5 March 2023) <<https://www.bbc.com/news/science-environment-64839763>> accessed 20 March 2023.

³ Hoagland Porter and others, 'Law of the Sea☆' in J Kirk Cochran, Henry J Bokuniewicz and Patricia L Yager (eds), *Encyclopedia of Ocean Sciences (Third Edition)* (Academic Press 2019) <<https://www.sciencedirect.com/science/article/pii/B9780124095489113442>> accessed 20 March 2023.

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(7) the regime of islands; (8) enclosed or semi- enclosed seas; (9) the right of access of landlocked states to and from the sea and freedom of transit.⁴

It establishes guidelines for all uses of the oceans' resources and establishes a comprehensive regime of law and order throughout the world's oceans and seas. It encapsulates long-standing guidelines for using the oceans in one document while also introducing new legal frameworks and addressing fresh issues. The Convention also lays forth the groundwork for future advancements in particular spheres of maritime law.⁵

The United Nations Convention on the Law of the Sea (UNCLOS) establishes guidelines for using the ocean and its resources, but it is silent on how governments should specifically, save for broad provisions, protect and sustainably utilise biodiversity found in the high seas. States are able to identify their jurisdictional waters and maritime zones by establishing a coastal baseline; 200 nautical miles from the baseline are included in their Exclusive Economic Zone (EEZ). The resources present in the zone may only be utilised or conserved by States. The term "Areas Outside National Jurisdiction" refers to the portions of the ocean outside the Exclusive Economic Zone. The water column, also known as the High Seas, and the seabed, sometimes known as the Area, are further divisions of these regions according to the Law of the Sea.⁶ Thus, currently there is no comprehensive set of rules to ensure their conservation and sustainable use.⁷

Notably, UNCLOS provides that 'all States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas'.⁸ UNCLOS uses the term 'high seas' to mean 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.⁹ It also states that 'the high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; and (f) freedom of scientific research, subject to Parts VI and XIII'.¹⁰ These freedoms are to be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.¹¹

⁴ 'The Legal and Institutional Framework Governing Ocean-Based Economic Sectors in Barbados' (2019) <https://unctad.org/system/files/official-document/ditctedinf2019d14_en.pdf> accessed 20 March 2023.

⁵ 'United Nations Convention on the Law of the Sea' <<https://www.imo.org/en/ourwork/legal/pages/unitednationsconventiononthelawofthesea.aspx>> accessed 19 March 2023.

⁶ 'Biodiversity: UN Agreement for the Protection of the Ocean | Research Institute for Sustainability' <<https://www.rifs-potsdam.de/en/output/dossiers/ocean-treaty>> accessed 20 March 2023.

⁷ *Ibid.*

⁸ UNCLOS, Article 117.

⁹ UNCLOS, Article 86.

¹⁰ UNCLOS, Article 87(1).

¹¹ UNCLOS, Article 87(2).

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UNCLOS also states that ‘States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, are obligated to enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They are to, as appropriate, cooperate to establish sub-regional or regional fisheries organizations to this end.’¹²

Regarding conservation of the living resources of the high seas, UNCLOS provides that ‘in determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global; and (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.’¹³

As far as the principles governing the area are concerned, UNCLOS provides that ‘necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the International Seabed Authority shall adopt appropriate rules, regulations and procedures for inter alia: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; and (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.’¹⁴

UNCLOS outlines States’ general obligation to protect and preserve the marine environment.¹⁵ In order to move away from these generalized duties under UNCLOS and which mainly focuses on the jurisdictions of States, the High Seas Treaty is meant to come into force to define specific environmental duties relating to the high seas. The background to this new development is that UNCLOS is best understood as a framework providing a basic foundation for the international law of the oceans intended to be extended and elaborated upon through more specific international agreements and the evolving customs of States.¹⁶

¹² UNCLOS, Article 118.

¹³ UNCLOS, Article 119(1).

¹⁴ UNCLOS, Article 145.

¹⁵ UNCLOS, Article 192.

¹⁶ Hoagland P, Jacoby J and Schumacher ME, ‘Law Of The Sea’ in John H Steele (ed), *Encyclopedia of Ocean Sciences* (Academic Press 2001) <<https://www.sciencedirect.com/science/article/pii/B012227430X004153>> accessed 20 March 2023.

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3. Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (High Seas Treaty)

It has been noted that nearly two-thirds of the planet's surface is covered by water, and the oceans account for 95% of the planet's total habitat by volume. Only 39% of the ocean is subject to national jurisdiction, and only 1% of the high seas have ever been subject to any kind of protection protocol.¹⁷ The High Seas Treaty, which ensures the protection and sustainable use of marine biodiversity in areas beyond of national authority, was approved by Member States of the United Nations after years of talks.¹⁸

The UN General Assembly unanimously approved Resolution 72/249 on December 24, 2017 to call a conference of governments and launch formal negotiations for a new international legally binding instrument (ILBI) under the UN Convention on the Law of the Sea (UNCLOS) for the conservation and sustainable exploitation of marine biological diversity in areas outside of national jurisdiction.¹⁹

The *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*²⁰ was informed by, *inter alia*: the relevant provisions of the United Nations Convention on the Law of the Sea, including the obligation to protect and preserve the marine environment; the need to respect the balance of rights, obligations and interests set out in the Convention; the need to address, in a coherent and cooperative manner, biodiversity loss and degradation of ecosystems of the ocean, due to, in particular, climate change impacts on marine ecosystems, such as warming and ocean deoxygenation, as well as ocean acidification, pollution, including plastic pollution, and unsustainable use; the need for the comprehensive global regime under the Convention to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; the importance of contributing to the realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, the special interests and needs of developing States, whether coastal or landlocked; and recognizing also that support for developing States Parties through capacity-building and the development and transfer of marine technology which are essential elements for the attainment of the objectives of the conservation and

¹⁷ Owen-Burge C, 'Why the High Seas Treaty Is a Breakthrough for the Ocean and the Planet' (*Climate Champions*, 10 March 2023) <<https://climatechampions.unfccc.int/why-the-high-seas-treaty-is-a-breakthrough-for-the-ocean-and-the-planet/>> accessed 20 March 2023.

¹⁸ *Ibid.*

¹⁹ 'Treaty Negotiations' (*High Seas Alliance*) <<https://www.highseasalliance.org/treaty-negotiations/>> accessed 20 March 2023.

²⁰ United Nations, *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction Resumed fifth session, New York, 20 February–3 March 2023 <https://www.un.org/bbnj/sites/www.un.org/bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf> accessed 20 March 2023.

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sustainable use of marine biological diversity of areas beyond national jurisdiction.²¹ The objective of the of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.²²

The proposed Agreement, shall be interpreted and applied in the context of and in a manner consistent with the Convention. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention, including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles. In addition, it shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.²³

In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches: (a) The polluter-pays principle; (b) the principle of the common heritage of humankind which is set out in the Convention; (b) the freedom of marine scientific research, together with other freedoms of the high seas; (c) the principle of equity, and the fair and equitable sharing of benefits; (d) Precautionary principle or precautionary approach, as appropriate; (e) an ecosystem approach; (f) an integrated approach to ocean management; (g) an approach that builds ecosystems resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the ocean's role in climate; (h) the use of the best available science and scientific information; (i) the use of relevant traditional knowledge of Indigenous Peoples and local communities, where available; (j) the respect, promotion and consideration of their respective obligations, as applicable, relating to the rights of Indigenous Peoples or of, as appropriate, local communities when taking action to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; (k) the non-transfer, directly or indirectly, of damage or hazards from one area to another and the non-transformation of one type of pollution into another, in taking measures to prevent reduce, and control pollution of the marine environment; (l) full recognition of the special circumstances of small island developing States and of least developed countries; and (m) acknowledgement of the special interests and needs of landlocked developing countries.²⁴

Parties shall be required to cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and promoting cooperation among relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies in the achievement of the objective of this Agreement.²⁵

²¹ Preamble, *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*.

²² Article 2, *Draft Agreement Under the United Nations Convention On the Law of the Sea On the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*.

²³ Article 4.

²⁴ Article 5.

²⁵ Article 6(1).

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Notably, the proposed Agreement also seeks to ensure the fair and equitable sharing of benefits arising from activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.²⁶ It also calls for the building and development of the capacity of Parties, particularly developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, to carry out activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction.²⁷ It also seeks to promote the generation of knowledge, scientific understanding and technological innovation, including through the development and conduct of marine scientific research as fundamental contributions to the implementation of this Agreement.²⁸ In addition to the foregoing, the proposed Agreement seeks to promote the development and transfer of marine technology in accordance with this Agreement.²⁹

The provisions of this Agreement shall apply to activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction collected and generated after the entry into force of this Agreement for the respective Party. The application of the provisions of this Agreement shall extend to the utilization of marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction collected or generated before entry into force, unless a Party makes an exception in writing under article 63 when signing, ratifying, approving, accepting or acceding to this Agreement.³⁰

Regarding environmental management, the Agreement seeks to ensure that States:(a) conserve and sustainably use areas requiring protection, including through the establishment of a comprehensive system of area-based management tools, with ecologically representative and well-connected networks of marine protected areas; (b) strengthen cooperation and coordination in the use of area-based management tools, including marine protected areas, among States, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies; (c) protect, preserve, restore and maintain biodiversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution; (d) support food security and other socioeconomic objectives, including the protection of cultural values; and (e) support developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, taking into account the special circumstances of small island developing States, through capacity-building and the development

²⁶ Article 7(a).

²⁷ Article 7(b).

²⁸ Article 7 (c).

²⁹ Article 7(d).

³⁰ Article 8.

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and transfer of marine technology in developing, implementing, monitoring, managing and enforcing area-based management tools, including marine protected areas.³¹

The Agreement also seeks to: (a) operationalize the provisions of the Convention on environmental impact assessment for areas beyond national jurisdiction by establishing processes, thresholds and other requirements for conducting and reporting assessments by Parties; (b) ensure that activities covered by this Part are assessed and conducted to prevent, mitigate and manage significant adverse impacts for the purpose of protecting and preserving the marine environment; (c) support the consideration of cumulative impacts and impacts in areas within national jurisdiction; (d) provide for strategic environmental assessments; (e) achieve a coherent environmental impact assessment framework for activities in areas beyond national jurisdiction; and (f) build and strengthen the capacity of Parties, particularly developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle income countries, to prepare, conduct and evaluate environmental impact assessments and strategic environmental assessments in support of the objectives of this Agreement.³²

The Agreement also requires Parties to ensure that the potential impacts on the marine environment of planned activities under their jurisdiction or control, which take place in areas beyond national jurisdiction, are assessed as set out in this Part before they are authorized.³³ In addition, when a Party with jurisdiction or control over a planned activity that is to be conducted in marine areas within national jurisdiction determines that the activity may cause substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction, that Party shall ensure that an environmental impact assessment of such activity is conducted in accordance with this Part or an environmental impact assessment is conducted under the Party's national process. A Party conducting such an assessment under its national process shall: (a) make relevant information available through the clearing-house mechanism, in a timely manner during the national process; (b) ensure that the activity is monitored in a manner consistent with the requirements of its national process; and (c) ensure that environmental impact assessment reports and any relevant monitoring reports are made available through the clearing-house mechanism as set out in this Agreement.³⁴

Beyond the provisions on environmental assessment under the Agreement, Parties are required to promote the use of environmental impact assessments and the adoption and implementation of the standards and/or guidelines developed under article 41 bis in relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies of which they are members.³⁵

In addition to environmental assessments, Parties are also required to, by using the best available science and scientific information and, where available, the relevant traditional knowledge of

³¹ Article 14.

³² Article 21.

³³ Article 22 (1).

³⁴ Article 22(2).

³⁵ Article 23.

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Indigenous Peoples and local communities, keep under surveillance the impacts of any activities in areas beyond national jurisdiction which they permit or in which they engage in order to determine whether these activities are likely to pollute or have adverse impacts on the marine environment. In particular, each Party shall monitor the environmental and any associated impacts, such as economic, social, cultural and human health impacts, of an authorized activity under their jurisdiction or control in accordance with the conditions set out in the approval of the activity.³⁶ Parties are also required to produce and make monitoring reports public, including through the clearing-house mechanism and the Scientific and Technical Body may consider and evaluate the monitoring reports.³⁷ Parties are also to ensure that the impacts of the authorized activity monitored pursuant to article 39 are reviewed.³⁸

Parties shall also be required under this agreement, individually or in cooperation with other Parties, to consider conducting strategic environmental assessments for plans and programmes relating to activities under their jurisdiction or control, to be conducted in areas beyond national jurisdiction, to assess the potential effects of that plan or programme, as well as alternatives, on the marine environment.³⁹

The Agreement also seeks to: (a) assist Parties, in particular developing States Parties, in implementing the provisions of this Agreement, to achieve its objectives; (b) enable inclusive, equitable and effective cooperation and participation in the activities undertaken under this Agreement; (c) develop the marine scientific and technological capacity, including with respect to research, of Parties, in particular developing States Parties, with regard to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through access to marine technology by, and the transfer of marine technology to, developing States Parties; (d) increase, disseminate and share knowledge on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; (e) more specifically, support developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, through capacity-building and the development and transfer of marine technology under this Agreement in achieving the objectives in relation to: (i) marine genetic resources, including the sharing of benefits, as reflected in article 7; (ii) measures such as area-based management tools, including marine protected areas, as reflected in article 14; (iii) environmental impact assessments, as reflected in article 21 bis.⁴⁰

This Agreement, as highlighted has key provisions and tools that are meant to ensure conservation and sustainable use of marine resources in areas beyond national jurisdictions. It is also worth noting that it seeks to empower developing countries in not only conserving these resources but also exploiting them through capacity building.

³⁶ Article 39.

³⁷ Article 40.

³⁸ Article 41.

³⁹ Article 41 ter.

⁴⁰ Article 42.

High Seas Treaty: Enhancing Environmental Responsibility for Marine Protection

4. High Seas Treaty: Enhancing Environmental Responsibility for Marine Protection

After more than a decade of discussions at the UN, formal negotiations to create a new treaty under the UN Convention on the Law of the Sea (UNCLOS) for the preservation and sustainable use of marine biodiversity in areas beyond the national jurisdiction (ABNJ) began at the UN in September 2018. This is the first ocean-related global treaty process in more than 20 years, and the only one that is exclusively focused on safeguarding marine biodiversity in ABNJ.⁴¹ Recognized as the governing document for the world's oceans, UNCLOS does not, however, contain the precise standards necessary to guarantee the successful execution of its broad commitments to safeguard the marine environment and its living resources.⁴² Hopefully, the High Seas Treaty will seal this gap as it spells out specific obligations for States and those interacting with the high seas.

Although the oceans and seas are sometimes disregarded in climate negotiations, research demonstrates that they are a crucial component of any solution since they store the carbon that is responsible for climate change and offer significant advantages for climate adaptation. Action on land and at sea is required to preserve the ocean. This entails lessening the direct effects of humans on the ocean, cleaning up polluted rivers, restoring wetlands, and creating a circular economy where potential pollutants are used for as long as feasible before being appropriately disposed of at the end of their useful lives.⁴³

As seen in the previous section, the High Seas Treaty comes with key tools and provisions geared towards promoting conservation and sustainable utilisation of marine resources and environment in ABNJ. It also seeks to empower developing countries through capacity building to bolster their capacity in exploiting these resources, especially in this period when sustainable utilisation of the blue economy resources to promote national development has gained international momentum.⁴⁴

5. Conclusion

This paper has critically discussed the current framework on marine resources governance and management and also compared it to the proposed High Seas Treaty which seeks to implement the UNCLOS provisions on protection and conservation of marine resources. Notably, the treaty goes beyond this by seeking to empower developing countries in their capacity to exploit the marine resources that lie within and beyond their territorial borders and high seas. It is hoped that the international community will fast track the formal adoption of this Treaty by fine tuning the few details remaining as it will go a long way in conservation of marine resources and environment as well as enhancing the capacity of developing countries in Africa to exploit their own marine resources for national development and socio-economic empowerment of their people. national jurisdiction Resumed fifth session, New York, 20 February–3 March 2023.

⁴¹ 'Protecting Half the Planet: A New High Seas Biodiversity Treaty' (*High Seas Alliance*) <<https://www.highseasalliance.org/resources/protecting-half-the-planet-a-new-high-seas-biodiversity-treaty-in-2020/>> accessed 20 March 2023.

⁴² 'Protecting Half the Planet: A New High Seas Biodiversity Treaty' (*High Seas Alliance*) <<https://www.highseasalliance.org/resources/protecting-half-the-planet-a-new-high-seas-biodiversity-treaty-in-2020/>> accessed 20 March 2023.

⁴³ 'Why Protecting the Ocean and Wetlands Can Help Fight the Climate Crisis' (*UNEP*, 11 November 2022) <<http://www.unep.org/news-and-stories/story/why-protecting-ocean-and-wetlands-can-help-fight-climate-crisis>> accessed 20 March 2023.

⁴⁴https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf> accessed 20 March 2023.

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

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.

²Nocca 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.

⁴Harris 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.

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parts of the world, communities seem sidelined in the efforts sustainable development agenda in 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 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.

⁷'Kenya: 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.cultural.sustainability.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.

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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*.

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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

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.

²³ Ibid.

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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 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

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.

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has gone in demonstrating communities' inclusion is 'the Government putting in place mechanisms to foster peace among warring communities through initiatives like 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,

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.

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sustainable consumption and production patterns, peaceful and inclusive societies, gender equality 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,

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.

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ranging from food insecurity, poverty, and environmental degradation, among others. The global community cannot therefore afford to ignore their role in the same.

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/8b832986477dddbd.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://landlinks.org/issue-brief/tenure-governance-and-natural-resource-management/>> accessed 8 January 2021;.

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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/kenyas-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,

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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.

<https://www.researchgate.net/publication/227736698_Challenges_to_Community-Based_Sustainable_Development_Dynamics_Entitlements_Institutions>accessed 6 January 2021.

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.

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Abstract

Sustainable development agenda seeks to strike a balance among what are considered to be the three dimensions of sustainable development: the economic, social and environmental. Any efforts that concentrate on either of the three while neglecting the other aspects are undesirable. This paper looks at the environmental aspects of sustainable development and the related issues of human rights in the context of international investments law. While the issues as discussed are transnational in nature, and thus the scope of this paper is not limited to Kenya, there are references to the relevant regional and international legal instruments, where applicable.

1. Introduction

This paper critically discusses the sustainable development agenda and the related issues of human rights in the context of international investments law with a bias on Kenya. It explores the international investments law and policy in Africa and Kenya in particular, and how the same addresses the related environmental questions and human rights issues that arise.

2. International Investment Law and Policy in Africa: International Investments and National Development

The main objective of investment laws is to promote (foreign) investment by regulating access to the domestic market; stipulating investor rights and guarantees; clarifying access to dispute settlement; setting up institutions, including investment promotion agencies and one-stop shops; and providing incentives schemes.¹ Development of international investment law, which pre-dates the development of investment treaties by several decades, is largely attributed to the customary international law theory that an affront to the rights of a foreign owned business in its host state is an affront to the sovereignty and interests of the investor's home state sovereign.² Scholars have observed that that in the immediate post-World-War II era, as international investment gained momentum, foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few contested customs, and some questionable general principles of law.³ For investors, this international legal structure was seriously deficient in at least four respects: first, it was incomplete, for it failed to take account of contemporary investment practices and to address important issues of investor concern, such as their rights to make monetary transfers from the host country; second, the principles that did exist were often vague and subject to varying interpretations; third, the content of international investment law was contested, particularly between industrialized countries and newly decolonized developing nations that in the 1970s began to demand a new international economic order to take account of their particular needs; and finally, existing

¹ United Nations Conference on Trade and Development, *World Investment Report 2018* UNCTAD/WIR/2018 (United Nations, 2018), p. 106. Available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [Accessed on 1/10/2018].

² Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.521.

³ Salacuse, J.W., "The Treatification of International Investment Law," *Law and Business Review of the Americas* 13, no. 1 (2007): 155 at p. 155.

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international law offered foreign investors no effective enforcement mechanism to pursue their claims against host countries that had injured or seized their investments or refused to respect their contractual obligations.⁴

To change the dynamics of this struggle and protect the interests of their companies and investors, industrialized countries began a process of negotiating international investment treaties that, to the extent possible, would be: 1) complete, 2) clear and specific, 3) uncontestable, and 4) enforceable. These treaty efforts took place at both the bilateral and multilateral levels, which, though separate, tended to inform and reinforce each other.⁵ Notably, the focus of the initial period of growth of investment treaties was singular: the protection of investor rights in foreign states.⁶ The protection of investors remained the sole objective of International Investment Agreements (IIAs) until the inclusion of investment liberalization provisions.⁷

United Nations Conference on Trade and Development (UNCTAD) observes that national investment laws operate within a complex web of domestic laws, regulations and policies that relate to investment (e.g. competition, labour, social, taxation, trade, finance, intellectual property, health, environmental, culture).⁸ It is also observed that investment-related issues are typically also enshrined in countries' company laws, and- sometimes- in countries' constitutions. As such, to the extent a country has an investment law, this law must be assessed in the context of the country's larger policy framework.⁹

There has been identified challenges arising from the policymaking interaction between IIAs and the national legal framework for investment as follows: policymakers in charge of national and international investment policies might be operating in silos and create outcomes that are not mutually supportive or, worse, conflicting; incoherence (e.g. between a clearly defined Fair and Equitable Treatment (FET) clause in one or several IIAs and a broad FET clause in an investment law) may have the effect of rendering IIA reform ineffective; and incoherence between investment laws and IIAs may also create Investor-state dispute settlement (ISDS)-related risks when national laws include advance consent to international arbitration as the means for the settlement of investor-State disputes, which could result in parallel proceedings.¹⁰

The World Bank has rightly pointed out that different countries have different priorities in their development policies and, therefore, any attempt at comparison of their development levels, would require one to first decide what development really means to them, and what it is supposed to achieve.¹¹ However, regardless of their priorities, developing economies can draw on a range of

⁴ Ibid, at p. 155.

⁵ Ibid, at p. 156.

⁶ Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.524.

⁷ Ibid, at p.524.

⁸ United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p. 106. Available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [Accessed on 1/10/2018].

⁹ Ibid, at p. 106.

¹⁰ Ibid, at p. 107.

¹¹ The World Bank, 'What Is Development?' pp. 7-10 at p.10.

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external sources of finance, including Foreign Direct Investment (FDI), portfolio equity, long-term and short-term loans (private and public), Official development assistance (ODA), remittances and other official flows.¹² Foreign investments are considered important for a country as they have the potential to build and upgrade industries, connect countries to international markets and also drive essential innovation and competitiveness.¹³ In addition, Investment Promotion Agencies (IPA) in developing economies expect most investment to come from agribusiness corporations, followed by information and communication Multinational Enterprises (MNEs). IPAs also expect to attract utilities and construction investors to fill infrastructure gaps. On the other hand, IPAs in developed economies expect most investments to come from information and communication companies and professional services, and from specialised manufacturing industries: pharmaceuticals, automotive and machinery.¹⁴ It is however noteworthy that there are some parallels within MNE expectations: IPAs from developing and transition economies all forecast investments from the food and beverages industry (light industry), matching corporation's plans of investments across the developing world. In addition, another promising industry for developing economies is information and communication (that includes both tech and telecom corporations) as the digital economy spreads to frontier markets.¹⁵

3. Investments, Human Rights, Environmental Damage and Sustainable Development: The (Dis) Connection

Sustainable development has been defined as a combination of elements, such as environmental protection, economic development, and most importantly social issues.¹⁶ 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.¹⁷ Economic, social, environmental and cultural aspects must be integrated in a harmonious manner to enhance the intergenerational well-being.¹⁸

Sustainable development contains both substantive and procedural elements, where substantive elements include the integration of environmental protection and economic development; the right to development; the sustainable utilisation of natural resources; the equitable allocation of resources both within the present generation and between present and future generations, while

Available at http://www.worldbank.org/depweb/beyond/beyondco/beg_01.pdf [Accessed on 1/10/2018].

¹² United Nations Conference on Trade and Development, *World Investment Report 2018*, at p. 12.

¹³ United Nations Conference on Trade and Development, *World Investment Report 2018*.

¹⁴ *Ibid*, at p.18.

¹⁵ *Ibid*, at pp.18-19.

¹⁶ Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1 ISBN: 978-1-84826-314-7 (eBook).

¹⁷ 'Theories of Economic Development,' p. 14. Available at www.springer.com/cda/content/document/cda_downloaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406 [Accessed on 02/10/2018].

¹⁸ *Ibid*; See also generally, Chambers, R., *Sustainable Livelihoods, Environment and Development: Putting Poor Rural People First*, IDS Discussion Paper 240, Brighton: IDS, 1987. Available at <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/875/rc279.pdf?sequence=1&isAllowed=y> [Accessed on 02/10/2018].

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procedural elements include public participation in decision making; access to information; and environmental impact assessment.¹⁹

Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.²⁰ Human rights depend upon having a liveable planet. The *Draft Principles on Human Rights and the Environment of 1994*,²¹ (1994 Draft Principles) provide for the interdependence between human rights, peace, environment and development, and declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.²² This indivisibility has been affirmed by various judicial courts such as in the in the case of European union case of *Lopez Ostra v Spain*²³, where the Court stated: “Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely....”

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.²⁴ 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.²⁵

The *Universal Declaration of Human Rights of 1948*²⁶ (UDHR) places an obligation on all states to employ progressive measures to ensure recognition of human rights as guaranteed therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. It provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.²⁷

While the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* 1966²⁸ guarantees the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources, they must do so without prejudice to any obligations arising out of international

¹⁹ Birnie, P. et al, *International Law and the Environment*, (3rd Ed., Oxford University Press, New York, 2009), p. 116.

²⁰ 1992 Rio Declaration, Principle 1, which reads in full: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

²¹ Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

²² Draft Principles on Human Rights and the Environment, Principle 1.

²³ *López Ostra v. Spain*, 303 Eur. Ct. H.R. 41 (1994).

²⁴ Fisher, A.D., ‘A Human Rights Based Approach to the Environment and Climate Change’ *A GI-ESCR Practitioner’s Guide*, March 2014.

²⁵ Ibid.

²⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [Accessed 10/08/2016].

²⁷ *Universal Declaration of Human Rights of 1948*, Art. 22.

²⁸ *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

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economic co-operation, based upon the principle of mutual benefit, and international law.²⁹ This is also captured under the *African Charter for Human and People's Rights* (Banjul Charter)³⁰.

*Agenda 21*³¹ 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.³² The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation. *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.³³ The *IISD Model International Agreement on Investment for Sustainable Development, 2005*³⁴ was formulated to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries.³⁵

Notably, the new generation of International Investment Agreements (IIAs) have sustainable development orientation, where, in contrast to the IIAs signed in 2000 and before, the 2017 IIAs include a larger number of provisions explicitly referring to sustainable development issues (including by preserving the right to regulate for sustainable development-oriented policy objectives).³⁶ For instance, UNCTAD observes that of the 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources.³⁷ In addition, all but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.³⁸ A good example is the Morocco-Nigeria BIT of 2016.

²⁹ Ibid, Article 1.2.

³⁰ *African Charter for Human and People's Rights* (Banjul Charter), adopted 27 June 1981, entered into force 21 October 1986), Article 21.

³¹ (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

³² Ibid, Preamble.

³³ Ibid, Clause 3.4.

³⁴ Howard Mann, et al., Int'l Inst. for Sustainable Dev., *IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook* (2d ed. 2006), available at https://www.iisd.org/sites/default/files/publications/investment_model_int_handbook.pdf [Accessed on 1/10/2018].

³⁵ *Model International Agreement on Investment for Sustainable Development*, Article 1.

³⁶ United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), op cit., at p. 96.

³⁷ Ibid, at p. 96.

³⁸ Ibid, at p. 96.

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The place of sustainable development agenda in investment law was also captured in the *United Nations 2030 Agenda for Sustainable Development*³⁹ which outlines the Sustainable Development Goals (SDGs) provides that one of the ways of reducing inequality within and among countries is ‘to encourage official development assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes’.⁴⁰ In addition, it provides that in order to strengthen the means of implementation and revitalize the global partnership for sustainable development, there is needed to adopt and implement investment promotion regimes for least developed countries.⁴¹ Furthermore, one of the declarations is that ‘*private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. The state parties also acknowledged the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. They called on all businesses to apply their creativity and innovation to solving sustainable development challenges. They affirmed to foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other on-going initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of ILO, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements*’.⁴²

The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources. It is expected that states efforts will be informed by the SDGs in the economic, social, political and environmental decisions. The Goals also provide an elaborate standard for holding countries accountable in their development activities. This way, environmental health is not likely to be sacrificed at the altar of economic development but will be part of the development agenda. The *2030 Agenda* paints a picture of inextricable interdependence as far as international investment as a tool of development and the realisation of sustainable development agenda are concerned.

In addition to other reform-oriented elements, some of the IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs such as: conditioning treaty coverage on investors’ contribution to sustainable development. That is, inclusion of a requirement that a covered investment should contribute to the host state’s economy or sustainable development (Burundi-Turkey BIT, Mozambique-Turkey BIT, Turkey-Ukraine BIT).⁴³ Moreover, there is also need for fostering responsible investment which requires including a “best efforts” obligation for

³⁹ 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.

⁴⁰ Ibid, Goal 10(7) b.

⁴¹ Ibid, Goal 17.5.

⁴² Ibid, Para. 67.

⁴³ United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p. 98. Available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [Accessed on 1/10/2018].

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investors to respect the human rights of the people involved in investment activities and to promote the building of local capacity and the development of human capital.⁴⁴ For instance, the mining operations often exist in remote parts of developing countries, with the combined challenges in public services delivery and development assistance and mining sector players are always called upon to catalyze development in such areas.⁴⁵ Furthermore, an increase in the number of multinational corporations has led to a greater presence of private corporations amongst communities around the world, and this, combined with a global decline in public sector development assistance has cast the private sector as an important player in social and economic development.⁴⁶ Under the requirement for corporate social responsibility, these corporations play an active role in betterment of the lives of locals in their countries' and specifically areas of operation. They, therefore, appear to be more useful in upgrading the lives of locals as compared to the often inefficient or absent government bodies.

This has been attributed to various factors including the existence of mining operations in environments where government institutions may be absent, weak, lack in capacity or corrupt, leaving gaps in essential public service provision. Further, the social and environmental footprint of mining operations often has impacts on local communities, requiring compensation and mitigation programmes and the remote locations of many operations accentuates the expectation for employment and economic development within host communities. The enclave nature of the mining industry can limit the "trickle down" of benefits unless specific social investment programmes are undertaken.⁴⁷ These are usually based on corporate social responsibility requirements that require these organisations to contribute positively to the lives of the communities.

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.⁴⁸ 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.⁴⁹ In carrying out their functions, the various MNCs should 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.

⁴⁴ *Ibid*, at p. 98.

⁴⁵ "World Bank, Mining Foundations, Trust and Funds: A Sourcebook. Washington, DC., 2010, p. 7, available at <https://openknowledge.worldbank.com/handle/10986/16965> [Accessed on 1/10/2018].

⁴⁶ The World Bank, 'Examining Foundations, Trusts and Funds (FTFs) in the Mining Sector,' Part 1, p.17. Available at http://siteresources.worldbank.org/EXTOGMC/Resources/Sourcebook_Part1_Main_Findings.pdf[Accessed on 1/10/2018].

⁴⁷ *Ibid*.

⁴⁸ Pimpa, N., 'Multinational Corporations: Corporate Social Responsibility and Poverty Alleviation in Thailand,' School of Management, RMIT University.

⁴⁹ 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.

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These requirements should be backed by a legal and policy framework safeguarding the rights of communities as well as entrenching environmental obligations in investment laws. It has however been noted that these innovative features do not necessarily translate into reduced level of investment protection, as most of the IIAs signed in 2017 maintain substantive investment protection standards.⁵⁰

It has been argued that states have a right, and indeed a duty, to seek to ensure that investments make a positive contribution to their sustainable development.⁵¹ This, it is argued, requires a shift in focus from looking at the quantity of investment as the only issue, to the quality of that investment as the key issue.⁵² From a sustainable development perspective, the link to investment is considered essential.⁵³ Scholars also argue that from a purely environmental perspective, foreign direct investment (FDI) provides a very valuable way to disseminate new technologies and processes, and thus to more rapidly advance the goal of sustainable development at the different levels of communities, states, and globally.⁵⁴

In addition, from a broader sustainable development perspective however, and taking fully into account social and economic development factors as well as environmental, more subtle approaches are needed.⁵⁵ Those in support of this proposition also believe that poverty eradication and economic and social development must be equal factors, and the protection and promotion of human rights is both a necessary goal and a measure for the achievement of sustainable development.⁵⁶ This is also affirmed in Principle 5 of the *Rio Declaration on Environment and Development 1992*⁵⁷ which provides that all States and all people should 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. Poverty eradication is thus considered to be at the heart of achieving sustainable development in the world, and unless it is dealt with, then attaining sustainable development remains a mirage. Environmental goals cannot be achieved without development since poor people will circumvent environmental restrictions in their desperation for land, food, and sustenance.⁵⁸ The World Bank defines poverty as “the economic condition in which people lack sufficient income to obtain certain minimal levels of health services, food, housing, clothing and education generally recognized as necessary to ensure an adequate standard of living.”⁵⁹

⁵⁰ Ibid, at p. 98.

⁵¹ Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.534.

⁵² Ibid, at p.534.

⁵³ Ibid.

⁵⁴ Mann, H., "Reconceptualizing international investment law: its role in sustainable development," op cit., at p. 535.

⁵⁵ Ibid., p. 535.

⁵⁶ Ibid, at p.534.

⁵⁷ United Nations, *Rio Declaration on Environment and Development 1992*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

⁵⁸ Sachs, J.D. and Reid, W.V., "Investments toward sustainable development," *Science (Washington)*, Vol.312, no. 5776 (2006): 1002.

⁵⁹World Bank, *Handbook on Measuring Poverty*, Chapter 2. Available at http://siteresources.worldbank.org/INTPA/Resources/4299661259774805724/Poverty_Inequality_Handbook_Ch02.pdf [Accessed on 3/10/2018].

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Human rights are defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.⁶⁰ Environmental protection is usually treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.⁶¹

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.⁶²

Despite the fact that the period between 1960s-70s saw many African countries attain independence from colonial domination, and the expectations that wealth would trickle down and create jobs for the people,⁶³ for most African countries, the expectations of a prosperous independent country have remained a mirage. Poverty remains rampant amongst many people across many African nations. Oil and mineral extraction, amongst other resources, in Africa is mostly 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.⁶⁴

Governments need to enforce environmental liability laws in their countries. To curb or avert violation of environmental rights or human rights, corporate entities involved in international investments could be exposed to criminal or tortious liability. A claim for toxic torts, in a civil suit, would be brought against a corporation for personal injury resulting from exposure to chemicals and other compounds brought about by activities of the corporation. Claims in toxic torts could be brought by employees, and other ordinary citizens that might suffer personal injury from toxic

⁶⁰ www.ohchr.org/EN/Issues/pages/WhatareHumanRights.aspx [Accessed 3/10/2018].

⁶¹ Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3, 2012.

⁶² 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 3/10/2018].

⁶³ Pilger, J., "Apartheid Did Not Die" in "Freedom Next Time" (Edition, 2006); "Mandela's Greatness may be assured, but not his Legacy" *New African*, Jan. 2014.

⁶⁴ Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief. Available at <http://uk.reuters.com/Art./2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616> [Accessed on 3/10/2018].

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outputs from the activities of a corporation. This would be in addition to claims for workers' compensation for occupational injury, where they occur. The liability could also arise from environmental harm affecting communities and their rights. For instance, *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.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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.⁶⁸ From the foregoing, it is apparent that the Nigerian people, just like it has been the case in other select African countries, have not benefited much, if at all, from the extractive industry in their country but instead have suffered more tragedy as a result.

Thus, in Africa, it is argued that unless investment law regime shifts its focus, it will begin to reverse its penetration and diminish in legitimacy as its focus on investor rights and freedom of investment proves to be of less and less value to developing countries.⁶⁹ Moreover, there is a growing international consensus that more is needed from investment treaties if they are to have a meaningful future, or any future at all, and this consensus is increasingly revolving around the sustainable development paradigm.⁷⁰

4. Sustainable International Investment Law and policies for National Development

It has convincingly been argued that although countries' investment policy regimes typically have both a national and an international dimension, and which dimensions often diverge intentionally, they nevertheless should interact in a way that maximizes synergies, including from a sustainable

⁶⁵ 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 3/10/2018].

⁶⁶ *Ibid.*

⁶⁷ 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].

⁶⁸ *Ibid.*

⁶⁹ Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *op cit.*, at p.535.

⁷⁰ *Ibid.*, at p.536.

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development perspective.⁷¹ As such it is suggested that shaping such interaction requires a solid understanding of the different objectives, functions and natures of the legal instruments involved. Strengthening cooperation between national and international investment policymakers, improving interaction and ensuring cross-fertilization between the two regimes (including by identifying lessons learned that can be transferred from one policy regime to the other) are crucial tasks for countries striving to create a mutually supporting, sustainable development-oriented investment policy regime.⁷² For instance, as far as SDG-oriented evolution is concerned, IIAs are subject to global debate on sustainable development-oriented IIA reform and also exhibit reform approaches to IIAs by many states, based on UNCTAD Reform Package.⁷³ On the other hand, the national legal framework have some elements, such as environmental laws, at the core of SDG-oriented policy reform while other elements, such as national investment laws, are less exposed to the SDG discourse.⁷⁴ It is still a contentious issue as to whether states should be held internationally accountable for achieving sustainability, whether globally or nationally, and also the specific formula to be used in deciding the ‘acceptable standard of sustainable development.’⁷⁵

The Rio+20 Declaration participating State Parties 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 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.⁷⁶ Thus, states retain substantial discretion in interpreting and giving effect to sustainable development.⁷⁷ It is however arguable that the national requirements to meet the needs of their people may be an incentive for such countries to uphold the principles of sustainable development and even set standards for the same.

This is well evidenced in the laws and the jurisprudence emanating from Kenyan courts. The Constitution stipulates that sustainable development is one of the national values and principles of governance that must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁷⁸ Article 43 of the Constitution of Kenya 2010 provides for economic and social rights of all the Kenyan people and guarantees the right to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security. Any efforts geared towards achieving these rights should thus bear in mind the principles of sustainable development. This would thus include laws and policies on international investments in the country that would have any impact on these rights. For instance, one of the most applicable principles of sustainable development is the Polluter-Pays

⁷¹ United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 106.

⁷² *Ibid*, at p. 106.

⁷³ United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 105.

⁷⁴ *Ibid*, at p. 105.

⁷⁵ Birnie, P. et al, *International Law & the Environment*, op cit, pp. 125-126.

⁷⁶ Art. 1.4, *Rio+20 Declaration*.

⁷⁷ *Ibid*, p. 126.

⁷⁸ Constitution of Kenya, Art. 10(2) (d).

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Principle which is seen not as a principle of equity; rather than to punish polluters, it is designed to introduce appropriate signals in the economic system so as to incorporate environmental costs in the decision-making process and, consequently, to arrive at sustainable, environment-friendly development.⁷⁹ 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.⁸⁰ The precautionary principle is believed to provide guidance for governance and management in responding to uncertainty.⁸¹ 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.⁸² This is just a demonstration of how the various principles of sustainable development can be applied in decision-making processes related to international investments.

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.⁸³ 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).⁸⁴ 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).⁸⁵ Maximising sustainable development benefits requires maximising synergies between IIAs and the national legal framework for investment.⁸⁶ Strengthening cooperation between the authorities in charge of the various dimensions of a country’s investment policy framework is crucial for ensuring a coherent approach that reflects the country’s overall strategy on investment for development.⁸⁷ It is suggested that one option for doing so is the establishment of special agencies

⁷⁹ 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 3/01/2018].

⁸⁰ Ibid, p. 67.

⁸¹ 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 3/10/2018].

⁸² Ibid, p.1.

⁸³ 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 3/10/2018]

⁸⁴ 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.

⁸⁵ 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 3/10/2018].

⁸⁶ United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., p. 108.

⁸⁷ Ibid, at p. 109; See also Organisation For Economic Co-Operation And Development, *Policy Framework For Investment*, (OECD, 2006). Available at <https://www.oecd.org/daf/inv/investment-policy/36671400.pdf> [Accessed on 3/10/2018].

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or interministerial task forces with a specific mandate to coordinate investment policy-related work (including the negotiation of IIAs) of different ministries and other government units. In addition, stakeholder consultations can help maximise synergies.⁸⁸

In addition, well-managed legal interaction between different investment policy instruments, based on a clear understanding of the different functions and objectives of the two regimes and the way they relate to each other, can help minimize challenges arising from diverging or conflicting clauses.⁸⁹ Policymakers are encouraged to strive for a more synergetic approach to the formulation of IIAs and the national legal framework for investment in order to produce an investment regime that is in line with a country's broader national development strategy and with sustainable development imperatives.⁹⁰ This is because an investment policy regime does not exist in a vacuum; it interacts with other areas of economic law and policy, as well as with other areas of law and policy that are considered "non-economic", such as culture, environment, health, labour, social or gender-related issues; land rights; national security issues, among others.⁹¹ In order to foster sustainable development-oriented policy coherence, it has been suggested that IIA reform must take into account the interaction between IIAs and other bodies of international law. This is because addressing this relationship in IIA reform can help avoid conflicts and provide arbitral tribunals with guidance on how to interpret such interaction.⁹²

Globalization has simply been described as increasing and intensified flows between countries of goods, services, capital, ideas, information and people, all of which produce cross border integration of a number of economic, social and cultural activities.⁹³ There are said to be four main driving forces behind increased interdependence namely: trade and investment liberalization; technological innovation and the reduction of communication costs; entrepreneurship; and global social networks.⁹⁴ There are remarkable benefits that come with globalization. For instance, there has been introduction of new technologies, access to new markets and the creation of new industries. Foreign aid remains crucial to developing countries. However, the practical situation in the global market is that there are unfair rules that are disadvantageous to developing countries due to their reduced bargaining powers as against many of the developed world countries.⁹⁵

Advocates of globalisation have contended that it affords the poor countries and their citizenry the chance to develop economically and raise their standards of living.⁹⁶ Opponents of globalisation on the other hand, have argued that the creation of an unregulated international free market works

⁸⁸ Ibid, at p. 109.

⁸⁹ Ibid, at p. 109.

⁹⁰ Ibid, at p. 111.

⁹¹ United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 111.

⁹² Ibid, p. 114.

⁹³ Bertucci, G., & Alberti, A., 'Globalization and the Role of the State: Challenges and Perspectives' p. 1. Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf> [Accessed on 3/10/2018].

⁹⁴ Ibid.

⁹⁵ World Bank World Economy Report, 'Sustainable Development Challenges' *World Economic and Social Survey 2013 E/2013/50/Rev. 1ST/ESA/344*.

⁹⁶ Globalization 101, 'What Is Globalization?' *The Levin Institute* - The State University of New York, Available at <http://www.globalization101.org/what-is-globalization/> [Accessed on 3/10/2018].

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for the benefit of multinational corporations in the Western world at the expense of local enterprises, local cultures, and common people.⁹⁷ They disagree with those who support globalisation in that it is concerned with the welfare of the rich and the developed world while denying the poor countries and their citizenry the chance to develop economically and raise their standards of living. The more developed countries with high bargaining power enjoy the biggest share of the benefits of globalisation. The rich industrialized countries formulate policies to make developing countries liberalize domestic markets for easier access but the same is not reciprocated in the domestic markets of industrialized countries. This makes Africa vulnerable since it can be extensively exploited yet it cannot readily access the national markets of developed countries.⁹⁸ As a result, African domestic industries have collapsed while foreign investments continue thriving. It has been argued that international policies on globalisation are deliberately calculated to ensure continued economic domination by the industrialized countries.⁹⁹ This only serves to impoverish the people in the developing states especially in Africa. Globalisation has also been associated with a decline in the power of national governments to direct and influence their economies especially with regard to macroeconomic management.¹⁰⁰

It is thus argued that the need to understand investment law as part of a broader part of international law relating to globalization suggests the need for a better method of integrating human rights, environmental, and other areas of law in a more transparent and conflict-free dispute settlement environment.¹⁰¹ 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.¹⁰²

Cross-fertilization between domestic investment rules and IIAs can also ensure that lessons learned in one realm of policymaking benefit the other. Facilitating cross-fertilization not only requires intensified cooperation between policymakers, but also the careful identification of potentially transferable lessons learned.¹⁰³

As far as sustainable development orientation of domestic laws on investments is concerned, it has been observed that only a small number of national investment laws refer- in their preamble or

⁹⁷ Ibid

⁹⁸ For example, under North American Free Trade Agreement, USA has entered into agreement opening its market only to its neighbours, that is, Canada and Mexico. Developing countries are excluded yet NAFTA members can under WTO's GATT agreement access the markets of developing countries.

⁹⁹ Stiglitz, J., *Globalization and its Discontents* (Penguin Books, UK, 2002).

¹⁰⁰ Smith, M. K. & Doyle M. 'Globalization' *the encyclopedia of informal education* (2002), Available at www.infed.org/biblio/globalization.htm [Accessed on 2/10/2018].

¹⁰¹ Mann, H., "Reconceptualizing international investment law: its role in sustainable development," op cit., at p.544.

¹⁰² 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, chapter 2, para. 79.

¹⁰³ United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 109.

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another dedicated clause on the objectives of the law- to sustainable development (or environmental or human health protection). This is however not to say that sustainable development- related concepts are entirely missing from other national laws and policies, as exemplified above in the case of Kenya.¹⁰⁴

5. Conclusion

An effective investment law and policy regime should be geared towards promoting sustainable development. It should also ensure minimal or no environmental damage. In addition, human rights must at all times be upheld. This paper argues that for 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.

¹⁰⁴ Ibid, at p. 111.

Legal Aspects of Strategic Environmental Assessment and Environmental Management

Abstract

This discussion mainly focuses on the legal aspects of Strategic Environmental Assessment (SEA) with particular reference to the international legal framework on environmental management and Kenya's legal and regulatory framework on environmental management. The same has been motivated by the debate on whether SEA should be founded in legislation or left as a non-statutory administrative tool. It therefore seeks to establish the position on the ground especially with reference to Kenya.

1. Introduction

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 decision-making and reform, and the World has even demonstrated its commitment to promoting the use of SEA as a tool for sustainable development.¹ Notably, since the inception of SEA in the early 1990s, it has globally received adoption for environmental assessment of strategic decisions – Policies, Plans and Programs, (PPPs).² However, one of the contentious issues in SEA amongst environmental law scholars is whether it should be founded in legislation or left as a non-statutory administrative tool.³ Despite this lack of common ground on the legal status of SEA, many developed and developing countries have either national legislative or other provisions for SEA, e.g. statutory instruments, cabinet and ministerial decisions, circulars and advice notes.⁴

It is also noteworthy that increasingly, developing countries are introducing legislation or regulations to undertake SEA – sometimes in EIA laws and sometimes in natural resource or sectors laws and regulations.⁵ This development illustrates the fact that SEA has become an important part of both international and domestic legal framework on environmental management. This paper examines the legal aspects of SEA and environmental management and highlights the prominent provisions from both international and domestic environmental law framework.

2. Strategic Environmental Assessment- A Definition

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

¹ The World Bank, 'Strategic Environmental Assessment,' September 10, 2013, available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 25/11/2016].

² 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.

³ Brown, A.L. & Thérivel, R., 'Effective methodologies: Principles to guide the development of strategic environmental assessment methodology,' *Impact Assessment and Project Appraisal*, vol. 18, No. 3, September 2000, pp. 183–189, at p. 184.

⁴ 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.25. Available at <http://www.oecd.org/environment/environment-development/37353858.pdf> [Accessed on 25/11/2016].

⁵ *Ibid*, p.25.

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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.⁶

The *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context* defines strategic environmental assessment to mean the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.⁷ 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.

3. Locating Strategic Environmental Assessment Within the Environmental Assessment Continuum

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.⁸ It can be defined as a process which produces a written statement to be used to guide decision-making, which provides decision-makers with information on the environmental consequences of proposed activities, programmes, policies and their alternatives; requires decisions to be influenced by that information and ensures participation of potentially affected persons in the decision-making process.⁹

The need for EIA was succinctly expressed in Principle 17 of the *1992 Rio Declaration on Environment and Development* which affords the strongest evidence of international support for EIA in the following terms;¹⁰

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.

It has been argued that since policies, plans and programmes (PPPs)¹¹ are more “strategic” as they determine the general direction or approach to be followed towards broad goals, SEA is applied to

⁶ Brown, A.L. & Thérivel, R., ‘Effective methodologies: Principles to guide the development of strategic environmental assessment methodology,’ op cit, at p. 184.

⁷ United Nations Economic Commission for Europe, *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*, Art. 2(6). Available at https://treaties.un.org/doc/source/RecentTexts/27_4bE.pdf

⁸ Birnie, P. & Boyle, A., *International Law and the Environment*, (2nd ed., Oxford University Press, 2002), p.131-132.

⁹ Sands, P., *Principles of International Environmental Law*, (2nd edn, Cambridge University Press, 2003), pp.799-800

¹⁰ 1992 *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992)

¹¹ Policy has been defined as a general course of action or proposed overall direction that a government is or will be pursuing and that guides ongoing decision making; Plan is defined as a purposeful forward looking strategy or design, often with co-ordinated priorities, options and measures that elaborate and implement policy; and Programme is defined as a coherent, organised agenda or schedule of commitments, proposals,

these more strategic levels while Environmental Impact Assessment (EIA) is used on projects that put PPPs into tangible effect.¹² Strategic environmental assessment (SEA) is undertaken much earlier in the decision-making process than project environmental impact assessment (EIA).¹³ However, SEA is not a substitute for EIA or other forms of environmental assessment, and should be seen as a complementary process and one of the integral parts of a comprehensive environmental assessment tool box.¹⁴ In the *Gabcikovo-Nagymaros Case*¹⁵ it had been alleged that an adequate EIA had not been carried out before proceeding with a hydro-electric project. The Court's view was that EIA is a continuum which will operate throughout the life of a project. Thus, 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.

4. Need for Strategic Environmental Assessment

SEA is believed to provide the potential to incorporate new objectives and constraints in policy formulation, the substitution of alternative objectives, policy instruments and implementation strategies, and the identification, clarification and resolution of conflicts, compromises and interlinkages.¹⁶ Further, it provides an opportunity to internalize externalities often not adequately considered in much sectoral policy formulation and decision-making.¹⁷ Thus, the intention of SEA is moving policy (and PPP generally) towards sustainable outcomes.¹⁸

Overall, it is arguable that the main rationale for applying SEA is to help create a better environment through informed and sustainable decision making.¹⁹ Further, SEA helps to ensure that many of the environmental issues of global importance are considered in policies, plans and programmes at different administrative levels (i.e. national, regional, local).²⁰

instruments and/or activities that elaborate and implement policy. (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.31.)

¹² Organisation for Economic Co-Operation and Development, 'Applying Strategic Environmental: Assessment Good Practice Guidance for Development Co-Operation,' *DAC Guidelines and Reference Series*, 2006, pp. 30-31. Available at <http://www.oecd.org/environment/environment-development/37353858.pdf> [Accessed on 25/11/2016].

¹³ United Nations Economic Commission for Europe, 'Introduction,' available at http://www.unece.org/env/eia/sea_protocol.html [Accessed on 25/11/2016].

¹⁴ Organisation for Economic Co-Operation and Development, 'Applying Strategic Environmental: Assessment Good Practice Guidance for Development Co-Operation,' *DAC Guidelines and Reference Series*, 2006, op cit., p. 32.

¹⁵ *Ibid.* ICJ Rep. (1997),7

¹⁶ Brown, A.L. & Thériver, R., 'Effective methodologies: Principles to guide the development of strategic environmental assessment methodology,' op cit., at p. 184.

¹⁷ *Ibid.*, p.84.

¹⁸ *Ibid.*, p.84.

¹⁹ Fischer, T.B., 'Strategic environmental assessment in post-modern times,' *Environmental Impact Assessment Review*, Vol.23, 2003, pp.155-170 at p. 162.

²⁰ *Ibid.*, p. 162.

5. Legal Framework for Strategic Environmental Assessment

5.1 International Legal Framework for Strategic Environmental Assessment

a. Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context

Article 1 thereof provides that the objective of this Protocol is to provide for a high level of protection of the environment, including health, by: (a) Ensuring that environmental, including health, considerations are thoroughly taken into account in the development of plans and programmes; (b) Contributing to the consideration of environmental, including health, concerns in the preparation of policies and legislation; (c) Establishing clear, transparent and effective procedures for strategic environmental assessment; (d) Providing for public participation in strategic environmental assessment; and (e) Integrating by these means environmental, including health, concerns into measures and instruments designed to further sustainable development.

Article 3(1) also makes it clear that each Party should take the necessary legislative, regulatory and other appropriate measures to implement the provisions of this Protocol within a clear, transparent framework.

Article 4 thereof specifically defines the field of application concerning plans and programmes and provides that each Party should ensure that a strategic environmental assessment is carried out for plans and programmes referred to in paragraphs 2, 3 and 4 which are likely to have significant environmental, including health, effects.²¹ Article 8 thereof also calls for early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes.

b. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), 1998

The Aarhus Convention 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. To the extent appropriate, each Party should endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.²²

This Convention affirms the central role of the principle of public participation in SEA.

²¹ 2. A strategic environmental assessment shall be carried out for plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use, and which set the framework for future development consent for projects listed in annex I and any other project listed in annex II that requires an environmental impact assessment under national legislation.

3. For plans and programmes other than those subject to paragraph 2 which set the framework for future development consent of projects, a strategic environmental assessment shall be carried out where a Party so determines according to article 5, paragraph 1.

4. For plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and for minor modifications to plans and programmes referred to in paragraph 2, a strategic environmental assessment shall be carried out only where a Party so determines according to article 5, paragraph 1.

²² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Art. 7.

c. The Convention on Biological Diversity

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

Article 14 (1) (b) thereof also provides that each Contracting Party, as far as possible and as appropriate, should, inter alia, introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.

5.2 National Legal framework for Strategic Environmental Assessment: Kenya

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.²³

a. Constitution of Kenya 2010

Before the promulgation of the current Constitution of Kenya 2010, there was little or inadequate formal and systematic integration of environmental considerations into Kenya's decision-making for developmental activities was generally. Notably, the Constitution treats environmental matters as central to decision-making processes especially with regard to the national development agenda. This is in line with the global environmental agenda of promoting sustainable development in all spheres of development. Most of the post-Constitution 2010 policies and legislation on environment are required to incorporate the Constitutional provisions.

The Constitution of Kenya 2010 saw a paradigm shift in environmental management in Kenya by dedicating substantive provisions on the conservation and management of the environment and natural resources in Kenya. To begin with, there is the preambular declaration which partly affirms the people's respect of the environment, being their heritage, and the determination to sustain it for the benefit of future generations. One of the national values and principles of governance as outlined in the Constitution is sustainable development.²⁴ The values and principles of governance are to 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.²⁵

Sustainable development encompasses social, economic and environmental management, amongst other elements and the import of the foregoing values and principles is that environmental considerations must be central to enactment, application or interpretation of any law; or making or implementation of public policy decisions. It has been pointed out that, 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

²³ Mutui, F.N., 'The Development and Practice of Strategic Environmental Assessment (Sea) In Kenya,' op cit, p. 166.

²⁴ Constitution of Kenya 2010, Art. 10(2) (c).

²⁵ Ibid, Art. 10(1).

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paths on how to achieve overall goals and objectives can be mapped out.²⁶ Furthermore, it is noteworthy that over the past decade, an important rationale for applying SEA has been planning for sustainable development.²⁷ Besides considering environmental and socio-economic aspects and pro-active objectives-led decision making, this also includes the consideration of the quality of life of future generations.²⁸

This, therefore, means that SEA finds its way in some of these governance decisions and it becomes an indispensable part of these processes, considering that it concerns itself with public programmes, plans and policies. Art. 42 thereof provides for the right of every person to a clean and healthy environment, which includes the right— (a) 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 obligations relating to the environment fulfilled under Article 70. SEA is one of the tools to be used for the protection of the environment.

Of particular relevance to this discussion are the State obligations to, inter alia—(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources; (d) encourage public participation in the management, protection and conservation of the environment; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; and (g) eliminate processes and activities that are likely to endanger the environment.²⁹ Environmental assessment is expressly recognised under this provision alongside the principle of public participation which is central to such processes. It has been observed that public participation in SEA provides a crucial [political] view of people's ways of understanding problems connected with policy, plan and programme making and can rationalise the decision process.³⁰ This is because it can make the whole planning process more efficient and reliable, improving the possibility of reaching formal agreement.³¹

With regard to eliminating processes that are likely to endanger the environment, it has been argued that SEA should apply the precautionary principle: if the value of development and its impacts are uncertain there should be a presumption in favour of protecting what exists.³² It is suggested that impact mitigation in SEA could include changing aspects of the strategic action to avoid the negative impact, influencing other organizations to act in certain ways, or setting constraints on subsequent project implementation.³³

Article 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. On application under clause (1), the court

²⁶ Fischer, T.B., 'Strategic environmental assessment in post-modern times,' op cit, at p. 163.

²⁷ Ibid, p. 163.

²⁸ Ibid, p. 163.

²⁹ Constitution of Kenya, Art. 69(1).

³⁰ Fischer, T.B., 'Strategic environmental assessment in post-modern times,' op cit, at p. 163; See also Therivel, R., *Strategic Environmental Assessment in Action*, (Earthscan, London and VA, 2004), p. 17.

³¹ Ibid, at p. 163.

³² Therivel, R., *Strategic Environmental Assessment in Action*, (Earthscan, London and VA, 2004), p. 8.

³³ Ibid, p.8.

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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.

While it is NEMA that is obligated to carry out SEA, where it fails to carry out its mandate on SEA, any person who is dissatisfied with the manner in which the same has been done or where it has not been done can approach the court to have them compelled to fulfill their statutory obligations for environmental management. This provision read together with Regulation 43(2) of Legal Notice 101 of 2003 which requires incorporation of summary of views of key stakeholders consulted into an environmental analysis suggests that one can challenge the validity of such PPPs. Considering that the Constitution provides environmental obligations for both the national and county levels of government, differing and inconsistent goals and objectives can be a major challenge to decision making for sustainable development. These include goals and objectives of: different administrative tiers, the three main systematic decision making levels (i.e. policies, plans and programmes), and different sectors.³⁴ As such, it has been argued that SEA application helps reconciling differing goals and objectives through integration, thus uncovering inconsistencies and providing a platform for suggestions on how to achieve sustainable development.³⁵ Furthermore, SEA application at the regional level allows reconciling national and local levels of decision making.³⁶

b. The Environmental Management and Coordination Act 1999

The *Environmental Management and Coordination Act (EMCA) 1999*³⁷, is the framework law on environmental management and conservation in Kenya. EMCA establishes among others the National Environment Management Authority. 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 inter alia, Environmental impact assessment (EIA) and Environmental audit and monitoring.

While the parent Act (EMCA) was initially silent on SEA, the same was introduced via the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act 2015).³⁸ The Amendment Act 2015 introduces a definition of SEA under section 2 thereof to mean a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives. The Amendment Act also amended EMCA by introducing section 57A (1) which provides that all Policies, Plans and Programmes for

³⁴ Fischer, T.B., 'Strategic environmental assessment in post-modern times,' op cit, at p. 164.

³⁵ Ibid, p. 164.

³⁶ Ibid, p. 164.

³⁷ *Environmental Management and Co-ordination Act, 1999*, No. 8 of 1999, Revised Edition 2015 [1999].

³⁸ *Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya.

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implementation should be subjected to Strategic Environmental Assessment.³⁹ Specifically, it provides that the said plans, programmes and policies 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.⁴⁰ Further, all entities are to undertake or cause to be undertaken the preparation of strategic environmental assessments at their own expense and should submit such assessments to the Authority for approval.⁴¹

The Amendment Act 2015 requires the Authority, in consultation with lead agencies and relevant stakeholders, to prescribe rules and guidelines in respect of Strategic Environmental Assessments.⁴²

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

These Regulations 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.⁴³ Regulation 42 (1) thereof obligates lead agencies in consultation with the Authority to subject all proposals for public policy, plans and programmes for environmental implementation to a strategic environmental assessment to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others. This has to consider the effect of implementing alternative policy actions taking into consideration: the use of natural resources; the protection and conservation of biodiversity; human settlement and cultural issues; socio-economic factors; and the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of built environment of historic or cultural significance.⁴⁴ 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.⁴⁵ The content of a strategic environmental impact report are provided under Regulation 43 (1) thereof.

d. Access to Information Act, 2016

Notably, 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, it states that 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. Accordingly, States are to facilitate and encourage public awareness and participation by making information widely available. It also provides that effective access to judicial and administrative proceedings, including redress and remedy, should be provided.

³⁹ S. 42, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

⁴⁰ s. 57A (2), *Environmental Management and Co-ordination Act, 1999*, No. 8 of 1999, Revised Edition 2015 [1999].

⁴¹ *Ibid*, s. 57A (3).

⁴² *Ibid*, s. 57 A (4).

⁴³ *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice No. 101, Regulation 2.

⁴⁴ *Ibid*, Regulation 42(2).

⁴⁵ *Ibid*, Regulation 42(3).

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In light of the foregoing, *Access to Information Act* 2016⁴⁶ 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.⁴⁷ 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.⁴⁸

6. Future of Strategic Environmental Assessment

While strategic environmental assessment can be a powerful tool for fostering progress towards sustainability, effective implementation involves confronting a set of substantial challenges. It has been observed that an important reason for applying SEA is the expectation that if socioeconomic and environmental effects are properly considered on top of the decision making hierarchy in a publicly accountable fashion, there should be less friction and fewer problems at decision making levels further down the decision making hierarchy.⁴⁹ Ensuring that SEA is not just an option in development policies, plans and programmes development but it is mandatory. Capturing SEA requirements and clearly defining what it entails, as demonstrated in both international and national frameworks discussed in the previous section will ensure that the public does not get shortchanged or they are not placed in harm’s way by the relevant authorities through negligence. 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.

7. Conclusion

It is evident that the elements of SEA have slowly but surely found their way into the international legal instruments on environmental management as well as national laws and constitutions. This means that they can no longer be carried out as matter of choice but law. The debate as to whether the same should be founded in legislation or left as a non-statutory administrative tool is also weakening in favour of legal backing of SEA as countries embark on making it a more prominent feature of their environmental legal framework on ensuring that all their plans, policies and programmes are compliant with the international and national environmental goals for realisation of the global agenda on sustainable development. This is, for instance, supported by the fact that Kenya achieved this position after formally recognizing SEA in the EMCA Amendment Act 2015 which makes SEA mandatory in particular plans, policies and programmes. It is hoped that as more countries embrace SEA and integrate environmental management and national development goals, SEA will be as tool to complement EIA and even meet the shortcomings that might have existed with the use of EIA alone in environmental management.

⁴⁶ *Access to Information Act*, 2016, Laws of Kenya (Government Printer, Nairobi, 2016).

⁴⁷ *Ibid*, S. 4(1).

⁴⁸ *Ibid*, s.2.

⁴⁹ Fischer, T.B., ‘Strategic environmental assessment in post-modern times,’ op cit, at p. 162.

Nurturing our Wetlands for Biodiversity Conservation

Abstract

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

1. Introduction

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

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

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

2. Wetlands, Biodiversity Conservation and Sustainable Development Agenda

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

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

² *Ibid.*

³ 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward) <<https://www.planetforward.org/idea/wetland-conservation-biodiversity>> accessed 28 December 2021.

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

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

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

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

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

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

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

⁷ Ibid.

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

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

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

¹¹ OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7

Environment Ministers' Meeting, 5-6 May 2019, 31.

3. Threats to Wetlands Conservation

Human development, urbanization, and poor management have all been blamed for the disappearance of wetlands.¹² Due to changes in land-use patterns, such as conversion of wetlands into farmlands, human settlements, urban centers, and infrastructure development, it is estimated that the area of wetlands has decreased by more than half since 1900.¹³

These are exacerbated by current challenges to biodiversity protection, such as habitat loss and degradation, climate change, chemical and biochemical pollution, logging and poaching, invasive species, illness, and the loss of plant pollinators, among others.¹⁴ That wetlands in Kenya also suffer from over-exploitation of their natural resources is one major threat. Others are encroachment, habitat degradation and biodiversity loss.¹⁵

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

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

Wetlands are ecologically diverse and highly productive ecosystems that improve water quality, regulate erosion, sustain stream flows, store carbon, and offer habitat for at least one-third of all threatened and endangered species.¹⁷ Kenyan wetlands are believed to cover up to 4% of the entire landmass, approximately 14,000 km² of the land surface, with a peak of roughly 6% during the rainy season.¹⁸ The High Court correctly pointed out in *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR* that access to information is a key pillar in our Constitution's environmental governance scheme because effective Public Participation in decision-making requires full, accurate, and up-to-date information.¹⁹ With enhanced literacy levels, it is possible

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

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

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

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

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

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

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

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

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

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

In addition to the foregoing, the United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.²² There is no better way to apply this than in enhancing protection of wetlands.

It is proposed that, because management decisions have not adequately considered the economic importance wetland goods and services provide to local communities and the national economy, a valuation of wetlands goods and services would assist policymakers in making decisions regarding wetlands conservation and exploitation in the country.²³ Arguably, this would enhance the participation of these communities as they appreciate the actual benefits they can get from these wetlands.

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

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

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

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

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

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

The related targets include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

One way of ensuring that all human activities foster biodiversity conservation is introducing pricing of biodiversity and actively assessing biodiversity's contribution to economic growth. However, it has been pointed out that while establishing the value of biodiversity to economies is important, as it may partly help policymakers in all countries to appreciate that there is a cost to losing nature, at the same time, an economic assessment must take into account the perspectives of the humanities, of developing countries and of members of indigenous communities.³⁰ Notably, undervaluing the economic and societal values of biodiversity is believed to pose a threat to biodiversity and investment in conservation, and while the value of conventional natural resources such as forestry, fisheries, and wildlife is well appreciated the wider ecological services that biodiversity provides which include water catchments, a natural cleansing of the air, water and soils we pollute, carbon sequestration and, in developing economies such as Kenya, the biomass energy that fuels the lives of most Kenyans in the form of wood and charcoal, are seldom valued.³¹ The government should continue to establish effective systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA), Environmental Audit and Monitoring, and Environmental Security Assessment (ESA), and ensure that they are reviewed on a regular basis to ensure that they remain effective. Without extensive environmental evaluation processes, development initiatives targeting wetland areas should be avoided. There is a need to ensure that these EIA processes are not only formal but also reflective of what is happening on the ground, and that there is a follow-up mechanism in place to ensure that companies engage with communities throughout and continue to carry out their obligations in accordance with the law and assessment reports.³²

Biodiversity Impact Assessment should be included in these impact assessment processes (BIA). BIA is a subset of EIA that entails finding, measuring, quantifying, valuing, and internalizing the

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

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

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

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

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

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

It is, therefore, worth pointing out that Article 14 does not impose a direct obligation that is enforceable by other states to conduct EIAs before undertaking activities that pose risks to biological diversity.³⁷ This is also captured in *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* which ‘emphasizes that the voluntary guidelines on biodiversity-inclusive environmental impact assessment are intended to serve as guidance for Parties and other Governments, subject to their national legislation, and for

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

³⁴ *Ibid*, 3.

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

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

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

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regional authorities or international agencies, as appropriate, in the development and implementation of their impact assessment instruments and procedures'.³⁸

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

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

The *Voluntary Guidelines On Biodiversity-Inclusive Environmental Impact Assessment* identifies some biodiversity issues at different stages of environmental impact assessment.⁴¹ The guidelines identify different stages in this process: *Screening*- used to determine which proposals should be subject to EIA, to exclude those unlikely to have harmful environmental impacts and to indicate the level of assessment required. Screening criteria have to include biodiversity measures, or else there is a risk that proposals with potentially significant impacts on biodiversity will be screened out; *Scoping*: used to define the focus of the impact assessment study and to identify key issues, which should be studied in more detail. It is used to derive terms of reference (sometimes referred to as guidelines) for the EIA study and to set out the proposed approach and methodology. Scoping also enables the competent authority (or EIA professionals in countries where scoping is voluntary) to: (a) Guide study teams on significant issues and alternatives to be assessed, clarify how they should be examined (methods of prediction and analysis, depth of analysis), and according to which guidelines and criteria; (b) Provide an opportunity for stakeholders to have their interests taken into account in the EIA; and (c) Ensure that the resulting Environmental Impact Statement is useful to the decision maker and is understandable to the public⁴²; *Assessment and evaluation of*

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

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

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

⁴¹ *Ibid.*

⁴² *Ibid.*

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*impacts, and development of alternatives; Reporting: the environmental impact statement (EIS); Review of the environmental impact statement; Decision-making; and, Monitoring, compliance, enforcement and environmental auditing.*⁴³

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

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

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

It is important for business and financial organisations to actively help achieve national biodiversity goals, the Convention on Biological Diversity (CBD) Aichi Biodiversity Targets and the SDGs, in close co-operation and co-ordination with policy makers and civil society as they also depend on biodiversity for the production of goods and services. The profitability and long-term

⁴³ Ibid.

⁴⁴ Ibid.

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

⁴⁶ Ibid, 7.

⁴⁷ Ibid, 6.

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survival of a number of business sectors (such as agriculture and fisheries which depend directly on biodiversity and well-functioning ecosystems), and loss of biodiversity and ecosystem services can, therefore, result in higher costs and risks for business and financial organisations, and directly affect their performance.⁴⁸

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

5. Conclusion

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

There is a need for active and meaningful involvement of communities in biodiversity conservation efforts especially within wetland areas because while activities that damage the environment, such as mining, industrial development or commercial logging, can deprive people of their livelihoods and cultural rights, it is also true that strict environmental protection which excludes people and deprives them of resources on which they are dependent, without providing viable alternatives, can

⁴⁸ OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7 Environment Ministers' Meeting, 5-6 May 2019, 35.

⁴⁹ 'Development Requires Local Empowerment'

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

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

⁵¹ *Ibid*, 49.

⁵² Richard T Kingsford, Alberto Basset and Leland Jackson, 'Wetlands: Conservation's Poor Cousins' (2016) 26 *Aquatic Conservation: Marine and Freshwater Ecosystems* 892, 892 <<https://onlinelibrary.wiley.com/doi/abs/10.1002/aqc.2709>> accessed 28 December 2021.

⁵³ Richard T Kingsford, 'Conservation of Floodplain Wetlands – out of Sight, out of Mind?' (2015) 25 *Aquatic Conservation: Marine and Freshwater Ecosystems* 727, 727 <<https://onlinelibrary.wiley.com/doi/abs/10.1002/aqc.2610>> accessed 28 December 2021.

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affect people's right to a livelihood.⁵⁴ Urgent measures that involve all stakeholders meaningfully need to be taken towards nurturing wetlands as a step towards conservation of biodiversity resources.

Nurturing our Wetlands for Biodiversity Conservation is clearly the way to go.

⁵⁴ Ibid, 5.

Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation

Abstract

With the promulgation of the 2010 Constitution of Kenya, the use of Alternative Dispute Resolution (ADR) mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts was formalised. The Constitution envisages a situation where conflicts, and specifically the natural resource ones, should first be dealt with using ADR and TDRMs and only resort to court where necessary. Communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. Despite this, there has not been evidence of genuine attempts at taking up these processes in managing natural resource conflicts, which are still prevalent and a cause of concern. While singling out negotiation and mediation, the author examines the opportunities that ADR mechanisms and particularly negotiation and mediation present in realising the goal of effective management of natural resource conflicts in Kenya through discussing the advantages associated with the processes and why they may be the most preferred means of natural resource conflict management.

1. Introduction

In this paper, the author critically discusses the effective management of natural resource conflicts through the use of negotiation and mediation. The paper contends that the existing national legal and institutional framework for the management of natural resource conflicts has been insufficient to effectively deal with the natural resource conflicts.

With the promulgation of the 2010 Constitution of Kenya, the law makers created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.¹ Notably, one of the principles of land policy as envisaged in the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.² The implication of such provisions is that before a matter is referred for court adjudication, communities are required to make legitimate attempts to resolve the matter using the most appropriate mechanisms available to them. This is also reinforced by the fact that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.³ 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.⁴ There have been frequent and well documented reports of violent conflicts over access to and use of land in Kenya.⁵

1 Art. 159(2) (c), Constitution of Kenya 2010, Government Printer, Nairobi.

2 Art. 60 (1) (g).

3 Art. 67(2) (f).

4 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 A.M. Akiwumi, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

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

For example, recently, Narok and Kwale Counties suffered natural resource conflict albeit in varying degrees. In Narok, Kenya, clashes between Maasai and Kipsigis in Olposimoru, Narok County in December 2015 over what is believed to be natural resource related conflict resulted in human casualties and displacement.⁶ In Kwale County, there have also been cases of violence related to natural resource exploitation.⁷ In such instances, one may find that a few herdsmen may have been accused of ‘trespassing’ to graze in another community’s territory and were thus attacked. The resultant chaos in retaliation affects the whole community. For them, it is not about arresting the involved individuals and arraigning them in court. It is about protecting the interests of the whole community and thus, any approaches to managing the conflict must involve the whole community or their representatives and address all of their concerns.

Despite the fact that the existence of legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered much in stemming the natural resource conflicts due to inadequacies within the structure. Natural resource conflicts in Kenya are still prevalent and a cause of much concern. It has been noted that the contribution of the issue of land to violent conflicts in Kenya is due to the way land is “treated with fervent sentimentality and sensitivity and in many ways considered explosive.”⁸ The emergence of multi-party politics in Kenya was perceived by many communities as a move to marginalize and dispossess them of land. The multi-party politics were thus influenced by tribal considerations with their roots in economic and considerations making it easier to incite politically based tribal violence.⁹

Land clashes that occurred in Kenya in 1992 and 1997 have been attributed to inequitable allocation of land resources and poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie the numerous conflicts that have occurred in Kenya. The post-election violence in 2007-08 can be traced, to a large extent, to contests over access to and use of natural resources in Kenya and the harboured feelings of alienation and discrimination in access and benefit sharing of the accruing benefits.¹⁰ It is against this background that the author examines the opportunities that ADR

6 Agutu, N., ‘GSU deployed in Narok after two killed in Maasai, Kipsigis clashes,’ The Star Newspaper, Dec. 26, 2015, 3:00 pm, Nairobi, available at http://www.the-star.co.ke/news/2015/12/26/gsu-deployed-in-narok-after-two-killed-in-maasai-kipsigis-clashes_c1265922 [Accessed on 2/01/2016]; see also AfriQua, ‘Narok land disputes threaten water resources,’ 18/03/2015, available at <http://onesafedrop.org/192/narok-land-disputes-threaten-water-resources/> [Accessed on 2/01/2016]; Khamadi, S., ‘Counties struggle to gain control over local natural resources in Kenya,’ Wednesday January 9th, 2013, available at <http://landquest.internewskenya.org/counties-struggle-to-gain-control-over-local-natural-resources-in-kenya/> [Accessed on 2/01/2016].

7 Musyoka, A., ‘Kenya: Four Killed at Kinango in Clash Over Grazing Land,’ The Star Newspaper, Dec. 19, 2014, Nairobi, available at <http://allafrica.com/stories/201412190701.html> [Accessed on 2/01/2016]; See also generally, Constitution and Reform Education Consortium (CRECO), *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/system/files/documents/files/CRECO_2012.pdf [Accessed on 3/01/2016].

8 Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

9 Ibid.

10 See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

mechanisms and particularly negotiation and mediation present in realising the goal of effectively managing natural resource conflicts in Kenya.

2. Defining Concepts in Conflict Management

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.¹¹ Notably, conflicts can be managed, transformed, resolved or settled depending on the approach adopted. While this paper is written with a bias towards conflict management through negotiation and mediation, it is important to explain the other concepts for purposes of clarity.

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.¹² Conflict management is seen as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively.¹³ Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.¹⁴

Conflict transformation focuses on long-term efforts oriented towards producing outcomes, processes and structural changes. It aims to overcome revealed forms of direct, cultural and structural violence by transforming unjust social relationships and promoting conditions that can help to create cooperative relationships.¹⁵

Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.¹⁶ Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.¹⁷ 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.¹⁸

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

11 Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*.

12 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 9/01/2016].

13 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 17/01/2016].

14 Ibid.

15 Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

16 Ibid.

17 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.

18 Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.¹⁹ Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible in nature and outcome.²⁰

Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.²¹ Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.²² It has rightly been observed that whereas concerns for justice are universal, views of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.²³ This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.²⁴ It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.²⁵

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.²⁶ 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.²⁷

Natural resource 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).²⁸ As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-

19 Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. p. 153; See also Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

20 See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

21 Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

22 Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

23 Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' *International Encyclopedia of the Social & Behavioral Sciences* (Second Edition, 2015), pp. 937-942.

24 Ibid.

25 Ibid.

26 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 10/01/2016].

27 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

28 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 2/01/2016].

oriented approach, stake-oriented approach or a combination of the three.²⁹ Despite this, there are key principles such as, inter alia, participatory approaches³⁰, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.³¹

Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.³² To them, justice would mean affording them an opportunity to get what they feel entitled to and anything less, means that they resort to other means of possessing the same. This way, conflicts become inevitable. Conflict resolution mechanisms such as negotiation and mediation affords the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.³³ This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.³⁴

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 approaches should not be used mutually exclusively but instead there should be synergetic application of the above approaches. Further, conflict management processes are not mutually exclusive and one can lead to another.³⁵ Each of the approaches has their success story where they have been effectively applied to achieve the desired outcome. The scope of this paper is, however, limited only to conflict resolution mechanisms namely negotiation and mediation.

3. Causes and Effects of Conflicts

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflict. The factors range from internal to relational and contextual factors.³⁶

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

29 Ibid.

30 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.

31 Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

32 FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 07/02/2016].

33 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.

34 See generally Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

35 Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

36 Louis, K., "Factors Shaping the Course of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003. <http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/>.

distribution of resource revenues as well as other benefits and burdens.³⁷ These conflict drivers have contributed to most of the natural resource conflicts in Kenya and should therefore be adequately addressed in managing the conflicts.³⁸

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management. The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct. They also include the nature and degree of integration between adversaries in economic, social, and cultural domains. So that a conflict between groups that depend on each other's produce will be easy to manage because each party is feeling the strain of the conflict resulting from scarcity of the produce from the other party.³⁹ However, abundance of resources, just like scarcity, can also cause conflicts. The African continent is awash with examples of countries that have suffered from "curse of natural resources" – where countries with great natural resource wealth tend to grow more slowly than resource-poor countries.⁴⁰

It has been argued that conflicts associated with natural resources are often due to different perceptions regarding who should benefit from the conflicts, and are an indicator of resource availability, evolution of tenure rights and systems, accessibility and control over the resource.⁴¹ They are believed to result from an imbalance in the power structure, where these power imbalances can exhibit themselves through unequal distribution of natural resource use and tenure rights.⁴² Further, it is asserted that conflicts show transition within societies, which can be positive if it expresses need for change or the ability of institutions to adapt to social, economic and/or environmental conditions. On the other hand, conflicts can have a negative impact if the changes that result from them cause further marginalisation of certain groups of society, such as the poor,

37 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.

38 Campbell, D.J., et al, 'Land use conflict in Kajiado District, Kenya,' *Land Use Policy*, Vol.17, Issue 4, October 2000, pp. 337–348; Yamano, T, et al, 'Land Conflicts in Kenya: Causes, Impacts, and Resolutions,' *FASID Discussion Paper 2005-12-002*, available at [www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya \(FASID DP\).pdf](http://www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya (FASID DP).pdf) [Accessed on 17/01/2016].

39 See Aylinga, R.D. & Kelly, K., 'Dealing with conflict: natural resources and dispute resolution,' *The Commonwealth Forestry Review*, Vol. 76, No. 3, 15th Commonwealth Forestry Conference Papers (1997), pp. 182-185.

40 Sachs, J.D & Warner, A.M, 'Natural Resources and Economic Development: The curse of natural resources,' *European Economic Review*, Vol. 45, Issues 4–6, May 2001, PP. 827–838 AT P. 827. For instance, there have been internal natural resource conflicts 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 17/1/2016].

41 Traore, S. & Lo, H., 'Natural Resource Conflicts and Community Forestry: A West African Perspective,' in FAO, *Annex C - Summary of Discussion Papers*, available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/01/2016].

42 Ibid.

women and minorities.⁴³ Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.⁴⁴

Conflict also often produces significant environmental degradation.⁴⁵ It is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict. Therefore, environmental damage from accelerated resource extraction may be severe. Scholars have stressed that human needs are among the major causes of conflicts. It is argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.⁴⁶ As such, if they are absent, the resulting conflict will remain intractable until the structure of society is changed to provide such needs to all. For instance, the need for identity has been described as a fundamental driver of intractable conflict.⁴⁷ Threats to identities often invite very negative responses from people who see the same as a way of protecting their essence.⁴⁸

The clash of interests can take many forms. For instance, it could be over resources such as land, food, territory, water, energy sources, and natural resources.⁴⁹ Such conflicts range from, to whom the resources should be distributed to, to whether the resources should be distributed and how the distribution should be undertaken. Conflict could also arise over power and control of the resources.⁵⁰ There are also conflicts over identity.⁵¹ These concern the cultural, social and political communities to which people feel tied. Conflicts over status may arise and have to do with whether people believe they are treated with respect and dignity and whether their traditions and social position are respected.⁵² In addition, the conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.⁵³ Further, conflicts have been associated with the changing norms, values, and world views about property rights

43 Ibid.

44 See G. Machel & B. Mkapa, *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

45 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.

46 John Burton, *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990; Herbert Kelman, *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

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

48 Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' op cit, p. 202.

49 Buckles, D & Rusnak, D, 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

50 Ibid, p. 2.

51 See Rothman, J., *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. (San Francisco: Jossey-Bass Publishers, 1997).

52 EAIM, 'Peace and Stability Are Prelude to Economic Development and Prosperity,' available at <http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/articlesFeb-2006/1802EAIM06-06EA.html> [Accessed on 10/02/2016].

53 Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' *Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1*, (World Watch Research, Abuja, Nigeria, March 2015).

within formerly subsistence-based (or pastoralist) communities.⁵⁴ Indeed, this scenario is not new to Kenya, where recently, there was witnessed violence in areas around Kajiado town with Maasai community seeking to 'evict foreigners' in the area.⁵⁵ The alleged foreigners are people who have bought land for residential homes and commercial purposes, through real estate land developers. They felt that their land was being taken away. Such incidences require collaborative conflict management techniques considering that there are deep-rooted issues and harboured feelings of alienation and discrimination that need to be adequately addressed. There is need to strike a balance between community interests and national interests on development. Otherwise, without such a balance erupting conflicts subsequently affect the course of development in the country.

There is also a school of thought that believes that public policy can also lead to natural resource conflicts. It is argued that specific policies, government programs, and their implementation have, in some areas, generated or aggravated conflicts, even when the intention was to reduce the conflict.⁵⁶ A good example of such policies would be those touching on property ownership, especially land, and where there is need to balance conservation and access to the resources by communities. A government policy to relocate people forcefully may degenerate into conflicts as witnessed in Mau forest eviction in Rift Valley Kenya.⁵⁷ There may be accusations of discriminatory relocation by the Government where some communities feel alienated. Indeed, such views may not be alien to the Kenyan scenario. For instance, according to the Business and Human Rights Resource Centre, an independent international human rights organisation, when Kenya discovered oil, there were fears that the legal regime was inadequate to regulate the industry and ensure that it does not fuel conflict within Kenya.⁵⁸ However, with the enactment of the current Constitution 2010, it was expected that this would change as it makes provisions for natural resource management and calls for community participation in the management of natural resources.⁵⁹

In homogenous societies constitutional provisions on natural-resource ownership are expected to address national development or how natural resources are shared between governments and private interests. However, in divided societies, the constitutional treatment of natural resources is

54 Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

55 Sayagie, G., 'Tension as different clans from Narok, Kajiado both claim Nguruman,' Sunday Nation, November 9, 2014, (Nation media Group, Nairobi, 2014). Available at <http://www.nation.co.ke/counties/Narok-Kajiado-clans-Nguruman/-/1107872/2516170/-/c6b4t5/-/index.html> [Accessed on 10/02/2016]; Daily Nation, 'Clashes in Kitengela as traders fight over market,' (Nation media Group, Nairobi, September 8, 2015). Available at <http://www.nation.co.ke/photo/-/1951220/2865112/-/faabnp/-/index.html> [Accessed on 10/02/2016].

56 Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022237.pdf> [Accessed on 10/01/2016].

57 Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' *Briefing Paper*, April 2007; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001.

58 Business and Human Rights Resource Centre, 'Steep Rise in Allegations of Human Rights Abuse as Boom in Investment Brings Hope of Prosperity Business and Human Rights in Eastern Africa: A Regional Briefing Paper,'

April 2014, p. 7. Available at <http://business-humanrights.org/sites/default/files/media/documents/eastern-afr-briefing-bus-human-rights-apr-2014.pdf> [Accessed on 19/01/2016].

59 Ibid, p. 7.

more concerned with how natural-resource wealth is shared among often antagonistic communities.⁶⁰ Conflicts do not occur in vacuum and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.⁶¹ Natural resource conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development.⁶²

The Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.⁶³ The SDGs go ahead to state that the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peacebuilding and Statebuilding.⁶⁴ They also call for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.⁶⁵ Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development. Within the Kenyan context, one of the most important natural resources is land and the Constitution provides that land in Kenya is to 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.⁶⁶ This is in recognition of the fact that Kenya is a divided society with different communities who hold different values, attitudes and beliefs towards the land and its resources.

60 Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 8.

61 Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

62 Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).

63 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

64 Ibid.

65 Ibid.

66 Constitution of Kenya 2010, Art. 60(1).

Further, it is also been observed that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and concomitant demands by some for greater conservation.⁶⁷ Consequently, approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, i.e. independent and where stakeholders have influence, and which in turn can generate trust between stakeholders.⁶⁸ It is thus believed that increased trust through fair participatory processes makes conflict resolution more likely.⁶⁹ Arguably, central governments who are genuinely concerned about the sustainable use of their country's natural resources must, at a minimum, involve local communities in their management.⁷⁰ This means taking local communities into confidence and having confidence in them; it means engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.⁷¹ It means being prepared to adjust national policies so that they can accommodate local interests, needs, and norms that are compatible with the long-term preservation of national ecosystems and their biological diversity.⁷²

The Constitution of Kenya requires the States 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; encourage public participation in the management, protection and conservation of the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.⁷³ 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.⁷⁴

It is, therefore, arguable that one of the way of stemming natural resource conflicts would be striking a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently building trust within communities and between communities and the national government. It has also been argued that for conflict management to be successful there is need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.⁷⁵

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued

67 Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

68 Ibid.

69 Ibid.

70 Buckles, D. (ed), *Cultivating Peace: Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), pp. vii-viii.

71 Ibid.

72 Ibid.

73 Constitution of Kenya 2010, Art. 69(1).

74 Ibid, Art. 69(2).

75 Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

access to and use of the environmental resources necessary for to survival from generation to generation.

4. Natural Resource Conflicts Management in Kenya

Over the years, Kenya has been faced with conflicts over natural resources such as water, forests, minerals and land among others. Natural resource conflicts are unique and require being resolved expeditiously since they involve livelihoods of people. Communities depend heavily on natural resources for their livelihoods.⁷⁶ Renewable and non-renewable natural resources have conflict generating potential. Renewable resources include crop land, fresh water, free wood and fish. None renewable resources include petroleum and minerals.⁷⁷ Scarcities of agricultural land, forests, fresh water, and fish are those which contribute to the most violence. This can be partly attributed to lack of effective conflict management mechanisms that are respected by the people who are involved in the se and access to the resources aforesaid. Various groups, communities, developers, government and other organisations have differing ideas of how to access and utilize environmental resources. The conflicts if not addressed can escalate into violence, cause

There is a legal and institutional framework in Kenya that is supposed to deal with natural resource conflicts and either resolve or manage them. These institutions include the courts of law, tribunals under various Acts,⁷⁸ the National Environmental Management Authority,⁷⁹ National Environmental Complaints Committee, Environment Tribunal and other various informal community based resource governance bodies.⁸⁰ The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes include the courts of law both under civil and criminal law,⁸¹ the National Environment Tribunal (NET),⁸² National Environmental Complaints Committee (NECC),⁸³ Arbitral tribunals,⁸⁴ Statutory tribunals set up under various laws (such as the Land Adjudication Boards)⁸⁵ and customary law systems of conflict management.⁸⁶

Some of the above conflict management mechanisms and institutions have not been very effective in managing natural resource conflicts. Courts, for instance, are formal, inflexible, bureaucratic

76 Tyler, S. (ed), *Communities, Livelihoods, and Natural Resources: Action Research and Policy Change in Asia*, (International Development Research Centre, 2006), available at <http://www.idrc.ca/EN/Resources/Publications/openebooks/230-9/index.html> [Accessed on 17/01/2016]; Gomes, N., 'Access to water, pastoral resource management and pastoralists' livelihoods: Lessons learned from water development in selected areas of Eastern Africa (Kenya, Ethiopia, Somalia),' (Food and Agriculture Organization of the United Nations, 2006), available at <ftp://ftp.fao.org/docrep/fao/009/ah247e/ah247e00.pdf> [Accessed on 17/01/2016].

77. Gizewski, P (1997) *Environmental Scarcity and Conflict*, Toronto, Canadian Security Intelligence Service p. 1.

78 They include the Central Land Appeals Board under the Land Control Act (Cap 302), amongst others.

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

80 Some communities like the Meru, Maasai, Giriama etcetera still have councils of elders who sit and resolve disputes that erupt within their respective communities.

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

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

83 Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, S. 20.

84 These are mainly established under Arbitration Act, Act. No. 4 of 1995

85 Established under Land Adjudication Act, Cap. 284, Laws of Kenya

86 Patricia Kameri-Mbote, *Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention*, IELRC Working 2005-1, available at <http://www.ielrc.org/content/w0501.pdf> <last accessed on 01/08/2008>

and expensive to access. They address strict legal rights rather than the interest of the parties. The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties. Law itself, has at times been a source of conflict rather than a conflict solver since it insists on pursuing personal rights rather than reaching agreed compromise and implementation of various laws may also lead to conflicting outcomes.⁸⁷ This is not to say that personal rights are to be ignored for what would be seen as the greater good of the community. However, there are instances where realisation of such personal rights may compromise the general stability of the society.

For instance, in the traditional community setup, there was need to balance community interests with that of individuals especially where such rights are claimed against the interests of an entirely different community. In such instances, the concerned communities will not look at those rights as accruing to individuals but to the community as a whole. Even where a threat arises, they perceive it as a threat to the whole community.⁸⁸ A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand. It is for this reason that this paper advocates for use of conflict management approaches that incorporate public participation. Litigation, which is a state-sponsored approach to conflict management, not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution. This is because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.⁸⁹

The national legal systems have been associated with a number of limitations which include, inter alia: inaccessibility to the poor, women, marginalized groups and remote communities because of cost, distance, language barriers, political obstacles, illiteracy and discrimination; failure to consider indigenous knowledge, local institutions and long-term community needs in decision-making; use of judicial and technical specialists who lack the expertise, skills and orientation required for participatory natural resource management; use of procedures that are generally adversarial and produce win - lose outcomes; providing only limited participation in decision-making for conflict parties; likely difficulty to reach impartial decisions if there is a lack of judicial independence, corruption among State agents, or an elite group that dominates legal processes; and use of highly specialized language of educated elite groups, favouring business and government disputants over ordinary people and communities.⁹⁰

Conflicts need to be managed through interactive, participatory and inclusive approaches for the sake of balancing interests, power and adjusting parties' expectations, in order to avoid the potentially negative effects of conflict in a society. There is a need to strike a balance among the

87 Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' 2006, available at <http://www.idrc.ca/>

88 Ejizu, C.I., 'African Traditional Religions And The Promotion of Community-Living in Africa,' available at <http://www.afrikaworld.net/afrel/community.htm> [Accessed on 10/02/2016]; See also Baland, J.M & Platteau, J.P., 'Compensations and Customary Rights in the Context of the Concessionaire Companies: An Economic Approach,' (International Growth Centre, September 25, 2013).

89 Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

90 FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals.

5. Alternative Dispute Resolution (ADR) and Natural Resource Conflicts Management

Article 33 of the *Charter of the United Nations* outlines the conflict management mechanisms in clear terms and it forms the legal basis for the application of Alternative Dispute Resolution (ADR) 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 should, first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (emphasis added).⁹¹ Despite this, ADR mechanisms have not been adequately utilized in management of natural resource conflicts in Kenya.

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 arguably not true.⁹²

Alternative Dispute Resolution (ADR) mechanisms include mediation, conciliation, negotiation and traditional/community based dispute management mechanisms. ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.⁹³

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 effective to the extent that they will be expeditious and cost-effective compared to litigation.⁹⁴ The use of mediation in natural resource conflicts management is especially common in Canada.⁹⁵ ADR Mechanisms are arguably most 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.

91 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

92 P. Fenn, P., “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), pp. 50-52.

93 Fenn, P., “Introduction to Civil and Commercial Mediation”, *op. cit.*, p.10.

94 Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

95 Dorcey, A.H.J. & Riek, C.L., ‘Negotiation-Based Approaches to the Settlement of Environmental Disputes in Canada,’ *Workshop on Political Theory and Policy Analysis*, 1987; Berkes, F., et al, ‘Co-Management: The Evolution Of The Theory And Practice of Joint Administration Of Living Resources,’ TASO Research Report, Second Series, No. 1, *Paper Presented at the Second Annual Meeting of IASCP University of Manitoba, Winnipeg, Canada*, Sept. 26-29, 1991.

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TDRMs include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. It has been observed that where traditional community leadership was strong and legitimate it had positive impacts in promoting local people's priorities in natural resource management.⁹⁶ The traditional and customary systems for managing conflict are associated with a number of strengths which include: they encourage participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.⁹⁷

In light of Article 159 (2) (c) and in relevant cases, the ADR mechanisms should be used in managing certain community disputes such as those involving use and access to natural resources among the communities in Kenya, for enhanced access to environmental justice and environmental democracy. While most of the foregoing ADR mechanisms can effectively be applied in the management of natural resource conflicts management, this paper is biased towards negotiation and mediation and explores at a greater length the application of the two mechanisms in conflicts. This is because the author is not keen on settlement mechanisms but resolution mechanisms and the two main approaches in resolution are negotiation and mediation. The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.⁹⁸

Natural resource conflicts are unique as they involve people's lives. Left to escalate, suffering and death may be the undesirable result. The conflict management mechanisms referred to herein as ADR have certain advantages that make them suitable for use in resolution of natural resource conflicts. For example, the mechanisms that allow for maximum party autonomy such as negotiation, conciliation and mediation are cost effective flexible, informal and leave room for parties to find their own lasting solutions to problems. They are thus particularly suitable for the resolution of natural resource conflicts.

Courts and formal tribunals are sometimes inflexible, bureaucratic and do not foster the maintenance of cordial relations between the parties. Parties come out of the proceedings before such courts and tribunals bitter and discontented. It has been argued that through ADR, multiparty "win-win" options are sought by focusing on the problem (not the person) and by creating awareness of interdependence among stakeholders.⁹⁹ This is justified on the fact that among the

96 Shackleton, S., et al, 'Devolution and Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' *Overseas Development Institute Natural Resource Perspectives*, No. 76, March 2002, p.4.

97 FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

98 *Ibid.*

99 Buckles, D. (ed), *Cultivating Peace Conflict and Collaboration in Natural Resource Management*, (International Development Research Centre 1999), p.5.

issues that influence negotiation attitudes, interdependence is of central importance, as actors' attitudes and behaviour are shaped by the fact that they will need to coexist after the period of negotiation.¹⁰⁰ Notably it can be said that the attributes of party autonomy, flexibility, all-inclusiveness, informality and acceptability by all parties can be exploited to come up with acceptable solutions to environmental problems and natural resource conflicts. It has compellingly been suggested that mediation, through the intervention of an impartial third party into a dispute, deals well with significant value differences, which are considered extremely difficult to resolve where there is no consensus on appropriate behaviour or ultimate goals.¹⁰¹ Further, ADR, drawing on the strengths of mediation techniques such as identification and reframing, can address value conflict, through specific techniques which include: transforming value disputes into interest disputes; identifying superordinate goals (both short- and long-term); and avoidance.¹⁰²

5.1 Negotiation and Natural Resource Conflicts Management

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. This refers to a process where parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. It is also described 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.¹⁰³ Negotiation is also defined as a process by which states and other actors communicate and exchange proposals in an attempt to agree about the dimensions of conflict termination and their future relationship.¹⁰⁴

There are various approaches to negotiation which include: positional negotiation; principled negotiation; and interest-based negotiation.¹⁰⁵ Positional negotiation is associated with firstly, separating the people from the problem; secondly, focusing on interests, not positions; thirdly, inventing options for mutual gain; and finally, insisting on objective criteria.¹⁰⁶ As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.¹⁰⁷ Principled negotiation on the other hand, decides issues on their merits rather than through a haggling process focused on what each side says it will and will not do. It suggests that a negotiator should look for mutual gains whenever possible, and that

100 Ibid, p. 110.

101 Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' *Environ Impact Asses Rev*, Vol. 16, 1996, pp. 71-102, p. 82.

102 Ibid.

103 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].

104 Bercovitch, J. & Jackson, R., 'Negotiation or Mediation? An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict,' *Negotiation Journal*, January 2001, Vol. 17, Issue 1, pp 59-77, p. 60.

105 R. Fisher, *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, pp. xxvi-xxvii.

106 Roger Fisher and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in* *Op cit.*, p. 42; See also

Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, p. 43.

107 Ibid.

where various interests conflict, negotiators are encouraged to have a result based on some fair standards independent of the will of either side.¹⁰⁸

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.¹⁰⁹ Since the aim of negotiation as discussed within the context of this paper is to arrive at "win-win" solutions, positional bargaining is not recommended as the general approach to negotiation because arguing over hard-line positions may produce unwise agreements, prove inefficient, endanger an ongoing relationship and also lead to formation of coalition among parties whose shared interests are often more symbolic than substantive.¹¹⁰

Negotiations are seen as preferable due to their unstructured often lack of formal procedures, suggesting a format which caters to the uniqueness of each negotiation.¹¹¹ The import of this is that due to the flexibility nature of the process, it is possible for parties to agree to settle on what works for them in a given scenario. Negotiation affords parties autonomy in the process and over the outcome for purposes of ensuring that they come up with creative solutions. By taking a collaborative rather than a competitive approach to negotiation, parties can attempt to find a solution satisfactory to both parties-making both sides feel like winners.¹¹² The outcome of a collaborative approach to negotiations is: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.¹¹³

As a vital first step in negotiation, it is important that the parties have conceptual clarity of the different issues, especially the difference between ownership issues, regulatory-authority control issues, and issues relating to the treatment of natural-resource revenues.¹¹⁴ Separating people from the issues allows the parties to address the issues without damaging their relationship and also helps them to get a clearer view of the substantive problem.¹¹⁵

With regard to natural resource management, public participation has been described as a form of negotiation, where there is joint decision-making among parties with interdependent yet incompatible interests.¹¹⁶ Principled negotiation has advantages that can facilitate mutual agreement on issues and consequently achieve conflict resolution. Negotiation is hailed as a process that can lead to empowerment of village-level and government participants and increased

108 Ibid.

109 UNESCO-IHP, "Alternative Dispute Resolution Approaches and Their Application in Water Management: A Focus On Negotiation, Mediation and Consensus Building" Abridged version of Yona Shamir, Alternative Dispute Resolution Approaches and their Application, Accessible at <http://unesdoc.unesco.org/images/0013/001332/133287e.pdf> [Accessed on 19/01/2016]

110 Ibid, p.23.

111 FAO, 'Alternative Conflict Management: The Role of Alternative Conflict Management in Community Forestry,' available at <http://www.fao.org/docrep/005/x2102e/X2102E02.htm>

112 A. French, *Negotiating Skills*, (Alchemy, 2003), p. viii.

113 Ibid.

114 Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 26.

115 Fisher, R. and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in*, op cit., pp. 10-11

116 Daniels, S.E. & Walker, G.B., 'Collaborative Learning And Ecosystem-Based Management,' *Environ Impact Asses Rev*, Vol. 16, 1996, pp. 71-102, pp. 78-79.

awareness of the conflicts and their causes.¹¹⁷ Through participation of communities in decision-making through negotiation, conflicts can be resolved or averted since each party is afforded an opportunity to raise their concerns in a joint forum where they can all be addressed with the aim of reaching a consensus or compromise.

It has been pointed out that in a conflict-oriented natural resources situation, one must learn and communicate about: technical, legal, and financial issues at hand; procedural issues; perceptions, concerns, and values of other participants; one's own goals, and those of others; personalities; communication styles; one's own set of options; and relative benefits of different strategies.¹¹⁸ Thus, the lead negotiators ought to have a good grasp of the issues at hand. This is one of the ways that they can adequately address not only their needs and interests but also those of opponents so as to facilitate a win-win situation.¹¹⁹

Negotiation may not always work and as such, parties may be required to try another approach by inviting a third party where they have reached a deadlock and cannot work out a consensus or a compromise. They third party comes in to help the parties clarify issues, interests and needs. Negotiation with the help of a third party is called mediation. Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.¹²⁰

5.2 Mediation and Natural Resource Conflicts Management

Mediation is a voluntary collaborative process where individuals who have a conflict with one another identify issues, develop options, consider alternatives and reach a consensual agreement.¹²¹ Trained and untrained mediators open communications to resolve differences in a non-adversarial confidential manner. It can also refer to a private and non-binding form of conflict management where an independent third party (neutral) facilitates the parties reaching their own agreement to settle a dispute. It is a structured process where the settlement becomes a legally binding contract.¹²²

Mediation is also 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. Within this definition, mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.¹²³ Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

117 Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' (Food and Agriculture Organization of the United Nations, 2003), p. 224.

118 Ibid, p. 79.

119 Ury, W., *Getting to Yes with Yourself and Others*, (HarperThorsons, 2015), pp. 147-148.

120 M. Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

121 J.G. Merrills, *International Dispute settlement*, (Cambridge University Press, Cambridge, 1991).

122 Fenn, P., "Introduction to Civil and Commercial Mediation," op cit p. 10.

123 Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).

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.¹²⁴

In relation to natural resource conflicts, it is arguable that an approach that seeks to eliminate the root causes of conflict are to be preferred considering the great importance attached to these resources. Human needs and desires are continuous and therefore, there is need to ensure that the unavoidable conflict that is bound to arise is controlled or eliminated altogether. Scholars believe that participatory and collaborative planning is useful in preventing conflicts resulting from government actions or policies.¹²⁵ This view may be validated in relation to Kenya, where the Constitution recognises the significance of public participation in decision-making and governance matters. For instance, among the national values and principles of governance that 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, include inter alia, democracy and participation of the people; equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability.¹²⁶

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.¹²⁷

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 added).¹²⁸ This makes mediation a viable process for the actualization of the right of access to justice. While both processes may be recommended for use in resolving natural resource conflicts in Kenya, mediation in the political process is to be preferred due to its obvious advantages, as highlighted above.

124 See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished*, University of Nairobi.

125 Ibid.

126 Art. 10, Constitution of Kenya 2010.

127 Ibid, Chapter 4; 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.

128 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).

Kenya resorted to mediation coupled with negotiation after the post-election conflict through the Koffi Annan initiative¹²⁹. Mediation offers a conflict management mechanism where all parties come to the table and with the help of the mediator find their own solutions. It was ADR that saved Kenya from the brink of total anarchy. However, mediation often work best in a conflict in which the parties have had a significant prior relationship or when the parties have an interest in continuing a relationship in the future.¹³⁰

In the Koffi Annan initiative, mediation was used in the face of the apparent failure or impotence of the legal and institutional mechanisms for the resolution of political conflict in Kenya. A critical look at ADR methods in the resolution of natural resource conflicts is worthwhile considering the many positive attributes and potential for involving the public and reaching of acceptable solutions that can withstand the test of time. Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management.

Mediation in the informal context leads to a resolution 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. Indeed, it has been observed that natural-resource negotiations are often a high-stakes, high-risk game, and one important role the mediator can therefore play is to empower the parties by providing them with the knowledge to have the confidence to negotiate.¹³¹ The import of this is that they must be well versed with mediation as a process but also the needs of each of the parties. This way, they would be able to know the appropriate approaches and skills to put into play.

It is also important to identify the correct interest groups who are regarded as stakeholders in the allocation of resources and the extent of their respective rewards against the overall importance of natural resources to financing national development must be determined.¹³² It is argued that to be successful, a process will need to engage a broad range of actors, including not only those who have legitimate claims to ownership of the resource, but also those who could be affected by the allocation of authorities over the resource or the distribution of its revenues.¹³³ In the case of Kenya, it would therefore mean going beyond the community especially where the resource in question is of national importance, such as water bodies.

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

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

130 J.S. Murray, Alan Scott Rau & Edward F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, University casebook series, Foundation Press, 1989, p. 47.

131 Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 27.

132 Ibid, p. 28.

133 Ibid.

relationship.¹³⁴ 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.¹³⁵

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.¹³⁶ 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 party's disadvantage.¹³⁷ 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. However, in *Thakrar V Cir Cittero Menswear plc (in administration)*, {2002} EWHC 1975 (ch), the English High Court held that a mediated settlement was an enforceable contract.¹³⁸ To deal with the problem of unenforceability, it has been affirmed before the parties go into mediation, there must be firstly, a mediation agreement binding the parties to mediation. After mediation, there is an agreement containing the terms of mediation. This agreement must be signed by all the parties to the mediation. In the agreement the parties agree that they were bound with the resolutions reached by the mediator. This final agreement is a document which can be tabled in court to show that one party is reneging from the agreed resolutions.¹³⁹ The results of mediation must be a mutual agreement between the parties to the dispute.¹⁴⁰ To achieve this, the mediator may consider incorporation of consensus building into the mediation, which seeks to build the capacity of people to develop a dialogue with each other, either directly or indirectly, to find a way forward based on consensus which generates mutual gains for all parties with the minimum of compromise and trade-off.¹⁴¹ This can ensure that even when they reach the final stage, chances of having an outcome acceptable to all sides are enhanced.

134 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*, No. 3, 2009, pp.802-803.

135 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*, No. 3, 2009, pp.802-803.

136 See generally, Fiss, O., "Against Settlement" 93 *Yale Law Journal*, 1073 (1984).

137 Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p. 3, *Effectius Newsletter*, Issue 13, (2011)

138 As quoted in *Kenya Plantation & Agricultural Workers Union V Maji Mazuri Flowers Ltd* [2012] eKLR, Cause 1365 of 2011.

139 *Greenhouse Management Limited v Jericho Development Company Limited* [2015] eKLR, Civil Case 49 of 2015.

140 Ibid; See also *Stephen Kiprotich Saina v Francisco Okutoyi Ayot & another* [2014] eKLR, E&L 348 of 2013.

141 Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' op cit, p. 16.

6. Enhancing the Use of Negotiation and Mediation in Natural Resource Conflicts Management in Kenya

Whereas natural resource conflicts may not be fully eliminated but they can be managed in such a way that Kenya avoids the violence that has been witnessed in the recent past in contests involving access to and use of natural resources. Peace can be achieved through the use of negotiation and mediation to facilitate conflict resolution and transformation.

It is also noteworthy that ADR can only work in appropriate cases. There is a need to strengthen the existing legal and institutional framework for the resolution of natural resource conflicts so as to make it effective in the face of the ever increasing natural resource conflicts. Kenya should learn from other jurisdictions that have combined the legal and institutional frameworks with the tenets of ADR and gone on to manage natural resource conflicts effectively.¹⁴² Kenya can learn and benefit from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of disputes and crimes.¹⁴³ The Constitution of Rwanda provides for the establishment in each Sector a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.¹⁴⁴ The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.¹⁴⁵

In other jurisdictions, there has been adoption of management approaches which attempts to mitigate resource development conflict involving disputed territory known under several names, such as *co-management*, *joint management*, or *joint stewardship* (emphasis added).¹⁴⁶ Co-management is an inclusionary, consensus-based approach to resource use and development. Through this approach, there is sharing of decision-making power with nontraditional actors in the process of resource management, whose nontraditional actors include those other than either state managers or industry, such as local resource users, environmental groups, or aboriginal people.¹⁴⁷ This approach is also lauded for the fact that it stresses negotiation rather than litigation as a means to resolve conflict and its ability to combine western scientific knowledge and traditional environmental knowledge for the purpose of improving resource management.¹⁴⁸ Arguably, this can create feelings of mutual trust and participation, with room to raise and address concerns from all the involved parties. Natural resource conflicts are thus minimized or eliminated. Indeed, communities have often asserted their rights in natural resource exploitation and participation, and

142 For example, Canada where it is provided under Rule 24.1 for Mandatory Mediation under Regulation 194 of the Revised Regulations of Ontario of 1990 made under the courts of Justice Act.

143 M. Mutisi, "Local conflict resolution in Rwanda: The case of *abunzi* mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74 at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012

Available at <http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf> [Accessed on 20/01/2016]

144 Article 159, Constitution of Rwanda, 2003.

145 *Ibid.*

146 Campbell, T., 'Co-management of Aboriginal Resources,' (Adopted from *Information North*, Vol 22, no.1 (March 1996), Arctic Institute of North America), available at <http://arcticcircle.uconn.edu/NatResources/comanagement.html> [Accessed on 20/01/2016]

147 *Ibid.*

148 *Ibid.*

with success.¹⁴⁹ Trust does not however emerge simply through increased interactions (interpersonal trust) but from a genuine willingness to share power, in terms of knowledge and decision implementation, especially in situations where local stakeholders are dependent on and knowledgeable about natural resources.¹⁵⁰ Such trust-building, it is argued, requires effort and resources however, as well as developing opportunities for appropriate dialogue between stakeholders to identify shared problems and in turn shared solutions.¹⁵¹

Lessons from various jurisdictions can be used to enhance our conflict management capabilities. However, it is noteworthy that currently, there are efforts by the legal fraternity in Kenya to enhance legal and institutional frameworks governing mediation in general.¹⁵² The *Civil Procedure Act*¹⁵³ provides for mediation of disputes.¹⁵⁴ There are also the *Mediation (Pilot Project) Rules, 2015*¹⁵⁵ which are meant to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Judiciary's Pilot Project.¹⁵⁶ The Rules provide that every civil action instituted in court after commencement of the Rules, should be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.¹⁵⁷

Non-Governmental Organisations (NGOs) have played an important facilitative and capacity building role in other jurisdictions, helping to bridge divergent views between local people and government agencies and manage conflict within or among communities.¹⁵⁸ NGOs working with local communities often have good will from the local people and hence, it is recommended that

149 Loon, J.V., 'Canada Natives Block Energy Projects: 'We Own It All',' *Bloomberg Markets*, January 27, 2014. Available at <http://www.bloomberg.com/news/articles/2014-01-27/harper-collides-with-native-canadians-natural-resources-claims> [Accessed on 20/01/2016]; See also Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' *Briefing Paper, April 2007*; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.

150 Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' op cit.

151 Ibid, p. 202.

152 W. Mutunga, Chief Justice & President of The Supreme Court of Kenya, '*Alternative Dispute Resolution and Rule of Law*' For East African –Prosperity,' remarks by The Chief Justice at The East African Arbitrators Conference September 25, 2014, pp. 3-4. Available at <http://www.judiciary.go.ke/portal/assets/files/CJ%20speeches/Cjs%20Speech%20ADR%20-%20Sept.%2025,%202014,%20Windsor.pdf> [Accessed on 20/01/2016]; "Judiciary to adopt alternative dispute resolution mechanism," People Correspondent, *People Daily Newspaper*, 10 March, 2015. Available at <http://mediamaxnetwork.co.ke/peopledaily/139823/judiciary-adopt-alternative-dispute-resolution-mechanism/> [Accessed on 20/01/2016]. The Chief Justice of Kenya Dr. Willy Mutunga appointed twelve members to the Mediation and Accreditation Committee. The Committee is chaired by a serving Judge and it is responsible for determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.

153 Cap 21, Laws of Kenya.

154 Sections 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, Government Printer, Nairobi, 2012, at pp.1092-1097.

155 Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

156 Rule 2. "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

157 Rule 4(1).

158 Shackleton, S., et al, 'Devolution and Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' op cit., p.4.

where there are negotiation and mediation talks, such organisations can play a major role in enhancing the communities' participatory capacity and boost the chances of reaching a mutually agreed outcome. They can achieve this through enhancing communities' access to information for informed decision-making as well as helping the community to understand the complex aspects of the law.¹⁵⁹

Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.¹⁶⁰ With regard to public participation in natural resource management, it has been argued that since most resource issues today are less dependent on technical matters than they are on social and economic factors, if a state is to maintain the land's health, they must learn to balance local and national needs.¹⁶¹ It is argued that the state must learn to better work with the people who use and care about the land while serving their evolving needs.¹⁶² In *The Matter of the National Land Commission [2015] eKLR*, the Supreme Court observed 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.¹⁶³

Sustainable development will need to draw upon the best knowledge available from the relevant scientific and stakeholder communities.¹⁶⁴ Public participation is required 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.¹⁶⁵ However, there should be fairness in public participation which means that all those affected by

159 See Maia, M., 'NGOs as Mediators: Their role in expertise, language and institutional exemption in urban development planning,' Working Paper No. 77, May 1996; See also Ahenkan, A., et al, 'Improving Citizens' Participation in Local Government Planning and Financial Management in Ghana: A Stakeholder Analysis of the Sefwi Wiawso Municipal Assembly,' *Journal of Public Administration and Governance*, Vol. 3, No. 2, 2013.

160 See generally, Hazen, S., *Environmental Democracy*, (<<http://www.ourplanet.com>). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries." European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

161 Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 2.

Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 3/01/2016].

162 Ibid; Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.

163 In *The Matter of the National Land Commission [2015] eKLR*, para. 21; See also Muigua, K., *et al*, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

164 Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' op cit, p. 4.

165 Ibid, p.4.

certain decisions are represented and, importantly, that procedures enable them to have an input into the format and content of discussions.¹⁶⁶

The traditional approaches, which were mostly based on top down resource management approaches may leave out the necessary elements of meaningful public participation. This is because, they provide for formal public participation process in which it is assumed that a government agency makes decisions and the general public can give their comments without necessarily affording them a meaningful opportunity to do so.¹⁶⁷ An example of such approaches is what is provided in the Environmental Management and Coordination Act, 1999 (EMCA).¹⁶⁸ These include such tools as the use of Environmental Impact Assessment (EIA)¹⁶⁹ in environmental management and conservation efforts. While acknowledging that EIA can be a powerful tool for keeping the corporate including corporations in check, the general public should be empowered through more meaningful and participatory ways such as negotiation and mediation. This is the only way that the affected sections of population appreciate their role in conflict management and decision-making processes. The general public should also be involved in Strategic Environmental Assessment (SEA) which is 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.¹⁷⁰ 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.¹⁷¹ Public participation in Strategic Environmental and Social Assessment (SESA) ought to be a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.¹⁷² These exercises, where conducted properly, should

166 Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' op cit, p. 197. Young, J.C., et al, argue that in situations where values or interests conflict, for example over conservation objectives, two aspects of fairness are important: 'independence' and 'influence.' In the context of conservation conflicts, they define an 'independent' participatory process as one which is unbiased, i.e. where certain participants are not imposing their interests at the expense of others. They define 'influence' as a process that allows those involved to have an input that has a genuine impact on the process and outcomes of participation, one potential outcome being conflict resolution (p. 297).

167 Ibid, p. 4.

168 Act No. 8 of 1999, Laws of Kenya.

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

170 Environmental protection Agency, 'Strategic Environmental Assessment,' available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> [Accessed on 26/10/2015].

171 Ibid; see also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42, 43 & 47.

172 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.

not be done as a mere 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. Engaging them through negotiation and mediation where necessary, would avert future conflicts and allow any developmental activities enjoy social acceptance in the community. Thus, government activities and policies would not clash with the community expectations.

Under Principle 10 of the Rio Declaration the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters. Access to justice through litigation is also a potent remedy when access to environmental information or public participation have been wrongly denied or are incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or deprivation.¹⁷⁴

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 10/02/2016]; 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 10/02/2016]. 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.

174 See Migai Akech, "Land, the environment and the courts in Kenya," *A background paper for The Environment and Land Law Reports*, February 2006, 1 KLR (E&L) xiv-xxxiv. Available at <http://www.kenyalaw.org> [Accessed on 09/01/2016]; *The Fair Administrative Action Act*, 2015 (No. 4 of 2015) which an Act of Parliament to give effect to Article 47 of the Constitution provides under s. 6(1) that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with s. 5. S. 5(1) provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall- issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice- (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within the

which such appeal shall be lodged. In relation to access to information, Art. 35(1) (b) of the Constitution guarantees every person's right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, the proposed law, *Access to Information Bill, 2015*, seeks to to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, clause 2 defines "private body" to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation

The Rio Declaration in principle 10 emphasizes the importance of public participation in environmental management through access to justice thus: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”¹⁷⁵ Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.¹⁷⁶

The provision of effective avenues for resolution of natural resource conflicts is thus far the most practical way of ensuring access to justice, and by extension adhering to public participation principle. Scholars have asserted that participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests.¹⁷⁷

Cultural, kinship and other ties that have always tied Kenyans together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, and respect for one another and to the environment. However, it has been observed that the success of customary natural resource management strategies in managing conflict often depends on the enforcement capacities of traditional authorities. When the authority of traditional elite groups is declining, the capacities of those groups to render or enforce a decision may also be reduced.¹⁷⁸ It is also argued that customary practices institutionalized within broader national legal frameworks may provide a good starting point to enhance traditional authorities' ability to deal with the challenges of contemporary natural resource management.¹⁷⁹ With regard to this, Kenya may be better positioned due to the Constitutional recognition for the application of TDRMs.¹⁸⁰ This may, therefore, help reposition the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Art. 60(1) (g) of the Constitution, is concerned.

Mediation in the informal context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context and not as a legal process.

175 United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

176 Hove, SVD, ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.

177 *Ibid*, p.16.

178 FAO, ‘Negotiation and mediation techniques for natural resource management,’ *op cit*.

179 *Ibid*.

180 Art. 159.

In the informal set up mediation is seen as an everyday affair and an extension of a conflict management process on which it is dependent. Conflict management is thus heavily embedded in the way of life of most Kenyan communities. Mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves* (emphasis added).¹⁸¹ It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process.¹⁸² Legislation should not kill mediation by annexing it to the court system and making it a judicial process but should instead strive towards creating a more conducive environment to make it more effective and receptive to the needs of the people. Informal mediators may still have a big role to play in making mediation work in Kenya especially in relation to resolution of natural resource conflicts.

It has been suggested that government policies can create opportunities for mediation during disputes.¹⁸³ However, they must include mechanisms for judging the prospects of success at the outset and adopting contingencies to ensure the mediators' security if situations deteriorate.¹⁸⁴ It is also contended that the community also needs the authority of the state to strengthen its ability to deal with large and powerful external interests, such as multinational corporations.¹⁸⁵ This is why there is need for the informal conflict mechanisms to work in synergy with the formal systems to ensure that the parties engage constructively. For instance, it has been observed that national legal systems may carry with them the following strengths: use of official legal systems strengthens the rule of State law, empowers civil society and fosters environmental accountability; they are officially established with supposedly well-defined procedures; they take national and international concerns and issues into consideration; they involve judicial and technical specialists in decision-making; where there are extreme power imbalances among the disputants, national legal systems may better protect the rights of less powerful parties because decisions are legally binding; and decisions are impartial, based on the merits of the case, and with all parties having equity before the law.¹⁸⁶

It has been observed that the role, tasks, required skills, and modus operandi of a successful mediator will depend on the specific context of any dispute.¹⁸⁷ However, there is need for the mediators to acquire broad scale skills to enable them handle a wide range of issues in natural resource conflicts. The crucial characteristic of an effective mediator-facilitator in natural resource conflicts is said to be credibility with the main parties in the dispute, whether that credibility comes

181 United Nations Development Programme, et al, 'Informal Justice Systems: Charting A Course For Human Rights-Based Engagement,' 2012; see also Albrecht, P., et al (eds), 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform,' (International Development Law Organization, 2011).

182 See Eilerman, D., 'Give and Take - The Accommodating Style in Managing Conflict,' August 2006, available at <http://www.mediate.com/articles/eilermanD5.cfm> [Accessed on 10/02/2016].

183 Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' op cit, p. 272.

184 Ibid.

185 Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit.

186 FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

187 Tyler, S.R., 'Policy Implications of Natural Resource Conflict Management,' op cit, p. 272.

from technical expertise, professional experience, social status, kinship, or wisdom ("authority" is usually a poor criterion for selecting mediators).¹⁸⁸

As for negotiation processes, it is also important to enhance capacity building within the communities. Capacity building is believed to be integral to developing a level-playing field, so less powerful stakeholders can participate equitably in a process of consensual negotiation.¹⁸⁹ It has been noted that successful problem-solving is a satisfying experience on a human level. Since the intended outcome of the negotiation is a win-win result,' the accomplishment of creating an innovative solution that maximizes joint as well as individual gains can be shared with the other side.¹⁹⁰ The process of reaching this goal is psychologically unifying, rather than divisive. Negotiation is thus an enjoyable and challenging personal experience, rather than a highly stressful battle of wits and words.¹⁹¹

Communication is seen as capable of only taking place within an interactive process of participation that brings together those holding different standpoints.¹⁹² In Kenya, devolution was designed and has been hailed as capable of opening channels for rural dwellers to communicate their priorities to government decision-makers and in some places improved community-government relations.¹⁹³ However, it has been observed that more powerful actors in communities tend to manipulate devolution outcomes to suit themselves.¹⁹⁴ As such, checks and balances need to be in place to ensure that benefits and decision-making do not become controlled by élites.¹⁹⁵ Participatory approaches for environment and sustainable development decision-making should extend beyond the realms of advocacy, academic focus and institutional discourses into the realm of real life implementation.¹⁹⁶

7. Conclusion

Sustainable development is not possible in the context of unchecked natural resource conflicts. As a recognition of this fact, 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'.¹⁹⁷ It is also noteworthy that SDGs

188 Ibid, p. 273.

189 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. 30.

190 Murray, JS, 'Understanding Competing Theories of Negotiation,' *Negotiation Journal*, April, 1986, pp. 179-186 at pp. 183-184.

191 Ibid.

192 Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' op cit, p.12.

193 Shackleton, S., et al, 'Devolution and Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' op cit., p.2; See also Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' *Paper Presented at the CIArb Africa Region Centenary Conference 2015*, held on 15-17 July, 2015 at Victoria Falls Convention Centre, Zambezi Sun Hotel, Livingstone, Zambia, (www.kmco.ke)

194 Ibid, p.1.

195 Ibid, p.1.

196 Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' op cit, p.15.

197 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.

seek to promote participation of local communities in natural resource management.¹⁹⁸ Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource conflicts and ensure that Kenyans achieve sustainable development. Furthermore, the affected communities, in cases of decision making, can have 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.¹⁹⁹

Natural resource conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system. As already pointed out, national legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.²⁰⁰ Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.²⁰¹ In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.²⁰²

Even where the use of ADR and TDR mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation in managing natural resource conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development. The Government efforts evidenced by bodies such as the National Cohesion and Integration Commission²⁰³ should actively involve communities in addressing natural resource conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of natural resource

198 Ibid, Goal 6b.

199 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 08/01/2016].

200 FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

201 Ibid.

202 See generally Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

203 This is a Commission established under s. 15 of the National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008]. One of the functions of the Commission is to promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace (s.25 (2) (g).

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conflicts in Kenya. Alternative Dispute Resolution mechanisms (ADR) and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource conflicts. They are expeditious, cost effective, participatory and all-inclusive and thus, can be used to manage natural resource conflicts in way that addresses all the underlying issues affecting the various parties.

Natural resource conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of natural resource conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the natural resource conflicts and environmental problems as it has many limitations and is also faced with many challenges. However, ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage natural resource conflicts and ensure Kenya realises its goals of sustainable development and the Vision 2030.

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, have been effective in managing conflicts where they have been used. Their relevance in natural resource conflicts has been recognized in the constitution.²⁰⁴ They are mechanisms that enhance Access to Justice. Some mechanisms such as 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 bring about a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of conflicts without undue regard to procedural technicalities.²⁰⁵ 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.

Managing natural resource conflicts in Kenya through the enhanced use of negotiation and mediation is an exercise worth pursuing for the sake of attaining Environmental Justice and ultimately sustainable development.

204 See Art. 60(1) (g); Art. 159.

205 Constitution of Kenya, Art. 159(2).

Realising Occupational Safety and Health as a Fundamental Human Right in Kenya

Abstract

The right to safe and healthy working conditions has dramatically gained a lot of interest at the global, regional and national levels. Countries around the world have recognized the universality, inalienability, interdependency and indivisibility of the human right to safe and healthy working conditions.

In this paper, the author discusses occupational safety and health as a fundamental human right, by first outlining the international legal framework on safe and healthy working conditions and thereafter, the extent to which Kenya has respected, protected and fulfilled its international legal obligations on safe and healthy working conditions. From an international human right perspective, the author puts forth the argument that since human rights are interconnected, then the right to occupational safety and health should be given the same attention as the civil and political rights. On the same note the author seeks to assess whether the right to occupational safety and health has been realised as a fundamental human right in Kenya.

The author notes lack of proper enforcement mechanisms, capacity challenges, emerging production techniques creating new risks as some of the main obstacles to the effective implementation of the law on occupational safety and health in Kenya as a fundamental human right. By making a succinct overview on the implementation of the Occupational Safety and Health Act¹ the author illustrates the main challenges facing occupational safety and health programs in the workplace and argues that it has not been realised as a fundamental human right in Kenya. The paper also assesses whether the Act has achieved the legislative intent, the opportunities it offers, and some of the key issues that need to be urgently addressed for occupational safety and health to be effectively and successfully managed in Kenya.

1. Introduction

Occupational health and safety is a cross-cutting disciplinary area concerned with protecting the safety, health and welfare of people engaged in work or employment.² All occupational health and safety programs are therefore geared towards fostering a safe working environment. As such this area has dramatically developed a lot of interest in Kenya following the enactment of the new Constitution of Kenya³ and the Occupational Health and Safety Act No. 15⁴ which came into force on 26th October 2007, and saw many workplaces which had hitherto operated without institutional and individual capacity for health and safety management having to develop the requisite mechanisms in order to improve the safety of the working environment and escape liabilities. The corpus of law in Kenya dealing with occupational safety and health is contained in the international legal instruments which emphasise that everyone is entitled to the right to safe and healthy working

1 Act No. 15 of 2007, Government Printer, Nairobi.

2 Available at, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R171>, accessed on 25/06/2011

3 The Constitution of Kenya, 2010 Government Printer, Nairobi.

4 Act No. 15 of 2007, Government Printer, Nairobi.

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conditions,⁵the Constitution of Kenya⁶, the Occupational Safety and Health Act No.15 of 2007, and the various labour laws now in force.⁷

Seeing occupational safety and health as a fundamental human right will ensure that the vulnerable workers mostly women, the poor and the children and forming the largest population of the working class get the basic knowledge of hazards, personal protection and that they do not work for long hours in unsafe conditions without health care or insurance covers. For occupational safety and health to attain the status of a basic human right for all workers there is a need to ensure that the working environment protects and promotes occupational safety and health.

As noted elsewhere in this paper human rights are indivisible and interconnected and thus the improvement of one right facilitates the advancement of the others. In the same way the deprivation of one right adversely affects the others. consequently, all human rights whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, they are indivisible, interrelated and interdependent. Occupational safety and health thus finds its basis from the fact that all rights are indivisible, interrelated and interdependent such that its improvement will facilitate the advancement of the other rights and vice versa.

1.1 Definition of terms

1.1.1 Health

The Act does not define the terms safety and health. The World Health Organization has defined health, thus; *“Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity”*. As this definition shows health is a very broad and wide concept which includes work related injuries and diseases, such as industrial deafness, dermatitis, occupational overuse injuries, asbestosis and occupational cancers. It could also include more general health problems like heart disease, high blood pressure and stress where the work environment and procedures could be shown to be contributing factors.⁸

5 The Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, The International Covenant on Civil and Political Rights, The Convention on the Elimination of All Forms of Discrimination Against Women, The Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Rights of the Child, The ILO Equal Remuneration Convention (No. 100), The ILO Discrimination (Employment and Occupation) Convention (No. 111), The ILO Minimum Age Convention (No. 38), The ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87), The ILO Right to Organize and Collective Bargaining Convention (No. 98), The ILO Forced Labour Convention (No. 29), the ILO Employment Policy Convention (No. 122), and The ILO Indigenous and Tribal Peoples Convention (No. 169).

6 The Constitution of Kenya, op.cit.

7 The labour laws in Kenya include: The Labour Relations Act No. 14 of 2007, Government Printer, Nairobi; The Employment Act No.11 of 2007, Government Printer, Nairobi; The Labour Institutions Act No.12 of 2007, Government Printer, Nairobi; The Work Injury Benefits Act No.13 of 2007, Government Printer, Nairobi etc.

8 Available at, <https://apps.who.int/aboutwho/en/definition.html>, accessed on 8/6/2011

1.1.2 Occupational Health and Safety

According to Professor Lee Reynolds⁹ occupational health and safety, “is the discipline concerned with preserving and protecting human and capital resources in the workplace”.¹⁰

1.1.3 Workers Health

The term “workers health” is coterminous with “occupational health” and has been defined as follows:¹¹

“Occupational health should aim at the promotion and maintenance of the highest degree of physical, mental and social wellbeing in all occupations; the prevention amongst workers of departures from health caused by their working conditions; the protection of workers in their employment from risks resulting from factors adverse to health; the placing and maintenance of the worker in an occupational environment adapted to its physiological and psychological equipment and, to summarize: the adaptation of work to man and of each man to his job”.

In 1985, ILO in its Supplementary Recommendation 171 again stressed the cross-cutting or multidisciplinary approach and a more multisectoral collaboration in occupational health¹².

1.1.4 Occupier

The Act defines an occupier as the person or persons who are in actual occupation of a workplace either as the owner or not and includes an employer.¹³ The above definition stems from the common law position. According to Street on Torts¹⁴ at page 195, the test of occupation is given;

“...The test of occupation, then, is whether a person has some degree of control associated with, and arising from, his presence in and use of, or his activity in, the premises...”

The Kenyan Act however does not make the common law distinction between invitees and licensees. Instead the Act at sections 17 and 18 makes provision for persons who are not necessarily employees but nevertheless get exposed to risks at the workplace. Therefore the Act has gone beyond the duties imposed on an occupier under the common law and the Occupiers Liability Act¹⁵ which only applies to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

9 Lee Reynolds is an Associate Professor at the department of Engineering Technology at Texas Technology University. (<http://apps.depts.ttu.edu/ceet/facstats.php>, accessed on 28/06/2011)

10 Ibid, The office and Class Schedule for Professor Reynolds-Spring Semester of department of Engineering Technology at Texas Tech University.

11 Available at, http://www.ilo.org/safework/info/publications/lang--en/docName--WCMS_110478/index.htm, accessed on 28/06/2011. This definition was rendered by the Joint Committee of WHO and ILO held in Geneva in 2003 and shows the historical interest of the United Nations in this discourse.

12 Supra note 2

13 Section 2 Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

14 John Murphy, Street on Torts, 4th ed. (Oxford University Press, Oxford, 2007), p.195

15 Cap.34 laws of Kenya, Government Printer, Nairobi

1.1.5 Hazard

A hazard means anything that may result in injury or harm to the health of a person. In providing an environment where employees are not exposed to hazards, employers must consider health as well as safety. Injuries could result from the traditional range of physical safety issues such as falls, strains, being hit by objects and electric shock to the non-traditional emerging risks.

2. Occupational Safety and Health as a Human Right

Human rights are rights inherent to all human beings, whatever the nationality, residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.¹⁶ These rights are all interrelated, interdependent and indivisible.¹⁷ Human rights have been said to be universal rights in that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. They are inalienable rights in the sense that they cannot be taken away, they cannot be denied to the right holders by the duty bearers, unless under certain situations recognized by law.¹⁸

The interdependency and interconnectedness nature of human rights has been emphasised by the United Nations. It has been said that all human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.¹⁹ From an international human right perspective it is correct to say that occupational safety and health is a fundamental human right which demands protection through national legislation and all the stakeholders concerned.

It has been rightly observed that, human rights entail both rights and obligations.²⁰ There is a correlation between the rights of the state and the individual and their corresponding duties. States assume obligations and duties under international law to respect, to protect and to fulfil human rights to all their nationals.²¹ *“The obligation to respect, to protect and to fulfil human rights to the nationals means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.”*²²

At the individual level, while we are entitled to our human rights, we should also respect the human rights of others. It is the duty of the employers to ensure workers rights are protected on the one

16 Available at, <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>, accessed on 21/06/2011

17 Ibid

18 Ibid

19 Ibid note 16

20 Ibid

21 Ibid

22 Ibid

hand and on the other hand workers should ensure their own safety and that of their colleagues at work.

3. The Right to Safe and Healthy Working Conditions as a Fundamental Human Right under International Law

According to **Stefano Sensi**,²³ the right to safe and healthy working conditions is part of the broader right of everyone to the enjoyment of just and favourable conditions of work, enshrined inter alia in article 23 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Economic, Social and Cultural Rights. The **Universal Declaration of Human Rights**²⁴ provides that everyone is entitled to the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.²⁵

The **International Covenant on Economic, Social and Cultural Rights**²⁶ further reiterates the right to safe and healthy working conditions. It provides all State parties to the Covenant will recognize the right of everyone to the enjoyment of just and favourable conditions of work which will ensure safe and healthy working conditions.²⁷ In the preamble to the **International Covenant on Civil and Political Rights of 1966**²⁸ the parties to that covenant outline the obligation of all States to recognize in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

The above conventions show the importance the international community has accorded to the right of all persons to safe and healthy working conditions. This being the case it is the duty of all States who are parties to these treaties to take all the necessary steps to ensure the systematic implementation of the right to safe and healthy working conditions to their citizenry.

4. Kenyan Perspective: Workers Health as a Basic Human Right

The Constitution of Kenya stipulates that the general rules of international law shall form part of the law of Kenya.²⁹ This article ensures that the above cited Conventions, customary international law, general principles and other sources of international law form part of the Kenyan law. Therefore international law lays down obligations for Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.³⁰

23Stefano Sensi, “The Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights,” A paper presented at a High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, held at Nairobi, November 30- December 1, 2009.

24A/RES/217/A (III)

25 See generally Article 23 of the Universal Declaration of Human Rights.

26 Annex to UNGA Res.2200 (XXI); 6 ILM 360 (1967) (1966 ICESCR) 91

27 See generally Article 7 of the International Covenant on Economic, Social and Cultural Rights.

28 Annex to UNGA Res.2200 (XXI); 6 ILM 368 (1967) (1966 ICCPR) 91

29 Article 2(5) of the Constitution of Kenya 2010, Government Printer, Nairobi

30 Supra, see note 16

Under Part 2 of the constitution being the rights and fundamental freedoms of all persons are outlined. As already stated these rights and freedoms are interdependent and indivisible ranging from the civil and political rights to the economic, social and cultural rights as covered in international legal instruments.³¹ The constitution provides that every person has a right to the highest attainable standard of health which includes the right to accessible and adequate housing, to reasonable standards of sanitation, to be free from hunger, to have adequate food of acceptable quality and to clean and safe water in adequate quantities.³² This being the case it is tenable to argue that the right of workers to a safe and clean working environment is a fundamental right in Kenya.

However, even though the constitution does recognize that every person has a right to the highest levels of attainable health; this is not the reality on the ground as workers rights continue to be trampled upon by the employers. In other regions³³ there have been arguments that due to increased globalization where the market conditions are shifting in favour of the employers as opposed to the employees, workers health has to be addressed in the broader context of a fundamental human right. This is geared towards bridging the gap in health inequality to alleviate poverty and achieve gender balance.

Industries in Kenya and all the other workplaces have to perceive occupational health and safety as an investment for economic productivity for a healthy workforce.³⁴ Seeing occupational safety and health as a fundamental human right will go a long way in ensuring that the vulnerable worker consisting of women, the poor and the children and forming the largest population of the working class get the basic knowledge of hazards, personal protection and that they do not work for long hours in unsafe conditions without health care or insurance covers.

In order to ensure that occupational health attains the status of a basic human right for all the vulnerable workers there will be a need to ensure that the working environment protects and promotes occupational health. This need to provide health for the vulnerable worker was given due recognition during the World Health Organization meeting of Parliamentarians held in New Delhi India in 1999.³⁵

4.1.1 Occupational Safety, Health and the Environment

In providing an environment where employees are not exposed to hazards, risks and injuries to their health, employers must consider health as well as safety. In the occupational safety and health discourse, environmental matters arise in two scenarios:

31 Supra, see note 5

32 See Article 43 of the Constitution of Kenya, Op.cit.

33 Supra see note 16

34 Supra note 11

35 Available at, http://www.searo.who.int/EN/Section316/Section503/Section2370_12953.htm, accessed on 28/06/2011

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- i) the working environment; and
- ii) the impact of the industrial activities on the natural environment.

The constitution in Article 69 (1) (g) enjoins the state to eliminate processes and activities that are likely to endanger the environment.³⁶ Article 69 (1) (g) is therefore in tandem with the Environmental Management and Coordination Act³⁷ and the Occupational Safety and Health Act³⁸ which require workplaces in Kenya nowadays to come up with the necessary institutional frameworks for environmental and occupational health and safety management. The law here is geared towards improving the quality of the working environment and also escaping liabilities in the event of injuries and occupational diseases. Attaining occupational health and safety at the workplace will require the government as well as the other social partners to attach as much importance to the health of workers as to the environment in which they work.

The constitution guarantees every Kenyan the right to a clean and healthy environment. This right incorporates the principles of intra-generational and intergenerational equity with regards to the protection of the environment and the State and individual duties with respect to the environment.³⁹ By analogy then, it means that the working environment also needs to be clean and healthy to the workers. In its national report dated 7th April 2011, on migration in the health and social sectors in Kenya the, Public Services International (PSI) ⁴⁰observes that;

“A working environment that is rewarding, where workers are valued, that is safe and stress free, and that provides satisfying work and opportunities for career development will avoid putting workers in apposition to migrate”

Every workplace should demonstrate respect for the natural environment and occupiers should work towards achieving the goals of no accidents, no harm to people and no damage to the environment. It should be noted that most employers in Kenya have not taken it as their responsibility to ensure the working environment is safe, clean and health. Even though Workers, including foreigners and immigrants, theoretically have the right to remove themselves from situations that endanger health or safety without jeopardy to their employment; this right has not been enforced effectively, and workers are reluctant to do so due to the risk of losing their jobs.⁴¹ For example on 5th May 2007, 28 tea workers were dismissed by a Company for striking over poor working conditions. However, the Kenya Plantation Union and the Minister of Labour supported the workers, fought for their reinstatement.⁴²

36 See Article 69 (1) (g) of the Constitution of Kenya, Government Printer, Nairobi

37 Cap. 8 of 1999, Government Printer, Nairobi

38 No. 15 of 2007, Government Printer, Nairobi

39 See generally, Articles 42 and 70 of the Constitution of Kenya, Op.cit.

40 See http://www.who.int/workforcealliance/members_partners/member_list/psi/en/index.html, accessed on 28/06/2011. PSI is a global federation of public service unions, representing 685 unions in 160 countries. Together, these unions represent more than 20 million public sector workers in health and social care, central government, municipal and community services and in public utilities.

41 See <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154352.htm>, accessed on 28/06/2011. The 2010 Country Reports on Human Rights Practices-Kenya.

42 See <http://www.unhcr.org/refworld/country,,ITUC,,KEN,456d621e2,4c52ca26c,0.html>, accessed on 28/06/2011. The 2007 Annual Survey of violation of Trade Union Rights in Kenya.

It is the role of the employers to ensure the safety and health of their employees, the other stakeholders in the labour movement and the minimization of industries/factories impact on the environment. Therefore, even though the law requires businesses to establish the necessary structures in environmental, health and safety management, they have not succeeded in ensuring environmental security by ensuring that their activities are within the existing legal framework on environmental matters.

5. The Occupational Safety and Health Act

The Occupational Safety and Health Act No.15 of 2007 repealed the Factories Act Cap 514. The Factories Act was meant to ‘make provisions for health, safety and welfare of persons employed in factories and other places of work, and for matters incidental thereto and connected therewith.’ In the year 2007, the Occupational Safety and Health Act was enacted which is seen as moving from the regulated style on safety and health to a self-regulated style of management.⁴³ It is therefore noteworthy that the enactment of the Occupational Safety and Health Act marked a big step towards moving from a reactive approach to safety and health at the work place to a more proactive attitude to workers welfare.⁴⁴ As will be seen elsewhere in this paper the activities of the labour administration in the field of occupational health and safety are based on the concept of the “duty of care”.

The primary objective of the various institutions under the Act should be to create a proactive occupational safety and health risk management culture with all potential risk creators in the labour market to ensure that those who create the risks in the workplace and those who work with them have the primary duty of solving the risks rather than relying on the government as seen in the former statutory arrangements⁴⁵. What is seen in the Act is an approach combining both the reactive and proactive approaches. The Act therefore has not moved completely from the regulated style on safety and health management as will be seen later in this paper. It is worth pointing out at the outset therefore, that even though the Act sets out the legal framework with regards to safety and health at the workplace, there still exists a disconnect between what the Act says and the reality on the ground.⁴⁶

5.1 The Occupational Safety and Health Act

The Occupational Safety and Health Act 2007 aims at securing the safety, health and welfare of workers and the protection of persons other than the workers against risks to safety and health arising out of, or in connection with, the activities of persons at work.⁴⁷ The Occupational Safety and Health Act 2007 sets objectives to promote and improve occupational safety and health standards. In Part II the general duties are laid down in the Act, and are supported by other requirements in the Act, codes of practice and regulations. The general requirement for employers

43 *Infra*, see note 46

44 *Infra*, see note 46

45 *Infra*, see note 46

46 Kennedy Odhiambo Obiewa’s Term paper on occupational health and safety management in Kenya: a case study of London Distillers Kenya Limited-International Safety Training Centre-2009

47 Section 3 (2) Occupational Safety and Health Act.

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to consult and co-operate with safety and health representatives and other employees is part of the employer's general duty under the Act.⁴⁸

Similarly, employees are required to co-operate with employers in safety and health matters so that employers are able to meet their responsibilities.⁴⁹ The Act also provides for the election of employee safety and health representatives and the formation of workplace safety and health committees. Safety and health committees are made up of employer representatives and safety and health representatives, or employee representatives if the workplace has no safety and health representatives.⁵⁰ The Act encourages employers and employees to resolve safety and health issues in a spirit of cooperation, using procedures developed through consultation.⁵¹ The Act places emphasis on workplace consultation between employers and employees, and safety and health representatives, if the workstation has any.

The Act also provides a framework where regulations, codes of practice, workplace standards and procedures to resolve issues support the general duty of care.⁵² The general duty of care is the guiding principle for all other parts of the Act. Under the Act all parties involved with work have responsibilities for safety and health at work.⁵³ This includes employers, employees, self-employed persons and others, such as people who control workplaces, design and construct buildings or manufacture and supply plant. The duties under the Act are expressed in broad terms, under Section 6 (2) (a-g) the duties are spelt thus;

- i) the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;
- ii) arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- iii) the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;
- iv) the maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;
- v) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;
- vi) Informing all persons employed of;

(a) any risks from new technologies; and

(b) imminent danger; and

48 Read generally the provisions of section 13 of the Act Occupational Safety and Health Act.

49 Section 13 (b) of the Act

50 The Safety and Health Committees have been established under section 9 of the Act.

51 See generally the duties of the employees under section 13 of the Act.

52 The codes are provided for in section 4 of the Act.

53 These general duties have been outlined in Part II of the Act. See generally sections 6-31.

- vii) Ensuring that every person employed participates in the application and review of safety and health measures.

The Act requires every workplace to be kept in a clean state, free from effluvia arising from any drain, sanitary convenience or nuisance. An occupier who contravenes these provisions on cleanliness commits an offence.⁵⁴ It also makes provision for environmental protection officers whose main purpose is to evaluate and coordinate the storage and handling of hazardous waste, the cleanup of contaminated soil or water, or other activities that affect the environment.⁵⁵ Such an outline of duties in very broad terms and without an effective enforcement mechanism raises doubt as to whether the employers or occupiers will fulfil these obligations given their lack of commitment to the same.

5.1.1 The Duty of Care

Like any other Occupational Safety and Health Act in the world the Kenyan law on occupational safety and health is based on the concept of the “duty of care”. The duties of the occupier⁵⁶, the employees,⁵⁷ designers⁵⁸, manufacturers, importers⁵⁹ are all set out in such a manner as to suggest that their respective duties are grounded on the “duty of care”. The Act imposes a general duty of care on occupiers and employers to protect persons at work from hazards and maintain safe and healthy workplaces.⁶⁰ According to the legal text, Street on Torts⁶¹ the common duty of care is defined in the following terms:

“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there”.

In the House of Lords decision in *Donoghue v. Stevenson*⁶² Lord Atkin gave the classic definition of the duty of care in the following terms;

“A man has a Duty of Care to conduct himself in such a way as to avoid harm to others, where a reasonable man would have seen that such harm could occur”.

54 Section 47 of the Occupational Safety and Health Act No.15 of 2007, Government Printer, Nairobi.

55 See generally Part IX of the Occupational Safety and Health Act No. 2007, op.cit.

56 Section 6 of the Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

57Ibid, Section 13.

58 Ibid, Section 20.

59 Ibid

60 Section 6 (2) (d), op. cit.

61 Supra, note 14

62 1932 All ER Rep 1; [1932] AC 562

Lord Atkin then gave the famous dictum in the said case in which he enunciated his seminal “neighbour principle” in trying to explain the duty of care.⁶³ The Occupational Safety and Health Act is⁶⁴ consequently based on this principle of duty of care and covers all workplaces in Kenya. Implementing the duty of care principle means planning for the prevention of workplace accidents, injuries and illnesses.⁶⁵ The general duties of care in the Occupational Safety and Health Act 2007 are based upon the principles established under the common law. Under Common Law the employer must take reasonable care for health and safety at the work place. If the employer does not do so, then he could be held to be negligent, and can be sued under Common Law. The duty of care is a general legal duty on all individuals and organisations to avoid carelessly causing injury to persons. It requires everything ‘reasonably practicable’ to be done to protect the health and safety of others at the workplace.

5.1.2 Institutions Established Under the Act

The Act establishes several institutions for the administration of the Act. The institutions include:

- i) The Directorate of Occupational Health and Safety Services
- ii) The National Council for Occupational Safety and Health
- iii) Technical Advisory Committee
- iv) Industrial court

5.1.3 The Directorate of Occupational Health and Safety Services

The office of the Director of Occupational Health and Safety Services established under the Act is responsible for the administration of the Act.⁶⁶ The Director is also a member of the National Council for Occupational Safety and Health.⁶⁷ The Act imposes a duty on the Director to conduct research either on his own or with the assistance of other persons or bodies on occupational health and safety⁶⁸. The Director is then supposed to use the information collected to formulate safety and health policies to be implemented at the workplace in furtherance of the provisions of the Act. Under section 24(6) of the Act the Director is tasked with duty of setting up the Occupational Safety and Health Institute. This institute is supposed to conduct research and train occupational health and safety officers and other persons on all aspects of safety and health. It is unfortunate that hitherto the said Institute has not been established in line with section 24 of the Act.

63“‘The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question”.

64 Act No. 15 of 2007, Government Printer, Nairobi

65 Available at, <http://www.workcover.nsw.gov.au/healthsafety/Pages/Dutyofcare.aspx>, accessed on 8/6/11.

66 Section 23 Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

67 Established under section 27 of the Occupational Safety and Health Act No. 15 of 2007, op.cit.

68 Section 24 Occupational Safety and Health Act No. 15 of 2007, op.cit.

5.1.4 The National Council for Occupational Safety and Health

The duties of this council⁶⁹ are to advise the Minister on the formulation and development of policy framework on occupational safety and health; on legislative proposals on occupational safety and health; on the strategic means of promoting the best practices in occupational safety and health; on the establishment, maintenance and development of a safety and health preventative culture; reviewing the provisions of the Act; the statistical analysis of work related deaths and injuries and such other matters affecting the quality of working life in Kenya⁷⁰. The Act further requires the Council⁷¹ to establish committees in different industries to assist it perform its duties with regards to industrial codes of practice and such other committees as it may deem fit.⁷²

5.1.5 The Role of the Industrial Court

The Constitution of Kenya⁷³ provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations⁷⁴. As such the Industrial Court is a superior court with the status of the High Court. It therefore has jurisdiction to settle trade disputes generally and trade disputes in essential services. It may also determine disputes arising out of employment contracts, and claims arising out of work related injuries and occupational diseases. The tripartite Industrial Relations Charter is also important in that it laid the foundation for an industrial relations system already prior to Kenya's independence in 1963⁷⁵. The International labour standards, especially ILO Conventions that have been ratified by Kenya are used by the industrial court as guidelines, even though they are not binding.⁷⁶ The Work Injury Benefits Act 2007 provides that an appeal can be made to the Industrial Court by an objector aggrieved by the decision of the Director of Occupational Safety and Health Services with regards to a contravention of the matters under the Act⁷⁷.

6. A Health and Safety Policy⁷⁸

The Act imposes a duty on the occupier to prepare a safety and health policy statement⁷⁹. A health and safety policy is a method of action that influences and guides actions that promote effective safe working procedures, occupational hygiene and safety training. It addresses the types of hazards associated with the workplace; it discusses the active and on-going participation of employees.⁸⁰ The Act requires the policy to be amended from time to time to keep pace with the changes occurring at the workplace. A written health and safety policy helps promote an effective Occupational, Health and Safety program. It strengthens the senior management's commitment to the health and safety of the workplace and the integration of health and safety into all workplace

69 Supra see note 67

70 Section 27 (1) Occupational Safety and Health Act.

71 The membership of the Council is outlined in section 28 of the Occupational Safety and Health Act.

72 Section 27 (4) Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi.

73 The Constitution of Kenya 2010, Government Printer, Nairobi.

74 Ibid Article 162(2).

75 See generally, <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ken.htm>, accessed on 30/06/2011

76 Ibid

77 Section 52(2) of the Work Injury Benefits Act 2007, Government Printer, Nairobi

78 See generally, <http://www.creek-kenya.org/health.php>, accessed on 8/6/2011.

79 Section 7 Occupational Safety and Health Act of 2007 Act No. 15 of 2007, Government Printer, Nairobi

80 Supra note 78

activities. That is to say that a health and safety policy reduces incidences of injuries and illnesses in the workplace, helps the employers to allocate resources towards health and safety, helps in identifying who is responsible for health and safety in the workplace. However, it is unfortunate that since the passing of the Act many industries have not come up with a health and safety policy⁸¹. This has partly been contributed by a lack of adequate awareness on safety and health or due to the costs of enforcing the requirements of the Act which places a heavy burden on the employers.

7. Offences, Penalties and Legal Proceedings

The offences under the Act can be prosecuted by the occupational safety and health officer. Part XIII in section 108(1) provides that a contravention in connexion with or in relation to a workplace of the provisions of this Act, the occupier, or if the contravention is one in respect of which the owner is by or under the Act made responsible, shall be guilty of an offence. The Act makes provision for a general penalty in the event that any person commits an offence for which no express penalty is provided for⁸². The said section provides for a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three months or not. It should be noted that considering the profits made by most of the employers in their enterprises the fines stipulated in the Act are not sufficient to deter employers from contravening the provisions of the Act.

According to the 2010 Country Reports on Human Rights Practices it was reported that despite the fact that the Act had detailed provisions on environmental, health, and safety standards; the government had not effectively enforced the law. The fines were generally too low to serve as a deterrent to unsafe practices. With such a low level of penalties currently applying and the weakness in factory inspection systems, it is evident that regulation is a *necessary* but not *sufficient* mechanism for meaningful investments in occupational health practices.⁸³ the number of prosecutions on safety and health at the work place is also hampered by the fact that the majority of Kenyan workers are in the informal sector and statistical data on occupational injuries and diseases is scanty. As a consequence, the number of deaths, injuries, accidents and occupational diseases contracted at the workplace are not well documented.

7.1 Other Provisions in the Act

The Act requires the Director to keep a register of all workplaces with such particulars as he may consider necessary⁸⁴. All workplaces must be registered as provided for under section 44 and can only be exempted from this provision in accordance with section 45 by the Minister by a Gazette Notice. This requirement is yet to be realized as the informal sector that employ the majority of the workforce and greatly hampered by poor coverage especially of the small enterprises and the informal sector. Consequently, the keeping of the register of all workplaces is not feasible.

Part VI of the Act then sets out the various standards by which workplaces must comply in order not to fall foul of the provisions of the Act. These provisions include matters such as maintenance

81 Supra note 46

82 Section 109 Occupational Safety and Health Act of 2007, Government Printer, Nairobi

83 Rene Loewenson, "Occupational health and safety in Southern Africa": ILO/SAMAT Policy Paper No.8

84 Section 43 Occupational Safety and Health Act of 2007, Op.cit.

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of a clean work environment, prevention of overcrowding, proper ventilation in the workplace provisions on lighting, drainage of floors and consideration of gender in providing sanitary conveniences and facilities.⁸⁵The requirements set out under this part are to be enforced by the local authority in the areas gazetted by the Minister.⁸⁶

Part VII of the Act deals with machinery safety. Sections 55-71 have detailed provisions on how machinery should be handled safely to avoid injury. These machines should also be inspected from time to time and certificates of compliance given by persons approved by the Director under part VII. Part VIII contains general provisions on safety. These provisions cover inter alia, storage of liquids, use of ladders, safe means of access to various parts of buildings, fire prevention, dealing with dangerous fumes and evacuation procedures. Part IX covers chemical safety. It contains provisions on handling, transportation and disposal of chemicals and other harmful substances. It is sad to note that despite the Act having very elaborate provisions on safety and health at the workplace; implementing and enforcing its objects is yet to be realized.

8. Challenges Facing Occupational Safety and Health Legislation in Kenya

a) The Directorate of Occupational Safety and Health Services

There is a lack of strong conviction, commitment and initiation to undertake the occupational health and safety reforms as introduced by the new Act right from the Director of Occupational Safety and Health Services, the National Council for Occupational Safety and Health and even the employers themselves since the enactment of the Act. The Directorate's main mandate is to ensure compliance with the provisions of the Act⁸⁷ that seeks to promote safety and health at the workplace. The Directorate also ensures compliance with the provisions of the Work Injury Benefits Act, 2007 through prompt compensation of employees against work related injuries.⁸⁸ It should be noted that since the enactment of the Act in 2007 the Directorate has not carried out extensive research personally or in collaboration with other organizations. Furthermore, the Directorate has hitherto not established an Occupational Health and Safety Institute. This is a huge challenge owing to the fact that it is the duty of the directorate to carry out research on workers health and safety.⁸⁹

The Directorate of Occupational Safety and Health Services does not function as a semi-autonomous government agency ensuring compliance with the provisions of the Occupational Safety and Health Act and the Work Injury Benefits Act. This has negatively impacted the enforcement of the Act in ensuring safety and health at the workplace.⁹⁰ Moreover, statistics do show that the Directorate of Occupational Safety and Health Services is understaffed. In its strategic plan for the year 2008-2012 the Ministry of Labour clearly states that the authorized

85 See generally, section 47-52 of the Occupational Safety and Health Act of 2007, Government Printer, Nairobi

86 Ibid, section 53.

87 Section 23 Occupational Safety and Health Act No. 15 of 2007, Government Printer, Nairobi

88 Section 53 Work Injury Benefits Act No. 14 of 2007, Government Printer, Nairobi

89 See generally, http://www.labour.go.ke/index.php?option=com_docman&Itemid=207, accessed on 30/06/2011.

90 Ibid

establishment level of the Directorate is 170 but in-post there are only 58, creating a variance of 112.⁹¹ From the onset it was evident that the Directorate did not have the capacity to carry out the functions conferred upon as it lacked the necessary funding and human resources.

b) Cost of Compliance: A Burden to Employers

There have been complaints that the undertakings introduced by the Occupational Safety and Health Act have been loaded upon employers and as such there need to be collaboration between the employers and the government to come to a favourable compromise.⁹² The argument is that the compulsory annual safety and health audits, risk assessments and the requirement for a health and safety statement by all employers will drive out the small investors who will not be able to comply for lack of capacity as the Act requires.

c) Weak/ Backward Infrastructure

A weak infrastructure has remained as a big challenge and constraint in achieving safety and health at the workplace. There has been an increase of institutional risks and more so those related to corruption, the quantity and quality of the infrastructure. Measures geared towards strengthening and promoting strategies for risks assessment and risk management remain as an immediate priority area where action is needed in Kenya. This can be achieved through development of the necessary institutions and capacity building.

There has been a lack of the necessary infrastructure for reporting the current magnitude and trends of occupational health diseases and injuries for the policy-makers to monitor the performance of occupational health and safety programmes. Therefore, the level of monitoring and surveillance of occupational diseases and injuries in Kenya is insufficient to allow policy-makers to assess the occupational health programmes and to intervene strategically. Further there has been a lack of a comprehensive policy on occupational safety and health and this has contributed to a weak infrastructure or safety culture amongst workers and employers, and the effectual non-compliance with the national and international health and safety standards⁹³. Kenya lacks good national policies on Employment, Occupational Safety and Health, Social Protection, Industrial Training, Child labour, Industrial attachment, Incomes and wage and Labour Export Policy.

d) Composition of the National Council for Occupational Safety and Health

A clear reading of section 28 of the Act reveals that the membership of the council is mainly drawn from government officials. This is not satisfactory seeing that the council will among other things be required to advise the Minister on how to formulate and develop a national occupational safety and health policy framework. It is instructive to note also that government policy has emphasized on private partnerships at all levels and therefore having a council with a membership mainly drawn from the government defeats that purpose. Since the Act has put more emphasis on a tripartite approach involving all the stakeholders in the sector the membership needs to be widened. Its membership should be drawn from the government, the employers and the employees alike.

91 See also, <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154352.htm>, accessed on 28/06/2011. The 2010 Country Reports on Human Rights Practices-Kenya.

92 As per Betty Maina, Kenya Association of Manufacturers < <http://www.kam.co.ke> >

93 See generally http://www.labour.go.ke/index.php?option=com_docman&Itemid=206 accessed on 21/06/2011.

e) Unclear Intention and Vague Language in the Act

There are unclear intentions and vague language regarding how often employers must conduct hazard inspections, how often employers must provide employees training and evaluations and what constitutes adequate employee training and sufficient employee involvement⁹⁴. The requirements of the Act and the duties thereto are too vague to be effectively and fairly enforced. The Act gives too much discretion to the Director and the inspectors. For example, section 4 of the Act provides that in providing guidance with respect to any provision of the Act and of health and safety regulations the Director after consulting with the council shall approve and “*issue codes of practice which are in his opinion suitable for that purpose.*”

Such an ambiguity in the law was also seen in the Work Injury Benefits Act 2007, where several sections in that Act were annulled by the High Court of Kenya⁹⁵. The annulled sections included Section 23(1) that empowered the Director of Occupational Safety and Health Services to make inquiries as are necessary to decide upon any claim or liability and sections 52(1) and (2) which permitted the Director of Occupational Safety and Health Services to review, vary or uphold his initial decision on a matter and make provision for the filing of appeals to the industrial courts by only the objector and not any affected party to the case. This nullification created a big gap in the protection of Kenyan workers’ rights to safe and favourable working conditions.

f) Inadequate Awareness on Occupational Safety and Health Issues Among the Working Population

There is a general lack of awareness by the working force of occupational safety and health issues. This has been caused by a lack of adequate funding to propell occupational safety and health programmes, lack of a proper linkage between promotion of occupational safety and health and work injury benefits and a lack of adequate research focusing on occupational safety and health in Kenya. There exists a knowledge gap in the safety and health working conditions which situation has been worsened by the lack of the necessary human resource development.

According to the Kenya Stakeholders Coalition for the Universal Periodic Review submitted on 2nd November 2009, there is a glaring gap on awareness of workers’ rights and corresponding employers’ duties by the general citizenry thus providing an avenue for exploitation of workers. The informal sector has grown from 5,716,400 in 2003 to 7,475,600 in 2009; yet the current legal framework offers no protection of the informal sector on an equal basis as the formal sector⁹⁶. This is in spite the introduction of the new labour law regime.

g) Technological Challenges

With the growing informal sector and the introduction of new technologies in the vast agricultural sector, new strategies have not been developed to make occupational safety and health achieve the

94 Section 6 of the Act depicts the use of vague language in relation to the duties of the employers.

95 The annulled sections included section 4, 7(1) and (4), 10(4), 16, 23(1), 25(1) and (3), 52(1) and (2) of the Work Injuries Benefits Act, 2007. (See the decision in HCCC. No.185 of 2008, Law Society of Kenya & another Versus Attorney General)

96 The Kenya National Bureau of Statistics. See generally, <http://www.knbs.or.ke/>, accessed on 30/06/2011

desired impact.⁹⁷ Curbing occupational risks is made even more complex by lack of the necessary technological infrastructure to manage and develop new prevention patterns due to the changing world of work which is shaping up and creating new risks. In the area of bio-technology for example, innovation is bringing new technologies at the workplace, which in turn raises the issue of bio-safety. It should be appreciated that these are new risks to the employers, and all the other stakeholders.

h) Capacity Challenges

Human resource development and capacity building pose a big challenge not only to regulators, supervisory and advisory institutions but also to the government, employers and the workers. This problem has largely been contributed by a lack of funding, failure to recruit staff as per establishment, failure to train professionals and practitioners in occupational safety and health and provision of adequate tools and equipment which remain as some of the primary issues that hamper not only the coverage but also the impact of occupational safety and health. For instance in the year 2010 the Directorate of Occupational Health and Safety Services had a target of 4,840 inspections, but carried out 4,000 inspections and prosecuted 100 companies for violating occupational health and safety regulations⁹⁸. No actual studies have been carried out to show the extent of coverage in industries and other sectors. Inspection records, though available, may be misleading as the exact number of workplaces requiring the services is not exactly known especially with the sprawling informal sector. Due to the previous set-up of the occupational safety and health system, larger industries are better covered than small and medium-sized enterprises and other sectors⁹⁹.

9. Areas in Need of Reform in the Occupational Safety and Health Discourse

a) A National Policy and Programme on Occupational Safety and Health Services

There is need for Kenya to come up with a national policy and programme on occupational safety and health services. It should be a functional national policy and programme on occupational safety and health services that is fully supported by all stakeholders, with adequate resources and facilities.¹⁰⁰ Such a policy will ensure effective provision of occupational safety and health services to all.

b) Creation of Adequate Awareness on Occupational Safety and Health

There is a general lack of awareness on the occupational safety and health issues among the working people in Kenya. To curb this there is a need to increase the use of electronic and print mass media, to teach safety and health issues in school curriculum at all levels, establish partnerships with key stakeholders-universities, employers and employees organizations, professional organizations and to establish the Occupational Safety Health and Work Injury

⁹⁷ See generally, <http://www.sheilapantry.com/cis/cis201010.html><Franklin K. Muchiri, African newsletter on Occupational Health and Safety vol.11 (2) Finnish Institute of Occupational Health (2001)>

⁹⁸ Supra note 89.

⁹⁹ Ibid

¹⁰⁰ Supra note 89

Benefits Authority. There is a need also of establishing a National Institute of Occupational Safety and Health and an Occupational Safety and Health Fund.¹⁰¹

c) Employee Ownership

The management in all places of work should show a commitment in setting up structures that give their employees a sense of ownership in the working systems established to ensure their safety. Employers can effectively achieve this by creation of awareness, disclosure of vital information, involving employees in the outlining and the eventual attainment of those goals and the giving of incentives to their employees.¹⁰²

d) Safety and Health Committees

The Act through the rules established therein requires that work places should have a safety and health committee. Some have argued that this is the bedrock of the Act in that it has attempted to move the Kenyan industries from the reactive to proactive system of management.¹⁰³ It is notable that the current safety and health committee members in many workplaces have not been empowered through training to be able to carry out their functions under the rules.¹⁰⁴ Many workplaces (some studies say 65%) have violated this mandatory legal requirement on the establishment of health and safety committees.¹⁰⁵ The members need to be empowered through relevant training to be able to carry out their functions as stated in the rules. Research shows that the safety and health committees do not really comprehend their mandate under the Act and therefore prove to be of no value to the safety and health agenda.

e. Promotion of the use of a Health Risk Paradigm of Risk Assessment and Management

According to Rene Loewenson¹⁰⁶ risk management has in the main been practised in many African states by the provision of personal protective equipment, which is in fact a last line of defence. More effective risk control is obtained by giving a greater emphasis on work environment (engineering) and work organisation (administrative) controls. It has been opined¹⁰⁷ that risk assessment and management provide the foundation for reducing the risk of occupational diseases and injuries. These variables play an essential role in guiding factory inspectors and health care personnel involved in their work. Such a unified approach as adopted by the SEAR¹⁰⁸ Countries will be helpful in Kenya as it is achieved through a two-step health risk paradigm consisting of risk management and assessment. According to this unified approach adopted by the SEAR countries risk assessment will be tri-pronged involving: hazard identification, dose –response characterization and exposure assessment while on the other hand risk management strategies should focus on supporting the development and promotion

101 Supra 91

102 Supra note 46

103 Kennedy Odhiambo Obiewa, Supra note 46.

104 Ibid

105 [A survey on management perspectives of the state of workplace health and safety practices in Kenya](http://www.ncbi.nlm.nih.gov/pubmed/10384222), by The Centre for Public Health Research, Kenya Medical Research Institute, Nairobi, Kenya.(<http://www.ncbi.nlm.nih.gov/pubmed/10384222>, accessed on 30/06/2011)

106 Supra note 83

107 See generally, http://www.searo.who.int/en/Section23/Section1214/Section1219_11049.htm, accessed on 30/06/2011.<Regional Strategy on Occupational Health and Safety in SEAR countries>

108 South East Asian Region Countries.

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of protective policy and practices through both engineering controls and biological maintenance.¹⁰⁹ On risk management we need to come up with protective policies and legislation that promotes protective practices. In other regions¹¹⁰ this has been achieved through;

- i) Provision of technical support for the formulation of a national plan based on situational analysis;
- ii) Promotion of preventive and control measures in reducing occupational risks at the workplace;
- iii) Strengthening health surveillance of workers through regular medical examination.

Health risk assessment can be achieved through supporting occupational health hazard assessment through environmental and exposure monitoring at the work place and the establishment of a national data-base of occupational hazards profiles.¹¹¹ There is also need of developing standardized methods and guidelines for occupational risk characterization through establishment of sentinel surveillance monitoring trends of occupational hazards, disease and injuries; and the establishment of a database on occupational disease and injury surveillance.¹¹² Such practical, factual and pragmatic measures are what the Kenyan legislation on occupational safety and health has not offered. It should be noted that despite the fact that the Act makes provision for risk assessment and management. Such measures are only theorized and not practical.

e) An Occupational Health Network in the Nation¹¹³

The Ministry of labour should establish a functioning network where the sharing of information on norms, standards, guidelines, modules and research methods can be done. Establishing such a network will also facilitate partnerships with key stakeholders such as the International Labour Organization (ILO) and the other UN agencies; and also promote intersectoral collaboration with all relevant implementing ministries, such as the ministry of health and the environment.

f) Allocation of Appropriate Resources for Occupational Health

The activities of the various institutions have been hampered by a lack of resources. This has negatively impacted research, training and education on occupational safety and health; there has been inconsistency in the enforcement of health and safety laws which calls for intensified monitoring, inspection, and rectification measures. In a nutshell therefore lack of proper funding, means that recruitment of staff as per establishment, professional training and the provision of adequate tools and equipment will be hampered hence smothering the impact and coverage of the Act. Allocation of the necessary resources for the efficient implementation of the Act should be availed.

109 Supra note 107

110 Supra note 107

111 Supra note 107

112 Supra note 107

113 Supra see note 65

g) Generation of a National Information Database on the Risk and Burden of Occupational Diseases and Injuries

Due to the lack of a national database on the risks, burden of occupational diseases and injuries, and the lack of reporting mechanisms on the occurrence of occupational diseases and injuries; there is a need to ratify the relevant conventions which would assist in requiring reporting on the progress made to the International Labour Office (ILO) in accordance with ‘Article 22’ of the ILO constitution.¹¹⁴ A central database should be in place for data collection and access to information related to occupational health and safety and all stakeholders should have a means of access.¹¹⁵

h) Capacity Building

The success of the Act will definitely lie on the strengthening of the human resource necessary to propel the activities of the council, the directorate and all the other institutions established under the Act. It is therefore key to note that even though the provisions in the Act seem to display a colourful picture in dealing with occupational health and safety, this is not the position on the ground as the institutions under the Act are under-staffed. In all the key areas in this discourse, human resource development has been a consistent factor. Research, education, training, workshops and seminars are the cornerstones for strengthening the capacity of all inspectors’ health care workers under the ministry of labour in the assessment and management of risks to occupational health.

In Kenya the level of training is wanting by virtue of the fact that the plethora of training courses, duration and courses that exist are really in want of improvement. The Act in section 24 states that the Director shall conduct directly or in collaboration with other persons or bodies, research, experiments and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques and approaches of dealing with occupational safety and health problems.

From section 24 it is eminent that the kind of research, experiment and demonstrations envisaged therein, are dependent on the discretion of the Director. It is for this reason that Kenya should support the development of training institutes, where the pedagogic approach applied by the universities and the specific needs of the ministry of labour and that of health should come to a compromise in developing teaching methods, curricula and courses that are of immediate use in occupational health.

Research undertaking should be an inbuilt component in the roles and responsibilities of occupational health and safety.¹¹⁶The ratio of occupational health care worker to employees should be attained if environmental monitoring, surveillance and management of occupational health is to be realized. In training the occupational health care workers, the training component must address the need for researchers and their distribution in the districts, county and the national levels.

114 Samuel O. Afubwa, Occupational health and safety management system (OHSMS) as a “SHAMBALLA FORCE” in public health, A paper presented as a lecture in Curtin University, in 2004.

115 Ibid

116 Ibid see note 65

i) Recognition of Occupational Safety and Health as a Business Concern

Perhaps recognising occupational safety and health as a business concern with great prospects will motivate industries and the government alike to allocate more resources to this sector. Areas such as research, education, training and the carrying out of risk assessments and management will create great opportunities for health and safety practitioners, researchers, the professionals and other stakeholders.¹¹⁷ A realization of this fact will act as a form of incentive to learning institutions such as the universities and the industries to invest a lot of finances in ensuring safety and health at the workplaces.

10. Conclusion

The foregoing discussion clearly illustrates that the right to safe and healthy working conditions as a fundamental human right has not been realised in Kenya. This is despite the enactment of the Occupational Health and Safety Act¹¹⁸ and the new constitution.¹¹⁹ The enactment of the Act was laudable as it was seen as a big step towards curbing occupational related diseases, injuries and harm, both to the workers and to the natural environment. However, there is a dire need of overcoming the capacity challenges in the Act in order to achieve its objects. There is a need to introduce provisions to guarantee equal treatment and opportunities to the informal sector workers. Amendments should be introduced to the Work Injury Benefits Act¹²⁰ or a redrafted Bill on Work Injury Benefits to Parliament for enactment to ensure that work injury cases are not held in abeyance before the courts.

In conclusion and in line with all the International Laws that guarantee the right to safe and favourable working conditions as a fundamental human right, Kenya needs to fill the major gaps in law relating to coverage of all workplaces, setting of clear rights and duties for tripartite co-operation, the right to refuse dangerous work, overcoming the administrative fragmentation of enforcement systems, strengthening penalties envisaged in the Act and ensuring greater harmonisation of the laws on health and safety, the codes of practice and standards. With the new dawn brought by the new constitution¹²¹, the challenges outlined above have to be addressed, if occupational health and safety is to be realised as a fundamental human right in Kenya.

117 Ibid note 107

118 Supra note 1

119 Supra note 3

120 Act No. 14 of 2007, Government Printer, Nairobi.

121 Supra note 3

Reconceptualising the Right to Clean and Healthy Environment in Kenya

Abstract

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

1. Introduction

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

2. Defining the Right to Clean and Healthy Environment

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

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

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

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

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

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

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

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

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

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

8 Para. 28.

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

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

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

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

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

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

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

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

14 *Ibid*, Principle 1.

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

16 See W.T., Olenasha, ‘The Enforcement Of Environmental Rights: A Case Study Of The New South African Constitutional Dispensation,’ *Thesis (LLM (Human Rights and Democratisation in Africa))* (University of Pretoria, 2001), available at

http://repository.up.ac.za/bitstream/handle/2263/969/olenasha_wt_1.pdf?sequence=1&isAllowed=y [Accessed on 28/08/2015].

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

18 *Ibid*.

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2.1 Scope of the Right to Clean and Healthy Environment

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

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

It is important to take cognisance of *Draft Principles on Human Rights and the Environment of 1994*,²³ an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles on Human Rights and the Environment* recognise the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

Principle 5 thereof declares that all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. This is a broader description of the right to clean and healthy environment, which includes such aspects as elimination of environmental threats to life, health, livelihood, well-being

19 Article 42, Constitution of Kenya 2010.

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

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

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

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

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

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or sustainable development. Indeed, this Declaration expressly states that such right must be recognised within and outside the national boundaries.

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

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

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

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

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

26 *Ibid*, p.11.

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

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

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

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

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

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

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

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

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

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

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

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

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

37 *Ibid*, p.193.

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

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

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

In the case of *Peter K. Waweru v Republic*, the Court observed that “...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman...” It went further to state, “...In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.”⁴⁴

In light of the foregoing case law, and in enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the right in question. These include the right, *inter alia*: to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality;

38[2006] eKLR.

39 Ibid, p.8.

40 Principle 2.

41 AIR 1991 SC 420, 1991 (1) SCC 598.

42 48 DLR 1996 (SC Bangladesh, 1996).

43 AIR 1999 Ker 385, p.11.

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

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and to clean and safe water in adequate quantities.⁴⁵ Adequate fulfillment of these rights depends on proper and efficient mechanisms for protection of the right to clean and healthy environment. The right to clean and healthy environment is inherently connected to the realisation of the other fundamental rights. Such broad approaches to realisation of other rights can go a long way in the protection of the right to clean and healthy environment, considering the central role played by the environment in meeting most the basic rights.

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

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

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

It has been pointed out that, whereas the right to a clean and healthy environment has rapidly gained constitutional protection around the world, in some countries, recognition of the right first occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life.⁴⁸ Currently, a number of countries have devoted constitutional provisions to an enforceable right to a clean and healthy environment including, *inter alia*: Uganda⁴⁹, South Africa⁵⁰, Congo⁵¹ and Ecuador⁵². These provisions however mean little, because they cannot be

45 Constitution of Kenya, Art. 43(1).

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

47 *Ibid.*

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

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

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

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

52 Republic of Ecuador, Constitution of 2008- Article 14 provides that the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay), is recognized; Environmental conservation, the protection of ecosystems, biodiversity and

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enforced in the courts, which regard them as insufficient to provide legal standing to anyone who cannot give evidence of personal and direct environmental harm.⁵³

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

The Court should be able to step in and protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁵⁶ An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.⁵⁷ However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.⁵⁸

The implication of the foregoing is that if a party is unable to prove the denial, violation, infringement or threat for one reason or the other, then their guarantee to right to clean and healthy environment is likely to be defeated. Indeed, this was demonstrated in the case of *Republic v Lake Victoria South Water Services Board & another*⁵⁹ where the learned Judge observed that the

the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.

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

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

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

56 Art. 70(2).

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

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

59 [2013] eKLR, Miscellaneous Civil Application 47 of 2012; See also *John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others* [2014] eKLR, Formerly Petition No. 63 of 2012 Now ELC No. 867 OF 2012, where the Learned Judge stated that the Petitioners had not made any submissions to the effect that the projects undertaken by the Respondents, being expansion of a road/construction to a link road, would

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applicants who claimed that their right to clean and healthy environment was likely to be contravened by the respondents if they were allowed to proceed with the implementation of a project, did not indicate clearly how their right to clean and healthy environment was likely to be infringed. However, the Judge went on to state that from the possible impacts set out in the Environmental Impact Assessment (EIA) Report that he had referred to in the case, there was no doubt that the applicants' right to clean and healthy environment would be breached unless adequate mitigation measures are put in place to meet these impacts.⁶⁰ The enforcement of the Constitutional provisions on the right to clean and healthy environment thus seems to be left to the discretion of the presiding Judge.

Recent decisions from the Kenyan Courts confirm this position. In *Said Tahir & 2 others v County Government of Mombasa & 5 others*,⁶¹ the Learned Judge was of the opinion that although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the *Environment and Land Act*⁶². The Court went further to state that the balance of convenience of jurisdiction lies with the Environment and Land Court by virtue of Article 70 of the Constitution which confers upon the court the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁶³ In *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others*, the Court stated that the Constitution designates the High Court as the only court to address questions on violation of the Bill of Rights. The only right under the Bill of Rights which the Environment and Land Court can hear is the right to clean and healthy environment and thus it has jurisdiction to entertain matters relating to violation of this right.⁶⁴ This case does not however seem to have settled the issue of jurisdiction.⁶⁵

Lack of clarity on which Court should handle matters relating to violation of the clean and healthy environment is, arguably, likely to affect efforts to realise the same for the Kenyan people. To overcome such likely challenges, it is important to adopt a broader approach to protection of the right to clean and healthy environment. This should be an approach that does not only rely on proof by the complainant of actual or likely denial, violation, infringement or threat by the respondent, but one that also incorporates ecocentric values. It is also important to point out that the Courts are

result to environmental degradation or in any way create unclean and unhealthy environment to the Petitioners. In the absence of specificity of the manner in which Arts 42, 69 and 70 had been violated, the Court found that there is no violation of the Petitioner's rights to a clean and healthy environment (p.13).

60 Para. 14.

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

62 No 19 of 2011, Laws of Kenya.

63 Para 15.

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

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

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under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations, who may not be able to prove the likelihood of denial, violation, infringement or threat to the right. Courts have a duty to protect the right of such future generations.⁶⁶ The Court should, like in the case of *Peter K. Waweru (supra)*, be proactive in promoting environmental protection and conservation for sustainable development.⁶⁷

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

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

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

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

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

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

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

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

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been important, as any person *who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment....*⁶⁹ (emphasis added) As stated by the Judges in *Peter K. Waweru* case, “in the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.” Courts ought to protect this right, for all and going by the above decisions, it is arguable that courts have not done enough in playing this role. An approach that does not emphasize on the likely denial, violation, infringement or threat to the right to clean and healthy environment but one that focuses on the protection and conservation of the environment and its resources, is what is required if the Courts are to ensure that all persons including those who cannot access justice through courts, enjoy the above right.

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

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

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

The foregoing provisions, although not territorially applicable to Kenya, offer a stark reminder for the country on the special relationship between human health and environment and the best approaches to dealing with them. There is need for strengthening multisectoral cooperation, integrating environmental health concerns into all national and county environmental and health-related policies. Under the Fourth Schedule of the Constitution of Kenya, the National and County Governments have shared responsibilities when it comes to environment and natural resources. The National Government is tasked with protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular— fishing, hunting and gathering; protection of animals and wildlife; water protection, securing

69 Paras 25 & 28.

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

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

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sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.⁷³ It is also to come up with health policy; agricultural policy; and the energy policy including electricity and gas reticulation and energy regulation.⁷⁴ On the other hand, the functions and powers of the county are, *inter alia*: agriculture, including—crop and animal husbandry; livestock sale yards; plant and animal disease control; and fisheries.⁷⁵ They are also tasked with County health services, including, in particular— county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; and refuse removal, refuse dumps and solid waste disposal.⁷⁶ The other function of county governments is control of air pollution, noise pollution, other public nuisances and outdoor advertising.⁷⁷ The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment. The two government levels should work together to facilitate a coordinated, multisectoral approach for effectiveness in the efforts to ensure realisation of the constitutional right to clean and healthy environment, for all.⁷⁸

Kenya's *Vision 2030* is the long-term development blueprint for the country, with various pillars that include economic, social and political pillars. The social pillar seeks to build a just and cohesive society that enjoys equitable social development in a clean and secure environment.⁷⁹ The transformation targets key social sectors, which include *inter alia*: water and Sanitation; the Environment and Housing and Urbanisation. Concerning the environment, the Blueprint seeks to ensure that Kenya becomes a nation that has a clean, secure and sustainable environment by 2030. This is to be achieved through: (i) promoting environmental conservation to better support

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

74 Clauses 28, 29, 31.

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

76 *Ibid*, clause 2.

77 *Ibid*, clause 3.

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

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

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

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

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

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

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the economic pillar's aspirations; (ii) improving pollution and waste management through the application of the right economic incentives; (iii) commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; (iv) enhancing disaster preparedness in all disaster-prone areas and improving the capacity for adaptation to global climatic change.⁸⁰ It is important that these aspirations are achieved as they go to the core of the right to clean and healthy environment. Joint efforts from all the relevant stakeholders including private citizens, coupled with collaborative approach by all the Government authorities can enhance the country's efforts for a prosperous nation.

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

The Blueprint also points out that Kenya's current institutional framework to manage the environment, which is characterised by fragmentation, has various aspects of the environment policy cutting across different institutions. Accordingly, policy and institutional reform for stricter enforcement, therefore, poses a big challenge that must be overcome by Vision 2030. However, policy and legal measures require determination and political goodwill from the citizenry and leadership, for their successful enforcement and compliance. Realising the right to clean and healthy environment requires an integrated approach that incorporates social, cultural and political measures from all.

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

3.1 Traditional Knowledge for Clean and Healthy Environment

"Traditional knowledge" is defined as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including

80 Ibid.

81 Ibid, p.123.

82 *Sessional Paper on Vision 2030*, p.123.

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know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.⁸³ The term is not to be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.⁸⁴

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

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

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

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

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

84 Ibid.

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

86 Ibid.

87 Ibid.

88 Constitution of Kenya, Art. 11(1).

89 Ibid, Art. 11(2) (b) & (3) (b).

90 Ibid, Art. 69(1) (c).

91 African Regional Intellectual Property Organization, *op cit*.

3.2 Scientific Knowledge for Clean and Healthy Environment

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

Adoption of cleaner technologies in such areas as transport, energy production and food production can be an effective preventive measure. Scientific knowledge is also useful in helping the citizenry adopt healthy lifestyles for a better, cleaner and healthier environment. It is common knowledge that the public, mostly around urban areas, also greatly contribute to the violation of the right to clean and healthy environment mainly through pollution and other activities that lead to degradation of the environment.⁹⁴ This does not however mean that the rural folk is excluded. They also contribute to degradation through such means as production methods that lead to degradation, over-exploitation of the limited resources, deforestation, overstocking, amongst others.⁹⁵ Scientific knowledge can play a great role in dealing with the above problems through, *inter alia*, cleaner production methods, sustainable housing and effective treatment and disposal of wastes.⁹⁶

3.3 Poverty Eradication for Clean and Healthy Environment

It has been argued that conservation can contribute to poverty reduction, particularly through restoring ecosystems and by improving access by the poor to ecosystem services, thus contributing to secure livelihoods for the people who depend on them.⁹⁷ These two concepts are however mutually dependent in that if the State puts effective measures in place to address poverty, some of the contributing factors to violation of the right to clean and healthy environment can arguably be dealt with. Such include deforestation, unsustainable production methods and giving the people a voice to deal with any likely violation through ensuring that they have the means to seek redress

92 Constitution of Kenya, Art. 33(1).

93 Ibid, Art. 11(2) (b).

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

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

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

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

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

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from Courts.⁹⁸ Effective natural resources management, along with conservation and restoration, can protect and enhance biodiversity and ecosystem services.⁹⁹ The environment and the ecosystem services are so connected to the human wellbeing that it has been argued that the Millennium Development Goals (MDGs) reflect the relationship between the environment and sustainable development. This is because the targets and indicators are based on delivery of ecosystem services to the poor.¹⁰⁰ Where people engage in unsustainable production activities due to poverty, the State together with other relevant stakeholders can put in place measures that eradicate poverty but at the same time educating the concerned people on the best alternatives that can enhance their livelihoods while still conserving the environment.

3.4 Public Awareness and Participation for Clean and Healthy Environment

The 1994 Draft Declaration on Human Rights and Environment describes the procedural rights, such as the right to participation, necessary for realization of the substantive rights.¹⁰¹ It has been argued that procedural rights, such as rights to information, participation and access to justice, have the potential to empower civil society groups to make social and environmental claims and to hold State bodies and private sector actors accountable for their actions or omissions, while exercising basic civil and political rights to be free from harassment and abuse.¹⁰² This is reiterated under Article 1 of the Aarhus Convention “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party should guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.”¹⁰³ It believed that environmental procedural rights such as the access to information, public participation and access to justice may be one of the ways and means to a realistic way for attaining the sustainable development.¹⁰⁴

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

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

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

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

101 Part 3 (Principles 15-24).

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

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

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

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for enforcing the same. The citizenry should be able to practise preventive measures while allowing the courts to come in only in cases of violation of environmental standards. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources. Dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

It has been argued that when the environment is destroyed, plundered, or mismanaged, we undermine our quality of life and that of our future generations. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.¹⁰⁵ The citizenry efforts can go a long way in creating a clean and healthy environment. There is therefore a need to encourage voluntary compliance with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. Such awareness can include organizing public forums, use of media to disseminate information and environmental campaigns and introducing comprehensive and up-to date environmental studies in learning institutions, at all levels. Incentives and disincentives can also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.¹⁰⁶

3.5 Enforcement and Compliance

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

Internationally and regionally, there are a number of instruments that strive to facilitate enforcement and compliance with environmental law, and ultimately realisation of the right to

105 'Wangari Maathai-an excerpt from the Nobel Peace Prize winner's Acceptance Speech,' *Earth Island Journal*. Available at

http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ [Accessed on 01/09/2015].

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

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

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

108 Ibid.

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

These measures, as observed in the Convention, rotate around protecting human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. These measures, if implemented can contribute positively in the realisation of the human right to clean and healthy environment. However, since they are only recommendations, they require political goodwill from the States for their implementation.

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

The *Montreal Protocol*,¹¹³ also an international Treaty, aims to regulate the production and use of chemicals that contribute to the depletion of Earth's ozone layer. The protocol set limits on the

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

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

111 Ibid.

112 Ibid.

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

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production of chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.¹¹⁴

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

The Convention outlines general obligations of State Parties which include, *inter alia*: Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal should inform the other Parties of their decision pursuant to Article 13; Parties are to prohibit or should not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above; and Parties should prohibit or should not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.¹¹⁸ Further to the foregoing, each Party should take the appropriate measures to, *inter alia*: ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects; and ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that should be located, to the extent possible, within it, whatever the place of their disposal.¹¹⁹

The Convention requires Parties to co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.¹²⁰

The International Court of Justice, in the 1997 case concerning the *Gabcikovo-Nagymaros Project* (Hungary and Slovakia)¹²¹, observed that “the protection of the environment is...a vital part of

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

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

116 Preamble.

117 Art. 2.8.

118 Art. 4(1).

119 Art. 4(2).

120 Art. 12.

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

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contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.” The Court held that the corpus of international law which relates to the environment now consists of the general obligation of states to ensure that activities within their jurisdiction and control respects the environment of other states or areas beyond national control. The concept of sustainable development is in consonance with the need to reconcile economic development with the protection of the environment. Hence, the terms of agreements to implement must be negotiated by the parties.¹²²

Locally, the Constitution of Kenya provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.¹²³ The Constitution goes further to provide that on such an application, the court may make any order, or give any directions, it considers appropriate--to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.¹²⁴

The existing environmental laws such as EMCA 1999 provide for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts. EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development.¹²⁵ EIA can be a powerful tool for keeping the corporate including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered through more meaningful participation in the same to ensure that the EIAs achieve their objectives. This is the only way that the affected sections of population appreciate the use of EIAs and also ensure that such exercises are not mere formalities on paper but are utilised fully for the protection of the right to clean and healthy environment. This is especially for projects taking place within the community dwellings, with potentially great effects on the people. An example of the same is the recent case of lead poisoning at the Coastal region of Kenya, due to unregulated mining activities.¹²⁶

122 Ibid.

123 Art. 70 (1).

124 Art. 70(2).

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

126 B. Jenje, ‘MP to compensate families injured by lead poison ‘if guilty’,’ *Daily Nation*, Wednesday, April 29, 2015, available at <http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9ivl/-/index.html> [Accessed on 05/09/2015]; See also M. W. Chege, *et al*, ‘Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,’ *International Journal of Physical Sciences*, Vol. 8, No.17, 9 May, 2013, pp. 835-839.

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It has been observed that investing in compliance and enforcement of environmental laws benefits the public by securing a healthier and safer environment for themselves and their children. It also benefits individuals, firms and others in the regulated community by ensuring a level playing field governed by clear rules applied in a fair and consistent manner.¹²⁷

Strengthening environmental compliance and enforcement requires renewed efforts by individuals and institutions everywhere. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in trust for all of their citizens according to the standards of good governance and with a view to protecting and improving public well-being and conserving the environment.¹²⁸ The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws are interpreted and applied fairly, efficiently, and effectively.¹²⁹ Concerted efforts from all the stakeholders, including the general public can ensure that the compliance and enforcement framework in place is used to promote and safeguard the right to clean and healthy environment as envisaged in the Constitution and environmental laws.

4. Towards a Clean and Healthy Environment in Kenya

The realisation of the right to clean and healthy environment for the Kenyan people calls for the reconceptualization of the right. The existing framework on environment, including EMCA falls short of defining what entails a clean and healthy environment. From the foregoing argument, it is the author's assertion that the right to a clean and healthy environment can only be fully realised through addressing all issues that adversely affect the environment. The anthropocentric approach mostly adopted by most of the existing legal instruments creates the false impression that the environment should only be protected for the convenience of human beings. However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

Sustainable development efforts may not bear much if the country does not move beyond laws. There is need for educating the public on the subject, with emphasis on preventive and conservation measures. The same should include change of attitude by the general public. Through encouraging use of traditional knowledge in conservation and production to active and meaningful participation in decision-making, the citizenry can hopefully appreciate the fact that the creation of a clean and healthy environment is not a State's responsibility only but there is a requirement of cooperation between the State actors and the individuals. It is to be recalled that Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. There is need to empower communities so as to actualise these constitutional provisions.

One of the national values and principles of governance as provided under Article 10 of the Constitution is sustainable development. The principles of sustainable development as captured in

127 International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' *op cit*, p.2.

128 *Ibid*.

129 *Ibid*.

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EMCA¹³⁰ include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle. There is need to actively engage the communities in environmental management and conservation in order to help in the implementation of these principles. With the communities empowered, then it is possible to hold to account those who flout environmental laws, be they entities or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

There is also a need to diversify production methods and waste disposal through use of innovation and technology. The State departments tasked with encouraging innovation and science ought to work closely with communities as way of identifying the most appropriate technology, either arising from the communities themselves or elsewhere, to boost production and address poverty. This also calls for more scientific research to come up with crops that can do well in dry areas to tackle the problem of drought and ultimate desertification. This will also help in diversification in economic activities by the concerned communities.

Courts also need to work closely with the public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals.

There is also need to sensitise the public on the dangers of environmental degradation 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.

5. Conclusion

From the foregoing, it is clear that it is possible for the right to clean and healthy environment to be enjoyed in Kenya. The same is protected by the Constitution and has been judicially interpreted. There is however a need to reconceptualise the right to a clean and healthy environment by clearly defining it and according it the correct place in the human rights discourse.

The right to a clean and healthy environment can be equated to the right to life. This is the bold declaration that must be made and captured in our legal framework so as to make it a reality.

130 S. 3(5).

The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya

Abstract

Efforts to achieve sustainable development have never been greater the world over. Most, if not all states and non-governmental organisations, are coming up with multisectoral measures to promote the sustainable development agenda, based on the global framework on sustainable development. Kenya has also not been left behind as there is evidence of various actions and programmes put in place to promote sustainable development in all sectors of the economy. However, one area that is arguably indispensable but has received minimal attention is safeguarding pollinators as important players in the sustainable development agenda. This paper critically discusses and offers recommendations on ways in which Kenya can ensure that pollinators, which play a critical role in environmental conservation and food and nutritional provision, are safeguarded as important players in the sustainable development debate.

1. Introduction

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

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

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

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

3 "Bees, butterflies face extinction, threatening Kenya food production," *Business Daily Africa*, Monday, April 18, 2016 16:36. Available at <http://www.businessdailyafrica.com/economy/Bees-butterflies-face-extinction-threatening-Kenya-food/3946234-3164704-xvcld/index.html> [Accessed on 24/11/2017].

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to food security for all, as guaranteed under the Constitution of Kenya 2010⁴. The inadequate or lack of legal responses to pollinators' protection in the Kenyan environmental and natural resources laws has had adverse effect on the pollinators, and arguably, their protection is currently based on a general approach to environmental conservation for provision of ecosystem services. Pollinators are part of the biodiversity and, if any measures geared towards biodiversity conservation are to succeed, they must include pollinators. This paper seeks to highlight and critically discuss some of the challenges that affect these important players in the sustainable development discourse and also suggest some of the legal and non-legal mechanisms through which they can be addressed.

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

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

While some plants are capable of self-pollination, the highest percentage of plant pollination is attributed to animal-mediated pollination. Animal-Pollinators have been defined as 'animals that enable reproduction of many species of flowering plants by transferring pollen from one flower to another of the same species'.⁷ Therefore, while there may be several types of pollinators, this paper is mainly concerned with the animal pollinators which include, inter alia, bees, beetles, bees, flies, moths, butterflies, bats and birds, amongst others, in what is commonly referred to as biotic pollination.⁸ Biotic pollination is meant to be a symbiotic process in which both the animal pollinators and the plants benefit in terms of food for the former and pollination process for the latter.⁹ This discourse is thus meant to address the factors and practices that adversely affect this mutual relationship between the two groups. Considering that 'plants serve as air and water filters, are an indispensable part of the water cycle, prevent erosion of valuable soil re-sources, and give

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

5 Dolf de Groot, 'Protecting natural capital for human wellbeing and sustainable development,' *Science for Environment Policy – A Weekly News Alert*, Special Issue: Ecosystem Services, Issue 20, May 2010, p.1. Available at

http://ec.europa.eu/environment/integration/research/newsalert/pdf/20si_en.pdf [Accessed on 24/11/2017].

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

7 San Luis Obispo County, 'Pollinator Information & Resources', *Ranching Sustainability Analysis Info Sheet*, available at

<http://cesanluisobispo.ucdavis.edu/files/136181.pdf> [Accessed on 24/11/2017].

8 "Pollination in the Tropics," available at

<https://wolfweb.unr.edu/~ldyer/classes/396/plantanimal.pdf> [Accessed on 24/11/2017].

9 Ibid.

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us numerous foods, fibers, and medicines, pollinators are considered as critical to biodiversity, ecosystem services, agricultural productivity, world economies, and human quality of life'.¹⁰ Any threats to these animal-pollinators therefore threaten the whole chain of natural provision of ecosystem services.

3. Protection of Pollinators: The Legal and Policy Framework

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

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

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

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

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

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

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

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

(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and

(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

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

Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I:

Annex I provides for monitoring and identification with regard to ecosystems and habitats containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance: or, which are representative, unique or associated with key evolutionary or other biological processes. Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention

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

The technical rationale for the Aichi Target 7, according to the Convention on Biological Diversity Secretariat, is that the ecologically unsustainable consumption of water, use and run-off of pesticides and excess fertilizers, and the conversion of natural habitats to uniform monocultures, amongst other factors, have major negative impacts on biodiversity inside and outside of agricultural areas, as well as on forest, inland water and coastal ecosystems.²⁰ The Secretariat supports sustainable management on the basis that it not only contributes to biodiversity conservation but can also deliver benefits to production systems in terms of services such as soil fertility, erosion control, enhanced pollination and reduced pest outbreaks, as well as contributing to the well-being and sustainable livelihoods of local communities engaged in the management of local natural resources.²¹

Party states are thus expected to put in place domestic measures that are geared towards achieving these targets. The Constitution of Kenya 2010 envisages the place of international legal instruments under Article 2 which recognises them as forming part of the laws of Kenya.²² The Constitution

to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use; Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and Maintain and organize, by any mechanism data, derived from identification and monitoring activities pursuant to subparagraphs (a), (b) and (c) above.

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

17 Agenda 21, Para. 15.1.

18 Agenda 21, Para. 15.2.

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

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

<https://www.cbd.int/sp/targets/rationale/target-7/> [Accessed on 1/01/2018].

21 Ibid.

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

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also places obligations on the state to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.²³

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

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

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

²³ Ibid., Article 69(1).

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

²⁵ Ibid., sec. 2.

²⁶ Ibid., sec. 50.

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controlling the introduction of alien species into natural habitats; and integrating traditional knowledge for the conservation of biological diversity with mainstream scientific knowledge.²⁷

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

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

Other provisions in EMCA that are germane to protection of pollinators relate to standards of pesticides and toxic substances, where the Act provides that the Standards and Enforcement Review Committee, in consultation with the relevant lead agencies should—prepare and submit to the Authority draft standards for the concentration of pesticides residues in raw agricultural commodities, for the purposes of this paragraph raw agricultural commodities—(i) include fresh or frozen fruit and vegetables in their raw state, grains, nuts, eggs, raw milk, meat and other agricultural produce; (ii) do not include any agricultural produce or good which is processed, fabricated or manufactured by cooking, dehydrating, milling, or by any other similar means; establish, revisit, modify and submit to the Authority draft standards to regulate the importation, exportation, manufacture, storage, distribution, sale, use, packaging, transportation disposal and advertisement of pesticides and toxic substances with the relevant organisations; establish and submit to the Authority draft procedures for the registration of pesticides and toxic substances; establish and submit to the Authority draft measures to ensure proper labelling and packaging of pesticides and toxic substances; constantly review the use and efficacy of pesticides and toxic substances and submit the findings of such review to the Authority; recommend to the Authority measures for monitoring the effects of pesticides and toxic substances on the environment; recommend to the Authority measures for the establishment and maintenance of laboratories to operate as standards laboratories for pesticides and toxic substances; recommend to the Authority measures for the establishment of enforcement procedures and regulations for the storage, packaging and transportation of pesticides and toxic substances; constantly collect data from industries on the production, use and health effects of pesticides and toxic substances and avail such data to the Authority; keep up-to-date records and reports necessary for the proper regulation

²⁷ Ibid., sec. 51.

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

²⁹ Ibid., sec. 53(1).

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of the administration of pesticides and toxic substances; do all other things as appear necessary for the monitoring and control of pesticides and toxic substances.³⁰

EMCA further provides that subject to the provisions of this Act or any other written law applicable in Kenya, any person who intends to manufacture, import or process a new pesticide or toxic substance or who intends to reprocess an existing pesticide or toxic substance for a significantly new use, must apply to the Authority for the registration of the pesticide or toxic substance, before importing, manufacturing, processing or reprocessing such pesticides or toxic substance.³¹

Furthermore, the application referred to in subsection (1) should include the name, trademark, and the molecular structure, proposed categories of use, an estimate of the quantity of the pesticides or toxic substances and any data related to health and other environmental effects thereof that the Authority may require.³² While animal pollinators include many insects and animals, bees seem to be the most popular in Kenya and around the world (perhaps based on the fact that beekeeping has traditionally been practised in the country over a long time for economic as an enterprise), with even attempts having been made to address them while excluding all the others. For instance, Kenya's *National Beekeeping Policy* which was developed by the Ministry of Livestock in 2009 with the overall objective of enhancing the contribution of the beekeeping sector to food security, employment creation and environmental conservation in the country.³³ This leaves all the other beneficial organisms predisposed to elimination through destructive agricultural practices and chemical use.

Kenya's *National Environment Policy 2012* accords the term 'environment' a very broad meaning to 'include the physical factors of the surroundings of human beings including land, water, atmosphere, sound, odour, taste, the biological factors of animals and plants and the social factors of aesthetics, and includes both the natural and the built environment'.³⁴ The *National Environment Policy* rightly points out that 'the main human activities contributing to environmental degradation in Kenya include unsustainable agricultural land use, poor soil and water management practices, deforestation, overgrazing, and pollution'.³⁵ 'These activities contribute a great deal to degradation of the country's natural resources such as land, fresh and marine waters, forests and biodiversity threatens the livelihoods of many people. They undermine the sink function of the environment which operates through such processes as nutrient recycling, decomposition and the natural purification and filtering of air and water.'³⁶

Regarding conservation of biodiversity, the *National Environment Policy* provides that 'Kenya is internationally recognized as a mega diverse country in terms of richness in biodiversity. It also recognises that biodiversity contributes to a wide variety of environmental services, such as regulation of the gaseous composition of the atmosphere, protection of coastal zone, regulation of the hydrological cycle and climate, generation and conservation of fertile soils, dispersal and

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

31 *Ibid.*, sec. 94(1).

32 *Ibid.*, sec. 94(2).

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

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

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

36 *Ibid.*, para. 2.2.

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breakdown of wastes, pollination of many crops, and absorption of pollutants. Furthermore, human health and well-being are directly dependent on biodiversity. Biodiversity also provides genetic resources for food and agriculture, and therefore constitutes the biological basis for food security and support for human livelihoods.³⁷

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

The *Pest Control Products Act*⁴⁰ is meant to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests and of the organic function of plants and animals and for connected purposes. All the foregoing national laws have some issues that may affect pollinators in their implementation, but notably, most of them hardly mention pollinators.⁴¹ There is no dedicated law that is meant to protect the pollinators and currently, their protection can only be done within the framework of all the above laws.

4. Safeguarding the Future: Addressing the Challenges Affecting Pollinators

It has rightly been pointed out that insect pollinators of crops and wild plants are under threat globally and their decline or loss could have profound economic and environmental

37 Ibid, para. 4.10.1.

38 Ibid, para. 4.10.2.

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

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

41 See also the *Wildlife Conservation and Management Act, No.47 of 2013*, Laws of Kenya, which provides for, inter alia, protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. Its scope includes "biodiversity" and "biological resources" the latter of which is defined to include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity; See also the *Forest Conservation and Management Act, 2016 (No 34 of 2016)* which was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country and for connected purposes. The Act envisages sustainable management of forest resources for purposes of inter alia, biodiversity; See also the *Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017*, Legal Notice No. 242 of 2017, which were enacted to (a) implement the classification of ecosystems, habitats and species into the following categories critically endangered; endangered; vulnerable; protected; and threatened; (b) provide for protection of ecosystems that are threatened or endangered so as to maintain their ecological integrity; (c) provide for the protection of species that are threatened, endangered, vulnerable, or protected to ensure their survival in the wild; (d) implement Kenya's obligations under international agreements regulating international trade in endangered species; and (e) ensure sustainable management and utilisation of biodiversity.

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consequences.⁴² Specifically, insect pollinators are believed to face growing pressure from the effects of intensified land use, climate change, alien species, and the spread of pests and pathogens; and this has serious implications for human food security and health, and ecosystem function.⁴³ There is need to avert the danger facing pollinators, and this can be achieved through various ways. While some require radical change in management approaches, others require all stakeholders to work closely and also include other relevant but often ignored groups in implementing decisions.

4.1 Ecosystem Services Approach to Pollinators Conservation

Studies have indicated that ecological restoration is likely to lead to large increases in both biodiversity and ecosystem services, offering a potential win-win solution if the two goals are combined in restoration projects.⁴⁴

The Convention on Biological Diversity (CBD) defines the ecosystem approach as follows:⁴⁵

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

To effectively protect animal pollinators, there is a need to entrench biodiversity management and conservation approaches that eliminate or reduce human activities which pose risks to these organisms.

There is also need to empower communities in ways that give them alternative means of making a living for social sustainability as opposed to relying on environment only as well as enabling them make informed decisions that would contribute positively to environmental sustainability.⁴⁶ Integrated Environmental Management provides a set of underpinning principles and a suite of environmental assessment and management tools that are aimed at promoting sustainable

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

43 Ibid, p. 251.

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

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

46 Muigua, K., "Realising the Right to Education for Environmental and Social Sustainability in Kenya," available at

<http://www.kmco.co.ke/attachments/article/139/REALISING%20RIGHT%20TO%20EDUCATION%20FOR%20ENVIRONMENTAL%20AND%20SOCIAL%20JUSTICE%20IN%20KENYA-%202022nd%20October%20edited.pdf>

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development, such as Environmental Impact Assessment (EIA)⁴⁷, which is well developed and mandatory world-wide⁴⁸, Strategic Environmental Assessment (SEA)⁴⁹ which helps to ensure that many of the environmental issues of global importance are considered in policies, plans and programmes at different administrative levels (i.e. national, regional, local)⁵⁰, and Environmental Audit⁵¹ which is the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment. Kenya has in place a number of other legislation that are relevant to

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

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

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

48 DEAT, *Overview of Integrated Environmental Management, Integrated Environmental Management, Information Series 0*, Department of Environmental Affairs and Tourism (DEAT), Pretoria, 2004, p.2. Available at

<https://www.environment.gov.za/sites/default/files/docs/series0%20overview.pdf>

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

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

51 Environmental auditing has been defined as a process whereby an organisation’s environmental performance is tested against numerous requirements, for example, clearly defined policies, legislated requirements and key performance indicators. (DEAT, *Overview of Integrated Environmental Management, Integrated Environmental Management*, op cit., p. 12); Sec. 2 of EMCA also defines “environmental audit” to mean the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.

Sec. 68

(1) of EMCA envisages Environmental Audit and Monitoring and provides that ‘the Authority shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment. An environmental inspector appointed under this Act may enter any land or premises for the purposes of determining how far the activities carried out on that land or premises conform with the statements made in the environmental impact assessment study report issued in respect of that land or those premises under section 58(2).

(2) The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made shall keep accurate records and make annual reports to the Authority describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted under section 58(2).

(3) The owner of premises or the operator of a project shall take all reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact assessment study report submitted under section 58(2) and shall prepare and submit an environmental audit report on those measures to the Authority annually or as the Authority may, in writing, require.

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

4.2 Reduction or Effective Control of Pesticide Use

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

Pest control practices such as Integrated Pest Management that enhance natural pest controls are believed to be effective to reduce or eliminate the use of Pesticides (herbicides, insecticides, fungicides), while at the same time, they greatly benefit pollinators which may be heavily impacted by pesticides.⁵⁶ It has been suggested that adoption of integrated pest management (IPM) programs

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

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

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

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

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

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

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can limit pesticide usage to times of economic damage and spraying at certain times in the pest and crop life cycles, through which pest control can be maximized and amount of pesticide used minimized.⁵⁷ This calls for closer working relationship between farmers and the agricultural extension services officers for sensitisation and education on the same.

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

The *Pest Control Products Act* defines “pest” to mean any injurious, noxious or troublesome insect, fungus, bacterial organism, virus, weed, rodent or other plant or animal pest; and includes any injurious, noxious or troublesome organic function of a plant or animal.⁶¹ This definition is arguably very broad and quite generic in that any product meant to eliminate the defined organisms is also likely to have adverse effects on the non-harmful or useful organisms. It is therefore important for the Pest Control Products Board to work closely with all the relevant stakeholders in the sector in order to ensure that the approved products have minimal adverse effects on non-targeted organisms.

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

Such a Board ought to closely work with the scientific and technology community and the general public especially the agricultural and pastoral communities in order to reduce or eliminate the use of harmful pesticide products, as a way of minimizing destruction of pollinators and their habitats. The Board should also have representatives in agricultural trainings and seminars in order to sensitize farmers on any outlawed or potentially dangerous pesticides that have broad spectrum effect on pollinators. This is important for ensuring that the information disseminated to farmers is up-to-date and germane. Such information should also be widely publicized in languages and media that are easy to understand. It is imperative that the general public appreciates that pesticide

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

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

59 Ibid., p.257.

60 Ibid., p.258.

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

62 Ibid., Sec. 5 & 6.

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use is not only harmful to human health but also affects other organisms that may be non-harmful to crop production or even beneficial, as pollinators.

4.3 Environmental Education, Awareness and Ethics

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

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

Environmental education has been defined as ‘a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment, thus enabling individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.’⁶⁶

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

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

If empowered through education, people are able to make their own decisions especially in matters relating to exploitation of natural resources, Environmental Impact Assessment (EIA) and other matters that touch on development but have a bearing on the environment and the livelihoods of

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

64 Ibid.

65 Ibid., p. 5.

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

67 No. 8 of 1999, Laws of Kenya.

68 Ibid., sec. 2.

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

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the people. The local communities would be able to actively engage potential investors in ensuring environmental sustainability. Principles of public participation⁷⁰ in governance and environmental democracy⁷¹ as envisaged in the current Constitution of Kenya becomes easier to implement.

There is an urgent need to ensure that appreciation and concern for the environment are instilled during the early years of development.⁷² It is important to ensure that all sections of the general public understand the fact that provision of most of the economic and social rights as guaranteed in the Constitution of Kenya 2010 is dependent on the state of the environment.⁷³ As such, environmental matters must be taken seriously and any factors or activities that adversely affect the environment should be minimised or eliminated. Anthropocentric⁷⁴ and ecocentric⁷⁵ approaches should be well entrenched in environmental management in order to promote the notion that all living organisms, including pollinators, should be accorded legal protection and their habitats protected as part of the universe not necessarily because of the benefits that accrue from their ecological activities.

4.4 Use of Scientific Research and Traditional Knowledge

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

70 The Aarhus Convention (*Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998*) (Article 7), *Stockholm Declaration on the Human Environment Stockholm, June 1972* (Principle 19) and the *Rio Declaration on Environment and Development Rio De Janeiro June 1992* (principle 10) all recognise the need to involve the populace in environmental decision-making. Principle 19 of the Stockholm Declaration advocates for education in environmental matters for the younger generation as well as the adults giving due consideration to the underprivileged in order to broaden the basis for an *enlightened opinion* and responsible conduct by individuals enterprises and communities in protecting and improving the environment in its full human dimension. (emphasis added) Principle 10 of the Rio Declaration further affirms the importance of environmental democracy. It provides that environmental issues are best handled with participation of all concerned citizens are relevant level. At the national level each individual shall have access to appropriate information concerning the environment that is held by Public authorities including information on hazardous materials and activities in their communities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be provided.

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

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

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

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

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

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

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

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

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

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

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

77 Agenda 21, para. 31.2.

78 Sec. 50-53, EMCA, 1999.

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

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

81 Ibid, Art. 11(2).

82 Ibid, Art. 11(3).

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

Notably, Parliament has since come up with the *Protection of Traditional Knowledge and Cultural Expressions Act, 2016*⁸⁴ which was enacted to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(1) (c) of the Constitution; and for connected purposes. The Act defines "traditional knowledge" to mean any knowledge- originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.⁸⁵

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

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

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

84 No. 33 of 2016, Laws of Kenya.

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

86 *Ibid*, sec. 19(1).

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diversity in achieving sustainable agricultural production and enhancing protection of the health of animal pollinators.

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

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

4.5 Addressing Climate Change

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

The *Agenda 2030 on Sustainable Development* urges countries to take urgent action to combat climate change and its impacts.⁹³ In response to this, Kenya has since taken commendable

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

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

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

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

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

92 Ibid.

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

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measures aimed at tackling the problem of climate change. Kenya's *Climate Change Act, 2016*⁹⁴ was enacted to provide for the legal and institutional framework for the mitigation and 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.⁹⁵ It is important that the provisions of this Act be implemented across the various sectors, especially the ones with a direct impact on environment and biodiversity in particular. Within this framework, it is important to continue tackling the problem of climate change and its effect on biodiversity, especially the animal pollinators.

5. Conclusion

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

Pollinators have an important role to play in crop and food production as well as realisation of the sustainable development agenda. There is need to put in place and employ active and conscious mechanisms specifically geared towards protection of the animal pollinators against adverse effects arising from human activities. Such measures must however go beyond legal responses and include scientific and cultural aspects especially in relation to crop production.

Safeguarding pollinators is a part of sustainable development and is crucial for the realisation of food and nutritional security in Kenya, and indeed worldwide. This neglected link between pollinators and sustainable development needs to be addressed as a matter of urgency.

94 No. 11 of 2016, Laws of Kenya.

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

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

The Race to Zero Emissions from an African Perspective

Abstract

This paper discusses the efforts towards achieving zero carbon emissions in the context of the African continent owing to its unique circumstances. As the rest of the world aims to achieve the race to zero by 2030, the African countries, which are also expected to achieve the same by at least 2040, must work harder against the challenges of poverty, slower development pace and the rapidly increasing population, as a way of overcoming climate change for sustainable development. The paper offers some viable recommendations on some of the most important issues that the African governments must address. The main argument is that countries must strive to build low to zero carbon infrastructure as well as empowering their people to afford them the sustainable alternatives.

1. Introduction

Greenhouse Gases (GHGs) effect emitted by human activities, is considered to be among the greatest contributors to climate change, one of the biggest threats of the 21st century as far as sustainability is concerned.¹ Indeed, climate change has been termed as the ‘biggest threat modern humans have ever faced’.² Economic and industrial activities have adverse carbon impacts on the environment and climate change mitigation activities must focus on such activities too, if these challenges are to be addressed.³ Notably, the principal greenhouse gases whose concentrations have increased over the industrial period are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and chlorofluorocarbons CFC-11 (CCl₃F) and CFC-12 (CCl₂F₂).⁴ Arguably, most of these carbon emissions come from development projects as well as burning fuels for energy.⁵

The Race To Zero is a global campaign to rally leadership and support from businesses, cities, regions, investors for a healthy, resilient, zero carbon recovery that prevents future threats, creates

1 Mora, C., Spirandelli, D., Franklin, E.C., Lynham, J., Kantar, M.B., Miles, W., Smith, C.Z., Freil, K., Moy, J., Louis, L.V. and Barba, E.W., ‘Broad Threat to Humanity from Cumulative Climate Hazards Intensified by Greenhouse Gas Emissions’ (2018) 8 Nature Climate Change 1062.

2 ‘Climate Change “Biggest Threat Modern Humans Have Ever Faced”, World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation | Meetings Coverage and Press Releases’ <<https://www.un.org/press/en/2021/sc14445.doc.htm>> accessed 23 September 2021.

3 Zaman K and Moemen MA, ‘Energy Consumption, Carbon Dioxide Emissions and Economic Development: Evaluating Alternative and Plausible Environmental Hypothesis for Sustainable Growth’ (2017) 74 Renewable and Sustainable Energy Reviews 1119; Mgbemene CA, Nnaji CC and Nwozor C, ‘Industrialization and Its Backlash: Focus on Climate Change and Its Consequences.’ (2016) 9 Journal of Environmental Science and Technology 301.

4 Change C and others, ‘Greenhouse Gases and Their Effect on the Earth-Atmosphere Energy Balance’ 1 <<https://ntrs.nasa.gov/api/citations/19990109667/downloads/19990109667.pdf>> accessed 23 September 2021.

5 US EPA O, ‘Sources of Greenhouse Gas Emissions’ (29 December 2015) <<https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions>> accessed 15 October 2021; ‘Building Sector Emissions Hit Record High, but Low-Carbon Pandemic Recovery Can Help Transform Sector – UN Report’ (*UN Environment*, 16 December 2020) <<http://www.unep.org/news-and-stories/press-release/building-sector-emissions-hit-record-high-low-carbon-pandemic>> accessed 15 October 2021; ‘New Report: The Building and Construction Sector Can Reach Net Zero Carbon Emissions by 2050’ (*World Green Building Council*) <<https://www.worldgbc.org/news-media/WorldGBC-embodied-carbon-report-published>> accessed 15 October 2021; ‘Low-Carbon Infrastructure: An Essential Solution to Climate Change?’ <<https://blogs.worldbank.org/ppps/low-carbon-infrastructure-essential-solution-climate-change>> accessed 15 October 2021.

decent jobs, and unlocks inclusive, sustainable growth.⁶ The Race to Zero was initiated by the adoption of the *Paris Agreement*, a legally binding international treaty on climate change which was adopted by 196 Parties at Conference of Parties (COP) 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016.⁷ The Paris Agreement was adopted with the goal of limiting global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels whereby to achieve this long-term temperature goal, countries aim to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century.⁸ This binding agreement is meant to combat climate change and adapt to its effects.⁹ This paper discusses the special circumstances and effects of climate change in the African continent and how these affect the people's and countries' response to the international calls for eliminating GHG emissions. This is in acknowledgement of the fact that the African continent must come up with its own unique custom- tailored responses to these efforts as it has to contend with challenges that may not necessarily be an issue to the rest of the world, and especially the developed world.

2. Greenhouse Gases Emissions and Climate Change: The Link

The World Meteorological Organisation (WMO) attributes the build-up of greenhouse gases in the atmosphere during the 20th century to 'the growing use of energy and expansion of the global economy.'¹⁰ The build-up of greenhouse gases in the atmosphere alters the radiative balance of the atmosphere and the net effect is to warm the Earth's surface and the lower atmosphere because greenhouse gases absorb some of the Earth's outgoing heat radiation and re-radiate it back towards the surface.¹¹ The Greenhouse gases (GHGs) warm the surface and the atmosphere with significant implications for rainfall, retreat of glaciers and sea ice, sea level, among other factors (the greenhouse effect).¹² The greenhouse effect involves:

'infrared (IR) active gases, principally water vapor (H₂O), carbon dioxide (CO₂), and ozone (O₃), naturally present in the Earth's atmosphere, absorb thermal IR radiation emitted by the Earth's surface and atmosphere. The atmosphere is warmed by this mechanism and, in turn, emits IR radiation, with a significant portion of this energy acting to warm the surface and the lower atmosphere. As a consequence, the average surface air temperature of the Earth is about 30° C higher than it would be without atmospheric absorption and re-radiation of IR energy'.¹³

6 'Race To Zero Campaign | UNFCCC' <<https://unfccc.int/climate-action/race-to-zero-campaign>> accessed 23 September 2021.

7 'The Paris Agreement | UNFCCC' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 24 September 2021.

8 Ibid.

9 Ibid.

10 UNFCCC, 'Fact Sheet: Climate Change Science-the Status of Climate Change Science Today', *United Nations Framework Convention on Climate Change* (2011).

11 Ibid.

12 Ramanathan V and Feng Y, 'Air Pollution, Greenhouse Gases and Climate Change: Global and Regional Perspectives' (2009) 43 *Atmospheric environment* 37.

13 Ledley TS and others, 'Climate Change and Greenhouse Gases' (1999) 80 *Eos, Transactions American Geophysical Union* 453.

Arguably, continuous emissions of GHGs are simultaneously shifting many elements of Earth's climate beyond thresholds that can impact humanity, whereby these gases affect the balance between incoming solar radiation and outgoing infrared radiation, thus increasing the Earth's energy budget, ultimately leading to warming and also affecting other aspects of the Earth's climate system.¹⁴

Notably, carbon emissions affect the guarantee to a right to Clean and Healthy Environment, and this must be safeguarded considering that the UN Human Rights Council recently recognised the human right to a clean, healthy, and sustainable environment.¹⁵ It is expected that "it will spark constitutional changes and stronger environmental laws, with positive implications for air quality, clean water, healthy soil, sustainably produced food, green energy, climate change, biodiversity and the use of toxic substances."¹⁶ The World Health Organization (WHO) estimates that 24 per cent of all global deaths, roughly 13.7 million deaths a year, are linked to the environment due to risks such as air pollution and chemical exposure.¹⁷ Notably, most of these environmental-related deaths are witnessed in developing countries.¹⁸ This, therefore, informs this paper's call for developing countries in Africa to do towards more to addressing the areas that contribute greatest to GHGs emissions as part of addressing climate change.

3. International Regulatory Framework on Carbon Emissions

This section highlights the main legal and institutional framework on regulation of carbon emissions that guides countries in their efforts towards reduction of carbon emissions.

3.1 Conference of Parties 26 (COP 26)

UNFCCC established Conference of the Parties (COP), as the supreme body of the Convention, and it is empowered to keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and should make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.¹⁹ The Parties to the Convention meet every year (with the exception of 2020 due to Covid-19) at the

14 Mora, C., Spirandelli, D., Franklin, E.C., Lynham, J., Kantar, M.B., Miles, W., Smith, C.Z., Freil, K., Moy, J., Louis, L.V. and Barba, E.W., 'Broad Threat to Humanity from Cumulative Climate Hazards Intensified by Greenhouse Gas Emissions' (2018) 8 *Nature Climate Change* 1062.

15 'OHCHR | UN Recognition of Human Right to Healthy Environment Gives Hope for Planet's Future – Human Rights Expert' <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27633&LangID=E>> accessed 17 October 2021.

16 Ibid.

17 'Landmark UN Resolution Confirms Healthy Environment Is a Human Right' (*UNEP*, 14 October 2021) <<http://www.unep.org/news-and-stories/story/landmark-un-resolution-confirms-healthy-environment-human-right>> accessed 17 October 2021.

18 'Air Pollution Hurts the Poorest Most' (*UNEP*, 9 May 2019) <<http://www.unep.org/news-and-stories/story/air-pollution-hurts-poorest-most>> accessed 17 October 2021; 'WHO | Environment and Health in Developing Countries' (*WHO*) <<https://www.who.int/heli/risks/ehindevcoun/en/>> accessed 17 October 2021; Manisalidis I and others, 'Environmental and Health Impacts of Air Pollution: A Review' (2020) 8 *Frontiers in Public Health* 14; Nations U, 'The Health Effects Of Global Warming: Developing Countries Are The Most Vulnerable' (*United Nations*) <<https://www.un.org/en/chronicle/article/health-effects-global-warming-developing-countries-are-most-vulnerable>> accessed 17 October 2021.

19 Article 7.

Conference of the Parties (COP), the meeting of the UNFCCC in Glasgow in November 2021 being COP26.²⁰

The COP26 Summit is meant to bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change.²¹ The goals of COP26 include to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver.²² At COP 26, countries are expected to commit to: come forward with ambitious 2030 emissions reductions targets that align with reaching net zero by the middle of the century, where they will consequently need to: accelerate the phase-out of coal, curtail deforestation, speed up the switch to electric vehicles, and encourage investment in renewables; protect and restore ecosystems and build defences, warning systems and resilient infrastructure and agriculture to avoid loss of homes, livelihoods and even lives; International financial institutions must play their part and we need work towards unleashing the trillions in private and public sector finance required to secure global net zero; and finalise the Paris Rulebook (the detailed rules that make the Paris Agreement operational), and accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.²³

3.2 Intergovernmental Panel on Climate Change (IPCC)

The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change.²⁴ It was created to provide policymakers with regular scientific assessments on climate change, through comprehensive Assessment Reports about the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place as well as special Reports on topics agreed to by its member governments, and Methodology Reports that provide guidelines for the preparation of greenhouse gas inventories.²⁵ They thus act as an updated source of information for the countries.

3.3 The United Nations Framework Convention on Climate Change 1992

The United Nations Framework on Climate Change Convention (UNFCCC)²⁶ was adopted in 1992, entered into force on 21 March 1994 and its ultimate objective and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate

20 'What Is COP26, Who Will Attend It and Why Does It Matter?' (*Energy & Climate Intelligence Unit*) <<https://eciu.net/analysis/briefings/international-perspectives/what-is-cop26-who-will-attend-it-and-why-does-it-matter>> accessed 13 October 2021.

21 'UN Climate Change Conference (COP26) at the SEC – Glasgow 2021' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/>> accessed 13 October 2021.

22 'COP26 Goals' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/cop26-goals/>> accessed 15 October 2021.

23 Ibid.

24 'IPCC — Intergovernmental Panel on Climate Change' <<https://www.ipcc.ch/>> accessed 17 October 2021.

25 Ibid.

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

system.²⁷ Notably, 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.²⁸ In implementing the UNFCCC, the Parties are to be guided, *inter alia*, by the following principles: Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities; specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration; Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects; Parties have a right to, and should, promote sustainable development; and Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.²⁹

These principles are an acknowledgement that any activities or actions geared towards climate change mitigation including the efforts in the race to zero emissions must take account of the differences between developed countries and developing regions such as Africa. It also follows that African countries must be allowed to come up with tailor made responses to carbon emissions, based on the current challenges and needs. Notably, as they are the source of most past and current greenhouse gas emissions, industrialized countries are expected to do the most to cut emissions on home ground.³⁰

3.4 Vienna Convention for the Protection of the Ozone Layer (1985)

The Vienna Convention is a framework convention that lays out principles agreed upon by many parties which does not, however, require countries to take control actions to protect the ozone layer unlike the Montreal Protocol.³¹ The Convention requires Parties to take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.³²

The Convention also requires that the Parties should co-operate, consistent with their national laws, regulations and practices and taking into account in particular the needs of the developing countries, in promoting, directly or through competent international bodies, the development and transfer of technology and knowledge. Such co-operation should be carried out particularly through: Facilitation of the acquisition of alternative technologies by other Parties; Provision of

27 Ibid, Article 2.

28 Ibid.

29 Ibid, Article 3.

30 'What Is the United Nations Framework Convention on Climate Change? | UNFCCC' <<https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>> accessed 14 October 2021.

31 'The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/vienna-convention>> accessed 17 October 2021.

32 Vienna Convention for the Protection of the Ozone Layer, Article 2.1.

information on alternative technologies and equipment, and supply of special manuals or guides to them; The supply of necessary equipment and facilities for research and systematic observations; and appropriate training of scientific and technical personnel.³³

3.5 Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 and the Kigali Amendment of 2016

The 1987 Montreal Protocol is a global agreement to protect the Earth's ozone layer through a phase-out plan which includes both the production and consumption of ozone-depleting substances, which was signed in 1987 and entered into force in 1989.³⁴ The Protocol has been termed as a success especially in reduction and elimination of anthropogenic emissions of ozone depleting substances (ODSs), primarily responsible for stratospheric ozone depletion since around the 1960s.³⁵ The nearly 100 man-made chemicals referred to as ozone depleting substances (ODS), when released to the atmosphere, damage the stratospheric ozone layer, Earth's protective shield that protects humans and the environment from harmful levels of ultraviolet radiation from the sun.³⁶

In recognition of the special situation of developing countries, Montreal Protocol provides that 'the Parties undertook to facilitate access to environmentally safe alternative substances and technology for Parties that are developing countries and assist them to make expeditious use of such alternatives'.³⁷ In addition, 'the Parties undertook to facilitate bilaterally or multilaterally the provision of subsidies, aid, credits, guarantees or insurance programmes to Parties that are developing countries for the use of alternative technology and for substitute products'.³⁸

The Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer which was adopted in Kigali, Rwanda on 15 October 2016 and came into force 1st January 2019 (provided it would have been ratified by at least 20 parties)³⁹ at the Twenty-Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, held in Kigali from 10 to 15 October 2016.⁴⁰ The Kigali Amendment to the Montreal protocol is expected to reduce the projected production and consumption of hydrofluorocarbons (HFCs) by more than 80 per cent over the next 30 years.⁴¹ The Kigali Amendment is also expected to avoid up to 0.4°C of global

33 Ibid, Article 4.2.

34 'The Montreal Protocol on Substances That Deplete the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/montreal-protocol>> accessed 14 October 2021.

35 Banerjee A and others, 'A Pause in Southern Hemisphere Circulation Trends Due to the Montreal Protocol' (2020) 579 Nature 544.

36 Environment UN, 'About Montreal Protocol' (*Ozonaction*, 29 October 2018) <<http://www.unep.org/ozonaction/who-we-are/about-montreal-protocol>> accessed 14 October 2021.

37 Article 5(2).

38 Article 5 (3).

39 'United Nations Treaty Collection'

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-f&chapter=27&clang=_en> accessed 17 October 2021.

40 Ibid.

41 'World Takes a Stand against Powerful Greenhouse Gases with Implementation of Kigali Amendment' (*UN Environment*, 3 January 2019) <<http://www.unep.org/news-and-stories/press-release/world-takes-stand-against-powerful-greenhouse-gases-implementation>> accessed 17 October 2021.

Addition of Article 2J

The following Article shall be inserted after Article 2I of the Protocol:

warming this century while continuing to protect the ozone layer, thus substantively contributing to the goals of the Paris Agreement.⁴²

While hydrofluorocarbons (HFCs), given their zero impact on the depletion of the ozone layer, are currently used as replacements of hydrochlorofluorocarbons (HCFCs) and chlorofluorocarbons (CFCs), they are extremely potent greenhouse gases with global warming potentials that can be many times higher than carbon dioxide, hence the need to phase them out in efforts towards climate change mitigation.⁴³ Key elements of the Kigali Amendment include: Innovative and flexible structure; Ambitious phasedown schedule; Incentive for early action; Broad participation; Enforcement and accountability; and Multiple opportunities to increase ambition.⁴⁴

3.6 Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)

The Kyoto Protocol⁴⁵ was adopted at the third session of the Conference of the Parties (COP 3) to the 1992 United Nations Framework Convention on Climate Change (“the Convention”), held at Kyoto (Japan) from 1 to 11 December 1997.⁴⁶ It applies the principle of common but differentiated responsibilities and sets binding targets for reducing greenhouse gas emissions for industrialized countries, recognizing them as those primarily responsible for the high levels of emissions currently present in the atmosphere.⁴⁷

4. Domestic Regulatory Framework on Carbon Emissions: The Case of Kenya

This section highlights the main regulatory legal instruments that the country can build on in its race towards zero emissions.

“Article 2J: Hydrofluorocarbons

1. Each Party shall ensure that for the twelve-month period commencing on 1 January 2019, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Annex F, expressed in CO₂ equivalents, does not exceed the percentage, set out for the respective range of years specified in subparagraphs (a) to (e) below, of the annual average of its calculated levels of consumption of Annex F controlled substances for the years 2011, 2012 and 2013, plus fifteen per cent of its calculated level of consumption of Annex C, Group I, controlled substances as set out in paragraph 1 of Article 2F, expressed in CO₂ equivalents:

(a) 2019 to 2023: 90 per cent

(b) 2024 to 2028: 60 per cent

(c) 2029 to 2033: 30 per cent

(d) 2034 to 2035: 20 per cent

(e) 2036 and thereafter: 15 per cent

42 Ibid.

43 ‘The Montreal Protocol Evolves to Fight Climate Change | UNIDO’ <<https://www.unido.org/our-focus-safeguarding-environment-implementation-multilateral-environmental-agreements-montreal-protocol/montreal-protocol-evolves-fight-climate-change>> accessed 17 October 2021.

44 US EPA O, ‘Recent International Developments under the Montreal Protocol’ (15 July 2015) <<https://www.epa.gov/ozone-layer-protection/recent-international-developments-under-montreal-protocol>> accessed 17 October 2021.

45 United Nations, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Kyoto, 11 December 1997, United Nations, Treaty Series, vol. 2303, p. 162.

46 ‘United Nations Treaty Collection’

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-a&chapter=27&clang=_en> accessed 17 October 2021.

47 ‘Kyoto Protocol [Framework Convention on Climate Change] | Observatory on Principle 10’ <<https://observatoriop10.cepal.org/en/treaties/kyoto-protocol-framework-convention-climate-change>> accessed 17 October 2021.

4.1 The Constitution of Kenya 2010

Article 10 of the Constitution outlines the principle of sustainability as one of the national values and principles of governance that must bind of policy and law makers.⁴⁸ Article 42 thereof guarantees every person's right to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.⁴⁹ Article 69(1) requires the State to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; and eliminate processes and activities that are likely to endanger the environment.⁵⁰

4.2 Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy

Kenya's *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy*⁵¹ was formulated to enhance adaptive capacity and resilience to climate change, and promote low carbon development for the sustainable development of Kenya.⁵² Its main objectives of this Policy are to: establish and maintain an effective and efficient institutional framework to mainstream climate change responses across relevant sectors and into integrated planning, budgeting, decision-making and implementation, at both the national and county levels; reduce vulnerability to the impacts of climate change by building adaptive capacity, enhancing climate change resilience and strengthening capacities for disaster risk reduction; catalyse Kenya's transition to cleaner, lower emission and less carbon intensive development; incentivize private sector involvement in building climate change resilience and engaging in low carbon development opportunities; facilitate widespread public awareness, participation, ownership and oversight of Kenya's climate change response efforts and Action Plans; provide a framework to mobilise resources for Kenya's climate change response and ensure effective and transparent utilisation of the resources; adopt intergenerational, special needs and gender mainstreaming approaches across all aspects of Kenya's climate change response; provide the policy framework to facilitate effective implementation of regularly updated and scientifically informed Climate Change Action Plans; and enhance research and use of science and technology in policy decisions and sustainable management of resources.⁵³

The implementation of this Policy will be guided by the following principles: Common but differentiated responsibilities and respective capabilities; Right to a clean and healthy environment; Right to Sustainable Development; Partnership; Cooperative government; Equity and social inclusion; Special needs and circumstances; Avoiding maladaptation; Integrity and transparency; and cost effectiveness.⁵⁴

48 Article 10, Constitution of Kenya 2010.

49 Ibid, Art. 42.

50 Ibid, Art.69(1).

51 Republic of Kenya, *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy*.

52 Goal 3.1.

53 Goal 3.2.

54 Goal 3.3.

The Climate Change Policy 2016 calls for low carbon climate resilient development through a number of actions: Enhancing Climate Resilience and Adaptive Capacity where the Government will: Put in place mechanisms for sustainable utilisation of natural resources to enhance climate resilience and adaptive capacity to protect the natural capital of Kenya; Mainstream climate resilience into national and county government development plans, processes and implementation; Ensure integration of climate change risk and vulnerability assessment in environment impact assessment and strategic environmental assessment; Develop incentives to promote climate resilient actions among public, private and other actors; Identify and implement priority adaptation actions across key social, environmental and economic sectors under the framework of a National Adaptation Plan; Promote public and stakeholder consultation and participation, including with vulnerable groups, to enhance adaptive capacity and climate resilience; and Develop mechanisms to build capacity to mainstream climate change into disaster risk reduction and management programmes;⁵⁵ Towards Low Carbon Growth-although Kenya currently contributes very little to global GHG emissions, a significant number of priority development initiatives outlined in Vision 2030 and regular Medium Term Plans (MTPs) will impact on Kenya's levels of GHG emissions. As such, the Government will: Identify and implement fiscal, taxation and other policy options in priority areas with high GHG emission abatement potential that enhance sustainable development; Mainstream low carbon growth options into the planning processes and functions of the national and county governments; Put in place mechanisms to establish a GHG emissions inventory to achieve efficient and effective collection, recording, sharing and utilisation of GHG emissions data; In view of strategic national interests, consider participating in voluntary emission reduction programmes when they support the country's sustainable development goals and achieve co-benefits; Put in place mechanisms to develop and promote clean technologies in all sectors of economic development; and Promote the creation of green jobs by establishing an enabling policy framework for investment, and creating business friendly regulatory environments in key areas such as renewable energy, efficient transport, clean manufacturing and sustainable agriculture.⁵⁶

4.3 Climate Change Act 2016

The Climate Change Act 2016⁵⁷ was enacted to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development, and for connected purposes.⁵⁸The Act is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.⁵⁹ The Act is to be applied in all sectors of the economy by the national and county governments to: mainstream climate change responses into development planning, decision making and implementation; build resilience and enhance adaptive capacity to the impacts of climate change; formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; mainstream intergenerational and gender equity in all aspects of climate change responses; provide incentives and obligations for private sector contribution in achieving low carbon climate resilient development; promote low carbon

55 Goal 4.1.

56 Goal 4.2.

57 Climate Change Act, No. 11 of 2016, Laws of Kenya.

58 Ibid, Preamble.

59 Ibid, sec. 3(1).

technologies, improve efficiency and reduce emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development; facilitate capacity development for public participation in climate change responses through awareness creation, consultation, representation and access to information; mobilize and transparently manage public and other financial resources for climate change response; provide mechanisms for, and facilitate climate change research and development, training and capacity building; mainstream the principle of sustainable development into the planning for and decision making on climate change response; and integrate climate change into the exercise of power and functions of all levels of governance, and to enhance cooperative climate change governance between the national government and county governments.⁶⁰

5. The Race to Zero Emissions: The Challenges

In accordance with the Paris Agreement, every country agreed to communicate or update their emissions reduction targets – their Nationally Determined Contribution (NDC) – every five years to reflect their highest possible ambition and a progression over time, where the targets set out how far countries plan to reduce emissions across their entire economy and/or in specific sectors.⁶¹

Kenya's *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy* identifies the following challenges as far as climate change mitigation is concerned: fossil fuel based electricity generation and consumption, and increases in fossil fuel use in the transportation sector contribute significantly to GHG emissions; agricultural sector is the largest contributor of GHGs emissions in the country mainly from livestock methane emissions and land-use change; deforestation and forest degradation in search for fuel wood, charcoal production and creation of agricultural land; transport sector in Kenya contributes to GHG emissions through the use of more fossil fuel and increases local air pollution, which has serious health implications; and industrial processing in Kenya are some of the main challenges that are likely to affect any efforts towards achieving zero emissions.⁶² Arguably, these challenges are a reflection of what is happening across the African continent. There is thus a need to address these challenges as part of the race towards zero carbon emissions.

5. The Race to Zero Emissions from an African Perspective: Way Forward

In line with the principle of common but differentiated responsibilities under the international environmental law, this section offers some recommendations on some viable steps that African States can take to address climate change through reduced carbon emissions.

5.1 Clean Development Mechanism

Carbon or emissions trading works by limiting the amount of carbon dioxide that entities such as companies, municipalities or countries can release into the atmosphere, creating competition to encourage them to become more energy efficient and adopt cleaner technology whereby companies aiming to reduce their carbon output can sell unused pollution allowances and those that exceed their allocated emissions allowance may have to buy more emissions permits, or be subject to

60 Ibid, sec. 3(2).

61 'COP26 Goals' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/cop26-goals/>> accessed 15 October 2021.

62 *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy*, Goal 4.2.

monetary fines.⁶³ African countries should invest in and explore more clean development mechanisms not only as way of raising funds but also climate change mitigation. Kenya should make more use of the Green Bond Programme - Kenya, which aims to promote financial sector innovation by developing a domestic green bond market.⁶⁴

5.2 Transition from Fuel-Based Transport to Electric Vehicles in Africa

It has been observed that ‘today’s transport sector accounts for around a quarter of energy-related CO2 emissions globally since it is almost completely dependent on fossil fuels and, therefore, decarbonizing the sector is crucial to achieving the temperature goals of the Paris Agreement.⁶⁵ Notably, in Africa and South Asia, the transition to low-carbon vehicles is vital in mitigating climate change.⁶⁶

While improved and expanded physical infrastructure through investment in roads and rail lines is an important and necessary enabler of socio-economic development, countries must start moving towards environmental friendly means of transport such as electric vehicles, through financial incentives as has been witnessed in Rwanda where the country’s leadership has unveiled incentives meant to encourage the citizenry to embrace electric cars.⁶⁷

5.3 Role of the Private Sector in Reducing Emissions

Notably, the Paris Agreement underscores the important role of Non-State Actors (NSAs), particularly the private sector in the implementation of the key provisions the landmark Pact adopted in 2015, such as the Nationally Determined Contributions, adaptation, mitigation and finance.⁶⁸

Arguably, in addition to top-down national or international policy instruments that aim to regulate the amount and flow of global emissions, the private sector is rising as a potent force for change.⁶⁹ It has been observed that the private sector is a key stakeholder in both urban and economic development, being a major contributor to national income and the principal job creator and employer, where it provides around 90% of employment in the developing world (including formal and informal jobs), delivers critical goods and services and contributes to tax revenues and the

63 Amesheva I, ‘The Road to Net-Zero Is Paved with Good Intentions’, 3 <https://www.arabesque.com/wp-content/uploads/2021/09/The-Road-to-Net-Zero_Part-One_FINAL.pdf> Accessed 24 September 2021.

64 ‘Kenya Green Bonds Programme’ (*greenbondskenya*) <<https://www.greenbondskenya.co.ke>> accessed 17 October 2021.

65 ‘Advancing Electric Mobility in Africa | UNFCCC’ <<https://unfccc.int/news/advancing-electric-mobility-in-africa>> accessed 13 October 2021.

66 Collett, Katherine A., Maximus Byamukama, Constance Crozier, and Malcolm McCulloch. "Energy and Transport in Africa and South Asia." *Energy and Economic Growth* (2020), 2.

67 ‘Rwanda Unveils New Incentives to Drive Electric Vehicle Uptake’ (*The New Times | Rwanda*, 16 April 2021) <<https://www.newtimes.co.rw/news/rwanda-unveils-new-incentives-drive-electric-vehicle-uptake>> accessed 17 October 2021.

68 PACJA, ‘The role of the African private sector in the transition to low-emission, climate-resilient, green growth and NDCs implementation,’ 9th *Conference On Climate Change and Development in Africa (CCDA-IX)*, Santa Maria, Sal Island, Cabo Verde, 13-17 September 2021.

69 Amesheva I, ‘The Road to Net-Zero Is Paved with Good Intentions’, 6 <https://www.arabesque.com/wp-content/uploads/2021/09/The-Road-to-Net-Zero_Part-One_FINAL.pdf> Accessed 24 September 2021.

efficient flow of capital.⁷⁰ The private sector is considered to be an important player in creating innovative and technological solutions, as well as providing resources to meet our global environmental challenges.⁷¹

It has been suggested that in order able to make private-sector energy solutions affordable for low-income households, ‘private sector financing will be necessary to complement public sector finance in realizing universal energy access in conjunction with renewable energy uptake, which is often prevented by high financing costs as a result of a range of technical, regulatory, financial and informational barriers and their associated investment risks.⁷² This is against the background of some studies which have concluded that ‘without significant additional investments and dedicated policies, the goal of total rural electrification and universal access to modern cooking fuels and stoves by 2030 is unachievable’.⁷³

5.4 Investing in Affordable Energy Technology Innovation in Reducing Greenhouse Gas Emissions

It is estimated that without new policies, by 2050, more disruptive climate change is likely to be locked in, with global greenhouse gas (GHG) emissions projected to increase by 50%, primarily due to a 70% growth in energy-related CO₂ emissions.⁷⁴

Most rural area residents have relied on biomass fuels for long due to their relatively cheaper accessibility as lack of financial resources is a key barrier to access to energy in rural Africa.⁷⁵ As already highlighted, the combustion of biomass fuels in traditional stoves produces greenhouse gases and aerosols such as black carbon and the extensive use of biomass can also result in forest, land, and soil degradation, leading to net CO₂ emissions.⁷⁶ As a result, it has been pointed out that

70 ‘The Role of the Private Sector’ (GSDRC) <<https://gsdrc.org/topic-guides/urban-governance/elements-of-effective-urban-governance/the-role-of-the-private-sector/>> accessed 27 September 2021.

71 Environment UN, ‘Private Sector Engagement’ (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/about-un-environment/private-sector-engagement>> accessed 27 September 2021.

72 ‘Accelerating SDG 7 Achievement: Policy Briefs in Support of the First SDG 7 Review at the UN High-Level Political Forum 2018 | Environmental Migration Portal’ 2 <<https://environmentalmigration.iom.int/accelerating-sdg-7-achievement-policy-briefs-support-first-sdg-7-review-un-high-level-political>> accessed 12 October 2021.

73 Pachauri, Shonali, Bas J. van Ruijven, Yu Nagai, Keywan Riahi, Detlef P. van Vuuren, Abeeku Brew-Hammond, and Nebojsa Nakicenovic. “Pathways to Achieve Universal Household Access to Modern Energy by 2030.” *Environmental Research Letters* 8, no. 2 (May 2013): 024015. <https://doi.org/10.1088/1748-9326/8/2/024015>.

74 ‘Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction - OECD’ <<https://www.oecd.org/env/indicators-modelling-outlooks/climatechangechapteroftheoecdenvironmentaloutlookto2050theconsequencesofinaction.htm>> accessed 17 October 2021.

75 Allet M, ‘Solar Loans through a Partnership Approach: Lessons from Africa’ [2016] Field Actions Science Reports. The journal of field actions 128.

76 Pachauri, Shonali, Bas J. van Ruijven, Yu Nagai, Keywan Riahi, Detlef P. van Vuuren, Abeeku Brew-Hammond, and Nebojsa Nakicenovic. “Pathways to Achieve Universal Household Access to Modern Energy by 2030.” *Environmental Research Letters* 8, no. 2 (May 2013): 024015. <https://doi.org/10.1088/1748-9326/8/2/024015>.

governments recognise that scaling up and shifting financial flows to low-emission and resilient infrastructure investments is critical to deliver on climate and sustainable development goals.⁷⁷

As part of reducing GHG emissions, it has been suggested that understanding the influence of energy technology innovation in reducing a country's greenhouse gas emissions requires a systematic review to characterize the existing system.⁷⁸ Arguably, technology Platforms unite stakeholders from industry, the research community, public authorities, the financial community, regulators, consumers and civil society around a specific technological challenge, where the key concepts for the Technology platform are: Development of a shared long-term vision; Creation of a coherent, dynamic strategy to achieve the vision; Implementation of an action plan to deliver agreed programmes of activities; and Leading role of the industry.⁷⁹ There is a need for adoption and promotion of low carbon resilient development initiatives.⁸⁰ Low-carbon resilience is an agenda that tackles reducing carbon emissions while simultaneously building climate resilience and supporting development in a supposed win-win policy agenda.⁸¹

5.5 Poverty Eradication

It has been observed that 'climate change is the defining issue of our time, and the world's most vulnerable people are suffering the worst effects of climate change, such as more intense storms, dangerous heat waves, more frequent and longer-lasting droughts, rising seas, while contributing least to the problem'.⁸² In addition, the two-way relationship between the lack of access to adequate and affordable energy services and poverty, in many respects, involves a vicious cycle in which people who lack access to cleaner and affordable energy are often trapped in a re-enforcing cycle of deprivation, lower incomes and the means to improve their living conditions while at the same time using significant amounts of their very limited income on expensive and unhealthy forms of energy that provide poor and/or unsafe services.⁸³

77 'Achieving Clean Energy Access in Sub-Saharan Africa' (*Green Finance Platform*, 8 April 2019) <<https://www.greenfinanceplatform.org/research/achieving-clean-energy-access-sub-saharan-africa>> accessed 12 October 2021.

78 Jordaan, S.M., Romo-Rabago, E., McLeary, R., Reidy, L., Nazari, J. and Herremans, I.M., 'The Role of Energy Technology Innovation in Reducing Greenhouse Gas Emissions: A Case Study of Canada' (2017) *Renewable and Sustainable Energy Reviews* 1397.

79 Năstase C and Popescu M, 'Sustainable Development through the Resource Use-Regional Innovation System.', *Proceedings of the 3rd IASME/WSEAS International Conference on energy, environment, ecosystems and sustainable development (EEESD'07)*, Agios Nikolaos, Crete Island, Greece, 24-26 July, 2007 (World Scientific and Engineering Academy and Society Press (WSEAS Press) 2007).

80 Fisher, S. "Low-Carbon Resilient Development in the Least Developed Countries: Emerging Issues and Areas of Research. IIED," 2013.

81 Ibid, 3.

82 'Global Conference Aims to Link Climate Action, Sustainable Development Agendas More Closely | UNFCCC' <<https://unfccc.int/news/global-conference-aims-to-link-climate-action-sustainable-development-agendas-more-closely>> accessed 12 October 2021.

83 Stephen Karekezi and others, 'Energy, Poverty, and Development' in Global Energy Assessment Writing Team (ed), *Global Energy Assessment: Toward a Sustainable Future* (Cambridge University Press 2012) 153

<<https://www.cambridge.org/core/books/global-energy-assessment/energy-poverty-and-development/DC1771AD93DD0A5031A07B057CA3A8C7>> accessed 12 October 2021.

Notably, most people especially in developing world continue to struggle with lack of access to clean energy in what is now commonly referred to as energy poverty. The World Economic Forum 2010 defined energy poverty as *the lack of access to sustainable modern energy services and products*. To be more precise, it is not only a matter of sustainability: energy poverty can be found in all conditions where there is a lack of *adequate, affordable, reliable, quality, safe and environmentally sound energy services to support development*.⁸⁴ Notably, ‘the concept of “energy poverty” includes “fuel poverty” in the developed world, but is most often used in the context of lack of access in the developing world to electricity, and/ or clean cooking fuels or technologies, where it is also estimated that about 1.2 billion people still lack access to electricity and nearly 40 per cent of the people in the world lack access to clean cooking fuels’.⁸⁵

World Health Organization estimates that indoor pollution causes an estimated 1.3 million deaths per annum in low income countries associated with the use of biomass in inadequate cook stoves.⁸⁶ There is a need to continually invest in research and development of newer and cleaner technologies as well as understanding the distribution of current and future energy needs, if the African countries are to overcome energy poverty and also achieve zero emissions from energy sources. It has been observed that ‘on the one hand, lack of access to reliable energy is believed to hamper economic growth in poor economies (energy poverty), and on the other hand, energy consumption met with the current fossil fuel based energy mix leads to emissions of greenhouse gases, which are accumulating in the atmosphere and are the major source of global climate change’.⁸⁷

It has been argued that ‘although energy poverty cannot be delinked from the broader, more complex problem of poverty in general, access to energy infrastructures would avoid its most serious consequences and would help to encourage autonomous development’.⁸⁸ Addressing poverty can go a long way in empowering people to not only embrace but also afford alternative and sustainable sources of energy and transport.

5.6 Investing in Off-Grid and Mini-grid Energy Sources: Renewable Energy for Climate Change Mitigation

Arguably, the most cost-effective way to expand household electricity access varies widely, within and between countries.⁸⁹ It has been observed that ‘in sub-Saharan Africa, two-thirds of the

84 Habitat for Humanity. “Energy Poverty.” Accessed October 12, 2021. <https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>.

85 ‘Accelerating SDG 7 Achievement: Policy Briefs in Support of the First SDG 7 Review at the UN High-Level Political Forum 2018 | Environmental Migration Portal’ 2 <<https://environmentalmigration.iom.int/accelerating-sdg-7-achievement-policy-briefs-support-first-sdg-7-review-un-high-level-political>> accessed 12 October 2021.

86 González-Eguino, Mikel. “Energy Poverty: An Overview.” *Renewable and Sustainable Energy Reviews* 47 (July 1, 2015): 377–85. <https://doi.org/10.1016/j.rser.2015.03.013>.

87 Shoibal Chakravarty and Massimo Tavoni, ‘Energy Poverty Alleviation and Climate Change Mitigation: Is There a Trade Off?’ (2013) 40 *Energy Economics* S67, S67.

88 González-Eguino, Mikel. “Energy Poverty: An Overview.” *Renewable and Sustainable Energy Reviews* 47 (July 1, 2015): 377–85. <https://doi.org/10.1016/j.rser.2015.03.013>.

89 Association GO-GL, ‘Providing Energy Access through Off-Grid Solar: Guidance for Governments’ [2015] Utrecht, the Netherlands, 9.

population live in areas that are not linked up with an electrical grid, and arguably, off-grid energy is the only option for these people.⁹⁰

Off-grid energy options have been hailed as viable tools of combating energy poverty especially in Africa. Mini-grids are also considered to be a viable option for those living in the most remote areas, where standalone solar systems operating independently of the grid can meet smaller home electricity needs but may struggle with larger electricity loads such as powering machinery and agricultural equipment, and that is where mini-grids which operate in a space between the two come in; when the population is too small or remote for grid extension and standalone solar systems aren't viable for larger electricity needs.⁹¹

There is a need for continued exploration and investments in this sector to empower people regardless of their distance from the main national power grid.

6. Conclusion

It is now an agreed fact that the most commonly considered indicator of climate change is the surface air temperature, mainly attributable to carbon based emissions.⁹² Notably, of the several anthropogenic greenhouse gases, Carbon Dioxide is considered to be the most important agent of potential future climate warming because of its large current greenhouse forcing, its substantial projected future forcing, and its long persistence in the atmosphere.⁹³ It has been argued that the GHG mitigation actions pledged by countries in the Cancún Agreements at the United Nations Climate Change Conference will not be enough to prevent the global average temperature from exceeding the 2°C threshold, unless very rapid and costly emission reductions are realised after 2020.⁹⁴ It has also been documented that 'if the current rate of greenhouse gas emissions continue, temperatures will rise to 1.5°C above pre-industrial levels by 2040'.⁹⁵ As a result, it has been argued, if this is to be prevented, the greenhouse pollution ought to reduce by 45 percent from 2010 levels by 2030 and completely, that is, by 100 percent, by 2050, where coal use, currently accounting for 40 percent of electrical production, would have to drop to nearly one percent while renewable energy sources, currently supplying 20 percent of electrical production, would have to more than triple.⁹⁶

90 '3 Reasons Off-Grid Solar Energy Isn't Yet Serving the Poor in Sub-Saharan Africa' (*Sun-Connect-News*) <<https://www.sun-connect-news.org/de/articles/market/details/3-reasons-off-grid-solar-energy-isnt-yet-serving-the-poor-in-sub-saharan-africa/>> accessed 12 October 2021.

91 ODI: Think change. "How Solar Mini-Grids Can Bring Cheap, Green Electricity to Rural Africa." Accessed October 12, 2021. <https://odi.org/en/insights/how-solar-mini-grids-can-bring-cheap-green-electricity-to-rural-africa/>.

92 Ledley TS and others, 'Climate Change and Greenhouse Gases' (1999) 80 *Eos*, Transactions American Geophysical Union 453, 455.

93 *Ibid*, 455.

94 'Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction - OECD'

<<https://www.oecd.org/env/indicators-modelling-outlooks/climatechangechapteroftheoecdenvironmentaloutlookto2050theconsequencesofinaction.htm>> accessed 17 October 2021.

95 'Climate Change Is The Greatest Threat To Human Health In History | Health Affairs Blog' <<https://www.healthaffairs.org/doi/10.1377/hblog20181218.278288/full/>> accessed 14 October 2021.

96 *Ibid*.

The Race to Zero Emissions from an African Perspective

African countries are already struggling with the current state of energy sector and other areas that contribute to greenhouse gas emissions. If they are to be considered worthy participants in the race to zero emissions, then they must address poverty levels, address pollution, invest in cleaner sources of energy and technologies and involve private sector more, among others. It is time for African countries to ensure that even as they engage in rapid development activities, the same are conscious of Sustainable Development agenda and the race to zero emissions.

The Race to Zero Emissions is one that can be won, in the fullness of time, within Africa and beyond.

UN Biodiversity Conference (CBD COP-15): What is in it for the Developing Countries?

Abstract

This paper highlights the outcomes of the decisions made by the UN Biodiversity Conference (Fifteenth meeting of the Conference of the Parties (COP-15) to the Convention on Biological Diversity (CBD) held between 7th to 19th December 2022 in Montreal, Canada and offers a perspective on how these decisions may affect developing countries especially in Africa, as far as biodiversity resources use and conservation efforts are concerned.

1. Introduction

The Conference of the Parties (COP), which oversees the Convention on Biological Diversity, makes decisions that enhance implementation of the Convention during its recurrent sessions.¹ The Conference of the Parties had its regular meetings yearly from 1994 to 1996. Since then, these meetings have been conducted less regularly, and as of 2000, they will now be held every two years due to a change in the norms of procedure.² The fifteenth Conference of the Parties (COP 15) met in two locations: Kunming, China, and Montreal, Canada. Phase one was conducted virtually from October 11 to October 15, 2021, and it featured a High-Level Segment on October 12 and 13. Phase two took place in Montreal, Canada, from December 7 and December 19, 2022.³ This paper highlights the major outcomes of these events and their implications on developing countries.

2. UN Biodiversity Conference (Fifteenth meeting of the Conference of the Parties (COP-15) to the Convention on Biological Diversity (CBD): Outcomes

2.1 Adoption of the Monitoring Framework for the Kunming-Montreal Global Biodiversity Framework

The Kunming-Montreal Global Biodiversity Framework⁴, which supersedes the Convention on Biological Diversity's (CBD) Strategic Plan for Biodiversity 2011-2020 and its Aichi Objectives, was agreed by CBD Parties on December 19, 2022, after four years of development talks. The agreement was reached during the second session of the fifteenth Conference of Parties (COP-15), which was held in Montréal, Canada, from December 7–19, 2022, and was presided over by the People's Republic of China.⁵ The framework consists of four global 2050 objectives and twenty-three global 2030 targets, which are divided into four major categories to correspond to the goals. This comprises techniques and solutions for mainstreaming and implementation, biodiversity protection and restoration, the value of nature to humans, access and benefit sharing, and benefits sharing.⁶ The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) Global Assessment Report of Biodiversity and Ecosystem Services, the fifth edition of

1 Unit B, 'Conference of the Parties (COP)' <<https://www.cbd.int/cop/>> accessed 16 February 2023.

2 Ibid.

3 Ibid.

4 Agenda item 9A, 15/4, Kunming-Montreal Global Biodiversity Framework, CBD/COP/DEC/15/4,19 December 2022.

5 'A New Global Biodiversity Framework: Kunming-Montreal Global Biodiversity Framework - DCCEEW' <<https://www.dcceew.gov.au/environment/biodiversity/international/un-convention-biological-diversity/global-biodiversity-framework>> accessed 20 February 2023.

6 Ibid.

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the Global Biodiversity Outlook, and many other scientific publications provide ample evidence that, despite ongoing efforts, biodiversity is deteriorating globally at rates unprecedented in human history. The Kunming-Montreal Global Biodiversity Framework aims to respond to these documents.⁷

The Kunming-Montreal Global Biodiversity Framework outlines an ambitious plan to implement widespread action to transform our societies' relationship with biodiversity by 2030, in line with the 2030 Agenda for Sustainable Development and its Sustainable Development Goals. It builds on the Strategic Plan for Biodiversity 2011–2020, its achievements, gaps, and lessons learned, as well as the experience and achievements of other pertinent multilateral environmental agreements.⁸ The Kunming-Montreal Global Biodiversity Framework aims to catalyse, enable, and galvanise urgent and transformative action by Governments, subnational and local authorities, with the involvement of all of society, to halt and reverse biodiversity loss and to achieve the outcomes it sets out in its Vision, Mission, Goals, and Targets. This will help to further the three goals of the Convention on Biological Diversity and its Protocols. The balanced execution of all three of the Convention's objectives is its main goal.⁹

The framework, which is action- and results-oriented, aims to direct and promote, at all levels, the revision, development, updating, and implementation of policies, goals, targets, and national biodiversity strategies and action plans. It also makes it easier to monitor and review progress at all levels in a more accountable and transparent way.¹⁰ While respecting their mandates, the framework encourages coherence, complementarity, and cooperation among parties to the Convention on Biological Diversity and its Protocols, other conventions related to biodiversity, and other pertinent multilateral agreements and international institutions. It also provides opportunities for collaboration and partnerships among various actors to improve the framework's implementation.¹¹

The Kunming-Montreal Global Biodiversity Framework, including its Vision, Mission, Goals and Targets, is to be understood, acted upon, implemented, reported and evaluated, consistent with the following: contribution and rights of indigenous peoples and local communities; different value systems; whole-of-government and whole-of-society approach; national circumstances, priorities and capabilities; collective effort towards the targets; right to development; human rights-based approach; gender; fulfilment of the three objectives of the convention and its protocols and their balanced implementation; consistency with international agreements or instruments; principles of the Rio Declaration; science and innovation; ecosystem approach; inter-generational equity; formal and informal education; access to financial resources; cooperation and synergies; and biodiversity and health.¹²

7 Agenda item 9A, 15/4, Kunming-Montreal Global Biodiversity Framework, CBD/COP/DEC/15/4,19 December 2022, Annex, Para. 2.

8 Ibid, para. 3.

9 Agenda item 9A, 15/4, Kunming-Montreal Global Biodiversity Framework, CBD/COP/DEC/15/4,19 December 2022, Annex, Para. 4.

10 Ibid, para. 5.

11 Ibid, para. 6.

12 Ibid, paras.7-25.

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A step towards achieving the goals of the 2030 Agenda for Sustainable Development is the Kunming-Montreal global biodiversity framework. In order to provide the circumstances essential for realising the goals and targets of the framework, progress towards the Sustainable Development Goals and the attainment of sustainable development in all of its three dimensions—environmental, social, and economic—are required. Recognizing the significant connections between biological and cultural diversity, it will place biodiversity, its conservation, the sustainable use of its components, and the fair and equitable sharing of the benefits resulting from the utilisation of genetic resources at the centre of the sustainable development agenda.¹³

2.2 Informing the scientific and technical evidence base for the Kunming-Montreal Global Biodiversity Framework

The Conference of the Parties welcomed the Global Assessment Report on Biodiversity and Ecosystem Services issued by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services¹⁴ and the related regional and thematic assessments.¹⁵ The COP also commended the Intergovernmental Panel on Climate Change's (IPCC) special reports on the effects of global warming of 1.5°C above pre-industrial levels and associated global greenhouse gas emission pathways, as well as on the ocean and cryosphere in a changing climate, climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems.¹⁶

In addition, COP took note of the following: the fifth edition of the Global Biodiversity Outlook, including its summary for policymakers, as well as the second edition of the Local Biodiversity Outlooks and the 2020 Plant Conservation Report; the general conclusions from the fifth edition of the Global Biodiversity Outlook; and the lessons learned from the implementation of the Strategic Plan for Biodiversity 2011–2020¹⁷ identified in the fifth edition of the Global Biodiversity Outlook.¹⁸

The COP also urged Parties, and invited other Governments, local, and subnational governments, as well as pertinent organisations, to use the reports and to take actions to widely disseminate their findings, including by translating the reports into local languages and by creating other suitable communication products for various stakeholders, as well as to use the reports when putting the Kunming-Montreal Global Biodiversity Framework into practice.¹⁹ The Intergovernmental

13 Agenda item 9A, 15/4, Kunming-Montreal Global Biodiversity Framework, CBD/COP/DEC/15/4, 19 December 2022, Annex, Para. 26.

14 Secretariat, 'Global Assessment Report on Biodiversity and Ecosystem Services | IPBES Secretariat' (17 May 2019) <<https://ipbes.net/node/35274>> accessed 16 February 2023.

The general objective of the assessment is to evaluate the state of biodiversity and ecosystem services, their trends, their effects on human well-being, and the efficacy of available interventions, including the Strategic Plan and its Aichi Biodiversity Targets. The process for evaluating and renewing the Strategic Plan for Biodiversity and its Aichi Biodiversity Targets is predicted to benefit from this deliverable.

15 Decision Adopted by The Conference of the Parties to The Convention On Biological Diversity, CBD/COP/DEC/15/2, 19 December 2022, para. 1.

16 Ibid, para. 2.

17 Unit B, 'Strategic Plan for Biodiversity 2011-2020, Including Aichi Biodiversity Targets' (21 January 2020) <<https://www.cbd.int/sp/>> accessed 17 February 2023.

18 Decision Adopted by The Conference of the Parties to The Convention On Biological Diversity, CBD/COP/DEC/15/2, 19 December 2022, paras.3,5&6.

19 Ibid, para. 7.

Science-Policy Platform on Biodiversity and Ecosystem Services' Global Assessment identified a number of factors that contribute to biodiversity loss, including climate change and land degradation. The COP urged Parties to address these factors urgently in order to address biodiversity loss in a coordinated manner.²⁰

2.3 Review of progress in the implementation of the Convention and the Strategic Plan for Biodiversity 2011-2020 and the achievement of the Aichi Biodiversity Targets

A revised and updated Strategic Plan for Biodiversity, including the Aichi Biodiversity Targets, for the years 2011 to 2020 was adopted by the Conference of the Parties at its tenth meeting, which took place from October 18 to October 29, 2010, in Nagoya, Aichi Prefecture, Japan. This decision is known as decision X/2. This Plan offered a comprehensive framework for biodiversity management and policy development for the whole United Nations organisation as well as the treaties that dealt with biodiversity.²¹ Parties concurred that it would take two years to convert this broad international framework into revised and updated national biodiversity policies and action plans.

2.4 Biodiversity and health

Regarding the relationship between biodiversity and health, the COP 15 encouraged Parties and their subnational and local governments, and invited other Governments, in accordance with national circumstances and priorities, where appropriate, and relevant stakeholders: (a) to take steps towards a long-term and inclusive recovery from the COVID-19 pandemic that support biodiversity preservation and sustainable usage, hence reducing the danger of zoonotic illnesses in the future, while also taking the One Health²² concept into consideration, among other holistic methods;²³ (b) to assist the implementation of the Kunming-Montreal Global Biodiversity Framework by further integrating the One Health approach—among other holistic approaches—into their national biodiversity policies and action plans, as well as national health programmes, if necessary;²⁴ (c) to further support capacity-building and development for mainstreaming biodiversity and health linkages into the implementation of the Kunming-Montreal Global Biodiversity Framework;²⁵ and (d) to strengthen compliance with international and national provisions on access and benefit-sharing, in order to enhance the fair and equitable sharing of benefits arising from the utilization of genetic resources, as well as the fair and equitable sharing of benefits arising from the use of digital sequence information on genetic resources, in the relevant health sectors.²⁶

²⁰ Ibid, para. 8.

²¹ Unit B, 'Strategic Plan for Biodiversity 2011-2020, Including Aichi Biodiversity Targets' (21 January 2020) <<https://www.cbd.int/sp/>> accessed 17 February 2023.

²² One Health is an integrated, unifying strategy with the goal of optimising the wellbeing of humans, animals, and ecosystems in a sustainable manner. It acknowledges the interconnectedness and interdependence of human health, that of domestic and wild animals, plants, and the larger environment (including ecosystems) < 'One Health' <<https://www.who.int/health-topics/one-health>> accessed 17 February 2023.

²³ 15/29. Biodiversity and health, CBD/COP/DEC/15/29, 19 December 2022, para. 1(a).

²⁴ Ibid, para. 1(b).

²⁵ Ibid, para. 1(c).

²⁶ Ibid 1(d).

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COP 15 also invited the Quadripartite for One Health, the One Health High-Level Expert Panel, and other relevant expert groups and initiatives:²⁷ (a) to consider in their work the connections between health and biodiversity, the need for the One Health approach, among other holistic approaches, in accordance with decisions XIII/6 and 14/4, as well as equity and solidarity, and social determinants of health and socioeconomic inequalities between developing and developed countries;²⁸ (b) to contribute with guidance, interdisciplinary education and training, to the implementation of health-related elements and the application of the One Health approach, among other holistic approaches, in the Kunming-Montreal Global Biodiversity Framework;²⁹ (c) To contribute to the development of, and reporting on, health-related indicators of the monitoring framework for the Kunming-Montreal Global Biodiversity Framework;³⁰ and (d) to collaborate with the Executive Secretary in providing Parties with capacity-building, technology transfer, and resource mobilization opportunities for mainstreaming biodiversity and health linkages.³¹

The COP 15 further invited the Global Environment Facility, in accordance with its mandate, as appropriate, to consider providing technical and financial support for mainstreaming biodiversity and health linkages.³² It also invited Parties, other Governments, and all relevant donors and funding organizations in a position to do so, to consider providing technical support and mobilizing resources for mainstreaming biodiversity and health linkages.³³

COP 15 further requested the Executive Secretary, subject to the availability of resources, in consultation with the Bureau of the Subsidiary Body on Scientific, Technical and Technological Advice, and in collaboration with the World Health Organization and the Quadripartite for One Health, to complete the work pursuant to decision 14/4, paragraph 13 (b) and (c) on targeted messages and a draft global action plan, drawing on the deliberations of the resumed session of the twenty-fourth meeting of the Subsidiary Body on Scientific, Technical and Technological Advice, as follows: (a) to produce an updated version of the draft global action plan and targeted messages based on the inputs received from Parties, other Governments, indigenous peoples and local communities, women, youth, and other relevant stakeholders, recognizing the issues of equity, including through the fair and equitable sharing of benefits arising from the utilization of genetic resources as well as the fair and equitable sharing of benefits arising from the use of digital sequence information on genetic resources and traditional knowledge associated with genetic resources; (b) to invite Parties, other Governments, indigenous peoples and local communities, women, youth, and other relevant stakeholders to review the updated version of the draft global action plan; (c) to make the outcomes of this work available for consideration by the Subsidiary Body on Scientific, Technical and Technological Advice at a future meeting, with a view to making recommendations to the Conference of the Parties at its sixteenth meeting.³⁴

27 15/29. Biodiversity and health, CBD/COP/DEC/15/29, 19 December 2022, para. 2.

28 Ibid, 2(a).

29 Ibid (2(b)).

30 Ibid 2(c).

31 Ibid, 2(d).

32 Ibid, para. 3.

33 Ibid, para. 4.

34 Ibid, para. 5.

2.5 Biodiversity and Climate Change

In respect of biodiversity and climate, the Conference of the Parties requested Parties, and invited other Governments and international organizations, to submit their views and information on biodiversity and climate change.³⁵ The COP also requested the Executive Secretary to compile these views and information and to make the compilation available to the Subsidiary Body on Scientific, Technical and Technological Advice.³⁶

It also requested the Subsidiary Body on Scientific, Technical and Technological Advice to further review the item on biodiversity and climate change on the basis of views and information from Parties, other Governments and international organizations, as referred to in paragraph 1 above, as well as relevant scientific and technical information on biodiversity and climate change, at its meeting to be held prior to the sixteenth meeting of the Conference of the Parties.³⁷

These decisions were reached based on the decisions VII/15, IX/16, X/33, XI/19, XII/20, XIII/4, and 14/5, and, in particular, the critical role of biodiversity and ecosystem functions and services for climate change adaptation, mitigation and disaster risk reduction.³⁸

2.6 Recommendations from the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity

The Conference of the Parties, took note of the recommendations emanating from the seventeenth and eighteenth sessions of the United Nations Permanent Forum on Indigenous Issues, and requests the Executive Secretary to continue to inform the Permanent Forum of developments of mutual interest.³⁹

It also welcomed the invitations of the Forum to the Secretariat of the Convention on Biological Diversity to contribute to: (a) a study on the contributions of indigenous peoples to the management of ecosystems and the protection of biodiversity; (b) a set of actions and commitments in relation to conservation and human rights in the context of the Kunming-Montreal Global Biodiversity Framework; and (c) a comparative legal study that analyses the rights of indigenous peoples and the emerging rights of local communities.⁴⁰

Thirdly, the COP decided to take the results of these activities under consideration in the development of its new programme of work on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities from the perspective of the relevance of the knowledge innovations and practices of indigenous peoples and local communities relevant to the conservation and sustainable use of biodiversity, particularly in the Kunming-Montreal Global Biodiversity Framework.⁴¹

35 Agenda item 23, 15/30. Biodiversity and climate change, CBD/COP/DEC/15/30, 19 December 2022, para. 1.

36 Ibid, para. 2.

37 Ibid, para. 3.

38 Agenda item 23, 15/30. Biodiversity and climate change, CBD/COP/DEC/15/30, 19 December 2022, preamble.

39 Agenda item 10C, 15/21. Recommendations from the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity, CBD/COP/DEC/15/21, 19 December 2022, para. 1.

40 Ibid, para. 2.

41 Ibid, para. 3.

Finally, the COP requested the Executive Secretary, subject to the availability of resources, to contribute to the above-mentioned activities, to provide information to the Forum about these and other relevant activities of the Convention, and to carry out commitments to indigenous peoples, in accordance with the Secretary General's system-wide action plan for ensuring a coherent approach to achieving the ends of the United Nations Declaration on the Rights of Indigenous Peoples.⁴²

2.7 Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services

As far as the Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services is concerned, the Conference of Parties welcomed the rolling work programme of the Platform up to 2030, adopted by the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services in its decision IPBES-7/1, noting with appreciation that the request of the Conference of the Parties set out in decision 14/36 has been met, and that work under the six objectives, including the assessments set out in the work programme, is expected to contribute to and be essential for the implementation of the Kunming-Montreal Global Biodiversity Framework.⁴³

The COP also welcomed the ground-breaking efforts of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services to advance the inclusion of indigenous and local knowledge and diverse knowledge systems in all its assessments and other functions through the implementation of its approach to recognizing and working with indigenous and local knowledge in the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services set out in annex II to decision IPBES-5/1, as well as its engagement with self-organized networks and organizations of indigenous peoples and local communities and stakeholders through the implementation of its stakeholder engagement strategy set out in annex II to decision IPBES-3/4, and invites the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services to continue to strengthen these efforts in the implementation of the relevant objectives of the 2030 work programme.⁴⁴

The COP further welcomed the fact that the rolling work programme up to 2030 of the Platform includes objectives related to each of the four functions of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, as well as strengthening communication and engagement of Governments and stakeholders and improvement of the effectiveness of the Platform, implemented in a manner whereby the objectives are mutually supportive.⁴⁵

It also welcomed the approval by the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, at its eighth session, to undertake thematic assessments on the interlinkages among biodiversity, water, food and health ("the nexus assessment"), and on the underlying causes of biodiversity loss and the determinants of transformative change and

42 Ibid, para. 4.

43 Agenda item 15A, 15/19. Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, CBD/COP/DEC/15/19, 19 December 2022, para. 1.

44 Agenda item 15A, 15/19. Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, CBD/COP/DEC/15/19, 19 December 2022, para. 2.

45 Ibid, para. 3.

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options for achieving the 2050 vision (“the transformative change assessment”), and, at its ninth session, to undertake a methodological assessment of the impact and dependence of business on biodiversity and nature’s contributions to people (“the business and biodiversity assessment”), as outlined in the respective scoping reports, as well as the important scientific contribution of these assessments for the implementation of the Kunming-Montreal Global Biodiversity Framework.⁴⁶ The COP 15 also invited Parties and relevant organizations to participate in the assessments referred to in paragraph 4 above, through the formal review processes.⁴⁷

It also welcomed the approval by the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, at its ninth session, of the summaries for policymakers of the Methodological Assessment Report on the Diverse Values and Valuation of Nature, and of the Thematic Assessment of the Sustainable Use of Wild Species, and the acceptance of the chapters of the respective assessments including their executive summaries, and takes note of the progress made in the preparation of the thematic assessment of invasive alien species and their control.⁴⁸

The COP 15 also requested the Subsidiary Body on Scientific, Technical and Technological Advice to consider the findings of the assessments referred to in paragraph 6 above, and to provide recommendations relating to the implementation of the Convention and, in particular, of the Kunming-Montreal Global Biodiversity Framework, for consideration by the Conference of the Parties at its sixteenth meeting.⁴⁹

The COP 15 also took note of the report of the expert workshop convened by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on biodiversity and pandemics, and notes its relevance for the work of the Convention, including the Kunming-Montreal Global Biodiversity Framework, as well as to the work carried out under the Convention on the interlinkages between biodiversity and health.⁵⁰

It also welcomed the cooperation between the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services and the Intergovernmental Panel on Climate Change; took note of the report of the co-sponsored workshop on biodiversity and climate change, noting the conclusions therein; and encouraged the two bodies to continue and further strengthen their collaboration in a transparent and participatory manner, with a view to increasing coherence while avoiding duplication of work.⁵¹

Furthermore, it invited Parties to coordinate their work with the national focal points for the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services and the Intergovernmental Panel on Climate Change in relation to assessments on biodiversity and climate

46 Ibid, para. 4.

47 Agenda item 15A, 15/19. Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, CBD/COP/DEC/15/19, 19 December 2022, para. 5.

48 Ibid, para. 6.

49 Ibid, para.7.

50 Ibid, para. 8.

51 Ibid, para. 9.

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change.⁵² COP 15 further noted that the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, at its tenth session, will consider requests, inputs and suggestions received in time for consideration at that session, including for a second global assessment of biodiversity and ecosystem services and for an assessment on ecological connectivity, as well as potential additional fast track assessments.⁵³

It also invited the Platform to consider the requests contained in the annex to the present decision.⁵⁴ COP 15 also requested the Executive Secretary to regularly and systematically assess and report to the Subsidiary Body on Scientific, Technical and Technological Advice on how to consider deliverables from all functions and processes of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services for the implementation of the Convention, including a forward schedule and regular agenda item in meetings of the Subsidiary Body.⁵⁵

The COP also requested the Executive Secretary to identify views from Parties on how the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services could, within its defined functions of producing further assessments, building capacity, strengthening knowledge and supporting policy, contribute to the review and monitoring process of the Kunming-Montreal Global Biodiversity Framework.⁵⁶

Furthermore, it invited the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services to contribute to the work of the Ad Hoc Technical Expert Group on Indicators for the Kunming-Montreal Global Biodiversity Framework.⁵⁷

The COP 15 also encouraged all Parties and other Governments, as well as subnational governments, to carry out national or subnational assessments, with the full engagement of indigenous peoples and local communities, women, youth, civil society, academia and business, adapting the process of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services to the local contexts, so that these national or subnational assessments can be used as potential input to the rolling work programme of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services and for the implementation of the Kunming-Montreal Global Biodiversity Framework, and urges Parties, and invites other Governments and organizations in a position to do so, to provide technical assistance, capacity-building and financial support, as appropriate.⁵⁸

52 Agenda item 15A, 15/19. Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, CBD/COP/DEC/15/19, 19 December 2022, para.10.

53 Ibid, para. 11.

54 Ibid, para. 12.

Annex:

Requests From The Convention On Biological Diversity For Consideration By The Plenary Of The Intergovernmental Science-Policy Platform On Biodiversity And Ecosystem Services At Its Tenth Session-Request from the Convention on Biological Diversity regarding a second global assessment on biodiversity and ecosystem services.

55 Agenda item 15A, 15/19. Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, CBD/COP/DEC/15/19, 19 December 2022, para. 13.

56 Ibid, para. 14.

57 Agenda item 15A, 15/19. Programme of work of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, CBD/COP/DEC/15/19, 19 December 2022, para. 16.

58 Ibid, para. 17.

2.8 Long-Term Strategic Approach to Mainstreaming Biodiversity Within and Across Sectors

The Conference of the Parties, in the preamble to this decision, recalled Article 6 (b) of the Convention, which requires Parties to 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; reiterated the critical importance of mainstreaming biodiversity across government and society in order to achieve the objectives of the Convention, and the urgent need to mainstream biodiversity in line with the Kunming-Montreal Global Biodiversity Framework; and emphasized the importance of intensified mainstreaming action to achieve the transformational change needed in order to attain the 2050 vision, while acknowledging the specific challenges faced by developing countries in supporting mainstreaming policies and the need for adequate means of implementation and enhanced international cooperation.⁵⁹

It went on to welcome the work of the Informal Advisory Group on Mainstreaming of Biodiversity, as reflected in the progress report of the Executive Secretary to the Subsidiary Body on Implementation at its third meeting as well as the new submissions as compiled in documents CBD/COP/15/INF/10, 11 and 12.⁶⁰ The COP 15 also requested Parties, and invited other Governments, international organizations and relevant stakeholders to submit their views on the draft long-term approach and associated action plan, and to identify ways forward to support implementation of the Kunming-Montreal Global Biodiversity Framework.⁶¹ Furthermore, it requested the Executive Secretary to organize an open-ended online forum through the clearing-house mechanism, to facilitate further views on the reports and outcomes as mentioned in paragraphs 1 and 2 above, and to compile these views in a report, including on an interim process, for consideration by the Subsidiary Body on Implementation at its fourth meeting.⁶²

2.9 Development of a new programme of work and institutional arrangements on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities

The Conference of the Parties, decided to develop a new programme of work on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities aligned with the Kunming-Montreal Global Biodiversity Framework, with the full and effective participation of indigenous peoples and local communities, on the basis of annexes I and II5 to the present decision.⁶³

It also decided to keep under review the programme of work on Article 8(j) and related provisions, as needed, and to reprioritize elements and tasks in order to ensure a programme of work supportive of a human rights approach and coherent with the priorities of the Kunming-

59 Agenda item 16A, 15/17. Long-term strategic approach to mainstreaming biodiversity within and across sectors, CDB/COP/DEC/15/17, 19 December 2022, Preamble.

60 Agenda item 16A, 15/17. Long-term strategic approach to mainstreaming biodiversity within and across sectors, CDB/COP/DEC/15/17, 19 December 2022, para. 1.

61 Ibid, para. 2.

62 Ibid, para. 3.

63 Agenda item 10A, 15/10. Development of a new programme of work and institutional arrangements on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities, CBD/COP/DEC/15/10, 19 December 2022, para. 1.

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Montreal Global Biodiversity Framework, and one which takes into account developments in other relevant international forums and organizations.⁶⁴

The COP 15 also encouraged Parties, according to national legislation and international obligations, to increase efforts to facilitate the full and effective participation of indigenous peoples and local communities as on-the-ground partners in the implementation of the Convention, including by recognizing, supporting and valuing their customary laws, collective actions, cosmocentric worldviews and diverse values, including the efforts of indigenous peoples and local communities to protect and conserve lands and waters that they traditionally occupy or use towards the goals of the Convention, and engaging them, as appropriate, in the preparation of national reports, in the revision and implementation of national biodiversity strategies and action plans, and in the process for implementing the Kunming-Montreal Global Biodiversity Framework.⁶⁵

It also requested Parties and other Governments to report on the implementation of the current programme of work on Article 8(j) and related provisions, and once adopted, of the new programme of work on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities, as well as on the application of the various voluntary guidelines and standards developed under the aegis of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions and adopted by the Conference of the Parties, as appropriate, through national reports, and to relevant subsidiary bodies, in order to determine progress made.⁶⁶

It further invited Parties, as per decision X/40 B, paragraph 7, to consider designating national focal points for Article 8(j) and related provisions in support of existing national focal points, to facilitate and disseminate culturally appropriate communications with indigenous peoples and local community organizations, and to promote the effective development and implementation of the programme of work on Article 8(j) and related provisions.⁶⁷

COP 15 also requested the Executive Secretary, subject to the availability of resources, to strengthen and support the network of national focal points for Article 8(j) and related provisions, as well as of the national focal points to the Convention on Biological Diversity, enabling them to play a key role at the national level in such areas as (a) national and subnational arrangements for the full and effective participation of indigenous peoples and local communities, (b) national arrangements for the protection, preservation and promotion of traditional knowledge and customary sustainable use, with the free, prior and informed consent of the holders of that knowledge, (c) facilitating the input of indigenous peoples and local communities into the drafting

64 Ibid, para. 2.

65 Agenda item 10A, 15/10. Development of a new programme of work and institutional arrangements on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities, CBD/COP/DEC/15/10, 19 December 2022, para. 3.

66 Ibid, para. 4.

67 Ibid, para. 5.

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of national reports, and (d) promoting capacity-building and development for indigenous peoples and local communities at the national and local levels, on issues related to the Convention.⁶⁸

The COP also requested the Executive Secretary to convene an ad hoc technical expert group on indigenous peoples and local communities, and the Kunming-Montreal Global Biodiversity Framework, subject to availability of financial resources, which should meet prior to the twelfth meeting of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions, with terms of reference as contained in annex III to the present decision, to provide advice on the further elaboration of the new programme of work on, and the possible institutional arrangements for, Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities, including the future modus operandi for the implementation of Article 8(j), considering the possible establishment of a subsidiary body, continuing the working group, or other arrangements.⁶⁹

2.10 Capacity-Building and Development and Technical and Scientific Cooperation

The Conference of the Parties recognised that many Parties, in particular developing country Parties, might not yet have the necessary capacities to fully implement the Kunming-Montreal global biodiversity framework and related decisions taken by the Conference of the Parties at its fifteenth meeting, and further highlighted the need for enhanced cooperation to address these capacity gaps.⁷⁰ In addition, it took that the Kunming-Montreal global biodiversity framework and related decisions are to be implemented in accordance with national priorities and capabilities, and also took into account the specific needs of developing country Parties, in particular the least developed countries and small island developing states, and countries with economies in transition, also taking into consideration the special situation of those that are most environmentally vulnerable, such as those with arid and semi-arid zones, coastal and mountainous areas, as well as indigenous peoples and local communities, women and youth.⁷¹

The COP 15 thus adopted the long-term strategic framework for capacity-building and development to support priorities determined by Parties in their national biodiversity strategies and action plans for the implementation of the Kunming-Montreal global biodiversity framework, contained in annex I to the present decision.⁷²

It also urged Parties and invited other Governments, indigenous peoples and local communities, women and youth, the capacity-building task force of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, relevant organizations and other stakeholders, to use the long-term strategic framework for capacity-building and development referred to in paragraph 1 above, as a flexible framework in the design, implementation, monitoring and

68 Agenda item 10A, 15/10. Development of a new programme of work and institutional arrangements on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities, CBD/COP/DEC/15/10, 19 December 2022, para. 6.

69 Ibid, para. 7.

70 Agenda item 13A, 15/8. Capacity-building and development and technical and scientific cooperation, CBD/COP/DEC/15/8, 19 December 2022, Preamble.

71 Agenda item 13A, 15/8. Capacity-building and development and technical and scientific cooperation, CBD/COP/DEC/15/8, 19 December 2022, Preamble.

72 Ibid, para. 1.

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evaluation of their capacity-building and development initiatives and programmes supporting the achievement of the vision, mission, goals and targets of the Kunming-Montreal global biodiversity framework.⁷³

COP 15 also urged Parties and invited other Governments to identify and prioritize capacity-building and development needs, in partnership with indigenous peoples and local communities, and with the participation of women and youth and other relevant stakeholders, to integrate capacity-building and development components in their national biodiversity strategies and action plans while updating them in line with the Kunming-Montreal global biodiversity framework, and/or develop dedicated biodiversity capacity-building and development action plans, and programmes, as appropriate.⁷⁴

Notably, it also invited universities and other academic institutions to develop and integrate into their curricula specialized and transdisciplinary academic courses and programmes and/or expand and strengthen existing ones, generate and share new knowledge, and implement continuing education programmes to support the Kunming-Montreal global biodiversity framework with the full and effective participation of indigenous peoples and local communities, women and youth.⁷⁵ COP 15 also urged Parties and invited other Governments and relevant organizations to recognize the important role of, and promote science, technology, innovation and other knowledge systems in supporting the implementation of the goals and targets of the Kunming-Montreal global biodiversity framework towards achieving the 2050 Vision of “living in harmony with nature”.⁷⁶ In order to support the priorities established by Parties in their national biodiversity strategies and action plans for the implementation of the Kunming-Montreal global biodiversity framework, the long-term strategic framework for capacity-building and development is intended to serve as a roadmap for the capacity-building and development efforts of government and non-government actors, including indigenous peoples and local communities.⁷⁷ By promoting coherence, efficiency, and effectiveness of capacity-building and development efforts at all levels through strategic, coordinated, and harmonized approaches, it seeks to catalyse institutionalized capacity-building and development interventions that are robust, coordinated, and delivered in a holistic and complementary manner.⁷⁸

According to this strategic framework, capacity is defined as "the ability of people, organisations, and societies as a whole to achieve the biodiversity-related goals and action targets," and capacity-building and development is understood as "the process by which people, organisations, and society as a whole unleash, strengthen, create, adapt, and maintain capacity over time to achieve positive biodiversity results." The enabling environment, the organisational level, and the person level are all taken into consideration when discussing capacity-building and growth.⁷⁹

73 Ibid, para. 4.

74 Ibid, para. 9.

75 Agenda item 13A, 15/8. Capacity-building and development and technical and scientific cooperation, CBD/COP/DEC/15/8, 19 December 2022, Para. 12.

76 Ibid, para. 17.

77 Annex 1, para. 1, Agenda item 13A, 15/8. Capacity-building and development and technical and scientific cooperation, CBD/COP/DEC/15/8, 19 December 2022.

78 Ibid.

79 Annex 1, para. 3.

2.11 Resource mobilization

Using Article 20 of the Convention as the basis for providing and mobilizing resources from all Sources, the Conference of the Parties emphasized the importance of urgently increasing the mobilization of financial resources from all sources, domestic and international, public and private, with a view to closing the biodiversity financing gap and making adequate and predictable resources available in a timely manner for the effective implementation of the Kunming-Montreal Global Biodiversity Framework.⁸⁰

The COP thus, among other things, acknowledged the pledges made to finance the implementation of the global biodiversity framework, recognized that further efforts are needed, and encouraged developed country Parties, other donors, and financial institutions to facilitate efficient access to these resources through multilateral and bilateral channels.⁸¹

Furthermore, it recognised efforts by other relevant instruments and institutions to integrate biodiversity in their financing and programming decisions and further encourages them to align their financing with the goals and targets of the global biodiversity framework.⁸² It also recognised the ongoing need of developing countries for other means of implementation, including technical and financial support and capacity-building, including to undertake domestic action to mobilize resources and monitor and report thereon.⁸³

It further encouraged Parties and invites other Governments, organizations, the private sector and other major stakeholder groups to take the strategy for resource mobilization into consideration as a flexible framework guiding implementation of the targets of the Kunming-Montreal Global Biodiversity Framework related to resource mobilization, in accordance with national circumstances.⁸⁴

3. Implications of the COP 15 Outcomes on the Developing Countries: Challenges and Prospects

The COP15 Agreement has received criticism for its watered-down ambitions, weak language, and stagnation in important areas such as reducing extinction of plants and animals, protecting intact ecosystems, and combating unsustainable production and consumption. Nevertheless, it reflects successes in paving the way for resource mobilization and monitoring frameworks.⁸⁵

States agreed to a deal known as "30 by 30," which became an often contested goal throughout discussions, to protect 30% of land, inland water, coastal, and marine resources by 2030. While local and indigenous people worked hard over the last two years to ensure that their lands and rights were acknowledged and protected in the objectives, many NGOs also regarded 30 by 30 as a lifeline for species languishing in the midst of the biodiversity catastrophe. Today, 17% of the

80 Agenda item 12A, 15/7. Resource mobilization, CBD/COP/DEC/15/7, 19 December 2022, Preamble.

81 Ibid, para. 6.

82 Ibid, para. 9.

83 Ibid, para. 10.

84 Ibid, para. 13.

85 'Nations Adopt Kunming-Montreal Global Biodiversity Framework' (*Mongabay Environmental News*, 20 December 2022) <<https://news.mongabay.com/2022/12/nations-adopt-kunming-montreal-global-biodiversity-framework/>> accessed 20 February 2023.

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planet's land area is protected, more than double the Aichi objectives' aims, and more than triple the 10% target for marine conservation.⁸⁶

Despite fierce opposition from developed nations, developing nations steadfastly defended the fundamental idea of common but differentiated responsibilities (CBDR) when addressing the connected issue of "Biodiversity and Climate Change" at the UN Convention on Biological Diversity's fifteenth Conference of the Parties (COP15).⁸⁷

Very diverse perspectives between developed and developing nations caused the impasse over whether or not to keep the CBDR concept, which was in square brackets (not agreed/unresolved) throughout the progress of the negotiation texts. The former refused to acknowledge it as a Fundamental tenet. The latter emphasised that it is a general idea that is incorporated in Principle 7 of the 1992 Rio Declaration on Environment and Development and, as a result, pertains to the CBD. Moreover, it was noted that Article 20 explicitly references it (on financial resources).⁸⁸

A long-running contentious issue, in addition to the CBDR principle, was the use of the contentious term "nature-based solutions" (NbS) throughout the negotiating texts, not just for the biodiversity and climate change agenda item but also for other agenda items, such as the Kunming-Montreal Global Biodiversity Framework. Most poor nations disagreed with this idea, arguing that NbS has not yet been approved by the CBD and instead preferring to refer to the previously approved strategy of "ecosystem-based approaches" (EBAs). Yet, poor nations finally made significant compromises in order to secure an agreement on keeping "nature-based solutions and/or ecosystem-based methods" in the name of "compromise" and moving forward with adoption of a decision on the agenda item. It is now acceptable to use this formulation.⁸⁹

The CBDR principle, which was referred to in Paragraph 8 of the conference room paper on the biodiversity and climate change agenda item (CRP.12), which stated that global strategies adopted to address biodiversity and climate change must take into account common but differentiated responsibilities and respect, was not reciprocated by developed countries despite developing countries exercising the most flexibility on the NbS issue. A proposed decision wording was being considered for approval together with the CRP.12 document.⁹⁰

Notably, the Framework urges countries to set biodiversity objectives and to submit, at least every five years, updates on their progress in the form of national biodiversity plans, even though it is not legally obligatory (violations of the Framework do not have stringent legal repercussions). These strategies will resemble "nationally defined contributions," which are the papers created by countries in accordance with the Paris Agreement outlining their climate change objectives. Although there is no immediate need for states to report on biodiversity, they will still be required

86 Ibid.

87 'CBD COP15: Developing Countries Defend Principle of Common but Differentiated Responsibilities' <<https://www.twn.my/title2/biotk/2023/btk230101.htm>> accessed 20 February 2023.

88 'CBD COP15: Developing Countries Defend Principle of Common but Differentiated Responsibilities' <<https://www.twn.my/title2/biotk/2023/btk230101.htm>> accessed 20 February 2023.

89 'CBD COP15: Developing Countries Defend Principle of Common but Differentiated Responsibilities' <<https://www.twn.my/title2/biotk/2023/btk230101.htm>> accessed 20 February 2023.

90 Ibid.

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to closely monitor any changes in biodiversity and make sure that their domestic policies are in line with the Framework's goals.⁹¹ In addition to the Paris Climate Accord, this agreement offers a solid framework for global biodiversity action, laying the groundwork for a resilient, climate-neutral, and nature-friendly society by 2050.⁹²

Contrary to COP27, poor nations were unable to accomplish their goal of creating a separate fund supported by wealthier nations. To assist poor nations, who are frequently the most biodiversity-rich, in achieving the global goals set forth by the new framework, the African group, in particular, argued for the creation of a "Global Biodiversity Fund" that is separate from climate finance and development aid. African nations and other developing nations demanded that rich nations mobilise \$100 billion annually for biodiversity. Instead, the final language establishes a target of \$200 billion per year from all sources, including the public and commercial sectors, by 2030. According to the document, rich nations must provide at least \$30 billion annually by 2030 and \$20 billion annually by 2025. (including official development assistance).⁹³

One thing that is clear from the outcomes of the UN Biodiversity COP 15 is that some good progress was made in supporting developing world efforts in biodiversity conservation, some funding mechanisms were established and the recognition of the role of indigenous communities in biodiversity conservation have a better chance now thanks to these outcomes. It is important that African countries keep pursuing the ambitious targets set out in COP 15 because, as it has been pointed out, biodiversity conservation and climate change mitigation all play a major role in achievement of socio-economic rights of citizens as envisaged under the 2030 Agenda or Sustainable Development Goals. Each country should adopt these outcomes based on their own unique domestic needs as well as available resources.

4. Conclusion

The primary objective of COP15 was for countries to come to an agreement on a post-2020 global biodiversity framework with goals and initiatives to combat nature and biodiversity loss. The Kunming-Montreal Global Biodiversity Framework (the "Framework") and 23 objectives to be accomplished by 2030 were both officially endorsed by the states during COP15.⁹⁴ These outcomes portend hope for the reversal of biodiversity loss across the world and form a good basis for governments to work closely with other stakeholders, including communities, in conservation efforts. COP 15 laid a lot of emphasis on the role of communities in conservation efforts, and

91 Harper KR Claudia, 'COP15: Outcome of Global Biodiversity Summit' (*Passle*, 22 December 2022) <<https://sustainablefutures.linklaters.com/post/102i42g/cop15-outcome-of-global-biodiversity-summit>> accessed 20 February 2023.

92 'Historic Outcome at COP15 - a Chance to Keep Our Planet Livable for Generations to Come! | EEAS Website' <https://www.eeas.europa.eu/eeas/historic-outcome-cop15-chance-keep-our-planet-livable-generations-come_en> accessed 20 February 2023.

93 Gita Briel, 'Trade-related Outcomes From the UN Biodiversity Conference (COP15),' 23 Dec 2022 <https://www.tralac.org/blog/article/15852-trade-related-outcomes-from-the-un-biodiversity-conference-cop15.html> accessed 20 February 2023.

94 Harper KR Claudia, 'COP15: Outcome of Global Biodiversity Summit' (*Passle*, 22 December 2022) <<https://sustainablefutures.linklaters.com/post/102i42g/cop15-outcome-of-global-biodiversity-summit>> accessed 20 February 2023; 'COP15: Nations Adopt Four Goals, 23 Targets for 2030 In Landmark UN Biodiversity Agreement' (*Convention on Biological Diversity*) <<https://www.cbd.int/article/cop15-cbd-press-release-final-19dec2022>> accessed 20 February 2023.

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governments should pursue this further in order to achieve biodiversity conservation, and using the envisaged funding mechanisms, empower these communities as a way of combating poverty, as this will enhance fight against environmental degradation due to diversified sources of livelihoods.

Utilizing Africa's Natural Resources to Fight Poverty

Abstract

Africa is well-endowed with a mass of natural resources. All over Africa there are many exploration and exploitation activities going on.¹ Africa has a large quantity of natural resources like oil, gold, diamonds, iron, cobalt, copper, bauxite, silver, uranium, titanium, petroleum among others.² 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 utilization 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.

A cursory glance of Africa would paint a picture of a rich continent with a people enjoying a high standard of living and excellent development. Such a continent would enjoy good infrastructure, high employment levels, high quality education, good health and long life expectancy. It would be expected to be 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. Africa's resources are fueling the world economy while Africa itself remains economically crippled; exploited and neglected. Sadly, the national leaders who are entrusted with the mandate of safeguarding natural resources for the benefits of the people have by and large betrayed the trust. The level of corruption in the application of revenue from the natural resources is high. 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 utilization of their natural resources. Poverty level is very high with a minority of extremely wealthy class and a majority of poor people.³

This paper critically examines how the natural resources of Africa can be used in the realization of basic human rights and particularly alleviating poverty among the African people. It also identifies challenges facing African economies and existing opportunities that can be harnessed to enable Africa utilize its resources to fight poverty. This paper also expresses the optimism that Africa has a bright future and what needs to be done is to ensure effective utilization of its wealth of resources. To this end, the paper makes a number of recommendations. These relate to the policy, legal and institutional frameworks. The ultimate aim would be to utilize Africa's resources to fight and eventually eradicate poverty.

1. Introduction

The *Universal Declaration of Human Rights of 1948*⁴ (UDHR) set the stage for the recognition, protection and promotion of human rights the world over. In its Preamble, the Declaration captured important concepts that include *inter alia*: recognition of the inherent dignity and the equal and

1 A.Rajaram, "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 7th January 2014.

2 World Resources, 'Natural Resources of Africa', available at www.worldresources.envi.org/natural-resources-africa/ Accessed on 7th January 2014.

3 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 8th January 2014.

4UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [Accessed 10 February 2014].

inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world; faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and determination to promote social progress and better standards of life in larger freedom; States co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms; and a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.⁵

The Declaration places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. Article 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights*, (ICCPR) 1966⁶ and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966.⁷ ICCPR on its part provides under Article 47 that nothing in that Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Further, ICESCR under Article 1.2 provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

From the foregoing, it is noteworthy that the main objective of all the major international legal instruments on human rights is the alleviation of human suffering and to ensure total wellbeing of all. The absence of such wellbeing is usually perceived to be poverty. Although at times it is viewed in a narrow manner, poverty can be conceptualized in a broad manner and indeed it has been posited as the recognition that it is not limited to lack of income only, but comprises of deprivations in areas of health, education, participation and security.⁸ Further, human poverty has been said to be a denial of human rights as it arguably infringes on *inter alia* human freedom and destroys

⁵ Preamble

⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 10 February 2014]

⁷*International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

⁸Gordon,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 15th February 2014].

human dignity. It is viewed as an intrusion into human dignity.⁹ Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.¹⁰

Since the aforementioned international legal instruments places the human rights implementation obligations on the states, it therefore follows that they are also under the obligation to use their state resources in ensuring the protection and promotion of such human rights and ultimately eradicating poverty amongst their peoples. Indeed, Principle 5 of the *Rio Declaration on Environment and Development 1992*¹¹ is to the effect that all States and all people shall 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. Poverty eradication is at the heart of achieving sustainable development in the world, and unless it is dealt with, then sustainable development remains a mirage.

This paper seeks to critically examine how the natural resources of the African continent can be used in the realization of basic human rights and particularly alleviating poverty amongst the African people. The author argues that it is indeed possible to fight poverty successfully using these natural resources for the betterment of the lives of the African people. The assertion herein is that equitable use and management of these natural resources holds the key to winning the fight against poverty amongst the African people and eventually achieving sustainable development. It has been rightly posited that Peace, development and environmental protection are interdependent and indivisible.¹² In the absence of one, it arguably becomes impossible to enjoy the rest.

1.2 Status of Natural Resources in Africa as a Continent

Natural resources have no definite definition. However, Article 260 of the Constitution of Kenya, 2010 broadly defines natural resources to mean *the physical non-human factors and components, whether renewable or non-renewable including sunlight, surface and ground water, forests, biodiversity and genetic resources and rocks, minerals, fossil fuels and other sources of energy*.¹³

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 as identified in the foregoing definition.¹⁴ This also makes Africa become possibly one of the biggest contributors to the percentage of the world's natural resources.¹⁵ It has been posited that Africa harbours approximately 10% of the world's known oil reserves, 40% of gold and 80-90% of the chromium and platinum metal group.¹⁶ Although they are not evenly distributed each state has a fair share of

9 A. Byaruhanga Rukooko, '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

10 *Vienna Declaration and Programme of Action*, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993

11 UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992)

12 Rio Declaration Environment and Development, Principle 25

13 Constitution of Kenya, 2010, Article 260.

14 *Ibid.*

15 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 17th February, 2014].

16 CNN, "How Africa's Resources fuel the World", July 2013.

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its own natural resources thus resulting in diversity on the availability of these resources. These include organic natural resources ranging from forests and the forest products in general and other land based resources including oil, gold, iron, cobalt, uranium, copper, bauxite, silver and petroleum which constitute the mineral and gas based resources. A recent World Economic Survey by CNN has shown that most manufacturing industries in the world derive the greatest percentage of raw materials in form of mineral resources from Africa.¹⁷

In Africa, oil is produced in Nigeria, Libya, Egypt, Sudan, Angola, Gabon, Congo, Cameroon, Tunisia, Equatorial Guinea, Gambia, Democratic Republic of Congo (DRC) and Cote d'Ivoire. Gold mining is done in South Africa, Congo and West African Belt. There are diamond deposits in Tanzania, Botswana, Zimbabwe, DRC and South Africa. Tantalum mining is done in DRC. Platinum and rhodium ores are also found in Africa. South Africa and Guinea exports large amounts of cobalt and chromium used to manufacture airplanes.¹⁸ Niger, Namibia and Malawi are exporters of uranium. In Kenya, there is soda, cement and ongoing oil exploration in Turkana. Uganda produces copper.

This is evident from the reports on the ongoing exploration activities in the continent. Oil exploration is ongoing in many countries and has yielded positive results.¹⁹ Most African countries depend on agriculture for food and exports. Agricultural products from Africa are exported to the global market but fetch relatively low prices since there is little or no value addition done in Africa. These mineral resources are used in the manufacture of cars, electronics, airplanes, batteries, jewellery, electricity and oil. The greatest percentage of platinum and rhodium comes from Africa.²⁰ In jewellery manufacturing, Africa produces more than 50% of the world's diamonds, 75% of platinum and 20% of gold. In 2012, Africa produced 10% of the world's oil which is about 9.4 million barrels per day.²¹ This oil was mainly from Nigeria, Angola, Algeria, Libya, Sudan and Egypt.²²

Economic talks about African economy observe that Africa's resources have fueled economic growth but most Africans have not benefited.²³

Available at www.edition.cnn.com/2013/07/25/world/Africa/-resources-fuel-world/index.htm>[Accessed on 15th January 2014]

17 World Economic Survey, 2013, Op.cit.

18 "How Africa's Resources fuel the World" Courtesy of CNN July 2013,

Available at www.edition.cnn.com/2013/07/25/world/Africa/-resources-fuel-world/index.htm> Accessed on January 15th, 2014.

19 For instance oil exploration activities by Tullow Oil Company in Turkana, Kenya. There are other multinational oil companies carrying on exploration in Namibia, Ethiopia and Uganda.

20 South Africa is a major producer of platinum and rhodium at 72% and 83% respectively, Zimbabwe is the second largest producer of platinum.

21 Cost per barrel of oil is about \$100.

22 *How Africa's Resources fuel the World*, op. cit.

23 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 January 15, 2014]

2. International Legal Framework on People-Centred Use and Management of Natural Resources and Sustainable Development

The right of a people to own, utilize and control natural resources within their countries is an internationally recognized right.²⁴ 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.

2.1 Permanent Sovereignty over Natural Resources, resolution 1803 (XVII), 1962

In 1952, the United Nations General Assembly requested the Commission on Human Rights to prepare recommendations concerning international respect for the right of peoples to self-determination. The Commission on Human Rights recommended establishment of a commission to investigate the right of peoples and nations to permanent sovereignty over their natural wealth and resources, as they noted that this right formed a “basic constituent of the right to self-determination”.²⁵ Consequently, the General Assembly adopted resolution 1803 (XVII) on the “Permanent Sovereignty over Natural Resources” on 14 December 1962 by 87 votes in favour to 2 against, with 12 abstentions.²⁶ This was due to the recognition that, firstly, the need for promotion and financing of economic development in under-developed countries and, secondly, the right of peoples to self-determination as provided for in the draft international covenants on human rights.²⁷ This right gives a people power to use, control and derive benefits from the extraction of natural resources. It requires those entrusted with the mandate of safeguarding natural resources to do so for the benefit of their people. Under the foregoing UN Resolution on sovereignty over resources, States have rights including the right: to dispose freely of the natural resource; to freely explore and exploit natural resources; to regain effective control and to compensation for damage; to use natural resources for national development; to manage natural resources pursuant to national environmental policy; to an equitable share in benefits of transboundary natural resources; to regulate foreign investment; and to expropriate or nationalize foreign investment (right to determine the conditions of nationalization and the amount of compensation).²⁸

However, central to this argument is the international calls for sustainable development in the utilization of these natural resources to achieve economic development.

24UDHR, ICCPR, ICESCR, Banjul Charter.

25 Preamble, General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"; Kilangi, A., Introductory note, Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII), New York, 14 December 1962, *Audiovisual Library of International Law*, Available at http://legal.un.org/avl/ha/ga_1803/ga_1803.html [Accessed on 22 February, 2014].

26 “the right of peoples and nations to permanent sovereignty must be exercised in the interest of their national development and of the well-being of the people of the State concerned” (Article 1); “The exploration, development and disposition of such resources as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable” (Article 2); “inherent and overriding right of a state to control the exploitation and the use of its natural resources” (Preamble)

27 Kilangi, A., Introductory note, Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII), New York, 14 December 1962, *Audiovisual Library of International Law*, op.cit.

28 Preamble, General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"; See also Voigt, C., Principles in IEL, *International Environmental Law*, page 17, Available at <http://www.uio.no/studier/emner/jus/jus/JUS5520/h12/undervisningsmateriale/3.-principles-in-iel.pdf> [Accessed on 22 February, 2014].

As already highlighted, Article 1.2 of *International Covenant on Economic, Social and Cultural Rights* (ICESCR)²⁹ provides that all people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.³⁰

2.2 Declaration of the United Nations Conference on the Human Environment, 1972

As early as 1972, the World Governments were already deliberating on how resources can be used in a way that benefits people but ensures conservation and protection of natural resources for the sake of future generations. This was discussed in depth at the famous United Nations Conference on the Human Environment, held in Stockholm, from 5 to 16 June 1972. Declaration of the United Nations Conference on the Human Environment (*Stockholm Declaration of 1972*)³¹ was adopted during this Conference where the discussion revolved around what later came to be known as *sustainable development* (emphasis ours).³² Noteworthy is the *Declaration's* recognition that man is both the creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. The Declaration was a confirmation of the Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.³³ Further, it proclaims that Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. 'In our time man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. The Declaration observes that wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment.'³⁴

Principle 2 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 asserts 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.

Principle 21 thereof further provides that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

29 Published on 16th December 1966, came to force on 3rd January 1976.

30 Initially addressed in general terms under Article 22 of the United Nations Declaration of Human Rights 31 U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972), the United Nations Conference on the Human Environment, Stockholm, 5 to 16 June 1972. This became the first global document outlining the general principles for the management of natural resources and the environment.

32 This has been defined as the Development that meets the need of the present without compromising future generations to meet their own needs. The term 'sustainable development' was popularised by the Brundtland Commission in its 1987 report *Our Common Future*, United Nations, 1987. "Report of the World Commission on Environment and Development." General Assembly Resolution 42/187, 11 December 1987.

33 Article 3, *Stockholm Declaration 1972*

34 *Ibid*, Article 3

Therefore, even as this declaration recognises people and Governments' right to use natural resources for improvement of the quality of life, it calls for use and management that will ensure their conservation and preservation. Indeed, this is well articulated under Principle 13 which observes that in order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

It therefore follows that although each state has exclusive jurisdiction within its territory and people and permanent sovereignty over the natural resources therein, the use and management of such natural resources should not be done in ways blind to the need for environmental conservation but the same should go hand in hand.

2.3 The World Charter for Nature

The *World Charter for Nature*³⁵, in its preamble recognizes that one of the reasons for the adoption of this charter was the conviction that the benefits which could be obtained from nature depended on the maintenance of natural processes and on the diversity of life forms and that those benefits were jeopardized by the excessive exploitation and the destruction of natural habitats.³⁶ General Principle 1 thereof is to the effect that nature shall be respected and its essential processes shall not be impaired. Further, Principle 7 provides that in the planning and implementation of social and economic development activities, due account shall be taken of the fact that the conservation of nature is an integral part of those activities. Principle 8 is to the effect that in formulating long-term plans for economic development, population growth and the improvement of standards of living, due account shall be taken of the long-term capacity of natural systems to ensure the subsistence and settlement of the populations concerned, recognizing that this capacity may be enhanced through science and technology.

The other relevant provision is principle 9 which is to the effect that the allocation of areas of the earth to various uses shall be planned, and due account shall be taken of the physical constraints, the biological productivity and diversity and the natural beauty of the areas concerned. Principle 10 asserts that natural resources should not be wasted, but used with a restraint appropriate to the principles set forth in the present Charter, in accordance with the following rules: Living resources shall not be utilized in excess of their natural capacity for regeneration; and the productivity of soils shall be maintained or enhanced through measures which safeguard their long-term fertility and the process of organic decomposition, and prevent erosion and all other forms of degradation. The foregoing principles are just but a few of the many provisions in the *Charter* which advocate for sustainable use and management of natural resources. This Charter thus imposes a duty on all persons and States to use natural resources in a way that ensures their conservation and protection.³⁷

35 UN General Assembly, *World Charter for Nature.*, 28 October 1982, A/RES/37/7,

36 Ibid, Preamble

37 Principle 24

2.4 1992 Rio Declaration on Environment and Development

Another important international instrument is the 1992 *Rio Declaration on Environment and Development*.³⁸ This Declaration sought to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving sustainable development. Principle 2 thereof recognises that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Further, Principle 3 is to the effect that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. Rio Declaration sought to promote utilisation of natural resources for development but within the practices that promote sustainable development.

2.5 Agenda 21

*Agenda 21*³⁹ 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.⁴⁰ It sought 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. Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.⁴¹ Further, clause 3.7(d) 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.

Governments, with the assistance of and in cooperation with appropriate international, nongovernmental and local community organizations, should also 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.⁴² Agenda 21 recognises that integral to poverty eradication is, together with international support, the promotion of economic growth in developing countries that is both sustained and sustainable

38 UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992)

39 (A/CONF.151/26, vol. II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21

40 Ibid, Preamble

41 Ibid, Clause 3.2

42 Ibid, Clause 3.8

and direct action in eradicating poverty by strengthening employment and income-generating programmes.⁴³

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.⁴⁴ *Agenda 21* basically seeks to enable all people to achieve sustainable livelihoods through integrating factor that allows policies to address issues of development, sustainable resource management and poverty eradication simultaneously.⁴⁵

2.6 African Charter for Human and People's Rights (Banjul Charter)⁴⁶

Regionally, the *African Charter for Human and People's Rights* (Banjul Charter)⁴⁷ echoes the provisions of ICESCR, under Article 21 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 are a people to be deprived of it. Under Article 21.2, in case of spoliation, the dispossessed people have the right to the lawful recovery of its property as well as to an adequate compensation. To safeguard this right, the same Article provides that State parties shall undertake to eliminate all forms of economic exploitation particularly practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.⁴⁸ Governments bear the primary responsibility for equitably managing resources for the benefit of their people. Any act of derogation or violation of this right is greatly condemned under the various international and regional legal instruments on human rights.⁴⁹

2.7 The African Convention on the Conservation of Nature and Natural Resources⁵⁰

The main objectives of this comprehensive regional Convention are: 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.⁵¹

Notably, this Convention provides that in taking action to achieve the objectives of this Convention and implement its provisions, the Parties shall be guided by the following principles: the right of all peoples to a satisfactory environment favourable to their development; the duty of States, individually and collectively to ensure the enjoyment of the right to development; and the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner.⁵² Article VIII is to the effect that the Parties shall take all necessary measures for the protection, conservation, sustainable use and rehabilitation of vegetation cover through *inter alia*: adopting scientifically-based and sound traditional conservation, utilization and management

43 Ibid, Clause 3.3

44 Ibid, Clause 4.5

45 Ibid, Clause 3.4

46 Adopted 27 June 1981, entered into force 21 October 1986)

47 Adopted 27 June 1981, entered into force 21 October 1986)

48 Article 21(6)

49 See Article 30, UDHR; Article 5, ICESCR; and Article 21.2, Banjul Charter.

50 OAU, 1001 UNTS 3

51 Ibid, Article II

52 Ibid, Article III

plans for forests, woodlands, rangelands, wetlands and other areas with vegetation cover, *taking into account the social and economic needs of the peoples concerned* (emphasis ours), the importance of the vegetation cover for the maintenance of the water balance of an area, the productivity of soils and the habitat requirements of species. Further, Article XX, dealing with capacity building, education and training, is to the effect that the Parties shall *inter alia* promote environmental education, training and awareness creation at all levels in order to enhance their peoples' appreciation of their close dependence on natural resources and their understanding of the reasons and rules for the sustainable use of these resources.

2.8 United Nations Declaration on the Rights of Indigenous Peoples⁵³

This Declaration was adopted with the awareness that indigenous peoples have 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.⁵⁴ It therefore came in to *inter alia* correct such situations. Article 3 thereof provides that indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The Declaration acknowledged that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self determination of all peoples by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.⁵⁵

Further, Article 26 thereof provides that: Indigenous peoples have the 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 shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. Also important is Article 29(1) which is to the effect that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. Further, States are to establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

The provisions of this Declaration are consistent with Principle 22 of the RIO Declaration which is to the effect 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. Further, States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

⁵³ 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on Thursday, 13 September 2007

⁵⁴ *Ibid*, Preamble

⁵⁵ *Ibid*; See also Article 3

One theme that evidently runs across all the foregoing legal instruments is the value of people as the centre of natural resources use and management and especially in the sustainable development agenda. The resources are first and foremost to be used for improving livelihoods and empowering the people in all aspects of their lives including, political, social and economic.

The overall wellbeing of the people must take centre stage in the discussion for sustainable use and management of natural resources and subsequent sustainable development.

3. Poverty as a Human Rights issue in Africa

The World Bank defines poverty as “the economic condition in which people lack sufficient income to obtain certain minimal levels of health services, food, housing, clothing and education generally recognized as necessary to ensure an adequate standard of living.”⁵⁶

It is estimated that about 40 per cent of the world's population live with the reality or the threat of extreme poverty, and that one in every five persons are living in a state of poverty so abject that it threatens survival.⁵⁷

Human rights are basically divided into three groups namely: Civil and political rights, Social, economic and cultural rights and Collective rights or ‘solidarity rights’. Collective rights include *inter alia*, the right to development and self-determination. The right to self-determination requires access to resources. Human rights ideas lie at the core of theories of distributive justice.⁵⁸ Distributive justice is said to concern itself with the fair allocation of resources among the members of a community.⁵⁹ These resources extend to all dimensions of social life and assume all forms, including income, economic wealth, political power, work obligations, education, shelter and health care.⁶⁰ Absence of distributive justice can only engender poverty in any given society. It is generally agreed that no one measure can capture all aspects of poverty.

The Commonwealth Human Rights Commission's Report⁶¹ conceived poverty in three different ways. Firstly, it defined poverty as a situation in which there is shortage of essential facilities, resulting from inadequate income'. Secondly, there is the definition of poverty based on basic or fundamental needs, that is, a failure to meet the basic human needs; or to remain deprived from such needs is a state of poverty. The third and final way of defining poverty is in respect of lack of opportunities.

⁵⁶World Bank, *Handbook on Measuring Poverty*, Chapter 2, Available at

http://siteresources.worldbank.org/INTPA/Resources/4299661259774805724/Poverty_Inequality_Handbook_Ch02.pdf Accessed on 15th February, 2014

⁵⁷ United Nations Development Programme (UNDP), *Human Development Report 2005: International cooperation at a crossroads: Aid, trade and security in an unequal world* (New York, United Nations, 2005), p. 24.; See also generally United Nations High Commissioner for Human Rights, *Principles And Guidelines For A Human Rights Approach To Poverty Reduction Strategies*, HR/PUB/06/12

⁵⁸ Austin, M.J.(Eds.), ‘Understanding Poverty From Multiple Social Science Perspectives’, A Learning Resource for Staff Development In Social Service Agencies, p.136, *Bay Area Social Services Consortium*, Available at <http://cssr.berkeley.edu/bassc/public/CompletePovertyReport082306.pdf> Accessed on 15th February, 2014

⁵⁹ Distributive Justice, Beyond Intractability, Available at <http://www.beyondintractability.org/essay/distributive-justice>, Accessed on 15th February, 2014

⁶⁰ Ibid

⁶¹ 2001

Amartya Sen rightly observes that poverty does not merely mean lack of adequate income or inability to meet basic human needs. According to him, some people have good health and can live a productive life but are deprived of suitable opportunities.⁶² Further, he argues that the implied denial of opportunities pushes them into unemployment resulting in loss of income and finally inability to meet the basic human needs.⁶³ He asserts that lack of opportunity in economic and political life is the root cause of poverty and therefore should not be neglected while defining poverty.

Poverty is generally conceived as the lack of necessities which include basic food, shelter, medical care, and safety and are seen as necessary based on shared values of human dignity. People are said to be in poverty when they live below a standard which their society recognises as a reasonable minimum.⁶⁴ This is also referred to as poverty line which is that level of income below which an individual or household cannot afford on a regular basis the necessities of life.⁶⁵

3.1 World Summit for Social Development, 6-12 March 1995, Copenhagen

The *World Summit for Social Development* held 6-12 March 1995 in Copenhagen, Denmark, saw world Governments adopt a Declaration and Programme of Action which focused on the consensus on the need to put people at the centre of development. The world leaders pledged to make the conquest of poverty, the goal of full employment and the fostering of stable, safe and just societies their overriding objectives.⁶⁶

The world's leaders agreed on what are commonly referred to as the ten commitments and these include to *inter alia*: eradicate absolute poverty by a target date to be set by each country; support full employment as a basic policy goal; promote social integration based on the enhancement and protection of all human rights; achieve equality and equity between women and men; accelerate the development of Africa and the least developed countries; ensure that structural adjustment programmes include social development goals; increase resources allocated to social development; create "an economic, political, social, cultural and legal environment that will enable people to achieve social development"; attain universal and equitable access to education and primary health care; and strengthen cooperation for social development through the United Nations.⁶⁷

62 See 'Amartya Sen's Theory of Poverty', *From the Selected Works of Mubashshir Sarshar*, January 2010

63Ibid

64 Veit-Wilson, J., *Poverty*, John Veit-Wilson's Papers on Concepts, Definitions and Measures of Poverty, On Income Adequacy and on Minimum Income Standards, p.1, *Routledge International Encyclopaedia of Social Policy* (2006), Available at <http://www.staff.ncl.ac.uk/j.veit-wilson/documents/povertyriesp.pdf> [Accessed on 15th February, 2014].

65 Our Common Future, Chapter 2: Towards Sustainable Development, From A/42/427. Our Common Future: Report of the World Commission on Environment and Development, Oxford: Oxford University Press, 1987

66 World Summit on Social Development, Copenhagen 1995: A Brief Description, *Gateway to Social Policy and Development*, Available at <http://www.un.org/esa/socdev/wssd.htm> [Accessed on 15th February, 2014].

67Ibid

3.2 United Nations Conference on Sustainable Development ("Rio+20")

The *United Nations Conference on Sustainable Development* ("Rio+20")⁶⁸ which took place in Rio de Janeiro, Brazil in June 2012, saw governments *inter alia* 'renew their commitment to sustainable development and to ensure the promotion of an economically, socially and environmentally sustainable future for the planet and for present and future generations. This would involve eradicating poverty which they recognised as the greatest global challenge facing the world today and an indispensable requirement for sustainable development. In this regard they therefore committed themselves to freeing humanity from poverty and hunger as a matter of urgency.⁶⁹

Under Article 1.6, the Rio+20 Report recognized that people are at the centre of sustainable development and in this regard state parties strive for a world that is just, equitable and inclusive, and they committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all. Further, under Article 1.8 thereof, State parties also reaffirmed the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, women's empowerment and the overall commitment to just and democratic societies for development. The two main themes at the Conference were: how to build a green economy to achieve sustainable development and lift people out of poverty; and how to improve international coordination for sustainable development.⁷⁰

Some scholars have argued that achieving genuine respect for human rights may constitute the greatest challenge facing Africans in the new millennium.⁷¹ It has been posited that more than seventy-five percent of the African continent's 700 million people live below the poverty line, and ten of the world's thirteen poorest countries are in Africa.⁷² This poverty has a direct link with lack of the necessary resources required to enable people achieve self-determination in terms of catering for their basic needs of food, shelter, health and education to mention but a few. This consequently makes them lead lives devoid of the human dignity as contemplated under international human rights instruments.⁷³

4. Challenges

The period between 1960s-70s saw many African countries attain independence from colonial domination. Among the key reasons for the rebellion by Africans was harsh economic exploitation due to land alienation for settler farming, natural resources extraction and forced labour. The independent Africa was ushered with much optimism. Africans trusted their new independent governments to safeguard their economic and social interests. There were expectations that wealth

68 United Nations, *Report of the United Nations Conference on Sustainable Development*, Rio de Janeiro, Brazil 20–22 June 2012, A/CONF.216/16

69 Ibid, Article 1.2

70 What is "Rio+20"?, Available at <http://www.un.org/en/sustainablefuture/about.shtml> [Accessed on 22 February, 2014].

71 Magnarella, P. J., "Achieving Human Rights in Africa." 4(2): 2. [online] URL:<http://web.africa.ufl.edu/asq/v4/v4i2a2.htm> [Accessed on 15th February, 2014].

72 Ibid

73 "All human beings are born free and equal in dignity and rights." Article 1, *Universal Declaration of Human Rights* (UDHR), 1948

would trickle down and create jobs for the people.⁷⁴ It was expected that revenue from resources would be shared equitably and for the benefit of all. It was expected that the independent governments would be democratic and transparent. However, for most African countries, the expectations of a prosperous independent country remained a mirage. Poverty remains rampant amongst many people across many African nations. This may be attributed to such factors as discussed herein below.

4.1 Corporate dominance by foreign multinational companies

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.⁷⁵

4.2 Globalization

Globalization has simply been described as increasing and intensified flows between countries of goods, services, capital, ideas, information and people, which produce cross border integration of a number of economic, social and cultural activities.⁷⁶ There are said to be four main driving forces behind increased interdependence namely: trade and investment liberalization; technological innovation and the reduction of communication costs; entrepreneurship; and global social networks.⁷⁷ Generally, the international market operates under a global platform with a liberalized and free market. In the liberalized market, there is free movement of goods and services around the world. Regulations and legal interventions are kept at minimum and operate only to facilitate movement of goods and services.

There are remarkable benefits that come with globalization. For instance, there has been introduction of new technologies, access to new markets and the creation of new industries. Foreign aid remains crucial to developing countries. However, the practical situation in the global market is that there are unfair rules that are disadvantageous to developing countries due to their reduced bargaining powers as against many of the developed world countries.⁷⁸ Advocates of globalization have contended that it affords the poor countries and their citizenry the chance to develop economically and raise their standards of living.⁷⁹ Opponents of globalization on the other

74 John Pilger, "Apartheid Did Not Die" in "Freedom Next Time" (Edition, 2006); "Mandela's Greatness may be assured, but not his Legacy" NewAfrican Jan. 2014.

75 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]

76 Bertucci, G., and Alberti, A., 'Globalization and the Role of the State: Challenges and Perspectives' pg 1, Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf> [Accessed on 24 February, 2014].

77 Ibid

78 World Bank World Economy Report, 'Sustainable Development Challenges' *World Economic and Social Survey* 2013 E/2013/50/Rev. 1ST/ESA/344.

79 Globalization 101, 'What Is Globalization?' *The Levin Institute* - The State University of New York, Available at <http://www.globalization101.org/what-is-globalization/> [Accessed on 24 February, 2014].

hand have argued that the creation of an unregulated international free market works for the benefit of multinational corporations in the Western world at the expense of local enterprises, local cultures, and common people.⁸⁰ They disagree with those who support globalisation in that it is concerned with the welfare of the rich and the developed world while denying the poor countries and their citizenry the chance to develop economically and raise their standards of living. The more developed countries with high bargaining power enjoy the biggest share of the benefits of globalization. The rich industrialized countries formulate policies to make developing countries liberalize domestic markets for easier access but the same is not reciprocated in the domestic markets of industrialized countries. This makes Africa vulnerable since it can be extensively exploited yet it cannot readily access the national markets of developed countries.⁸¹ As a result, African domestic industries have collapsed while foreign investments continue thriving. It has been argued that international policies on globalization are deliberately calculated to ensure continued economic domination by the industrialized countries.⁸² This only serves to impoverish the people in the developing states especially Africa.

It has been argued that globalization has led to a decline in the power of national governments to direct and influence their economies especially with regard to macroeconomic management.⁸³

4.3 Poor Governance

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.⁸⁴ Economic corruption remains rampant in most African countries. Some corrupt African leaders are said to use natural resources to satisfy their selfish interests at the expense of the citizens. It is noteworthy that many at times African governments do not uphold the key principles of democracy, transparency and accountability in governance. As a result, the subjects minimally, if at all, participate in the use and management of natural resources in their countries and benefit sharing is often absent.⁸⁵

Some countries export and earn heavy revenue from resources, but the revenue is misappropriated by corrupt leaders. It has been asserted that corruption deepens poverty, it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths.⁸⁶

80 Ibid

81 For example, under North American Free Trade Agreement, USA has entered into agreement opening its market only to its neighbours, that is, Canada and Mexico. Developing countries are excluded yet NAFTA members can under WTO's GATT agreement access the markets of developing countries.

82 J. Stiglitz, *"Globalization and its Discontents"* (Penguin Books 2002).

83 Smith, M. K. and Doyle M. 'Globalization' *the encyclopedia of informal education* (2002), Available at www.infed.org/biblio/globalization.htm [Accessed on 24 February, 2014].

84 Sundoy Dare, 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

85 Akindele, S.T., et. al., *Globalization, Its Implications and Consequences for Africa*,

86 *The Durban Commitment to Effective Action Against Corruption*, 1999

4.4 Lack of Industrial Development

Most African countries lack advanced industries for processing and value addition of raw materials. This can be attributed to high capital requirements to set up such industries and the technology gap.⁸⁷ It has been asserted that Africa lost its status as a net exporter of agricultural products in the early 1980s when prices for raw commodities fell and local production stagnated, making agricultural imports grow faster than agricultural exports, and by 2007 reached a record high of \$47bn, yielding a deficit of \$22bn. Further, it is said that the value of agricultural exports from Thailand is now greater than for the whole of the African continent below the Sahara.⁸⁸ This has been blamed on bad weather and climate change. Technology inferiority is also partly to blame.

4.5 Unfair and Inequitable Economic Policies.

World economy under the 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.⁸⁹

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. Few or none of the members from developing countries are invited in the policy negotiation and formulation table.

4.6 Use of Poor Technology

Although the raw materials are plenty, they cannot be effectively harnessed without good and effective modern technology most African domestic industries. The use of poor technology in Africa may be attributed to the high expense of technology.⁹⁰ Most African countries cannot meet the high capital requirements in acquisition of technology in terms of the know-how itself, the equipment and equipping workers with the necessary skills.⁹¹ This has forced many countries to export raw materials instead of processing them in the domestic industries.

4.7 Climate Change

Climate change has been identified as a fundamental threat to sustainable development and the fight against poverty.⁹² Human activities have released large amounts of carbon dioxide and other

87 Ngwenya, S., "Africa has to Shed off the Resource Curse Stigma" The Star Newspaper, Friday January 3, 2014.

88 Skoll World Forum, On Africa: The Value Addition Imperative In Agriculture, *Forbes*, Available at <http://www.forbes.com/sites/skollworldforum/2013/08/21/on-africa-the-value-addition-imperative-in-agriculture/> [Accessed on 24 February, 2014].

89 The WTO and other organizations - World Trade Organization, www.wto.org > ... > wto & other organizations

90 *Africa's Technology Gap: Case Studies on Kenya, Ghana, Uganda and Tanzania*, pp.11-12, United Nations Publications, July 2003, UNCTAD/ITE/IPC/Misc.13

91 Ibid.

92 The World Bank Group, Visit <http://www.worldbank.org/en/topic/climatechange> [Accessed on 22 February, 2014].

greenhouse gases into the atmosphere, thereby causing global warming. One of the most devastating effects of global warming is desertification which problem directly affects people's livelihoods especially in Africa. "Desertification" has been defined in the United Nations Convention to Combat Desertification (UNCCD) to refer to land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities.⁹³ Further, UNCCD defines land degradation as a reduction or loss, in arid, semi-arid, and dry sub-humid areas, of the biological or economic productivity and complexity of rain-fed cropland, irrigated cropland, or range, pasture, forest, and woodlands resulting from land uses or from a process or combination of processes, including processes arising from human activities and habitation patterns, such as: (i) soil erosion caused by wind and/or water; (ii) deterioration of the physical, chemical and biological or economic properties of soil; and (iii) long-term loss of natural vegetation.⁹⁴

This phenomenon affects people's livelihoods especially those who directly rely on natural resources for their livelihoods, thus leading to poverty. Those living in such dry areas do often rely on the goodwill of the government to support them and this insecurity reduces them to leaving miserable lives.

5. Natural Resources and Realization of Human Rights in Africa

Article 22 of UDHR, 1948 guarantees that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Most African countries have ratified ICESCR and the Banjul Charter and integrated them into their national laws. These instruments appeal to State parties to take all the necessary measures and to use the state resources in ensuring realization of enjoyment of the human rights of their people. Indeed, some countries have integrated the right of a people to benefit from and control extraction of natural resources into their Constitutions. For instance, Kenya promulgated her Constitution on 27th August 2010. Chapter Four thereof envisages the Bill of Rights and fundamental freedoms. Article 43 provides for economic and social rights of all the Kenyan people. The Article guarantees the right to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security.

Of great significance to this discourse is Article 1.4 of the Rio+20 Declaration in which the State parties recognized 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.⁹⁵ They also reaffirmed the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for

93 10, *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, Ch XXVII 10 VOL-2 Chapter XXVII ,Paris, 14 October 1994

94 Ibid, Article 1 (f)

95 Rio+20 Report, Op. cit. Article 1.4

all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting 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.

6. Opportunities

Although Africa has constantly featured in the UN and World Bank World poverty index, all is not lost. There is high potential and opportunities for economic recovery and prosperity in Africa. The latest world economy statistics was published in March 2013 in which Africa was indicated as the poorest continent. Despite this fact, World Bank projects that most African countries will hit 'middle income status'⁹⁶ by 2025 provided that the current growth rates continue.⁹⁷ In 2013, it was reported that Africa has a high economic potential since it was ranked as the world's fastest growing continent, at 5.6% a year and GDP is expected to rise by an average of over 6% a year between 2013 and 2023.⁹⁸

Similarly, Global Multidimensional Poverty Index 2013⁹⁹ indicates some African countries as countries with the most reducing Multidimensional Poverty Index. They include Ghana, Rwanda, Uganda, Ethiopia, Kenya and Tanzania. This shows that African countries can fight poverty if they are willing to utilize their resources effectively.

Currently, there are lucrative value addition opportunities through COMESA and COMESA-EAC-SADC tripartite region in a number of mineral sectors including coal, natural gas, mineral oil, copper, iron and steel, manganese, phosphates and nickel. It is the beneficiation and value addition of mineral deposits and other commodities that holds the potential for growth of African industries. In effect, Africa will be able to create jobs, regional market and equitable health.¹⁰⁰ Today, Africa has embraced education. Many of its inhabitants have had access to education and with the consolidation of the democratic process, expect their popularly elected governments to deliver on the promises of employment and improving quality of life for all.

Under Article 31 of the RIO+20 Report, state parties emphasized that sustainable development must be inclusive and people-centred, benefiting and involving all people, including youth and children. They also recognized that gender equality and women's empowerment are important for sustainable development and our common future. They therefore reaffirmed their commitments to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision-making.

96 Equivalent to at least 1000 USD per person per year.

97 See World Bank World Economy Report, 'Sustainable Development Challenges' *World Economic and Social Survey* 2013 op. cit.

98 Ibid.

99 United Nations, *UNDP Human Development Report 2013 & Alkire and Conconi Report 2013*, available at <http://sustainabledevelopment.un.org/content/documents/3528alkire.pdf> [Accessed on 10th January 2014].

100 Ngwenya, S., "Africa has to Shed off the Resource Curse Stigma" *The Star Newspaper*, Friday January 3, 2014.

It has been observed that the view that poverty is a shortage of income ought to be changed to one that perceives poverty as 'unfreedoms' of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions. Amartya Sen asserts that undeniably, low income can contribute to that, but other factors such as the lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role. He opines that Poverty can be reduced through addressing all these issues.¹⁰¹ Addressing these issues requires mobilization of resources by the state. This mobilization depends on a number of factors which include but are not limited to sound institutional and legal frameworks, streamlining the governance system, empowering the citizenry to participate in the governance matters amongst other measures.

6.1 Establishment of a strong legal framework.

For effective protection of the people's rights to benefit and control the utilization natural resources, there is a need for a strong national legal and institutional framework on efficient use and management of natural resources. Such legislation should take into consideration mechanisms to ensure transparency and accountability in the extraction, use and application of revenue from natural resources, including benefit sharing. This will ensure that natural resources are utilized in accordance with the law and all revenue accounted for. This in turn will highly contribute towards fighting poverty in Africa. Principle 11 of the Rio declaration on Environment and Development requires that states enact effective environmental legislation. It states that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Laws should therefore be more practical rather than theoretical in their drafting and application.

In exercising permanent sovereignty over natural resources States must as a matter of obligation use the resources for national development and the well-being of the people and ensure conservation and preservation of the same.¹⁰² Indeed, this is echoed under the Constitution of Kenya 2010, Article 69(1), which lay out the state obligations toward environment to include *inter alia*: ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.

6.2 Value Addition

To reduce poverty in Africa and steer the continent to its full potential, value addition model is the best alternative rather than a commodity export model. By this model, Africans would use the resources they have as anchors for regional growth clusters and then ensure that they attract value-

101 Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), pg. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, Available at http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf [Accessed on 24 February, 2014].

102 UN Res. 1803/XVII, 1962

addition industries.¹⁰³ 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.

Over time there have been successful value addition efforts in Africa. For instance, Ethiopia has adopted value addition approach to its leather industry.¹⁰⁴ In Kenya, value addition has been achieved in the horticulture industry.¹⁰⁵ Kenya has a well-established export base of highly processed horticultural products to the overseas market in the European Union.¹⁰⁶

Exporting fully processed goods instead of raw commodities is said to result in a much higher percentage of their value staying in African countries and many more opportunities for families to gain livelihoods and exit poverty.¹⁰⁷

6.3 Transparency in Governance

Under Article 1.10 of the RIO+20 Report, State parties acknowledged that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. Further, they reaffirmed that to achieve sustainable development goals there is need for institutions at all levels that are effective, transparent, accountable and democratic.¹⁰⁸

Indeed, one of the guiding principles in the implementation of the Programme of Action based on a strengthened framework of partnership for successfully achieving the objectives of the *Programme of Action for the Least Developed Countries for the Decade 2011-2020*, is Country ownership and leadership.¹⁰⁹ Article 13 thereof is to the effect that the ownership, leadership and primary responsibility for the least developed countries own development lies with them. The Plan observes that the Least developed countries (most of which are in Africa) have the right and responsibility to formulate and execute their own coherent economic and development policies and strategies and identify their own national priorities, including striking a balance in the allocation of resources between economic and social sectors. Perhaps more important the observation that

103 Ngwenya,S., "*Africa has to Shed off the Resource Curse Stigma*" OP. cit.

104 In Ethiopia, the value addition strategy on the leather industry has revolved around a combination of an export tax on unprocessed hides, incentives for value added manufacturing firms, and aggressive measures on technology and skills transfer. The export tax has forced reluctant European manufacturers to relocate tanning and manufacturing activities to Ethiopia. Consequently, the composition of Ethiopia's leather exports has changed dramatically. For instance, the share of hides in leather group exports declined from 70% in 2004 to zero per cent in 2011. The share of finished leather increased from less than a third to 93% in the same period.

105 Horticulture products are among the Kenya's leading exports. The horticulture industry in Kenya has undergone significant transformation and Kenyan producers have been able to meet increasingly stringent food safety regulations, demanding market requirements and private standard.

106 Ngwenya, S., '*Africa has to Shed off the Resource Curse Stigma*' Op. cit.

107 *Value Added in Africa*, Available at <http://www.ideaonline.ie/content/value-added-africa> [Accessed on 24 February, 2014]

108 RIO+20 Report, Op. Cit.

109 Article 13, *Programme of Action for the Least Developed Countries for the Decade 2011-2020*, A/CONF.219/3, Fourth United Nations Conference on the Least Developed Countries, Istanbul, 9-13 May 2011

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Development partners should support least developed countries in the design and implementation of their development strategies. Transparency in governance cannot therefore be substituted with foreign aid in order to realize economic development and ultimate uplifting of the people from poverty.

There are a lot of non-transparent dealings in resource extraction in Africa. Besides insufficient or unavailability of information, there are other complicated issues of tax avoidance and evasion, profit concealment and anonymous company ownerships and corruption. To counter concealment of profits, African governments should put in place mechanisms that ensure systematic monitoring of the value and quantity of exports by extracting companies. There should be a clear export taxation system and policy. Availability and access to information can counter anonymous company ownerships which in turn would reduce money laundering and corruption. This would call for the cooperation of the international community since anonymous company ownership is a global problem which is making countries lose huge revenues to fraudsters.¹¹⁰

Africa has lost huge revenues to fraudsters. For example, Democratic Republic of Congo has recently lost an estimated US\$ 1.36 billion through a protracted systematic undervaluation and sale of mineral assets to unknown buyers.¹¹¹ Members of the international community should put in place measures to deal with false companies in their jurisdictions. Although there have been attempts by the international community to resolve this problem through the establishment of Extractive Industries Transparency Initiative (EITI), a lot needs to be done. It would be helpful to establish such similar institutions at local and regional levels.

Transparency is necessary in utilization of the accruing natural resource revenue. It should be applied reasonably, fairly and equitably for the benefit of all. For example, by 2011, Equatorial Guinea had grown on average of 17%, making it the fastest growing economy in the world joining the leagues of high-income countries.¹¹² Despite this remarkable economic growth, three quarters of Equatorial Guinea's population live in poverty and the country records high child mortality rates.¹¹³

Transparency also transcends the taxation system. 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.

6.4 Job Creation

Most of African countries have a rapidly growing population. There is high unemployment in the continent. Under Article 24 of the RIO+20, State parties expressed deep concern about the

110 "Equity in Extractives: Stewarding Africa's Natural Resources for All" (Africa Progress Report 2013).

111 A.Rajaram, "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>

112 "Equity in Extractives: Stewarding Africa's Natural Resources for All" (Africa Progress Report 2013).

113 Ibid

continuing high levels of unemployment and underemployment, particularly among young people, and noted the need for sustainable development strategies to proactively address youth employment at all levels. In this regard, they recognized the need for a global strategy on youth and employment building on the work of the International Labour Organization (ILO).¹¹⁴ Further, Article 30 thereof is to the effect that state parties did recognize that many people, especially the poor, depend directly on ecosystems for their livelihoods, their economic, social and physical well-being, and their cultural heritage. For this reason, it is essential to generate decent jobs and incomes that decrease disparities in standards of living in order to better meet people's needs and promote sustainable livelihoods and practices and the sustainable use of natural resources and ecosystems. The *International Covenant on Economic, Social and Cultural Rights* protects numerous fundamental rights, *inter alia* the right to work under Articles 6 and 7.

Even if Africa were to improve on resource utilization without creating jobs for the people, the revenue from resources would be inadequate to cater for the needs of the people. Thus, there is a need to create jobs for the rapidly growing population. This would of course import the need to provide good education to equip people with skills and knowledge suitable for the job market. For effective job creation, Africa must also invest in its people through quality education. The money generated from the natural resources should also be invested in the education sector so as to empower the people.

Education and job opportunities will empower the poor. It is generally accepted that effective poverty reduction cannot be achieved without the empowerment of the poor.¹¹⁵

6.5 Institutional Reforms

The quality of institutions matter because of the pivotal role they play in good administration and performance towards economic growth.¹¹⁶ Public institutions may be economically classified as inclusive or extractive. Inclusive institutions manage and apply resources for the public good and benefit of all. Conversely, extractive institutions apply and manage public resources for the benefit of certain influential individuals at the expense and sufferance of the majority.¹¹⁷ It is important that measures are taken to ensure that these institutions are used for the interests of the wider society as against promoting the interests of a few people in a country.

In natural resource management across African countries, there is a great need for ensuring quality participation of the people in the use and management of natural resources. This can be achieved in many ways including communities and/or local people's participation through any community based natural resource management approaches, as would be applicable to various countries.

Regarding this, it has been argued that in order to increase environmental management efficiency and improve equity and justice for local people, there is need to explore participatory and

114 RIO+20 Report, Op. Cit

115 United Nations High Commissioner for Human Rights, *Principles And Guidelines For A Human Rights Approach To Poverty Reduction Strategies*, HR/PUB/06/12, page 9

116 Ibid.

117 Acemalogue and Robinson, 2012.

Community-Based Natural Resource Management (CBNRM).¹¹⁸ However, the assertion is that decentralization requires both power transfers and accountable representation. It is noteworthy that across many states, local representatives remain accountable and subject to central authorities and their powers can be given and taken at the whim of central agents. Thus, choosing representative and accountable local institutions is key for equity, justice, and efficiency. Accountability of local decision makers to the people, that is, local democracy is arguably a viable mechanism for achieving greater equity and efficiency in resource management.¹¹⁹ Reforms aimed at ensuring greater representation and quality participation by all can be an effective tool for ensuring that more benefits from natural resources exploitation flows to the common people and eventually alleviating poverty.

6.6. Sound, fair and equitable globalization Policies

Good political environment is critical for economic development. Over time, African politics have been founded on ethnicity and greed. Africa should provide for an enabling environment by creating an initiative for policy dialogue and conducting informed democratic discussions of alternative policies.

A good market policy should clearly state the role of the government interventions and market forces. While markets are at the center of the economy, the government has a role to play as well. The two are complementary.¹²⁰ There is a need to reinvent the government to make it more efficient and responsive. The international community should formulate rules that promote fairness and equality. Decision making should be inclusive; both the rich and poor countries should participate. Some proponents of globalization argue that contrary to what is often claimed, economic globalization is not a blind force. They argue that it is individual governments that set the policies and the rules of the globalized economy. Thus, economic globalization is, according to them, the result of policy decisions made by individual countries that allow global market forces to operate. To make globalization beneficial to states, it is argued, the actual issue that ought to be looked into is determining which countries set the rules, whoever benefits from the favor and how best the least powerful countries can also influence policy-making in the international arena, and do it in ways that will benefit them.¹²¹

Under Article 1.11 of the RIO+20 Report, the State parties reaffirmed their commitment to strengthen international cooperation to address the persistent challenges related to sustainable development for all, in particular in developing countries. In this regard, the state parties reaffirmed the need to achieve economic stability, sustained economic growth, promotion of social equity and protection of the environment, while enhancing gender equality, women's empowerment and equal opportunities for all, and the protection, survival and development of children to their full potential,

118 Ribot, J.C., 'Democratic Decentralization Of Natural Resources: Institutionalizing Popular Participation' Pg.1, *World Resources Institute report* (2002)

119 Ibid, pg.1

120 This is because while government cannot remedy every market failure, markets by themselves cannot solve any societal problem. For example, the government can play a key role in reduction of inequality, unemployment, protection of domestic industries and control of pollution

121 Bertucci, G., and Alberti, A., 'Globalization and the Role of the State: Challenges and Perspectives' Op. cit. pg 2

including through education. Through exploitation of national and international resources and international cooperation, the foregoing can indeed be achieved.

It has been stated that while "integrating with the world economy is a powerful vehicle for growth and poverty reduction in developing countries,... it would be still more powerful if the rich countries further increased the openness of their own economies" (Stern, 2000, p. 5).¹²²

There is need for fair and equitable ground rules of globalization for the benefit of all countries especially the third world countries from Africa.

Even in the face of globalization, there is a need to uphold and respect the right of people and states to self-development especially in light of exploiting natural resources for their own empowerment. Any economic engagement ought to show this recognition. The right of peoples to self-determination as contemplated under the various international and regional legal instruments is said to depend on the following elements: the free choice of political status and of economic, social and cultural development; peoples' sovereignty over their natural resources; equality of peoples; non-discrimination; sovereign equality of states; peaceful settlement of disputes; good faith in the accomplishment of obligations and in international relations; the non-use of force; international cooperation and the respect by states of their international commitments, in particular regarding human rights.¹²³ The international consensus on the making of sound, fair and equitable globalization policies can demonstrate the recognition of every state's ability to engage competitively and productively in the global arena, for the benefit of all.

6.7. Access to information/Public Participation

The role of information in economic growth cannot be overlooked. There is need for an open access to information. To this end, a free and independent press is a critical check on abuses and is necessary for democracy. The one with the information has a higher bargaining power. Developing countries lack sufficient information on global market hence cannot bargain their place. Principle 10 of the Rio Declaration on Environment and Development provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. Further, 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. The Rio Declaration requires that states should facilitate and encourage public awareness and participation by making information widely available. Scholars argue that it is imperative to allow the resources that are vital for people's way of life to be managed by those that depend on them.¹²⁴ It has been posited that co-management of resources can balance state-level priorities of efficiency and equity against local concerns for self-governance and participatory decision-making.

122 Ibid., pg 6

123 Ozden, M. and Golay, C., *'The Right of Peoples To Self-Determination And To Permanent Sovereignty Over*

Their Natural Resources Seen from A Human Rights Perspective' Pg. 13, Part of a series of the Human Rights Programme of the Europe-Third World Centre (CETIM)

124 Clarke, R.A., 'Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications', *5/2 Law, Environment and Development Journal* (2009), p. 130, pg. 132

Available at <http://www.lead-journal.org/content/09130.pdf> [Accessed on 24 February, 2014].

Consequently, this direct user involvement in negotiations is believed to increase the legitimacy of rules and leads to better compliance.¹²⁵

Such participation and/or inclusion in decision making demand a well informed people. There is need to realize that if citizens are to gain maximum benefits from natural resources use and management, they need to be well informed. It has been asserted that the three “access rights” of access to information, participation in decision-making and access to justice in environmental matters empower individuals to have a meaningful voice in decisions that affect sustainable development.¹²⁶ Environmental democracy entails the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.¹²⁷ It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.¹²⁸ Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.¹²⁹

6.8 Use of Modern Technology

For Africa to export manufactured products to the international market there is a need to use the best modern and advanced technology in value addition process. At the moment the technology used in Africa in the extraction of natural resources is poor. There is little value addition technology. This explains why most of Africa's exports are raw materials or semi-processed products. On this issue, the way forward would be for Africa to invest highly in modern technology through human resource development and acquisition of technology products. The ability to create, acquire and adapt new technologies is said to be a critical requirement for competing successfully in the global marketplace.¹³⁰ There has been contention that Africa's technological gap could be the source of its increasing economic deterioration since other developing regions (East and South-East Asian countries) are constantly upgrading their own technological capabilities, and the global marketplace has become increasingly liberalized and competitive.¹³¹

It has been argued and rightly so that science can essentially contribute to solving the global problems of hunger, poverty, and environmental degradation.¹³² Science can be useful in enhancing yield and productivity, bridging yield gaps, and protecting yield gains; exploiting the

125 Ibid, pg. 139

126 ‘Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries’, pg 11, *European Regional Report*, The Access Initiative Europe; See also *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention)

127 Hazen, S., (1998), *Environmental Democracy*, Available at <<http://www.ourplanet.com>> [Accessed on 25 February, 2014].

128 Ibid

129 Ibid

130 *Africa's Technology Gap: Case Studies on Kenya, Ghana, Uganda and Tanzania*, pg iii, Op.cit.

131 Ibid

132 FAO, ‘Science And Technology To Meet The Challenges: Food-Security, Poverty-Alleviation, And Sustainability’ Available at <http://www.fao.org/docrep/005/ac483e/ac483e08.htm> [Accessed on 24 February, 2014].

gene revolution (biotechnology); benefiting from information and communication technology revolution and promoting knowledge-based development; managing natural resources (land, water, and biodiversity); addressing environmental concerns; managing climate change; and minimizing adverse impacts of natural disasters.¹³³ Sound scientific and technology knowledge application to agriculture, fisheries, and forestry, and to rural, coastal, and urban ecosystems and human systems within which hunger and poverty persist can help alleviate the problem of poverty.¹³⁴

6.9 Climate Change

The *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification* has a very broad and potentially effective objective which is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas.

In order to achieve this objective the Convention further provides for guiding principles which are *inter alia*: the Parties should ensure that decisions on the design and implementation of programmes to combat desertification and mitigate the effects of drought are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels; the Parties should, in a spirit of international solidarity and partnership, improve cooperation and coordination at sub regional, regional and international levels, and better focus financial, human, organizational and technical resources where they are needed; the Parties should develop, in a spirit of partnership, cooperation among all levels of government, communities, non-governmental organizations and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use; and the Parties should take into full consideration the special needs and circumstances of affected developing country parties, particularly the least developed among them.¹³⁵

There are of course many other international instruments which seek to address the problem of climate change. If these principles are actualized, it is possible to effectively address this problem of climate change in order to achieve sustainable development. There is need 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.

7. Conclusion

From the foregoing, it is evident that there is a hope for Africa. There are many opportunities for effective utilization of resources to fight poverty. The potential for Africa's natural resources is high. If it can utilize its resources maximally, effectively and sustainably, Africa has the potential

133 Ibid

134 Ibid

135 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Principle 3

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to eradicate poverty amongst its people through equitable utilization of its resources. The change may be gradual, even discouraging, but the ultimate goal of eradicating poverty is worth pursuing. For effective utilization of Africa's resources to fight poverty, there is a need to adopt the foregoing recommendations since if all of them were effectively applied, they will highly contribute to reduction of poverty in Africa.

Under Article 23 of the RIO+20 Report, the state parties reaffirmed the importance of supporting developing countries in their efforts to eradicate poverty and promote empowerment of the poor and people in vulnerable situations, including removing barriers to opportunity, enhancing productive capacity, developing sustainable agriculture and promoting full and productive employment and decent work for all, complemented by effective social policies, including social protection floors, with a view to achieving the internationally agreed development goals, including the Millennium Development Goals.

It is noteworthy that each African country faces specific challenges to achieve sustainable development and eradication of poverty.¹³⁶ However, if each of these countries explores the best resource exploitation practices to make maximum use of the natural resources in their territory, it is indeed possible to eradicate poverty to achieve sustainable development, equity, justice, non-discrimination and fairness in society and Africa as a continent.

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 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

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.

4 *Ibid.*

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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.

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 . .

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.

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. . . 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 animal in case of disease, injury or delivery of young; or wilfully, without reasonable cause or

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].

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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

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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 The Act also prohibits the use of traps and other devices for the purpose of capturing or killing an animal.³²

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).

32 Ibid, sec. 6(1).

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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 sustained high or low leve

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

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).

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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.⁴¹ 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.⁴²

4.4 Wildlife Conservation and Management Act, 2013

The Wildlife Conservation and Management Act, 2013⁴³ is to apply to all wildlife resources on public, community and private land, and Kenya territorial waters.⁴⁴ 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.⁴⁵ 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.⁴⁶

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 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.⁴⁷

41 Ibid, Regulation 5(1).

42 Ibid, Regulation 6.

43 Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

44 Ibid, sec. 2.

45 Ibid, sec. 89(1).

46 Ibid, sec. 89(2).

47 Wildlife Conservation and Management Act, 2013, sec. 92; See also sec. 95.

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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.⁴⁸

The Act also prohibits any person from knowingly or recklessly using any substance whose effect is to poison any wildlife species.⁴⁹ Act also prohibits any person from engaging in sport hunting or any other recreational hunting.⁵⁰ 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.⁵¹ 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.⁵²

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.⁵³

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.⁵⁴

4.5 Fisheries Management and Development Act, 2016

The Fisheries Management and Development Act, 2016⁵⁵ 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.⁵⁶ 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.⁵⁷

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 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

48 Ibid, sec. 93.

49 Ibid, sec. 95A.

50 Ibid, sec. 96.

51 Ibid, sec. 97.

52 Ibid, sec. 98.

53 Ibid, sec. 99.

54 Ibid, sec. 109.

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

56 Ibid, Preamble.

57 Ibid, sec. 5(1).

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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, 2013⁵⁸; ensuring effective cooperation with coastal States, fishing States and entities and competent organisations; and ensuring that the livelihood of fishers is enhanced.⁵⁹

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 Code⁶⁰ establishes the country's code of criminal law.⁶¹ 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.⁶² 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 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

58 Treaty Making and Ratification Act, No 45 of 2012, Laws of Kenya.

59 Ibid, sec. 5(2).

60 Penal Code, Cap 63, Laws of Kenya.

61 Ibid, Preamble.

62 Ibid, sec. 162 (b).

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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.⁶³

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.⁶⁴

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.⁶⁵ 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.⁶⁶ 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).⁶⁷

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.⁶⁸ 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.⁶⁹

4.7 Environmental Management and Co-ordination Act, 1999

The *Environmental Management and Co-ordination Act, 1999*⁷⁰ (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.⁷¹ 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,

63 Ibid, sec. 267 (3) (4) (5) (6) (7) (8).

64 Penal Code, sec. 278.

65 Ibid, sec. 289.

66 Ibid, sec. 291(1).

67 Ibid, sec. 291(2).

68 Ibid, sec. 338.

69 Ibid, sec. 341.

70 Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

71 Ibid, Preamble.

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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).⁷²

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).⁷³ 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.⁷⁴

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, form, inter alia— introducing any *animal*, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland.⁷⁵ 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.⁷⁶

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.⁷⁷ 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.

4.8 Veterinary Surgeons and Veterinary Para-professionals Act, 2011

The *Veterinary Surgeons and Veterinary Para-professionals Act, 2011*⁷⁸ 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.⁷⁹

72 Environmental Management and Co-ordination Act, sec.2.

73 Ibid, sec. 2.

74 Ibid, sec. 2.

75 Ibid, sec. 42 (1) (c).

76 Ibid, sec. 52.

77 Ibid, Second Schedule [Section 58, Act No. 5 of 2015, s. 80.]

78 Veterinary Surgeons and Veterinary Para-professionals Act, No. 29 of 2011, Laws of Kenya.

79 Ibid, Preamble.

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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.⁸⁰ 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.⁸¹

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.⁸² 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.⁸³

4.9 Branding of Stock Act

The *Branding of Stock Act*⁸⁴ makes provision for the registration of brands of stock.⁸⁵ The Act applies to “stock” which is defined to mean horses, cattle, camels, sheep and goats.⁸⁶ 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.⁸⁷ 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.⁸⁸

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.⁸⁹ The Rules also 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.⁹⁰

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.

80 Ibid, sec. 2(1).

81 Ibid, sec. 2(1).

82 Ibid, sec. 2(1).

83 Ibid, sec. 45 (2)(1).

84 Branding of Stock Act, Cap 357, Laws of Kenya.

85 Ibid, Preamble.

86 Ibid, sec. 2.

87 Ibid, sec. 9(a).

88 Ibid, sec. 9(b).

89 Branding of Stock Rules, Rule 2.

90 Ibid, Rule 3.

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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.⁹¹ 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.⁹² Hot-iron branding has even been banned in some countries.⁹³

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.⁹⁴ 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.⁹⁵ "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.⁹⁶ "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.⁹⁷

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.⁹⁸ "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.⁹⁹ 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.¹⁰⁰ 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

91 Greg Rushford and TR Goldman, 'Urging an End To Face Branding Of Cattle';

92 Animal Ethics, 'Animal Branding' (*Animal Ethics*, 29 March 2016) <<https://www.animal-ethics.org/animal-branding/>> accessed 21 July 2020.

93 Sarah JJ Adcock and others, 'Branding Practices on Four Dairies in Kantale, Sri Lanka' (2018) 8 *Animals* 137.

94 *Animal Welfare and Protection Bill, 2019*, Preamble.

95 *Ibid*, 2019, Clause 2.

96 *Ibid*, 2019, Clause 2.

97 *Animal Welfare and Protection Bill, 2019*, Clause 2.

98 *Ibid*, Clause 2.

99 *Ibid*, 2019, Clause 2.

100 *Ibid*, 2019, Clause 3(1).

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animal care and animal husbandry; and provide for the process of approving the use of animals in research, investigations and teaching.¹⁰¹

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.¹⁰²

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.¹⁰³

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.¹⁰⁴ The proposed law seeks to establish an Advisory Committee to be known as the National Animal Welfare Advisory Committee,¹⁰⁵ 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.¹⁰⁶ In carrying out its functions, the Committee shall: monitor and report on animal welfare matters; promote co-operation among public departments, County 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.¹⁰⁷

101 Ibid, Clause 3(2).

102 Ibid, Clause 4.

103 Animal Welfare and Protection Bill, 2019, Clause 5(1).

104 Ibid, Clause 5(2).

105 Ibid, 2019, Clause 6.

106 Ibid, Clause 7(1).

107 Ibid, Clause 7(2).

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Each county government shall establish a County Animal Welfare Committee,¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰

Transportation of animals must only be done in accordance with the provisions of the proposed law.¹¹¹ 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.¹¹² 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.¹¹³ 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.¹¹⁴ 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.¹¹⁵

Any person keeping or in custody of a companion animal is required to ensure that its specific welfare and species needs are met.¹¹⁶ 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.¹¹⁷ All animals kept for purposes of food for human consumption must also be cared for in a manner that guarantees their welfare

108 Ibid, Clause 10(1).

109 Ibid, Clause 11.

110 Animal Welfare and Protection Bill, 2019, Clause 23 (1).

111 Ibid, Clause 24 (1).

112 Ibid, Clause 25 (1).

113 Ibid, Clause 25 (2).

114 Ibid, Clause 25 (3).

115 Ibid, Clause 26 (2).

116 Ibid, Clause 27 (2).

117 Ibid, Clause 28(1).

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as stipulated under the proposed law.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.¹²¹

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.¹²²

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.¹²³

118 Ibid, Clause 31.

119 Ibid, Clause 32(1).

120 Animal Welfare and Protection Bill, 2019, Clause 33.

121 Ibid, Clause 34.

122 Ibid, Clause 35(1).

123 Ibid, Clause 36(1).

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It also prohibits use of traps to capture animals or the purpose of capturing or killing any animal except a vermin or fish.¹²⁴ Notably, the proposed law also borrows from the Penal Code to prohibit an unnatural act or bestiality with an animal of any kind.¹²⁵ The proposed law, if enacted will repeal the Prevention of Cruelty to Animals Act, Cap. 360.¹²⁶

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 2018.¹²⁷ 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.¹²⁸ 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.¹²⁹ 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 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.¹³⁰ While some of the provisions envisaged in the proposed law may take time to enforce and implement, especially against the background of many

124 Animal Welfare and Protection Bill, 2019, Clause 38(1).

125 Ibid, Clause 44.

126 Ibid, Clause 63.

127 Jennifer Fiala, ‘News’ [2008] VIN.com <<https://www.vin.com/doc/?id=4235063>>.

128 Animal Welfare and Protection Bill, 2019, Clause 35 (3).

129 Ibid, Clause 3.

130 Animal Welfare and Protection Bill, 2019, Clause 7.

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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.¹³¹ 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.

4. 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*¹³², 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.¹³³

In *May v Republic [1979] eKLR*¹³⁴, 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. 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.

131 Tom Regan, 'The Case for Animal Rights' < <https://www.tier-im-fokus.ch/wp-content/uploads/2009/09/regan85.pdf> > 23 July 2020.

132 Hussein Khalid and 16 others v Attorney General & 2 others [2014] eKLR, Petition 324 of 2013.

133 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.

134 May v Republic [1979] eKLR, Criminal Appeal 24 of 1979.

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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*¹³⁵, 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.

5. 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.¹³⁶ 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.¹³⁷ 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

135 *Joseph Wanjogu Kungu v Republic [2005] eKLR*, Criminal Appeal 160 of 2000.

136 'BBC - Ethics - Animal Ethics: Introduction to Animal Rights' <<http://www.bbc.co.uk/ethics/animals/rights/introduction.shtml>> accessed 25 July 2020.

137 *Ibid*.

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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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ It is therefore imperative that whichever approach is adopted, whether towards absolute protection of animal 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.¹⁴¹

138 'BBC - Ethics - Animal Ethics: Introduction to Animal Rights'

<<http://www.bbc.co.uk/ethics/animals/rights/introduction.shtml>> accessed 25 July 2020.

139 Muigua K. "The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya." *Journal of cmsd*. 2017;1(2):72-96.

140 *Ibid*, p. 92.

141 David A Fennell and Valerie Sheppard, 'Tourism, Animals and the Scales of Justice' [2020] *Journal of Sustainable Tourism* 1.

6. 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.

The Place of Environmental, Social and Governance (ESG) in Arbitration

The Place of Environmental, Social and Governance (ESG) in Arbitration

Abstract

The paper critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration. The paper argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. It addresses some of the current concerns in ESG and the ability of arbitration to deal with these concerns. The paper further proposes recommendations towards embracing arbitration in management of ESG disputes for Sustainable Development.

1. Introduction

Environment, Social and Governance (ESG) is a concept that seeks to promote sustainable, responsible and ethical corporate behavior by incorporating Environmental, Social and Governance concerns in corporate decision making¹. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making². Further, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever³. In addition, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

Consequently, how corporations handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. Most investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁵. Matters touching on climate change and sustainability dominate current ESG focus⁶. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention⁷. Many projects, investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of

1 Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

2 De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

3 Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

4 Martin.C et al., 'Corporate governance and the 2008–09 Financial Crisis.' *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

5 Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (accessed on 28/09/2022)

6 Ibid

7 Ibid

The Place of Environmental, Social and Governance (ESG) in Arbitration

investment projects before making commitment or funding⁸. The importance of ESG tenets is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders⁹.

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts¹⁰. These commitments can take various forms including respect for the environment, human rights and labour laws.¹¹ ESG related disputes can arise where corporations violate such commitments. Such disputes can be managed through various mechanisms including arbitration.

The paper seeks to discuss the place of Environmental, Social and Governance (ESG) in arbitration. It brings out the nexus between ESG and arbitration. The paper further highlights and discusses the viability of arbitration in management of ESG related disputes. It also proposes interventions towards embracing arbitration in management of ESG disputes for Sustainable Development.

2. The Nexus between Environmental Social and Governance (ESG) and Arbitration

Arbitration is form of Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation¹². It has been described as a private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution¹³. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution¹⁴.

It is argued that ESG principles have become a model for sustainable business development through which a corporations' goal for solving environmental, social and governance problems is achieved¹⁵. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts¹⁶. In such contracts, investors are required to adhere to the concept of sustainable development as envisaged under the contracts and failure to do so may result in ESG related disputes.

In the wake of the climate change debate, there have been calls for responsible business practice towards climate change mitigation through measures such as reduction of carbon emissions¹⁷. The

8 Muigua. K., 'Realising Environmental, Social and Governance Tenets for Sustainable Development' available at <http://kmco.co.ke/wp-content/uploads/2022/07/Realising-Environmental-Social-and-Governance-Tenets-of-Sustainable-Development-Kariuki-Muigua-July-2022.pdf> (accessed on 28/09/2022)

9 Ibid

10 Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at https://www.vonwobeser.com/index.php/publication?p_id=1650 (accessed on 28/09/2022)

11 Ibid

12 Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4th Edition, 2022

13 Ibid

14 Constitution of Kenya, 2010, Article 159 (2) (c)

15 Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at https://aprp.msal.ru/jour/article/view/3223?locale=en_US (accessed on 28/09/2022)

16 Ibid

17 International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at <https://www.freshfields.com/en-gb/our-thinking/campaigns/international->

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Paris Agreement on Climate Change has raised the awareness of the need for global efforts to combat climate change and the role of responsible and ethical corporate behavior towards achieving this goal¹⁸. Further, corporations are increasingly required to safeguard human rights as envisaged by ‘S’ pillar of ESG¹⁹.

However, some corporations have been accused of violating these ESG concerns as a result of their business practices. Some corporations have been accused of failing to promote climate change mitigation through reduction of carbon emissions and transitioning to cleaner energy production²⁰. Further, some corporations have been accused of violating fundamental human rights such as the right to a clean and healthy environment especially in the investment sphere in Africa²¹. These instances have resulted in an increasing number of ESG-related disputes.

The growth of ESG concerns has seen corporations being increasingly required to embrace ESG principles in their business practices. Consequently, ESG clauses are being adopted in commercial and investment contracts²². In case of violation of such clauses, ESG related disputes are bound to occur. It has been asserted that adoption of ESG-related practices into pre-existing social and governance models adopted by corporations would be disruptive²³. The inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with²⁴. ESG issues are not only reshaping corporate behavior across the globe but can also be a potential battleground in international disputes²⁵. This creates the need for an effective mechanism of management of such disputes in order to enhance ESG principles in the quest for Sustainable Development.

Arbitration has for a long time been the most viable mechanism for management of international commercial and investment disputes²⁶. It offers a neutral forum for the management of disputes and addresses some of the concerns that parties may have in relation to the other parties’ legal system²⁷. In international commercial and investment arbitration, parties are reluctant to submit to

arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/ (accessed on 28/09/2022)

18 Von Wobeser., ‘The Role of Arbitration in ESG Disputes’ Op Cit

19 Ibid

20 Ibid

21 Muigua. K., ‘International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development’ available at <http://kmco.co.ke/wp-content/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf> (accessed on 28/09/2022)

22 International Arbitration in 2022., ‘The Rising Significance of ESG and the Role of International Arbitration’ Op Cit

23 The ALP Review., ‘The Importance of ESG and its effect on International Arbitration’ available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf> (accessed on 28/09/2022)

24 Ibid

25 Hamilton. J & Coulet-Diaz. M., ‘Arbitration & the ESG Era’ available at <https://www.whitecase.com/news/media/arbitration-esg-era> (accessed on 28/09/2022)

27 Moses. L.M, ‘*The Principles and Practice of International Commercial Arbitration*’ 2nd Edition, 2017, Cambridge University Press

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the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system²⁸. Further, arbitration has the potential of facilitating expeditious management of disputes²⁹. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.³⁰ The viability of arbitration in management of international commercial disputes is further enhanced by the availability of a legal framework for the recognition and enforcement of foreign arbitral awards. The *New York*³¹ Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards across different jurisdictions.

Consequently, the adoption of ESG elements in international commercial and investment agreements has resulted in the use of arbitration to manage disputes arising from such agreements³². ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and human rights³³. It has been asserted that the growth of ESG will redefine the practice of arbitration as it seeks to adapt to the new concerns created by ESG³⁴. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well positioned to manage ESG disputes³⁵. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

3. Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes

Arbitration represents a viable mechanism for management of ESG disputes. The following can be done towards enhancing the use of arbitration in ESG disputes:

3.1 Knowledge in ESG Concerns

Statistics show that many ESG related disputes are being managed through arbitration³⁶. According to the International Chamber of Commerce, engineering, construction and energy disputes represent the highest number of cases handled representing 38% of all cases registered in 2021³⁷. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns³⁸. This demonstrates that ESG and arbitration are inextricably linked. Arbitration practitioners thus need to equip themselves with knowledge in ESG related matters in order to be better placed to manage ESG related disputes.

28 Ibid

29 Muigua, K., 'Promoting International Commercial Arbitration in Africa' available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf>

30 Ibid

31 United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

32 Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

33 Ross, A., 'We need talk about ESG' available at <https://globalarbitrationreview.com/we-need-talk-about-esg> (accessed on 28/09/2022)

34 Hamilton, J & Coulet-Diaz, M., 'Arbitration & the ESG Era' Op Cit

35 Ibid

36 Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

37 International Chamber of Commerce., 'ICC Dispute Resolution Statistics: 2020' available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> (accessed on 28/09/2022)

38 Ibid

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3.2 Promoting Sustainable Development

Sustainable Development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs³⁹. This concept entails a combination of elements including environmental protection, economic development and social issues⁴⁰. The importance of Sustainable Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development⁴¹. Most of the Sustainable Development Goals entail aspects of ESG such as clean water and sanitation, affordable and clean energy, industry, innovation and infrastructure and climate action⁴². Arbitration practitioners should therefore promote the principles of sustainable development when managing ESG related disputes. This could entail requiring investors to comply with the host country environmental laws and ESG standards in mining, energy and construction disputes which have an ESG bearing⁴³.

3.3 Upholding Human Rights

The 'S' pillar in ESG seeks to promote responsible and ethical corporate behavior through aspects such as respect for human rights⁴⁴. However, corporate behavior especially in the investment sphere in Africa has resulted in gross violation of human rights⁴⁵. Some corporations which have invested in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture⁴⁶. In Kenya, a multinational corporation that has invested in the agricultural sector has been accused of human right abuses such as killings, rape, and other forms of sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities⁴⁷.

Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues⁴⁸. Arbitrators should thus seek to uphold human rights in such disputes by

39 World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).

40 Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

41 United Nations., 'Sustainable Development Goals' available at <https://sdgs.un.org/goals> (accessed on 28/09/2022)

42 Ibid, Goals 6, 7, 9 and 13.

43 The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf>

44 Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

45 Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

46 Maiangwa.B & Agbiboa.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' *Africa Spectrum* 2/2013: 71-83

47 Kenya Human Rights Commission., 'Heavy price for... egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 29/09/2022)

48 Amao. O., 'Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.' Routledge, 2011.

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rendering awards that are in line with human rights standards⁴⁹. By promoting human rights, arbitrators will be embracing the ‘S’ pillar that is fundamental in the ESG debate.

3.4 Promoting Good Governance

The Governance pillar in ESG seeks to achieve good financial and accounting standards as well as legal and regulatory compliance, such as transparency, corporate structures and ethics in corporate conduct⁵⁰. It also seeks to align Governance with the Sustainable Development Goals where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)⁵¹. Good governance can be promoted through arbitration by rendering awards that adhere to good governance practices such as transparency, accountability, reporting and disclosure.

3.5 Seeking Expert Assistance in Complex ESG Matters

Arbitration has a significant role in promoting ESG tenets in areas such as climate change. Arbitrators play a significant role in shaping and adapting international law to respond to the climate crisis⁵². However, in some instances, arbitration has been slow to act in response to the climate crisis⁵³. Some climate change concerns such as determining adherence to climate change commitments through low carbon transition requires arbitrators to be fully informed and engaged in such concepts⁵⁴. This may require expert analysis and guidance from persons with requisite knowledge in environmental matters⁵⁵. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

4. Conclusion

The relationship between Environmental, Social and Governance (ESG) and arbitration continues to grow. Adoption of ESG by corporations as a means of promoting responsible and ethical business practices and the wide use of arbitration in management of international commercial and investment disputes points to increased use of arbitration in management of ESG related disputes⁵⁶. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change⁵⁷. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously promoting Sustainable

49 Krajewski, M. ‘Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.’ Available at SSRN 3133529 (2018).

50 RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 29/09/2022)

51 Sustainable Development’ available at <https://sdgs.un.org/goals> (accessed on 29/09/2022)

52 Greenwood. L., ‘The Canary is Dead: Arbitration and Climate Change’ *Journal of International Arbitration*, Volume 38, Issue 3 (2021)

53 Ibid

54 Miles. W., ‘BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes’ available at https://www.bviiac.org/Portals/0/Files/Publications/Wendy%20Miles%20QC_BVI_A%20Frontline%20Focus%20for%20Resolving%20Future%20Climate%20Change%20Related%20Disputes.pdf (accessed on 29/09/2022)

55 Cummins. T et al., ‘ESG Litigation – How Companies Can Get Ready, Respond and Resolve Claims’ available at <https://www.emerald.com/insight/content/doi/10.1108/JOIC-07-2021-0032/full/html> (accessed on 29/09/2022)

56 Von Wobeser., ‘The Role of Arbitration in ESG Disputes’ Op Cit

57 Ibid

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Development. There is need to enhance the viability of arbitration in management of ESG related disputes.

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Abstract

The central themes in this paper revolve around environmental resources management with the aim of achieving sustainable development. It is based on the idea that environment and its natural resources are a heritage that should be managed, conserved and protected not only for the sake of the current generation, but also for future generations. Environment affects all the life on earth in various ways, be it directly or indirectly. The environment and the resources therein must be carefully nurtured to ensure that their health is not sacrificed at the altar of national development. The argument is that there should be a paradigm shift from over-reliance on natural resources to curb environmental degradation and resource depletion. This may be achieved through such ways as scientific innovation and creativity, amongst other means of supporting community livelihood, which should be encouraged. Easing the pressure on the environment through diversification of livelihood means is essential to facilitate protection, conservation and replenishment of the environment and the resources therein. Kenya has already launched a roadmap to guide the process of achieving the sustainable development goals.² The discourse is therefore relevant both in the broader arena and the Kenyan context.

1. Introduction

This paper argues that the environment should be nurtured while human beings pursue development. Development should therefore be sustainable, taking care of ecological and anthropocentric concerns. Some of the running themes that are informed by the anthropocentric approach to environmental management include Poverty Eradication, Food Security, Environmental Democracy, Environmental Justice, Environmental Security, Public Participation, Gender Equity, Access To Information, Conflicts Management, amongst others. All these themes are discussed within the broader theme of human rights, while emphasising the special relationship between human rights and the environment. Ecocentric arguments inform the discussion on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature. However, promoting such rights as the right to a clean and healthy environment has both anthropocentric and ecocentric benefits and should therefore be pursued.

While the paper highlights the role of law in facilitating environmental protection, there is also an emphasis on the need to move beyond the law in looking for answers to the challenges facing sustainable environmental management.

1 The ideas in this paper are captured and discussed in more details in a book by the same author, titled, Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016). The paper, therefore, offers an overview of the subject and the reader can get the details and comprehensive discussion on the various concepts in this book.

2 Expogroup, 'Kenya to Set Out Roadmap for Achieving SDGs,' Wednesday, 14th September 2016, available at http://expogr.com/detail_news.php?newsid=3596&pageid=2&t=Kenya%20to%20Set%20Out%20Roadmap%20for%20Achieving%20SDGs [Accessed on 20/09/2016].

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2. Environment and Sustainable Development

The term ‘environment’ is defined as all the physical, chemical and biological factors external to a person, and all the related behaviour.³ The *Draft International Covenant on Environment and Development*⁴ defines environment to mean “the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities.”⁵ Environment has also been defined as “...the whole complex of climatic, adaptive and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community...”⁶ The European Commission also proffered a definition of ‘environment’ as ‘the combination of elements whose complex inter-relationships make up the settings, the surroundings and the conditions of life of the individual and of society as they are and as they are felt’.⁷ Close to home, the *Environmental Management and Coordination Act (EMCA)*⁸, 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.⁹

Development has several dimensions which include: Economic development, that is, improvement of the way endowments and goods and services are used within (or by) the system to generate new goods and services in order to provide additional consumption and/or investment possibilities to the members of the system; Human development, that is, people-centred development, where the focus is put on the improvement of the various dimensions affecting the well-being of individuals and their relationships with the society (health, education, entitlements, capabilities, empowerment etc.); Sustainable development, that is, development which considers the long term perspectives of the socio-economic system, to ensure that improvements occurring in the short term will not be detrimental to the future status or development potential of the system. In other words, development will be “sustainable” on environmental, social, financial and other grounds; and Territorial development, that is, development of a specific region (space) achievable by exploiting the specific socio-economic, environmental and institutional potential of the area, and its relationships with external subjects.¹⁰

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

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

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

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

7 Council Regulation (EEC) No. 1872/84 on Action by the Community Relating to the Environment, OJL 176 (1984) 1. (As quoted in Birnie, P. et al, *International Law & the Environment*, (3rd ed., Oxford University Press, Oxford, 2009), p. 5).

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

9 *Ibid*, s.2.

10 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

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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.¹¹ Scholars have observed that since environmental economists are concerned that the long-term neglect of the environmental assets is likely to jeopardize the durability of economic growth, and sustainable development therefore “involves maximizing the net benefits of economic development, subject to maintaining the services and quality of natural resources over time”.¹² Its concern is about balancing the objectives of economic growth and attending to environmental considerations. Sustainable development aims to improve the quality of life in a comprehensive manner, including economic prosperity, social equity and environmental protection. Economic, social, environmental and cultural aspects must be integrated in a harmonious manner to enhance the intergenerational well-being.¹³

The *World Charter for Nature*¹⁴, was partly informed by the conviction that the benefits which could be obtained from nature depends on the maintenance of natural processes and on the diversity of life forms and that those benefits are jeopardized by the excessive exploitation and the destruction of natural habitats.¹⁵

Considering that each state has exclusive jurisdiction within its territory and people and permanent sovereignty over the natural resources therein, as far as international law is concerned, sustainable management and governance of world resources can only be achieved through the concerted efforts of each state taking care of the environmental resources falling within the confines of their sovereign territory.

3. Environmental Sustainability and Sustainable Development: The Framework

There are a number of international and regional legal and regulatory instruments within international environmental law that are geared towards promoting environmental sustainability, and sustainable development, in general. Some of the major ones have been highlighted in this section.¹⁶ The *Ramsar Convention (1973)*¹⁷ is an intergovernmental treaty whose mission is the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout

http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf [Accessed on 02/09/2016].

11 ‘Theories of Economic Development,’ p. 14. Available at

www.springer.com/cda/content/document/cda_downloadocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406 [Accessed on 02/09/2016].

12 Ibid.

13 Ibid; See also generally, Chambers, R., *Sustainable Livelihoods, Environment and Development: Putting Poor Rural People First*, IDS Discussion Paper 240, Brighton: IDS, 1987. Available at <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/875/rc279.pdf?sequence=1&isAllowed=y>

14 UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

15 Ibid, Preamble.

16 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), Chapter one for full discussion.

17 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972).

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the world.¹⁸ It is the overarching international legal instrument that should inform state parties' legal framework on wetlands conservation and use.

Wetlands play an important role in ensuring environmental stability and health and thus, this Convention is important in helping countries come up with measures on how to counter impending threats to these resources. As reservoirs for water and nutrients, wetlands serve the human beings, animals and plants. It therefore, follows that improved health of the wetland resources is necessary in achieving environmental health and security for both anthropocentric and ecocentric reasons. Member States have obligations under the Ramsar Convention relating to promotion of sustainable management and utilisation of wetlands resources.

Another important international instrument on environment is the 1992 *Rio Declaration on Environment and Development*.¹⁹ This Declaration sought to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving sustainable development.²⁰ The *Rio Declaration* sought to promote the usage of natural resources for development but within the practices that promote sustainable development.

*Agenda 21*²¹ 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.²² The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.

The *Convention on Biological Diversity*²³ 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.²⁴ The provisions of this Convention should generally inform domestic laws on genetic resources conservation and benefit sharing framework on the accruing benefits in the member states, with the aim of ensuring that communities participate in conservation measures but also benefit from such resources.²⁵

18 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.

19 UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

20 Principle 2 thereof recognises that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Principle 3 is to the effect that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

21 (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

22 Ibid, Preamble.

23 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

24 Article 1.

25 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,

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The *United Nations Conference on Sustainable Development* ("Rio+20")²⁶ which took place in Rio de Janeiro, Brazil in June 2012, saw governments *inter alia* 'renew their commitment to sustainable development and to ensure the promotion of an economically, socially and environmentally sustainable future for the planet and for present and future generations. This would involve eradicating poverty which they recognised as the greatest global challenge facing the world today and an indispensable requirement for sustainable development. In this regard they therefore, committed themselves to freeing humanity from poverty and hunger as a matter of urgency.'²⁷

The *Convention on the Non-Navigational Use of Watercourses*²⁸ 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.²⁹ 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

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 thereof also states that each Contracting Party should identify components of biological diversity important for its conservation and sustainable use, and monitor those components, particularly those requiring urgent conservation measures and those which offer the greatest potential for sustainable use. They should also identify and monitor processes and activities likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and maintain and organise data derived from monitoring. In identifying such components, states are able to ensure the conservation and sustainable use of those resources. However, for them to do so, they ought to bring on board all the relevant stakeholders, namely, communities, scientists, and regulators, amongst others to make the work easier and comprehensive. International cooperation in such projects is also important for purposes of sharing scientific knowledge and research outcome. The net effect would be enhanced environmental security, not only for the good of the concerned people but also for improved environmental health.

26 United Nations, *Report of the United Nations Conference on Sustainable Development*, Rio de Janeiro, Brazil 20–22 June 2012, A/CONF.216/16.

27 *Ibid*, Article 1.2. Under Article 1.6, the Rio+20 Report reiterated that people are at the centre of sustainable development and in this regard, it urges state parties strive for a world that is just, equitable and inclusive. They also committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all. Further, under Article 1.8 thereof, State parties also reaffirmed the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, women's empowerment and the overall commitment to just and democratic societies for development. The two main themes at the Conference were: how to build a green economy to achieve sustainable development and lift people out of poverty; and how to improve international coordination for sustainable development.

The implication of the foregoing assertions is that sustainable development agenda may not be achieved as long as states approach the same in a disintegrated manner, especially by creating governmental departments that do not work together. The discussion is one that transcends sectoral approach to issues and requires issues of development and environmental conservation be treated as mutually inclusive.

28 *Convention on the Non-Navigational Use of Watercourses*, Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

29 *Convention on the Non-Navigational Use of Watercourses*, Article 1.1.

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harm to other watercourse States.³⁰ There is also a general obligation for the Watercourse States to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse.³¹ It is important to recognise the need for joint efforts in conserving and protecting international watercourses since any negative effects would also be transnational and would affect different states. Although the Convention does not have binding effect on the parties, it provides a good framework within which parties can collaborate in ensuring environmental health of the international watercourses for the sake of both present and future generations.

The *Forest Principles*³² 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.³³ According to these principles, forestry issues and opportunities should be examined in a holistic and balanced manner within the overall context of environment and development, taking into consideration the multiple functions and uses of forests, including traditional uses, and the likely economic and social stress when these uses are constrained or restricted, as well as the potential for development that sustainable forest management can offer.³⁴

The *Forests Principles*, though non-legally binding, provide minimum guidelines on the efficient management, conservation and sustainable utilisation of forest resources for the current and future generations. Owing to their many uses, forest conservation and protection is important for the realisation of a healthy environment and eradication of poverty.³⁵ At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted *the 2030 Agenda*

30 Ibid, Article 7.1.

31 Ibid, Article 8.1.

32 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).

33 Ibid, Preamble.

34 Preamble.

35 The Principles require countries to ensure that forest resources and forest lands are sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. As a result, appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests and diseases, in order to maintain their full multiple value (Principle 2 (b)).

Notably, the Principles state that the vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognised (Principle 4).

The Principles also provide that national forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. Further, appropriate conditions should be promoted for these groups to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being through, inter alia, land tenure arrangements which serve as incentives for the sustainable management of forests (Principle 5 (a)).

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for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.³⁶ The 2030 Agenda for Sustainable Development³⁷ 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.³⁸

The Sustainable Development Goals, otherwise known as the Global Goals, are to build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015.³⁹ 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.⁴⁰

The *2030 Agenda for Sustainable Development* provide that by 2030, countries should ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality.⁴¹ Further, by 2020, countries are to maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge, as internationally agreed.⁴²

As far as natural resources and environmental governance within the African region is concerned, there is the *African Convention on the Conservation of Nature and Natural Resources*⁴³ which

36 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].

37 *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.

38 Ibid, Preamble.

39 Ibid.

40 Ibid.

41 Goal 2.4. The Agenda envisages a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. To this end, it seeks to promote realisation of a world in which consumption and production patterns and use of all natural resources – from air to land, from rivers, lakes and aquifers to oceans and seas – are sustainable. Further, state parties committed to create a world in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, is essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. They also committed to realize a world in which development and the application of technology are climate-sensitive, respect biodiversity and are resilient. This is one in which humanity lives in harmony with nature and in which wildlife and other living species are protected (Agenda No. 9).

42 Goal 2.5.

43 African Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001 UNTS 3.

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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.⁴⁴

There is also the *Bamako Convention*⁴⁵ which is an African region Convention aimed at preventing environmental pollution by hazardous wastes. The Convention obligates its member Parties to take appropriate legal, administrative and other measures, within the area under their jurisdiction, to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties.⁴⁶ This is a Convention that is meant to ensure that even as African countries engage in development projects and international trade with countries outside the region, they do not engage in activities that adversely affect the environment.⁴⁷

Chapter nineteen (Articles 111⁴⁸, 112⁴⁹ and 114⁵⁰) of the *East Africa Community Treaty*⁵¹ calls for co-operation in environment and natural resources. The East Africa Community Treaty (EAC) Partner States are to take joint effort to co-operate in efficient management of these resources, with key priorities of the sector including climate change adaptation and mitigation, natural resource

44 Ibid, Article I.

45 African Union, *Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 1991. Available at <http://www.jus.uio.no/im/hazardous.waste.ban.afrian.import.bamako.convention.1991/portrait.pdf>

46 Ibid, Article 4(1).

47 Generally, the Convention's purpose is to: prohibit the import of all hazardous and radioactive wastes into the African continent for any reason; minimize and control transboundary movements of hazardous wastes within the African continent; prohibit all ocean and inland water dumping or incineration of hazardous wastes; ensure that disposal of wastes is conducted in an "environmentally sound manner "; promote cleaner production over the pursuit of a permissible emissions approach based on assimilative capacity assumptions; and establish the precautionary principle (UNEP, 'First Conference Of Parties To The Bamako Convention,' available at <http://www.unep.org/delc/BamakoConvention> [Accessed on 31/08/2016]).

48 Article 111: Environmental Issues and Natural Resources

'The Partner States recognise that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development.'

49 Article 112: Management of the Environment. 1. 'For purposes of Article 111 of this Treaty, the Partner States undertake to cooperate in the management of the environment and agree to: (a) develop a common environmental management policy that would sustain the eco-systems of the Partner States, prevent, arrest and reverse the effects of environmental degradation; (b) develop special environmental management strategies to manage fragile ecosystems, terrestrial and marine resources, noxious emissions and toxic and hazardous chemicals; (c) take measures to control trans-boundary air, land and water pollution arising from developmental activities; (d) take necessary disaster preparedness, management, protection and mitigation measures especially for the control of natural and man-made disasters. These include oil spills, bio-hazards, floods, earthquakes, marine accidents, drought and bush fires; and (e) integrate environmental management and conservation measures in all developmental activities such as trade, transport, agriculture, industrial development, mining and tourism in the Community.'

50 Article 114: Management of Natural Resources. 1. For purposes of Article 111 of this Treaty, the Partner States agree to take concerted measures to foster co-operation in the joint and efficient management and the sustainable utilisation of natural resources within the Community for the mutual benefit of the Partner States.'

51 East African Community, *the Treaty for the Establishment of the East African Community*, Arusha. EAC: 2002 xiv, 111p: 230mm (EAC Publication, No.1) ISBN: 9987 - 666-01-9 (amended 2006).

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management and biodiversity conservation, disaster risk reduction and management, and pollution control and waste management.⁵²

The foregoing legal instruments are meant to guide states in their efforts to achieve environmental sustainability, for the realisation of the bigger goal of attaining sustainable development. However, it is important to point out that these are just a few of the many legal and regulatory instruments, which are mostly sectoral, selected for illustration purposes.

4. National Obligations on Environment and Sustainable Development

As already pointed out, it is noteworthy that most of the main international and regional legal and regulatory instruments on environment have spelt out mandatory obligations as well as non-binding guidelines on the international best practices in environmental matters. While some of these obligations and guidelines are meant to be applied directly, especially in relation to international environmental relations, others are meant to be incorporated into the domestic laws on environment or at least offer guidelines on the substantive and procedural contents of the domestic laws.

This can be exemplified using the Constitution of Kenya 2010, which provides that the general rules of international law should form part of the law of Kenya.⁵³ It also provides that any treaty or convention ratified by Kenya should form part of the law of Kenya under this Constitution.⁵⁴ In light of this, it is noteworthy that Kenya is a signatory to a number of international and regional legal and regulatory instruments on environment. The international community thus expects Kenyan authorities and people in general, to promote and implement the internationally agreed best practices in environmental governance. These are the same expectations and obligations placed on other countries around the world, the only differences being special frameworks put in place for particular types of natural resources and environmental conditions.

Agenda 21 tasks governments to do all that is necessary in giving communities a large measure of participation in the quest for sustainable management and protection of the local natural resources, in order to enhance their productive capacity.⁵⁵ Governments, with the assistance of and in cooperation with appropriate international, nongovernmental and local community organizations, are obligated to establish measures that will directly or indirectly, *inter alia*, rehabilitate degraded resources, to the extent practicable, and introduce policy measures to promote sustainable use of resources for basic human needs.⁵⁶

52 EAC, 'Environment and Natural Resources,' *EAC's Environment Agenda: A Healthy Natural Environment for Present and Future Generations*.

Available at <http://www.eac.int/sectors/environment-and-natural-resources> [Accessed on 31/08/2016].

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

54 *Ibid*, Article 2(6); See also the *Treaty Making and Ratification Act, No. 45 of 2012*, which is an Act of Parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes. Notably, This Act applies to—(a) multilateral treaties; (b) bilateral treaties which deal with, *inter alia*, the environment and natural resources (s. 3(2)).

55 *Agenda 21*, Clause 3.7(d).

56 *Agenda 21*, Clause 3.8.

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The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources. It is expected that states efforts will be informed by the SDGs in the economic, social, political and environmental decisions. The Goals also provide an elaborate standard for holding countries accountable in their development activities. This way, environmental health is not likely to be sacrificed at the altar of economic development but will be part of the development agenda.

Article VIII of the *African Convention on the Conservation of Nature and Natural Resources* is to the effect that the Parties should take all necessary measures for the protection, conservation, sustainable use and rehabilitation of vegetation cover through *inter alia*: adopting scientifically-based and sound traditional conservation, utilization and management plans for forests, woodlands, rangelands, wetlands and other areas with vegetation cover, *taking into account the social and economic needs of the peoples concerned* (emphasis added), the importance of the vegetation cover for the maintenance of the water balance of an area, the productivity of soils and the habitat requirements of species.⁵⁷

This section alludes to the role of law in facilitating environmental protection especially at the global level, the impact of globalisation and trade development in international environmental law and sustainable development.⁵⁸ While the various instruments may vary in their applicability depending on the region, types of resources or environmental and climatic conditions, the bottom line is that countries are supposed to promote and ensure sustainable utilisation of the available resources for present and future generations, within the framework of sustainable development. To appreciate the differences that may exist due to varying group interests, different players, different types of resources, sustainable development agenda is informed and driven through a number of basic principles. These principles underlie and guide the formulation of the various international, legal and regulatory instruments on environmental matters, especially in relation to the substantive and procedural aspects therein.

5. Definition and Elements of Sustainable Development

5.1 Definition of Sustainable Development

It has been observed that the structures of imperial and colonial power which dominated the world in the nineteenth and early twentieth centuries made little provision for economic and social advance in what is now called the developing world.⁵⁹ This is because colonial regions functioned

⁵⁷ Further, Article XX thereof which deals with capacity building, education and training, is to the effect that the Parties should, *inter alia*, promote environmental education, training and awareness creation at all levels in order to enhance their peoples' appreciation of their close dependence on natural resources and their understanding of the reasons and rules for the sustainable use of these resources.

⁵⁸ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi – 2015), Chapter one for full discussion on the role of law in natural resources management.

⁵⁹ Harris, J.M., *Basic Principles of Sustainable Development*, Global Development and Environment Institute, Working Paper 00-04, June 2000, p.1. Available at http://www.ase.tufts.edu/gdae/publications/working_papers/Sustainable%20Development.PDF [Accessed on 25/08/2016]

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primarily to supply imperial powers with raw materials and cheap labour – including slave labour as late as the mid-nineteenth century.

However, by the end of the Second World War, perceptions and policy had changed drastically where economic and social improvement for the majority had become a major preoccupation of governments, and with the crumbling of colonial power relations this goal was extended to the poorer nations of the world.⁶⁰ Thus, economic development, human development, amongst other forms of development gained popularity the world over.

Sustainable development is believed to be one of a series of innovative concepts—following such antecedents as human development, equitable development, or appropriate development—that seek to broaden the scope of development theory from its narrow focus on economic growth.⁶¹ It has been documented that the idea of “sustainable development” was born in 1713 when Carlowitz, while editing the first book on forest sciences, argued that timber would be “as important as our daily bread” and that it should be “used with caution in a way, that there is a balance between timber growth and lumbering”. This would allow forever a continuous, perpetual use.⁶² The concept is also attributed to the International Union for Conservation of Nature and Natural Resources (IUCN) in 1980.⁶³

The concept of sustainable development however, received increased international attention after the release of the *Report of the World Commission on Environment and Development: Our Common Future*.⁶⁴ The World Commission defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.⁶⁵ It has been observed that the definition by the Commission is anthropocentric (the “needs” refer to human needs not ecological needs), a stance that was reaffirmed in the Rio Declaration of the United Nations Conference on Environment and Development (UNCED; 1992) which stated that “human beings are the centre of concerns for sustainable development”.⁶⁶ This is mainly an anthropocentric approach to sustainable development.

60 Ibid, p.2.

61 Working Group III (WGIII) of the Intergovernmental Panel on Climate Change (IPCC), ‘Setting the Stage: Climate Change and Sustainable Development,’ (IPCC, 2001). Available at <http://www.ipcc.ch/ipccreports/tar/wg3/index.php?idp=60> [Accessed on 25/08/2016].

62 Keiner, M., ‘History, Definition(s) and Models of “Sustainable Development”,’ p. 1. Available at <http://e-collection.library.ethz.ch/eserv/eth:27943/eth-27943-01.pdf> [Accessed on 25/08/2016].

63 See ‘Chapter: 2 History of Sustainability, in *Sustainability and the U.S. EPA* (The National Academies Press, 2011), available at <http://www.nap.edu/read/13152/chapter/4> [Accessed on 25/08/2016]; See also Schwass, R.D., Introduction To Sustainable Development – *World Conservation Strategy of the International Union for the Conservation of Nature and Natural Resources (IUCN)*, (UNESCO – Encyclopedia of Life Support Systems (EOLSS)), p.2. Available at <http://www.eolss.net/sample-chapters/c13/e1-45-02-05.pdf> [Accessed on 25/08/2016].

64 World Commission on Environment and Development, *Our common future*. Oxford, (Oxford University Press, 1987).

65 Ibid, para. 27.

66 Principle 1, *1992 Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992). Adopted at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil from 3-14 June, 1992.

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There is also another definition, which emphasizes the ecological dimensions of sustainability: Sustainability as a relationship between human economic systems and larger dynamic, but normally slower-changing ecological systems, in which (1) human life can continue indefinitely, (2) human individuals can flourish, and (3) human cultures can develop; but in which effects of human activities remain within bounds, so as not to destroy the diversity, complexity and function of the ecological life support system.⁶⁷

It has correctly been observed that sustainability concerns manifest as resource depletion or absence, resource degradation, the deliberate or accidental damage of resources for short term gain, or as a misunderstanding of the complex interrelationships between resources.⁶⁸ Indeed, the need for sustainable development was well captured in the assertion that sustainable development is primarily a social justice project focusing on equitable development to meet human needs while still recognizing that the preservation of natural resources is necessary to fulfill these needs.⁶⁹ It is, therefore, arguable that the best approaches to sustainable development should establish a connection between the anthropocentric and ecocentric approaches in environmental matters.

The 2002 World Summit on sustainable Development in Johannesburg adopted a plan of implementation reiterating the Rio principles and establishing poverty eradication, sustainable consumption and production patterns and protection of the natural resource base for economic and social development as the three prime objectives (Johannesburg Plan).⁷⁰ It has been contended that human needs cannot be sufficiently met just by providing an ecologically stable and healthy environment, but that - if a society is indeed committed to sustainability - the equally legitimate social and cultural needs ought to be taken care of as well.⁷¹ Economic, social, and cultural conditions, efforts, and values are deemed to be resources that also need to be preserved for future generations.⁷²

Sustainable development, as defined in the *Brundtland Commission* Report, includes human development.⁷³ One of the ways of addressing poverty is focusing on human development which empowers people, both men and women, to contribute positively towards eradication of poverty without solely relying on the Government to do so. This World Summit, thus, helped in establishing the link between sustainable development and social development and showing that they must be mutually inclusive if development is to be considered effective.

67 Faucheux, S., *Principles of Sustainable Development* - Vol. III – ‘Summary Principles for Sustainable Development,’ p.2.

Available at <http://www.eolss.net/Sample-Chapters/C13/E1-46-06.pdf> [Accessed on 27/08/2016].

68 Thatcher, A., ‘Theoretical definitions and models of sustainable development that apply to human factors and ergonomics,’ in Broberg, N. O., et al, (eds), *Human Factors In Organizational Design And Management – Xi, Nordic Ergonomics Society Annual Conference – 46*, 2014, pp. 747-752 at p. 747.

69 Ibid, p. 747.

70 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.

71 Littig, B. & Grießler, E., ‘Social sustainability: a catchword between political pragmatism and social theory,’ *Int. J. Sustainable Development*, Vol. 8, Nos. 1/2, 2005, pp. 65-79 at p.67.

72 Ibid, p.67.

73 Costantini, V. & Monni, S., “Measuring Human and Sustainable Development: an integrated approach for European Countries,” *Working paper No. 41*, 2004. p. 8.

Available at <http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf> [Accessed on 15/04/2015].

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It is also important to point out that poverty affects males and females in varying ways and as such, any efforts geared towards its eradication should bring on board all the affected parties in order to come up with effective mechanisms that will not only reflect and address the needs of all sections of the society, but will also facilitate participation of all. This is also important as it helps generate social acceptance of the government's policies while are geared towards addressing the real issues affecting its people.

At the Rio+20 Conference, world leaders, participants from governments, the private sector, NGOs and other groups, deliberated on how they can reduce poverty, advance social equity and ensure environmental protection.⁷⁴ According to the Rio+20 outcome document,⁷⁵ member States agreed that sustainable development goals (SDGs) must *inter alia*: be based on *Agenda 21* and the Johannesburg Plan of Implementation; fully respect all the Rio Principles; contribute to the full implementation of the outcomes of all major summits in the economic, social and environmental fields; focus on priority areas for the achievement of sustainable development, being guided by the outcome document; address and incorporate in a balanced way all three dimensions of sustainable development and their inter-linkages; be coherent with and integrated into the United Nations development agenda beyond 2015; not to divert focus or effort from the achievement of the Millennium Development Goals; and include active involvement of all relevant stakeholders, as appropriate, in the process.⁷⁶

It has been asserted that people are at the centre of sustainable development and, in this regard, Rio+20 delegates promised to strive for a world that is just, equitable and inclusive, and committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby benefit all, in particular the children of the world, youth and future generations of the world without distinction of any kind such as age, sex, disability, culture, race, ethnicity, origin, migratory status, religion, economic or other status.⁷⁷ This is an all-inclusive approach that does not create any distinction between male and female but focuses on humanity as a whole.

It is worth noting that one of the main outcomes of the Rio+20 Conference was the agreement by member States to launch a process to develop a set of Sustainable Development Goals (SDGs), which would build upon the Millennium Development Goals and converge with the post 2015 development agenda.⁷⁸ The sustainable development goals focus on inequalities, economic growth, decent jobs, cities and human settlements, industrialization, energy, climate change, sustainable consumption and production, peace, justice and institutions.⁷⁹

74 United Nations Conference on Sustainable Development, available at <http://www.uncsd2012.org/about.html> [Accessed on 17/05/2015].

75 The Rio+20 Outcome Document, The Future We Want (Resolution 66/288, July 2012).

76 United Nations Department of Economic and Social Affairs, Division for Sustainable Development.

77 United Nations, 'Open Working Group proposal for Sustainable Development Goals,' *op cit*.

78 United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> [Accessed on 20/05/2015].

79 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.

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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.⁸⁰ In this regard, much of the global debate on sustainable development has identified three core elements of sustainability which include:⁸¹ Economic: An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.⁸²

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.⁸³ The key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making.⁸⁴

5.2 Basic Principles of Sustainable Development

The Rio Declaration on Environment and Development lists the main principles of sustainability as far as environment is concerned. However, it has been acknowledged that there exists diversity of interpretations of the main principles of sustainable development in terms of indicators, of decision-making processes and of models of sustainable development policies, and this has partly been attributed to the variability of scientific knowledge across different problem domains.⁸⁵ Therefore, the discussion in this section is not and cannot be purported to be exhaustive on these principles. The discussion is limited to just a number of these principles, which are relevant to the discourse in this paper.⁸⁶

80 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.

81 Harris, J.M., *Basic Principles of Sustainable Development*, Global Development and Environment Institute, Working Paper 00-04, June 2000, op cit., pp.5-6.

82 Ibid, p.6.

83 Hopwood, B., *et al*, "Sustainable development: mapping different approaches," *Sustainable Development*, Vol. 13, Issue 1, February 2005, pp.38–52,p.39.

84 Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' *Brief for GSDR 2015*, p.3. Available at https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf [Accessed on 2/06/2016].

85 Faucheux, S., *Principles of Sustainable Development - Vol. III – 'Summary Principles for Sustainable Development'*, p.2. Available at <http://www.eolss.net/Sample-Chapters/C13/E1-46-06.pdf> [Accessed on 27/08/2016].

86 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Two, for more details on the highlighted principles.

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a. Sovereign Right to Exploit Natural Resources

Principle 2 of the *Rio Declaration on Environment and Development* provides that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

International law prohibits states from conducting or permitting activities within their territories, or in common spaces, without regard for the rights of other states or for the protection of the global environment.⁸⁷ It comes with the obligation to take appropriate measures to prevent or minimise as far as possible the risk of significant harm, not merely a basis for reparation after the event.⁸⁸

b. The User Pays Principle

The "*User Pays Principle*" centres around the idea that the user of a public facility, or consumer of a public good, pays for the environmental good or service or the damages which may arise from that use.⁸⁹ The OECD observes that the User Pays Principle is part of the overall internalisation of environmental costs, which involves consumers paying directly for use of environmental assets as well as having producer costs passed through product prices.⁹⁰

This principle is in recognition of the need for concerted efforts by all persons and states in nurturing the environment, for the sake of the present as well as future generations. It is meant to ensure that someone or a state is held liable for any loss attributable to their negative actions that affect the environment especially where the goods in question fall within common heritage of mankind by way of having incentives or disincentives.

c. Principle of International Co-operation in the Management of Shared Environmental Resources

Principle 7 of the *Rio Declaration on Environment and Development* provides that States should cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. Furthermore, in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The *Declaration* further states that developed countries also acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. The principle of cooperation is also captured under principle 5 of the *Rio Declaration* which states that all States and all people should cooperate in the essential task of eradicating poverty 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.

87 Birnie, P., et al, *International Law and the Environment*, (3rd ed., Oxford University Press, New York, 2009), p. 137.

88 Ibid, p. 143.

89 OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., Para. 42.

90 Ibid.

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The concept of "*common but differentiated responsibilities*" is defined to refer to the shared responsibilities of countries for the protection of shared resources, with the caveat that these responsibilities may be different depending on the contribution of the country to the environmental problem and its capability for addressing the environmental problem.⁹¹ This is based on differing contribution to environmental degradation and probability of greater financial and technical resources.⁹²

d. The Principles of Intergenerational and Intragenerational Equity

These principles may have been informed by Principle 1 of *Declaration of the United Nations Conference on the Human Environment* (Stockholm Declaration) which states that 'man bears a solemn responsibility to protect and improve the environment for present and future generations.'⁹³ Further, Principle 3 of the *Rio Declaration on Environment and Development* provides that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. It is also noteworthy that one of the guiding principles of the *1992 United Nations Framework on Climate Change*⁹⁴ is that the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.⁹⁵

The United Nations has defined intergenerational equity as the issue of sustainable development referring, within the environmental context, to fairness in the intertemporal distribution of the endowment with natural assets or of the rights to their exploitation.⁹⁶ It has gone further to describe intergenerational justice as a related but broader concept that involves, apart from distributive dimensions, procedural, restorative and retributive dimensions.⁹⁷

It has been contended that sustainable development is inherently an intergenerational as well as an intragenerational question, which relies on a commitment to equity with future generations.⁹⁸ This, it is postulated, is both an ethical and philosophical commitment which acts as a constraint on a natural inclination to take advantage of our temporary control over the earth's resources, and to use them only for our own benefit without careful regard for what we leave to our children and their descendants.⁹⁹ The United Nations has already declared that fairness between generations is embedded in the concept of sustainable development; satisfying the needs of the present generation

91 OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), Para. 16. OCDE/GD (95)124.

Available at <http://www.oecd.org/trade/envtrade/39918312.pdf> [Accessed on 26/08/2016].

92 Ibid.

93 Principle 2 thereof also categorically states that the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

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

95 *1992 United Nations Framework on Climate Change*, Article 3(1).

96 United Nations, *Intergenerational Solidarity and the needs of future generations- Report of the Secretary-General*, A/68/322, Sixty-eighth session, Item 19 (a) of the provisional agenda, para. 10.

97 Ibid.

98 Weiss, E.B., "In Fairness to Future Generations and Sustainable Development," *American University International Law Review*, Vol. 8, No. 1, 1992, pp. 19-26 at p. 19.

99 Ibid, p. 19.

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should not come at the expense of generations to come. That is, generally, the pursuit of welfare by the present generation should not diminish the opportunities of succeeding generations for pursuing a good and decent life.¹⁰⁰

The theory of intergenerational equity states that we, the human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations.¹⁰¹ The concept of intragenerational equity is believed to be as a result of the recognition that the lessening of economic inequality in the current generation must be seen as a primary goal of development rather than as a secondary or separate process.¹⁰²

There has been proffered three normative principles of intergenerational equity namely: Each generation must conserve options, which means conserving the diversity of the natural and cultural resource base, so that each generation does not unduly restrict the options available to future generations in solving their problems and satisfying their own values; each generation should be required to maintain the quality of the planet so that it is passed on in a condition no worse than that in which it was received; and finally, each generation should provide its members with equitable rights of access to the legacy of past generations and conserve this access for future generations.¹⁰³

It has rightly been argued that what makes intragenerational equity a key principle of sustainable development is that inequities are a cause of environmental degradation. This is because poverty deprives people of the choice about whether or not to be environmentally sound in their activities.¹⁰⁴ This was also well articulated in the *1987 Brundtland Commission Report* which stated: ‘Those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge.’¹⁰⁵

e. The Polluter-Pays Principle

Principle 16 of the *Rio Declaration on Environment and Development* states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear

100 United Nations, *Intergenerational Solidarity and the needs of future generations- Report of the Secretary-General*, A/68/322, Sixty-eighth session, Item 19 (a) of the provisional agenda, para. 10.

101 Weiss, E.B., “In Fairness to Future Generations and Sustainable Development,” op cit., p. 20.

102 OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), Para. 15. OCDE/GD (95)124. Available at <http://www.oecd.org/trade/envtrade/39918312.pdf> [Accessed on 26/08/2016].

103 Weiss, E.B., “In Fairness to Future Generations and Sustainable Development,” op cit., pp. 22-23.

104 Beder, S, ‘Costing the Earth: Equity, Sustainable Development and Environmental Economics,’ *New Zealand Journal of Environmental Law*, Vol. 4, 2000, pp.227-243 at p.230; See also generally, Emas, R., ‘The Concept of Sustainable Development: Definition and Defining Principles,’ Brief for GSDR 2015, p3. Available at

https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf [Accessed on 26/08/2016].

105 *1987 Brundtland Commission Report*, op cit. (As quoted in Beder, S, ‘Costing the Earth: Equity, Sustainable Development and Environmental Economics,’ op cit. at p.230).

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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.¹⁰⁶ This was also captured in the *1972 OECD Guiding Principles on the International Economic Aspects of Environmental Policies*, which state: "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called 'Polluter Pays Principle.' This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the costs of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment."¹⁰⁷

In the *Trail Smelter Arbitration (United States v. Canada)*,¹⁰⁸ 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 1997¹⁰⁹ 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

106 OECD, *Environmental Principles and Concepts*, (Organisation for Economic Co-Operation and Development, Paris, 1995), op cit., Para. 37.

107 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).

108 Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941). The Trail Smelter located in British Columbia since 1906, was owned and operated by a Canadian corporation. The resultant effect of air pollution from the sulfur dioxide from Trail Smelter resulted in the damage of the state of Washington between 1925 and 1937. This led to the United States (P) suit against the Canada (D) with an injunction against further air pollution by Trail Smelter. The decision made by the Tribunal established the concept of Trans Boundary Harm and the principle of the "polluter pays" to ensure sovereignty. (Prunella, C., 'An International Environmental Law case study: The Trail Smelter Arbitration,' December, 2014. Available at <http://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration/> [Accessed on 27/08/2016]

109 International Court of Justice, Communiqué (unofficial) No. 97/10 bis of 25 September 1997 and Judgement. Both available from the ICJ Internet Home Page (<http://www.icj-cij.org/docket/files/92/7375.pdf> [Accessed on 27/08/2016]

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management and to harmonise methods for allocating the cost of pollution to avoid distortions in prices for products entering international trade.¹¹⁰

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.¹¹¹ The Polluter-Pays Principle is also seen not as a principle of equity; rather than to punish polluters, it is designed to introduce appropriate signals in the economic system so as to incorporate environmental costs in the decision-making process and, consequently, to arrive at sustainable, environment-friendly development.¹¹² 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.¹¹³

f. Principle of Reasonable Use and Equitable Utilisation of Natural Resources

This principle is mainly used in relation to international or transboundary water resources. In this regard, the UN Watercourses Convention User's Guide points out that the principle of equitable and reasonable utilisation is the cornerstone of the UN Watercourses Convention¹¹⁴ and the fundamental doctrine guiding water-sharing for international watercourses. It entitles a watercourse State to an equitable and reasonable share of the uses and benefits of the particular watercourse, and also creates the reciprocal obligation not to deprive other States of their respective rights in this regard.¹¹⁵

110 Vicha, O, The Polluter-Pays Principle In OECD Recommendations And Its Application In International And EC/EU Law, *Czech Yearbook of Public & Private International Law*, Vol. 2, 2011, pp. 57-67. Available at files.cyil.eu/200000043-87d4c88ce6/%C4%8CSMP_2011_05_vicha.pdf [Accessed on 27/08/2016]

111 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.

112 Ibid, p. 67; See also Nicoleta, D.D., 'The Polluter-Pays Principle- -Expression Of Tort Liability For Environmental Protection,' *Analele Universității din Oradea, Fascicula Protecția Mediului* Vol. XVIII, 2012, pp. 295-302 at p. 301. Available at

http://protmed.uoradea.ro/facultate/anale/protectia_mediului/2012A/im/11.%20Dascalu%20Diana.pdf [Accessed on 27/08/2016].

113 Ibid, p. 67.

114 *Convention on the Law of the Non-Navigational Uses of International Watercourses*, 1997 Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49). Article 5-Equitable and reasonable utilisation and participation.

1. Watercourse States shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse. 2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such in participation includes both the right to utilise the watercourse and the duty to co-operate in the protection and development thereof, as provided in the present Convention.

115 Equitable and Reasonable Utilisation, *UN Watercourses Convention User's Guide Fact Sheet Series: Number 4*, p.1. Available at

<http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf> [Accessed on 27/08/2016].

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Scholars observe that this is the most widely recognised and practiced principle in the resolution of water related problems, a principle based on equity, fairness and norms of distributive justice in which the interests of every contestant country are taken into consideration.¹¹⁶

g. Precautionary Principle

Principle 15 of the *Rio Declaration on Environment and Development*¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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).¹²¹ 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).¹²²

116 ‘Chapter- Three: Equitable Utilisation’ p. 108 (International Water Law). Available at <http://www.internationalwaterlaw.org/bibliography/Articles/general/Part-%203.pdf> [Accessed on 27/08/2016]; See also HE, Y., "On the Performance of the Principle of Equitable and Reasonable Utilization in the Practice of the Utilization of Transboundary Water Resources," *iBusiness*, Vol. 1 No. 1, 2009, pp. 40-45. Available at

http://file.scirp.org/pdf/IB20090100013_63621513.pdf [Accessed on 27/08/2016]; See also United Nations, *Environmental Law Guidelines and Principles on Shared Natural Resources*, Principle 1. Available at http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/Enviro_Law_Guidelines_Principles_rev2.pdf [Accessed on 27/08/2016].

117 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.

118 Cooney, R., *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, (IUCN, Gland, Switzerland and Cambridge, 2004), UK. xi + 51pp at p. 1. Available at

<http://www.sehn.org/pdf/PrecautionaryPrincipleissuespaper.pdf> [Accessed on 27/08/2016].

119 *Ibid*, p.1.

120 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/preprin.pdf> [Accessed on 27/08/2016]

121 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.

122 Sunstein, C.R., ‘Beyond the Precautionary Principle,’ University of Chicago Public Law and Legal Theory Working Paper No. 38, January 2003, p.11. Available at http://www.law.uchicago.edu/files/files/38.crs_precautionary.pl-lt.pdf [Accessed on 27/08/2016].

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h. Principle of Public Participation

Principle 1 of the *Rio Declaration on Environment and Development* affirms that human beings are at the centre of concerns for sustainable development and are as such entitled to a healthy and productive life in harmony with nature. This means that apart from addressing the human needs, human beings must actively participate in the sustainable development agenda, if the same is to be meaningfully achieved. It is noteworthy that Principle 1 does not discriminate against men or women as it contemplates a society where both gender participate in the sustainable development efforts for a healthy and sustainable environment for everyone.¹²³

Principle 10 of the *Rio Declaration* states that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States are to facilitate and encourage public awareness and participation by making information widely available. It also provides that effective access to judicial and administrative proceedings, including redress and remedy, should be provided.

The *Declaration on the Right to Development*¹²⁴ 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.¹²⁵

It is also noteworthy that the foregoing *Declaration* does not discriminate against women or men and it envisages equal, active and meaningful participation of *all individuals* (emphasis added). The *Declaration* is particular about equality of all and requires that States should undertake, at the national level, all necessary measures for the realization of the right to development and should ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Specifically, it states that effective measures should be undertaken to ensure that women have an active role in the development process. As such, it advocates for appropriate economic and social reforms to be carried out with a view to eradicating all social injustices.¹²⁶

123 This is affirmed in Principle 20 of the *Rio Declaration on Environment and Development* which states that women have a vital role in environmental management and development and their full participation is, therefore, essential to achieve sustainable development. The youth also form part of the community and Principle 21 advocates for their participation by providing that the creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all. These Principles, thus, advocate for the equal and meaningful participation of all persons in promotion of sustainable development agenda.

124 United Nations, *Declaration on the Right to Development*, A/RES/41/128.

125 *Ibid*, Article 1.

126 Article 8(1).

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Elimination of social injustices entails promoting gender equity as a way of ensuring that both men and women get fair opportunities for the realisation of their right to self-determination and contribution towards national development. The *UN Conference on Environment and Development, Agenda 21*¹²⁷ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. It is in recognition of the fact that unless all these groups are equitably and meaningfully involved in the decision making policies, especially those on sustainable development, then the Government efforts would either fail or prove inadequate. This recognition creates a chance for the government to appreciate and address the particular needs of these groups, considering that, needs as envisaged in the Brundtland Commission Report may vary from society to society.

i. Cultural Issues in Sustainable Development

Principle 22 of the *1992 Rio Declaration on Environment and Development* states that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. In light of this, States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

It has been argued that many, if not all of the planet's environmental problems and certainly all of its social and economic problems, have cultural activity and decisions – people and human actions – at their roots.¹²⁸ 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.¹²⁹ 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.¹³⁰ 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.'¹³¹ The Agenda 2030 for Sustainable Development captures the states' pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility, and their acknowledgement of the natural and cultural diversity of the world and recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.¹³²

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

128 Dessein, J. et al (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015), p. 14. Available at <http://www.culturalsustainability.eu/conclusions.pdf> [Accessed on 27/08/2016].

129 Ibid, p.14.

130 Ibid, p. 21.

131 United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Culture for Sustainable Development,' available at <http://en.unesco.org/themes/culture-sustainable-development> [Accessed on 27/08/2016]

132 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.

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African States and other stakeholders, in the *Ngorongoro Declaration*¹³³ 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.¹³⁴ 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.¹³⁵

The Constitution of Kenya 2010 states that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹³⁶ In light of this, it obligates the State to, inter alia, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; and recognise the role of science and indigenous technologies in the development of the nation.

These are some of the initiatives that highlight the existing relationship between culture and sustainable development, thus affirming the fact that cultural issues cannot be wished away in the discussion and efforts towards achieving sustainable development in Kenya and the world over. This paper has dedicated a section on the place of indigenous knowledge, being a cultural issue, in the quest for sustainable development.¹³⁷

6. General Approaches to Sustainability and Sustainable Development Debate

It is noteworthy that various groups define sustainability differently, where some restrict it to environmental sustainability and others include broader issues affecting human life. However, it has been observed that while definitions slightly differ, the most common one sees sustainability as the requirement to maintain the capacity to provide non-declining well-being over time.¹³⁸ There are generally two approaches to sustainability namely: weak and strong sustainability. Strong sustainability regards natural capital as providing some functions that are not substitutable by man-made capital.¹³⁹ These functions, labeled ‘critical natural capital’, are stressed by defining

133 The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016

134 Ibid, p.2.

135 Ibid, p. 3.

136 Article 11 (1), Constitution of Kenya, 2010.

137 See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Eleven, for the full discussion.

138 Neumayer, E., ‘Sustainability and Well-being Indicators,’ Research Paper No. 2004/XX, (UNU World Institute for Development Economics Research (UNU-WIDER), March 2004, p.1. Available at <http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/SustainabilitywellbeingArticle.pdf> [Accessed on 27/08/2016].

139 Gutes, M.C., ‘Commentary: The concept of weak sustainability,’ *Ecological Economics* Vol. 17, 1996, pp.147-156 at p.147.

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sustainability as leaving the future generations a stock of natural capital not smaller than the one enjoyed by the present generation.¹⁴⁰

Weak sustainability has been described as involving the replacement of natural resources and environmental assets—that are currently freely available to everyone —with human-made resources that have to be bought and may only be accessible to some people in the future.¹⁴¹ The argument is that the depletion of natural capital can lead to irreversible losses such as species and habitats, which once lost cannot be recreated through man-made capital.¹⁴² As such, intergenerational equity is not compatible with the concept of weak sustainability, a concept that assumes that future generations will not suffer from environmental losses as long as it is compensated for this loss by wealth creation.¹⁴³

The very weak sustainability approach asserts that natural and manufactured capital can substitute perfectly for one another, where the substitutability of different types of capital implies that the preservation of an aggregate level of natural plus manufactured capital, rather than the preservation of natural capital in particular, is crucial.¹⁴⁴ The sustainability of ecological systems is viewed as important only as far as required for the sustainability of the human component.¹⁴⁵ The fundamental debate regarding sustainable development is, therefore, whether to adopt a strong or a weak conception of sustainability.¹⁴⁶

It has rightly been argued that despite continuing disagreement about the meaning of ‘sustainable development’, what is referred to as the triple-bottom-line trajectory – which would see economic advancement being achieved alongside social equity and environmental security – is viewed as

140 Ibid, p. 147.

141 Beder, S, ‘Costing the Earth: Equity, Sustainable Development and Environmental Economics,’ *op cit*, p.230.

142 Ibid, p. 229; See also Humphrey, M., "Three conceptions of irreversibility and environmental ethics: some problems," *Environmental Politics*, Vol.10, No. 1, 2001, pp. 138-154; See also generally, Spash, C.L. & Clayton, A.M.H., ‘The Maintenance of Natural Capital: Motivations and Methods,’ in Light, A. & Smith, J.M. (eds), *Place and Environmental Ethics*, Series Philosophy and Geography, Vol. 1 (Lanham: Rowman & Littlefield Pub. Inc., 1997) pp. 143-173). Available at http://www.clivespash.org/wp-content/uploads/2015/04/1997-Spash_Clayton-Natural-Capital-Maintenance.pdf [Accessed on 27/08/2016].

143 Ibid, p. 230; See also Padilla, E., "Intergenerational equity and sustainability." *Ecological Economics* Vol.41, 2002, pp. 69-83; See also Hediger, W., (1999) "Reconciling “weak” and “strong” sustainability", *International Journal of Social Economics*, Vol. 26 Iss: 7/8/9, pp.1120 – 1144; See also Beckerman, W., "How Would you Like your 'Sustainability', Sir? Weak or Strong? A Reply to my Critics." *Environmental Values*, Vol.4, No. 2, (1995), pp.169-179.

144 Gallopín, G., ‘A systems approach to sustainability and sustainable development,’ United Nations Sustainable Development and Human Settlements Division ECLAC/ Government of the Netherlands Project NET/00/063 “Sustainability Assessment in Latin America and the Caribbean” Santiago, Chile, March, 2003, p.13. Available at http://repositorio.cepal.org/bitstream/handle/11362/5759/1/S033119_en.pdf [Accessed on 27/08/2016].

145 Ibid, p.13.

146 Pelenc, J., ‘Weak versus Strong Sustainability,’ *Technical Report · March 2015*, Brief for GSDR 2015, p.1. Available at https://www.researchgate.net/publication/280979919_Weak_versus_Strong_Sustainability [Accessed on 27/08/2016].

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one of the promises for future progress regionally, nationally and globally.¹⁴⁷ The concept of sustainable development represents an attempt to go beyond the simple assertion of physical limits to economic-growth, and to explore how, in what terms, and to what extent, the socioeconomic objectives traditionally linked to growth can be reconciled with the concern for environmental quality and inter-temporal equity.¹⁴⁸

The sustainable management of the environment is also seen as a way to enhance the long term economic, social and environmental wellbeing of people and communities by: promoting social justice and equality of opportunity; and enhancing the natural and cultural environment.¹⁴⁹ It is, therefore, suggested that the key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making.¹⁵⁰ That is to say, in practice, sustainable development requires the integration of economic, environmental, and social objectives across sectors, territories, and generations. It requires the elimination of fragmentation; that is, environmental, social, and economic concerns must be integrated throughout decision making processes in order to move towards development that is truly sustainable.¹⁵¹

The quest for sustainability and sustainable development requires integrating economic, social, cultural, political, and ecological factors.¹⁵² It has been argued that sustainability is a property of a system open to interactions with its external world and not a fixed state of constancy, but a dynamic preservation of the essential identity of the system amidst permanent change.¹⁵³ On the other hand, sustainable development is not a property but a process of directional change by which a system improves through time in a sustainable way.¹⁵⁴

147 Lawrence, G., 'Promoting Sustainable Development: The Question of Governance,' in Buttel, F.H. & McMichael, P. (ed.), *New Directions in the Sociology of Global Development*, (Research in Rural Sociology and Development, Volume 11) Emerald Group Publishing Limited, 2006, pp.145 – 174. Available at [http://www.emeraldinsight.com/doi/abs/10.1016/S1057-1922\(05\)11006-3](http://www.emeraldinsight.com/doi/abs/10.1016/S1057-1922(05)11006-3) [Accessed on 27/08/2016]

148 Faucheux, S., *Principles of Sustainable Development - Vol. III – 'Summary Principles for Sustainable Development,'* op cit, p.4.

149 Environmental Advisory Council, 'Principles of Sustainable Development,' March 2013, p. 2. Available at https://www.princeedwardisland.ca/sites/default/files/publications/principles_of_sustainable_development.pdf [Accessed on 27/08/2016]

150 Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' Brief for GSDR 2015, op cit., p3.

151 Ibid, p. 3.

152 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.

153 Ibid, p. 35; See also Hattingh, J.P., "Conceptualizing Ecological Sustainability and Ecologically Sustainable Development in Ethical Terms: Issues and Challenges," (2011). Available At <http://s3.amazonaws.com/academia.edu.documents/44180384/Hattingh.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1472743455&Signature=dRj4ImH1m15nltIgC4YSfWhKJZU%3D&response-content-disposition=inline%3B%20filename%3DHattingh.pdf> [Accessed on 31/08/2016].

154 Ibid, p.35; See also *Our Common Future, Chapter 2: Towards Sustainable Development*, From A/42/427. *Our Common Future: Report of the World Commission on Environment and Development*; See also Hjorth, P. & Ali, B., "Navigating towards sustainable development: A system dynamics approach," *Futures*, Vol.38, No. 1, 2006, pp. 74-92; See also Berke, P.R., "Does Sustainable Development Offer a New Direction for Planning? Challenges for the Twenty-First Century." *Journal of Planning Literature*, Vol. 17, No. 1, 2002; See also Kemp, R., et al, "Transition management as a model for managing processes of co-

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While there may be differences between sustainability and sustainable development, it is clear from the discussion that there are resources and players that are constant in both. For instance, human beings have been placed within the context of both processes, considering that development is meant to improve the quality of human life (be it at the expense of the environment or while ensuring environmental sustainability) while sustainability is mainly concerned with the continued availability and supply of the resources that are meant to facilitate such development. The issues of strong or weak sustainability as well as anthropocentrism or ecocentrism approaches to sustainable development narrow down to striking the balance between meeting human needs (present and future generations) and environmental sustainability.

The principles highlighted in this section inform these discussions, the only differences being that while some of the principles are anthropocentric others are ecocentric in their approach. It has rightly been pointed out that principles provide flexible and context-specific guidance: they may be of variable importance in different contexts, can be in conflict with other principles, and they allow discretion for decision-makers to balance them and be guided by those they find to be most important.¹⁵⁵ With this in mind, it is noteworthy that the principles of sustainable development are meant to offer guidelines to states on policy formulation.

A key feature of sustainable development is that it comprises three elements: Environment, Society and Economy.¹⁵⁶ There are different approaches to sustainability and sustainable development which include environmental sustainability, economic sustainability, and social sustainability. The *1987 Brundtland Commission Report* observed in the foreword that “what is needed now is a new era of economic growth – growth that is forceful and at the same time socially and environmentally sustainable.” The implication of this is that even as sustainable development efforts focus on economic development, regard has to be had on the aspects of environment and social development so as to ensure that economic development is not achieved at the expense of all these.

However, when these principles are incorporated into domestic law, then more often than not they become binding and obligatory on state organs and all persons. For instance, in Kenya’s domestic laws, these principles have been incorporated and in an obligatory manner and are binding on state organs, law makers, interpreters and implementers.¹⁵⁷

evolution towards sustainable development." *Perspectives on Radical Changes to Sustainable Consumption and Production (SCP)* Vol.20, 2006, p. 387.

155 Cooney, R., *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, op cit, p5.

156 Shell Livewire, “Elements of Sustainable Development: Environment, Society and Economy,” available at <http://shell-livewire.org/business-library/employing-people/management/sustainable-development/Sustainable-development/> [Accessed on 3/04/2015].

157 See Article 10, Constitution of Kenya 2010. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. (2) The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

7. Human Rights, Sustainable Development and the Environment

Over the last three decades or so, the debate on the relationship between human rights and environmental protection has raged on, especially in environmentalist circles and among generalist international lawyers.¹⁵⁸ The Constitution of Kenya 2010 expressly outlines that every person has a right to a clean and healthy environment, lending the thought that the Kenyan legal regime recognizes the relationship between the environment and human rights.¹⁵⁹ The question then arises as to the nature of the relationship between the environment and human rights. This section discusses the special relationship between the environment, human rights and the sustainable development debate. The section addresses such questions as whether environmental rights are human rights; whether it is human rights that informed the formal recognition of environmental rights or are the latter justiciable on their own. It also discusses the place of such rights as the right to a clean and healthy environment and what informs environmental rights- anthropocentric or ecocentric approaches to environmental protection and conservation.¹⁶⁰

7.1 Environmental Protection and Human Rights

Human rights have been defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.¹⁶¹ Environmental protection should be treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.¹⁶²

The environment and its states affect a wide (if not the whole) spectrum of human life, which is protected by human rights. There is, thus, a direct co-relation between the environment and the right to life¹⁶³, human dignity¹⁶⁴, the right to reasonable standards of sanitation¹⁶⁵, the right to food¹⁶⁶ and the right to clean and safe water in adequate quantities.¹⁶⁷ The Constitution of Kenya 2010 goes further to expressly state the right to a clean and healthy environment, which effectively lays to rest the question of the question of the environment and human rights in Kenya. On an international plane, however, there is no recognised right to a healthy environment.

158 Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3 (Oxford University Press, 2012); See also Anton, D. & Shelton, D., *Environmental Protection and Human Rights* (2011); Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; D. Bodansky, J. Brunnée, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), at chs 28 and 29; Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental L Rev* (2007) 471; A.E. Boyle and M.R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996).

159 The Constitution of Kenya 2010, Article 42.

160 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Three, for the full discussion.

161 www.ohchr.org/EN/Issues/pages/WhatareHumanRights.aspx [Accessed 10/08/2016].

162 Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3, 2012.

163 Constitution of Kenya 2010, Article 26.

164 *Ibid*, Article 28.

165 *Ibid*, Article 43(b).

166 *Ibid*, Article 43(c).

167 *Ibid*, Article 43(d).

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Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.¹⁶⁸ Human rights depend upon having a liveable planet. The right to life as espoused in Article 26 of the Constitution would not be fully enjoyed without due consideration being paid to the planet on which such a right is to be enjoyed. Certain rights such as the right to water and food and sanitation show the link between environment protection and sustainable development, as they are necessary for these rights to be achieved.¹⁶⁹ The right to water, for example, is necessary for poverty eradication, empowerment of women and maintenance of human health (which in turn, is an indicator of sustainable development). It is, thus, logical for human rights to be integrated into sustainable development.

The human rights-based approaches provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.¹⁷⁰ 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.¹⁷¹

The *Universal Declaration of Human Rights of 1948*¹⁷² (UDHR) set the stage for the recognition, protection and promotion of human rights the world over. The *Declaration* places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights.¹⁷³ The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights*, (ICCPR) 1966¹⁷⁴ and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966.¹⁷⁵ The *Draft Principles on Human Rights and the Environment of 1994*¹⁷⁶ (1994 Draft Principles) comprehensively addresses the linkage

168 1992 Rio Declaration, Principle 1, which reads in full: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

169 Horn, L., ‘Reframing Human Rights in Sustainable Development’ *Journal of the Australasian Law Teachers Association*, 2013.

170 Fisher, A.D., ‘A Human Rights Based Approach to the Environment and Climate Change’ *A GI-ESCR Practitioner’s Guide*, March 2014.

171 Ibid.

172 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [Accessed 10/08/2016].

173 Article 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

174 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. ICCPR on its part provides under Article 47 that nothing in that Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

175 *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976). ICESCR under Article 1.2 provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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

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between human rights and the environment, and provide for the interdependence between human rights, peace, environment and development.¹⁷⁷

The *World Summit for Social Development*, held 6-12 March 1995 in Copenhagen, Denmark, saw world Governments adopt a Declaration and Programme of Action which focused on the consensus on the need to put people at the centre of development. The world leaders pledged to make the conquest of poverty, the goal of full employment and the fostering of stable, safe and just societies their overriding objectives.¹⁷⁸ There is a multiplicity of international instruments on environment protection, dating as far back as the Stockholm Declaration of 1972. While the language of Article 1 of both the Stockholm Declaration and the Rio Declaration seem to connote a human right approach to the environmental conservation, during the conferences, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected¹⁷⁹. It is arguable that the conferences created an oxymoronic circumstance, in denying what would only be in the nature of ‘the right to adequate conditions of life in *an environment of a quality that permits a life of dignity and well-being*’.¹⁸⁰

From the foregoing, it is noteworthy that the main objective of all the major international legal instruments on human rights is the alleviation of human suffering and to promote the total wellbeing of all. The absence of such wellbeing is usually perceived to be poverty. Although at times it is viewed in a narrow manner, poverty can be conceptualized in a broad manner and indeed it has been posited as the recognition that it is not limited to lack of income only, but comprises of deprivations in areas of health, education, participation and security.¹⁸¹ Further, human poverty has been said to be a denial of human rights as it arguably infringes on, *inter alia*, human freedom and

177 Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

178 World Summit on Social Development, Copenhagen 1995: A Brief Description, *Gateway to Social Policy and Development*, Available at <http://www.un.org/esa/socdev/wssd.htm> [Accessed on 15/02/2014]. The world's leaders agreed on what are commonly referred to as the ten commitments and these include to *inter alia*: eradicate absolute poverty by a target date to be set by each country; support full employment as a basic policy goal; promote social integration based on the enhancement and protection of all human rights; achieve equality and equity between women and men; accelerate the development of Africa and the least developed countries; ensure that structural adjustment programmes include social development goals; increase resources allocated to social development; create "an economic, political, social, cultural and legal environment that will enable people to achieve social development"; attain universal and equitable access to education and primary health care; and strengthen cooperation for social development through the United Nations.

179 Handl, G., ‘Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992’ (United Nations Audiovisual Library of International Law, 2012).

180 1972 Stockholm Declaration Principle 1. It reads in full: “Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.

181 Gordon, D., Chapter 1, ‘Definitions of Concepts for the Perceptions of Poverty and Social Exclusion’ www.bris.ac.uk/poverty/downloads/.../pse/99-Pilot/99-Pilot_1.doc [Accessed 15/02/ 2014].

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destroys human dignity. It is viewed as an intrusion into human dignity.¹⁸² Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.¹⁸³ Since the aforementioned international legal instruments place the human rights implementation obligations on the states, it therefore follows that they are also under the obligation to use their state resources in ensuring the protection and promotion of such human rights and ultimately eradicating poverty amongst their peoples. Poverty eradication is at the heart of achieving sustainable development in the world, and unless it is dealt with, then attaining sustainable development remains a mirage.

7.2 Greening of Human Rights versus Third Generation Rights

There have generally been two types of approaches to human rights and the environment, which are the greening of already existing human rights and the introduction of a third generation of human rights.

a. Greening of Human Rights

This is a popular approach, whereby the right to a healthy environment is ‘gleaned’ from the already existing body of human rights, rather than the addition of new rights to existing treaties. This is taking place in the European Human Rights Court related to Article 8 Right to privacy and home¹⁸⁴, in the Interamerican Commission on Human Rights (*Yanomani Indians v Brazil* (Life and health)) and in the African Commission on Human Rights (*Ogoniland v Nigeria (Article 24 and several others)*).

This also seems to be the stance adopted by the United Nations¹⁸⁵ as indicated by a 2009 report for the Office of the High Commissioner on Human Rights (OHCHR) that ‘while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the rights to life, to health, to food, to water, and to housing’.¹⁸⁶ While the relationship between certain human rights and the environment has been clearly illustrated, acknowledged and accepted, there are certain disadvantages to having these rights being the vehicles to protect the environment. For one part, environmental rights do not fit neatly into one generation of human rights. Existing civil and political rights can be used to give individuals the right to environmental information and judicial processes, which is a role of

182 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.

183 *Vienna Declaration and Programme of Action*, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

184 Kravchenko, S. & Bonine, J.E., ‘Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights’ op cit: This is seen in the decisions rendered by the European Commission on Human Rights. Cases such as *Guerra*, *Lopez Ostra*, *Öneryildiz*, *Taskin*, *Fadeyeva*, *Budayeva*, and *Tatar* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information.

185 UNHRC Resolution 2005/60 (2005) also recognized the link between human rights, environmental protection, and sustainable development.

186 Ibid; UN HRC, *Report of the OHCHR on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, 15 Jan. 2009, at para. 18.

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facilitating participation in decision making and forcing the government to meet minimum standards for protection of life and property from environmental harm.¹⁸⁷

This approach is however anthropocentric, as humans are considered the central concern while the environment is considered secondary.¹⁸⁸ This is unlikely to provide adequate protection to the environment, as the intrinsic value of the environment is not recognized. Instead it is viewed as instrumental to the intrinsic value of human beings. It is suggested that the domination of the anthropocentric approach has resulted to the lack of success in protecting the environment. On the other end of the spectrum is the ecocentric approach, whereby there is a moral concern for nature. Through it, there is the adoption of a new land ethic, where a thing is right when it intends to preserve the integrity, stability and beauty of the biotic community, and is wrong if it intends to otherwise.¹⁸⁹ A dual rights-based approach, where the intrinsic value of humans and nature co-exist in an interconnected manner is hoped to pool the benefits of both approaches. A clean environment may also be regarded as a social and economic right, giving it such status as rights to development and would be largely programmatic, with weak implementation mechanisms.¹⁹⁰

b. Third Generation Classification of Human Rights

Human rights proponents have been particularly reluctant to recognize a third generation of human rights. Third-generation rights are described as solidarity rights that, and are attributed as group rights or collective rights¹⁹¹. It has been argued that these rights devalue the concept of human rights, and divert attention from the need to implement existing civil, political, economic and social rights fully.¹⁹² On the flip side, rights herein include the right to development, the right to peace, the right to a healthy environment and the right to intergenerational equity.¹⁹³ 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.¹⁹⁴

Some human rights lawyers opine that the recognition of third generation rights will devalue the concept of human rights and divert attention from the already recognised first and second-

187 Alan Boyle, 'Human Rights and the Environment: A reassessment' *First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability* (12 - 13 October 2011 - Kuala Lumpur, Malaysia).

188 Horn, L., 'Reframing Human Rights in Sustainable Development' *op cit*.

189 Barouskaya I., 'Anthropocentrism & Ecocentrism: Finding Balance for Environment Protection' *A presentation at the University of Limerick*.

190 Boyle, A., 'Human Rights and the Environment: A reassessment' *op cit*.

191 Horn, L., 'Reframing Human Rights in Sustainable Development' *op cit*.

192 Boyle, A., 'Human Rights and the Environment: A reassessment' *op cit*.

193 Ruppel, O.C., 'Third Generation Human Rights and the Protection of the Environment in Namibia'.

194 Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006), p.8.

Available at <http://www.gov.scot/resource/doc/123822/0029776.pdf> [Accessed on 15/08/2016].

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generation rights.¹⁹⁵ The right to a clean and healthy environment, as is with all environmental rights, has for a long time been grouped under the ‘third generation rights’ or ‘solidarity rights’. However, the right to clean and healthy environment is not a ‘third generation right’ but a *fundamental right*; (emphasis added) a prerequisite for full enjoyment of all the other rights. It is a right, crucial for the realisation of the so-called first and second generation rights. Indeed, it has been rightly argued that when people must struggle to obtain the basic necessities of life, political freedoms and human rights may appear meaningless to them.¹⁹⁶ This is because the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population.¹⁹⁷

It is against this background that there emerged recognition of the right to a clean and healthy environment, as a distinct right, owing to the importance of the environment for the realisation of the other human rights especially the socio-economic rights. There is need to redefine the right to clean and healthy environment as a fundamental right, and classify it with the other basic rights as opposed to the existing notion that it is a third generation right. This is because the right to a clean and healthy environment can be equated to the right to life.

8. Environment and Sustainable Development in Kenya

Kenya's approach to environmental governance has largely been sectoral. The international best practices in sustainable development envisage an integrated approach to economic, social and economic dimensions of development.¹⁹⁸

8.1 Domesticating Principles of Sustainable Development

As already pointed, sustainable development contains both substantive and procedural elements, where substantive elements include the integration of environmental protection and economic development; the right to development; the sustainable utilisation of natural resources; the equitable allocation of resources both within the present generation and between present and future generations, while procedural elements include public participation in decision making; access to information; and environmental impact assessment.¹⁹⁹ It has been suggested that the most potentially far-reaching aspect of sustainable development is that for the first time it makes a state's management of its own domestic environment a matter of international concern in a systematic way.²⁰⁰ Nonetheless, it is still a contentious issue as to whether states should be held internationally accountable for achieving sustainability, whether globally or nationally, and also the specific

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

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

197 Ibid.

198 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Four, for the full discussion.

199 Birnie, P. et al, *International Law & the Environment*, op cit, p. 116.

200 Ibid, p. 124.

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formula to be used in deciding the ‘acceptable standard of sustainable development.’²⁰¹ Thus, states retain substantial discretion in interpreting and giving effect to sustainable development.²⁰²

While acknowledging the foregoing dilemma, it is arguable that national requirements to meet the needs of their people may be an incentive for such countries to uphold the principles of sustainable development and even set standards for the same. This is well evidenced in the laws and the jurisprudence emanating from Kenyan courts.²⁰³ The Constitution stipulates that sustainable development is one of the national values and principles of governance that must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.²⁰⁴ The implication of these constitutional provisions is that both national and county levels of government are tasked with promoting sustainable development especially with regard to natural resources and environmental management.²⁰⁵ The foregoing statutory and constitutional provisions as well as the case law cited confirm Kenya’s position as far as recognition, promotion and implementation of the principles of sustainable development are concerned. Thus, the debate as to whether the various stakeholders may be held accountable for violation of the elements of sustainable development in the course of their duties seems to have been settled in Kenya and may safely be answered in the affirmative. It is arguable that some of the current laws on natural resources management in Kenya still adopt approaches that defeat any efforts aimed at achieving sustainable development.

201 Ibid, pp. 125-126.

202 Ibid, p. 126.

203 In the Kenyan case of *Peter K. Waweru v Republic* ([2006] eKLR, Misc. Civil Application No. 118 of 2004) the High Court had to deal with a contention by the applicants that they could comply with the health requirements concerning the waste water and that the cost of having treatment works in their respective plots would be out of reach of the individual property owners – and that the costs would be prohibitive. The court rejected the argument firstly because sustainable development has a cost element which must be met by the developers and secondly because they had not stated that they had thought of other alternatives which could be more environmentally friendly to deal with the problem [para. 4]. The Court went on to state as follows: *...As regards the township itself this court is concerned on whether or not in the circumstances described the development is ecologically sustainable.... We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as regards uncoordinated approval of development and the absence of sewerage treatment works. As a Court we cannot therefore escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us.... Section 3 of EMCA demands that courts take into account certain universal principles when determining environmental cases. Apart from the EMCA it is our view that the principles set out in s 3 do constitute part of international customary law and the courts ought to take cognizance of them in all the relevant situations [p.7].*

204 Constitution of Kenya, Article 10(2) (d).

205 Further, the EMCA provides that in exercising the jurisdiction conferred upon it under subsection (3), the High Court of Kenya should be guided by the following principles of sustainable development: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.

8.2 Legal and Regulatory Framework on Environmental Governance and Sustainable Development in Kenya

Constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.²⁰⁶ 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 resources²⁰⁷, 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, biodiversity²⁰⁸ and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity²⁰⁹; 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.²¹⁰

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.²¹¹ 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

206 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.

207 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).

208 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).

209 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.

210 Constitution of Kenya, Article 69(1).

211 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:....

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natural resources.²¹² Article 69(2) of the Constitution of Kenya places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

The Constitution goes a step further to provide for active involvement of communities in sustainable environmental and natural resources matters through seeking court's intervention. Citizens have a right of ensuring that their rights in relation to the environment are not violated, by way of litigation.²¹³ This is also captured in the various statutes such as the *Environmental Management and Co-ordination Act*.²¹⁴ The Constitution also recognises the right of every person to a clean and healthy environment.²¹⁵ 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.²¹⁶

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

212 Constitution of Kenya, Article 69(2).

213 Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; Article 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate— to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Article 70(2)). For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Article 70(3)). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

214 No. 8 of 1999, Laws of Kenya, s. 3(3); See also *Environmental Management and Co-ordination (Amendment) Act, 2015* which expands the provisions to include the right to clean and healthy environment and also the right of a person to file suit on his behalf or on behalf of a group or class of persons, members of an association or in the public interest (s. 3).

215 Article 42. This right includes the right— to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70

216 See Principle 10 of the *Rio Declaration*, which affirms that environmental issues are best handled with participation of all concerned citizens, at the relevant level. The *Aarhus Convention* also establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Convention provides for *inter alia*: the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"); the right to participate in environmental decision-making ("public participation in environmental decision-making"); and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice") (*Aarhus Convention*, Article 4, 5, 6 & 9 respectively). Although the *Aarhus Convention* is a European region legal instrument, its provisions have gained international recognition and approval especially considering the fact that it reflects Principle 10 of the Rio Declaration on Environment and Development); See also *Access to Information Act, 2016* which deals with disclosure of information including information on dangers of public health, safety and the environment.

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provisions. The reality however, is that some of the laws are yet to be aligned and thus making it difficult to achieve the constitutional objectives on environment and natural resources governance. A good example is the *Environmental Management and Co-ordination Act 1999 (EMCA)*, which is the environmental framework law, meant to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.

An interpretation of the current wording of EMCA shows that where the framework law provides for consultations, the same are only meant to be between the state agencies charged with environmental governance. Even where a decision is likely to affect the interests of communities, the Act only provides for unilateral decision by the Cabinet Secretary in charge to ensure that such welfare is well taken care of.²¹⁷ 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.

8.2.1 Equitable Benefit Sharing for Social Sustainability

The proposed legislation *Natural Resources (Benefit Sharing Bill)*²¹⁸ seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities, to establish the natural resources benefit sharing authority and for connected purposes. The law is to apply with respect to petroleum and natural gas, among other natural resources. It also provides for guiding principles which include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.²¹⁹

There is need to actively involve communities in the implementation of this law, if enacted, to ensure that they are not left out as far as benefit sharing is concerned. The approach should be one that ensures that communities feel part of the resource management strategies and not mere spectators where they are not consulted even on the best approaches to benefit sharing. The *Community Land Act, 2016*²²⁰ gives effect to Article 63 (5) of the Constitution; provides for the recognition, protection and registration of community land rights; management and administration of community land; and provides for the role of county governments in relation to unregistered community land.²²¹ The Act provides that subject to any other law, natural resources found in community land should be used and managed—sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits.²²² This provision thus requires all those charged with administration of such jointly owned resources to not only ensure equitable sharing of accruing benefits but also sustainable and productive use and management of the same. The requirement for transparency and accountability is meant to give the community channels of ensuring that the resources are not wasted or mismanaged.

217 See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulation 17 which provides for public participation albeit inadequately.

218 *Natural Resources (Benefit Sharing Bill)*, 2015 (Government Printer, Nairobi, 2015).

219 Ibid, clause 4.

220 Act No. 27 of 2016, Laws of Kenya.

221 Preamble, *Community Land Act*, No. 27 of 2016 (Government Printer, Nairobi, 2016).

222 Ibid, s. 36.

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Where need for concessions arise, the Act provides that an agreement relating to investment in community land should be made after a free, open consultative process and should contain provisions on the following aspects — an *environmental, social, cultural and economic impact assessment* (emphasis added); stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment to the community; payment of compensation and royalties; requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity building of the community and transfer technology to the community; and any other matters necessary for determining how local communities will benefit from investments in their land.²²³

It is important to point out that if the concerned communities are to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way. They must be made to understand that the expected benefits will not only come in monetary terms and must be made aware of the various non-monetary forms that benefits may accrue to them, for instance, such as those envisaged under the *Nagoya Protocol*.²²⁴ 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.²²⁵ These Regulations may therefore offer useful guidelines on how

223 Ibid, s. 37.

224 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*).

225 Regulation 20 (1) without prejudice to the generality of the foregoing, the holder of an access permit shall facilitate an active involvement of Kenyan citizens and institutions in the execution of the activities under the permit. (2) The facilitation by the holder of an access permit shall include enjoyment of both monetary and non-monetary benefits arising from the right of access granted and the use of genetic resources. (3) Monetary benefits include – (a) access fees or fee per sample collected or acquired; (b) up-front payments; (c) milestone payments; (d) payment of royalties; (e) license fees in case genetic resources are to be utilized for commercial

purposes; (f) fees to be paid to trust funds supporting conservation and sustainable use of biodiversity; (g) salaries and preferential terms where mutually agreed; (h) research funding; (i) joint ventures; (j) joint ownership of relevant intellectual property rights; (4) Non-monetary benefits include – (a) sharing of research and development results; (b) collaboration, co-operation and contribution in scientific research and development programmes, particularly biotechnological research activities; (c) participation in product development; (d) admittance to ex situ facilities of genetic resources and to databases by participating institutions; (e) transfer to Kenya of genetic resources of knowledge and technology under fair and most favourable terms, including concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity;

(f) strengthening capacities for technology transfer to Kenya; (g) institutional capacity building; (h) human and material resources to strengthen the capacities for the administration and enforcement of access regulations; (i) training related to genetic resources with the full participation of Kenya and where possible, in Kenya; (j) access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies; (k) institutional and professional

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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.²²⁶

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.²²⁷ 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.²²⁸

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.²²⁹ 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

relationships that can arise from access and benefit sharing agreements and subsequent collaborative activities; (I) joint ownership of relevant intellectual property rights.

226 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.

227 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].

228 Ibid, p. 61.

229 Article 47(1) of the Constitution of Kenya guarantees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair (See also *Fair Administrative Action Act*, No. 4 of 2015). Further, Article 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 60(1) (g) provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution. Furthermore, one of the functions of the National Land Commission include to encourage the application of traditional dispute resolution mechanisms in land conflicts (Article 67(2) (f). Also relevant is Article 159(2)(c) which requires that in exercising judicial authority, the courts and tribunals should be guided by the principles which include, inter alia—promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, subject to clause (3). The foregoing provisions provide a good platform upon which communities and other stakeholders can enjoy grievance mechanisms that are easily understood, accessible and linked directly to project performance measures.

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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.²³⁰

There is a need to ensure that the any model that is put in place guarantees a fair and equitable benefit-sharing, with the terms and provisions which clearly spell out the model to be used in determining the accruing benefits and the associated costs, in order to determine the investments (and compromises) from all parties and stakeholders involved.²³¹

8.2.2 Devolution and Sustainable Development in Kenya: Challenges and Prospects

The United Nations Development Programme (UNDP) recommends adoption of decentralised governance of natural resources, which concerns the ownership and control of, access to and use of resources, and involves decision making and the exercise of the powers over others.²³² 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.²³³ 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.²³⁴

The Constitution provides for the role of devolved governance system in the management of natural resources and the environment. The Fourth Schedule to the Constitution²³⁵ 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.²³⁶ 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.²³⁷

230 Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 61.

231 See generally, Jonge, B.D., 'What is Fair and Equitable Benefit-sharing?' *Journal of Agricultural and Environmental Ethics*, Vol. 24, 2011, pp.127–146.

232 United Nations Development Programme, *Decentralized Governance of Natural Resources*, available at <http://web.undp.org/drylands/decentralized-governance.html> [Accessed on 14/07/2016].

233 Ibid.

234 Ibid.

235 (Article 185 (2), 186 (1) and 187 (2)), Constitution of Kenya.

236 Constitution of Kenya 2010, Fourth Schedule, Clause 22.

237 Constitution of Kenya 2010, Fourth Schedule, clauses 10 & 14.

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It has rightly been observed that Governments in many developing countries have discovered the need for a decentralised approach to human development.²³⁸ This is usually achieved through ceding a certain degree of authority, by way of devolution, on the local and regional levels in order to address the common difficulty in responding to local needs which may arise due to lack of information as well as bureaucratic incapacity.²³⁹ This is well captured in the constitutional obligation of County Governments to ensure and coordinate the participation of communities and locations in governance at the local level, and assisting them to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance.²⁴⁰

(i) State Department of Devolution

According to the Ministry's mandate as stipulated in Executive Order no. 2 of 2013²⁴¹, the Ministry of Devolution and Planning is now organized into two State Departments. These are State Department of Planning and State Department of Devolution. The State Department for Planning is to play the role of formulating and coordinating national development, mainstreaming youth into development and empowering them, building fairer gender equality, and tracking of development results in the economy to ensure the Ministry and the government as a whole achieve their strategic objective.²⁴²

The State Department of Devolution, on the other hand, is responsible for overall coordination of implementation of devolution policies, sustainable development policy for Northern Kenya and other Arid Lands (ASALs) and implementation of programmes and projects to provide relief to the vulnerable groups and communities in our arid and semi-arid lands.²⁴³ To enable Kenya to meet the SDGs, the Strategic Plan requires the Government to set up a Sustainable Development Goals Planning Department in order to ensure alignment of the SDGs with the national development plans and to support accelerated implementation of the goals.²⁴⁴

(ii) National Drought Management Authority

It has been documented that in Kenya, the ASAL occupy 89% of the country and are home to about 36% of the population, 70% of the national livestock herd and 90% of the wild game that supports the country's tourism industry.²⁴⁵ The National Drought Management Authority (NDMA) is a public body established by the National Drought Management Authority (NDMA) Act, 2016.²⁴⁶ It

238 Alaedini, P. & Namazi, S., 'Decentralization and Sustainable Human Development: An Analysis of Local and Municipal Councils in Iran,' *Encyclopedia of Life Support Systems* (EOLSS), p. 1. Available at www.eolss.net/Eolss-sampleAllChapter.aspx {Accessed on 10/07/2016}

239 Ibid.

240 See Constitution of Kenya, Schedule four (*Article 185 (2), 186 (1) and 187 (2)*), Part 2.

241 Republic of Kenya, Executive Order No 2 of 2013 on the Organization of Government of Kenya, (Government Printer, 2013, Nairobi).

242 Republic of Kenya, *Ministry of Devolution and Planning Strategic Plan 2013/14-2017/18*, (Government Printer, 2014, Nairobi), p. viii-ix.

243 Ibid, p.30.

244 Ibid, p. 32.

245 Para. 1.1, Draft *National Policy for the Sustainable Development of Northern Kenya and other Arid Lands 2015: Unlocking Our Full Potential for Realization of the Kenya Vision 2030*, (Government Printer, Nairobi, July 2015).

246 See National Drought Management Authority Website. Available at <http://www.ndma.go.ke/index.php/features/about-ndma>. It previously operated under the State Corporations Act (Cap 446) of the Laws of Kenya by Legal Notice Number 171 of November 24, 2011.

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is an agency of the Government of Kenya mandated to establish mechanisms which ensure that drought does not result in emergencies and that the impacts of climate change are sufficiently mitigated.

The Act gives the NDMA the mandate to exercise overall coordination over all matters relating to drought management including implementation of policies and programmes relating to drought management.²⁴⁷ The NDMA provides a platform for long-term planning and action, as well as a mechanism for solid coordination across Government and with all other stakeholders. The Authority has established offices in 23 ASAL counties considered vulnerable to drought.²⁴⁸ The NDMA has been supporting Disaster Risk Reduction (DRR) initiatives in arid and semi-arid counties mainly based on community participatory approaches. For instance, NDMA has been implementing, with the support of the Kenya Rural Development Programme (KRDP), ASAL Drought Management project, whose main focus has been on building capacity of community planning structures to allow mainstreaming of drought risk reduction strategies in the local planning process through a Community Managed Disaster Risk Reduction (CMDRR) approach.²⁴⁹ The CMDRR approach is meant to bring together a community to enable it to collectively address a common disaster risk and pursue disaster risk reduction measures. It includes implementation of Participatory Disaster Risk Assessment (PDRA) and development of local disaster risk reduction and response plans.²⁵⁰

The approach allows communities to analyse the impact of droughts on their livelihoods, identify possible preparedness and response activities to enhance resilience, and mainstream disaster risk reduction into long-term development plans.²⁵¹ Furthermore, the NDMA provides investment resources to implement some of the strategic DRR projects identified and prioritised by communities to enhance local resilience to drought. These projects may include, inter alia, livestock restocking and dairy goats for breed improvement.²⁵²

8.2.3 National Courts and Sustainable Development

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.²⁵³ For instance, the

247 S. 5, National Drought Management Authority (NDMA) Act, No. 4 of 2016.

248 See National Drought Management Authority Website.

249 CMDRR: Investing in participatory approaches to community empowerment, available at <http://www.ndma.go.ke/index.php/success-stories/93-cmdrr-investing-in-participatory-approaches-to-community-empowerment> [Accessed on 09/09/2016]; See also See also Agenda 2030 for Sustainable Development Goals, Goal 11.b which requires that by 2020, countries should have substantially increased the number of cities and human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change, resilience to disasters, and develop and implement, in line with the Sendai Framework for Disaster Risk Reduction 2015–2030, holistic disaster risk management at all levels.

250 Ibid.

251 Ibid.

252 Ibid.

253 Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at

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*Environmental Management and Co-ordination (Amendment) Act, 2015*²⁵⁴ amends section 48 of EMCA by inserting subsection (3) to the effect that where a forested area is declared to be a protected area under section 54(1), the Cabinet Secretary may cause to be ascertained, any individual, community or government interests in the land and forests and should *provide incentives to promote community conservation* (emphasis added).²⁵⁵ Such an approach can boost the State's efforts in sustainable development.

In *Peter K. Waweru v Republic*,²⁵⁶ 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.²⁵⁷ 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.’²⁵⁸

Kenyan Courts' position in the foregoing case is also reflected in the practice by Indian Courts. The Supreme Court of India held in *Subhash Kumar v. State of Bihar*,²⁵⁹ that the “right to life guaranteed by Article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life.” Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others*²⁶⁰, 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)²⁶¹

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

http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf [Accessed on 20/07/2016].

254 *Environmental Management and Co-ordination (Amendment) Act*, No. 5 of 2015, Laws of Kenya.

255 S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

256 [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

257 p.14.

258 *Ibid*, p.8.

259 AIR 1991 SC 420, 1991 (1) SCC 598.

260 48 DLR 1996 (SC Bangladesh, 1996).

261 AIR 1999 Ker 385, p.11.

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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.²⁶²

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*,²⁶³ 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.²⁶⁴ It is a specialised body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.²⁶⁵

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.²⁶⁶ Having on board non-judicial members with specialised knowledge in environmental matters may help come up with better approaches to environmental and natural resource management. Access to environmental justice also becomes easier.²⁶⁷ They can work more closely with mainstream courts to promote sustainable development.

The Court should step in and protect the environment without necessarily looking for immediate proof of likely violation of the right to a clean and healthy environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.²⁶⁸ 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.²⁶⁹

262 Constitution of Kenya, Article 43(1).

263 No. 19 of 2010, Laws of India.

264 National Green Tribunal, available at <http://www.greentribunal.gov.in/> [Accessed on 28/07/2016].

265 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].

266 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*).

267 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.

268 Constitution of Kenya, 2010, Article 70(2).

269 Constitution of Kenya, 2010, Article 70(3); See also s. 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

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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.²⁷⁰

The *suo moto* powers of the Court in environmental matters is also reflected under provisions of the *Environment and Land Act*.²⁷¹ 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 local bodies to adequately and peaceably address conflict or disputes. Where state decision makers or such local bodies or tribunals attempt to bypass the legal requirements on public participation in decision-making in matters that greatly affect the livelihoods of a particular group of people, courts can use its constitutional powers to enforce and uphold the law.

8.2.4 Community Empowerment for Sustainable Use and Management of Natural Resources

Empowerment of the citizenry is important to enable them carry out their duties towards environmental management effectively. The fact that the Constitution of Kenya²⁷² and EMCA²⁷³ 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*²⁷⁴ 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

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

271 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.

272 For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Article 70(3)).

273 S.3 (4) A person proceeding under subs. (3) of this s. shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action – (a) is not frivolous or vexatious; or (b) is not an abuse of the court process.

274 [2013] eKLR, Environment and Land No. 273 of 2013.

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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...*²⁷⁵ (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, and other enabling laws, which guarantee the right to information.²⁷⁶

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.²⁷⁷ 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.²⁷⁸ 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.²⁷⁹

Thus, it is important to ensure that the principle of public participation is well captured in the policy and legal framework to facilitate sustainable management and conservation of environmental resources through approaches that are inclusive, participatory and deliberative as contemplated under the international environmental law. The need for involvement of citizens in the environmental enforcement process has been recommended for several reasons. First, citizen participation in environmental enforcement taps the direct, immediate connection between individuals and their environment. This is because citizens are uniquely knowledgeable about their own communities. Their day-to-day observations give them access to information about environmental conditions that the government could never obtain. Involving citizens in environmental enforcement encourages productive use of this information.²⁸⁰ 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

275 Ibid, Paras 25 & 28.

276 Article 35(1) states that every citizen has the right of access to—(a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. Also relevant is the *Access to Information Act, 2015*, which is intended to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. It classifies environmental information as part of the information that falls under information affecting public interest.

277 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]

278 Ibid.

279 Agenda 21, clause 3.7(d).

280 Roberts E. & Dobbins J., 'The Role of the Citizen in Environmental Enforcement,' op cit.

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groups to affect the outcome, may increase compliance, deter violations, and contribute to a more realistic and responsive environmental enforcement strategy.²⁸¹

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.²⁸² Allowing citizens to have a concrete role in implementing the regime they helped to design strengthens public support for and awareness of environmental goals.²⁸³ 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.²⁸⁴

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).”²⁸⁵

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

281 Ibid.

282 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).

283 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]

284 Ibid.

285 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].

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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.²⁸⁶

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.²⁸⁷ Some of the main features of the revised policy framework for forest conservation and sustainable management include, inter alia: the devolution of community forest conservation and management, implementation of national forest policies and strategies, deepening the community participation in forest management through elaborate strategies of strengthening of community forestry associations, and the introduction of benefit-sharing arrangements; the adoption of an ecosystem approach for the management of forests, and recognition of customary rights, the vulnerable and marginalized groups, and user rights that support sustainable forest management and conservation; and the establishment of national programmes to support community forest management and afforestation/reforestation on community and private land.²⁸⁸

8.2.5 Environmental Impact Assessment, Environmental Audit and Monitoring of the Environment

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.²⁸⁹ The *Environment (Management and Coordination) Act* (EMCA)²⁹⁰ 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.²⁹¹

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

286 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].

287 InterAction, *Environment & Climate: Overview-Our Work*, available at <https://www.interaction.org/project/environment/overview> [Accessed on 6/07/2016].

288 Draft National Forest Policy, 2015, pp. i-ii.

289 Constitution of Kenya, 2010, Article 69(1) (f).

290 No. 8 of 1999, Laws of Kenya (Government Printer, Nairobi, 1999), s.68.

291 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].

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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.²⁹² 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’.²⁹³ 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.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶

The mandatory requirements for Environmental Impact Assessment, Strategic Environmental Assessment²⁹⁷ and Strategic Environmental and Social Assessment (SESA) also present viable channels through which communities can actively participate in sustainable development agenda in the country.²⁹⁸ They can participate in averting environmental degradation or help stop development projects that are likely to water down efforts towards achieving sustainable development. Section 115 of the *County Government Act 2012*²⁹⁹ provides that Public participation in the county planning processes should be mandatory and should be facilitated through—

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

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

294 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>

295 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.

296 Ibid, p. 6.

297 "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.

298 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).

299 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.

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mechanisms provided for in Part VIII³⁰⁰ 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).³⁰¹ They only need technical support from the Government and through collaboration, they can come up with lasting solutions. Where they are not well informed, public awareness through civic education and agricultural field trainings can help them identify the issues. Where funds are allocated for environmental protection, the local people should adequately be represented in deciding the most urgent issues that ought to be addressed. The various sectoral laws, including wildlife, water, forests and wetlands have come up with special kitty to facilitate conservation and effective management of resources. Communities ought to be evidently and adequately represented in committees dealing with such kitty to curb corruption and improve management.

There is also need to establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA). Strategic Environmental Assessment (SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final adoption (emphasis added).³⁰² 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.³⁰³ Environmental impact assessment means a systematic examination conducted to determine whether or not a programme,

300 Ibid, Ss. 87-92.

301 See the *East African Community Protocol on Environment and Natural Resources Management*, 2005. Article 4 (2) (p). One of the principles of environment and natural resources management is: the principle of subsidiarity in the management of the environment and natural resources; See also generally, *Protocol (No 2) on the application of the principles of subsidiarity and proportionality*, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December, 2007; See also Article 5 of the Treaty on European Union, C 326/1.

302 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.

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

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activity or project will have any adverse impacts on the environment.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ These exercises should not be just a matter of formality and paper work.³⁰⁷ The affected communities should be afforded an opportunity to meaningfully participate and give feedback on the likely effects on social, economic and environmental aspects of the community.

8.2.6 Addressing Climate Change for Sustainable Development

The Bali Principles of Climate Justice of 2002 (Bali Principles)³⁰⁸ 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

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

305 Ibid.

306 Notably, the proposed law, *Energy Bill, 2015*, requires under clause 135 (1) (2)(d) that a person who intends to construct a facility that produces energy using coal should, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.

307 See generally, United Nations, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, (UNEP, 2004). Available at <http://www.unep.ch/etu/publications/textONUbr.pdf> [Accessed on 20/07/2016];

See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 26/10/2015]. The World Bank argues that policy makers in are subject to a number of political pressures that originate in vested interests. The weaker the institutional and governance framework in which sector reform is formulated and implemented, the greater the risk of regulatory capture. The World Bank observes that in situations such as these, the recommendations of environmental assessment are often of little relevance unless there are constituencies that support them, and with sufficient political power to make their voices heard in the policy process. While strong constituencies are important during the design of sector reform, they are even more important during implementation. It follows that effective environmental assessment in sector reform requires strong constituencies backing up recommendations, a system to hold policy makers accountable for their decisions, and institutions that can balance competing and, sometimes, conflicting interests. The World Bank thus affirms its recognition of the strategic environmental assessment (SEA) as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform.

308 Available at <http://www.ejnet.org/ej/bali.pdf> [Accessed on 28/07/2016].

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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.³⁰⁹

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.³¹⁰

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.³¹¹ Principle 8(a) of the *Forest Principles of the United Nations Conference on Environment and Development* (UNCED)³¹² affirm that efforts should be undertaken towards the greening of the world. Thus, all countries, including developed countries, should take positive and transparent action towards reforestation, afforestation and forest conservation, as appropriate.³¹³

*Draft National Forest Policy, 2015*³¹⁴ 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.³¹⁵ The overall goal of the Policy is sustainable development, management, utilisation

309 Though non-binding, the *Bali Principles* give some recommendations that can boost efforts to achieve sustainable development.

310 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].

311 Ibid.

312 *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, Report of The United Nations Conference On Environment and Development (Rio De Janeiro, 3-14 June 1992), Annex III: Non-Legally Binding Authoritative Statement of Principles for A Global Consensus on The Management, Conservation and Sustainable Development of All Types of Forests, A/CONF.151/26 (Vol. III).

313 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.

314 *Forest Policy, 2015* (Government Printer, Nairobi, 2015).

315 Ibid, para. 1.1.9.

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and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.³¹⁶

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.³¹⁷ The Policy thus also recommends that the Government should, inter alia, promote partnerships with land owners to increase on-farm tree cover and to reduce pressure on reserved forests.³¹⁸ 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.³¹⁹

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.³²⁰

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.³²¹ 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.³²² 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.³²³ Therefore, in many countries it is unlikely that any real progress can be made toward sustainable forest management or forest landscape restoration until tenure issues are addressed and resolved. Arguably, resolution will only come by engaging key interest groups in a participatory and constructive dialogue with a commitment to an equitable outcome.³²⁴

316 Para. 3.1.

317 Para. 4.5.

318 Ibid.

319 Para. 8.2.

320 Draft National Land Use Policy 2016, para. 3.8.3.

321 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].

322 Ibid.

323 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).

324 Ibid, pp. 66-7.

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In a bid to deal with some of the highlighted challenges, the *Forest Conservation and Management Act, 2016*³²⁵ 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.³²⁶ The guiding principles of the law include: public participation and community involvement in the management of forests; and consultation and co-operation between the national and county governments. The Act also requires the Cabinet Secretary, in consultation with the relevant stakeholders, develop a national forest management policy for the sustainable use of forests and forest resources, and which must be reviewed at least once in every five years.³²⁷

While the Act has attempted to create opportunities for community participation, the same falls short of constitutional threshold of active community participation in decision making. It also largely adopts the protectionist approach of its predecessors, where communities are only to receive instructions from the state organs and also receive some of the forest resources as mere incentives and not benefits adequate to make them appreciate conservation agenda of the state. Unilateral efforts to achieve at least ten percent tree cover may not bear much fruits since communities may feel used by the State organs without necessarily benefiting from the same.

Deforestation contributes to climate change and thus, it must be tackled as one of the means of achieving the sustainable development agenda. Kenya's efforts towards climate change mitigation are commendable. In March 2012, NEMA obtained accreditation as a National Implementing Entity (NIE) by the Adaptation Fund Board of the United Nations Framework Convention on Climate Change (UNFCCC)³²⁸. This accreditation gave NEMA the mandate to offer vetting, approval and supervision of projects financed by the Adaptation Fund.³²⁹ Later on, NEMA submitted the Kenya Climate Change Adaptation Programme (KCCAP) Proposal to the AF Board for its consideration. The Proposal was approved and NEMA received approximately Ksh.1 Billion for its implementation. The National Environment Management Authority launched a Sh1 billion climate change programme in January 2016, titled 'Integrated Programme to Build Resilience to Climate Change and Adaptive Capacity of Vulnerable Communities in Kenya' that will be implemented in 14 counties. The programme is to be implemented in conjunction with three executing entities namely Coast Development Authority, Kenya Forestry Research Institute and Tana and Athi River Development Authority and eight other Sub Executing Entities.³³⁰ The Green Climate Fund (GCF) is a finance mechanism established under the UNFCCC.

325 No. 34 of 2016 (Government printer, Nairobi, 2016).

326 Ibid, s.3.

327 Ibid, s.5.

328 The ultimate objective of the Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. (UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189, Article 2)

329 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].

330 Ibid.

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Furthermore, the Green Climate Fund (GCF)³³¹ 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.³³² NEMA is thus the national implementing entity for Adaptation Fund project pipeline in Kenya. Following the GCF accreditation, NEMA has become the first government institution in Kenya, accredited to have direct access for GCF funding of up to USD 10 million, having submitted its application in May 2015.³³³

In addition to the foregoing, the *National Climate Change Response Strategy 2010* (NCCRS)³³⁴, has identified the forestry sector as a strong vehicle for undertaking both mitigation and adaptation efforts and intends to exploit incentives provided within the framework of UNFCCC, especially the Reducing Emissions from Deforestation and Forest Degradation (REDD) mechanism, to implement sustainable forest management approaches.³³⁵ Kenya is also an observer country to the UN-REDD Programme and it is a participant country to the Forest Carbon Partnership Facility (FCPF).³³⁶ As part of its FCPF programme, Kenya is well on its way to developing its National REDD+ Strategy and implementation framework, in addition to establishing a Forest Reference Level/Reference Emission Level and a National Forest Monitoring System.³³⁷

Kenya has already put in place the *Climate Change Act*³³⁸ to provide for a regulatory framework for enhanced response to climate change; to provide for mechanisms and measures to achieve low carbon climate development, and for connected purposes. The Act notably establishes the National Climate Change Council to coordinate the country's climate change efforts.³³⁹ These efforts and initiatives should be supported as they demonstrate Kenya's commitment to climate change mitigation, a positive step towards attaining sustainable development.

331 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.

332 National Environment Management Authority, 'Adaptation Fund and GCF programmes,' op cit.

333 Ibid.

334 See para. 4.2.5.2, *National Climate Change Response Strategy 2010*, Government of Kenya, 2010.

335 The REDD Desk, *REDD in Kenya*, available at <http://theredddesk.org/countries/kenya> [Accessed on 28/07/2016].

336 Ibid.

337 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].

338 Climate Change Act, No. 11 of 2016.

339 Ibid, s. 5.

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8.2.7 Sustainable and Inclusive Approaches to Environmental Resources Management

The now repealed *Forest Act, 2005*³⁴⁰ was enacted, as an attempt to provide for involvement of local communities living around any forest in the management of those forests.³⁴¹ The Act provided for Community Forest Associations, where local communities come together and form an association, through which they can manage forest resources around them and benefit from the sustainable utilization of forest produce.³⁴² 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)³⁴³, and the formation of Community Forest Associations (CFAs).³⁴⁴

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.³⁴⁵ However, one of the most glaring shortcomings in this provision is the exclusion of communities in such deliberations. This is because, although the Act provided that such a committee will include four persons knowledgeable in forestry matters nominated by forest associations operating in the conservancy area, it is noteworthy that such associations are optional and an area may not necessarily have such associations.³⁴⁶

It is also worth mentioning that the associations, as envisaged in the structure under the Act, only target formally educated people and locks out those who may possess traditional ecological knowledge but not necessarily formal environmental law knowledge.³⁴⁷ 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.³⁴⁸ 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.³⁴⁹

340 No. 7 of 2005, Laws of Kenya. The Act has since been repealed by the Forest Conservation and Management Act, No. 34 of 2016.

341 Part IV, SS. 45-48.

342 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.

343 S.4, No. 7 of 2005.

344 No. 7 of 2005, S. 45.

345 Ibid, s. 13(3) (e).

346 Ibid, s. 13(4).

347 S. 45(3) of the Forest Act 2005 (Repealed) outlines the formal requirements of such an association, before registration.

348 Article 11(1), Constitution of Kenya 2010.

349 Article 11(2), Constitution of Kenya 2010.

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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.³⁵⁰ He added that such people have the traditional skills needed to help the Government conserve the forests.³⁵¹ 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.³⁵² If the Commission adopts such an approach, they are likely to boost chances of succeeding in environmental conservation and enhancing meaningful and active participation of communities in natural resources and environmental conservation, especially with regard to forests.

It is also arguable that the Act did not specifically spell out how communities are to be involved in decision-making processes. Where CFAs are formed, it is noteworthy that the Act does not have substantive provisions on how such associations can participate in decision-making processes. They are portrayed as recipients of instructions from the KFS so that they can even be deregistered where it deems fit to the Director of KFS to do so.³⁵³ Thus, this Act seems to have adopted both incentives based and protectionist approaches to management, both of which have not had any major success. Even where CFAs have been formed, the same cannot be said to have been very successful due to a number of reasons. Considering that CFAs involve a limited number of people, they may not be said to be representative of the majority and therefore even where they receive benefits, the same may not flow to the rest of population.

Secondly, CFAs are registered by few people who are interested in doing so and the same are not necessarily representatives of the majority of the people. This means, therefore, that even where they make decisions regarding formulation and implementation of forest programmes consistent with the traditional forest user rights of the community concerned, the same cannot be said to be a representative voice of the majority. Community, in this context and as defined in the Act, does not necessarily mean the whole community.

The forest Policy acknowledges that the promulgation of the Constitution brought new requirements for natural resource management such as public participation, community and gender rights, equity in benefit sharing, devolution and the need to achieve 10% forest cover among others.³⁵⁴ 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.³⁵⁵

350 Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

351 Ibid.

352 Ibid.

353 S. 48, Forest Act 2005 (repealed).

354 Ibid, para. 2.1.1.

355 Ibid, para. 2.1.2.

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With regard to wildlife and biodiversity, it has been observed that many of the regions with abundant and diverse wildlife communities remaining in East Africa are occupied by pastoralists.³⁵⁶ 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.³⁵⁷ 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.³⁵⁸

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.³⁵⁹ 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.³⁶⁰

Wildlife is required to contribute directly and indirectly to the local and national economy through revenue generation and wealth creation.³⁶¹ 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.³⁶²

From the Policy, it is also worth noting the acknowledgement that Kenyan communities have lived amongst, and used, wildlife resources since time immemorial without formal policy and legislation. These communities ensured conservation of the wildlife resource through cultural and social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.³⁶³ 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,

356 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].

357 Ibid.

358 Ibid, p. 74.

359 Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy, 2012*, p. 1.

360 Ibid.

361 Ibid.

362 Ibid.

363 Ibid, p.2.

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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.³⁶⁴ 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.³⁶⁵

The *Wildlife Conservation and Management Act*, 2013³⁶⁶ 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.³⁶⁷ The Act affirms that benefits of wildlife conservation should be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline; wildlife conservation and management should be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations; and benefits accruing from wildlife conservation and management should be enjoyed and equitably shared by the people of Kenya.³⁶⁸

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.³⁶⁹ 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.³⁷⁰

With regard to forests, it has been observed that the management regimes of public forests (and arguably even other natural resources in Kenya), whether they are protectionist oriented or incentive-based are important in determining outcomes of conservation and sustainable use.³⁷¹ 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

364 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.

365 Ibid, p. 604.

366 The Wildlife Conservation and Management Act, No. 47 of 2013.

367 Ibid, Preamble.

368 Ibid, s.4.

369 Ibid, s.7 (e) (f).

370 Ibid, s. 19(b) (c) (d).

371 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.

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minimisation of other forms of human impact.³⁷² Broadly, this approach viewed development objectives of local communities as being in direct conflict with the objectives of biodiversity conservation.³⁷³

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.³⁷⁴ 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.³⁷⁵ 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.³⁷⁶

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.³⁷⁷ 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.³⁷⁸ There is hope for Kenya after the recently developed Draft National Land Use Policy 2016³⁷⁹ 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.³⁸⁰

372 Ibid, p. 146.

373 Ibid.

374 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.

375 Ibid.

376 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/~wwwcec/special/AgiBookChapter2002.pdf> [Accessed on 27/07/2016]

377 Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' *African Journals Online*, op cit at p.78.

378 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]

379 Developed by the Ministry of Lands and Physical Planning, Kenya, May 2016.

380 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:

Land-use planning, resource allocation and resource management for sustainable development to promote public good and general welfare;

environmental management and sustainable production initiatives in the utilization of land resources

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With regard to natural resources and the equitable sharing of the accruing benefits, the International Finance Corporation, a member of the World Bank Group (WBG), argues that Governments face competing priorities when designing policies that determine when, how, and by whom the natural resources will be developed.³⁸¹ 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.³⁸² 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.³⁸³

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*,³⁸⁴ which recognises that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development. Some of the Agenda's key principles include sustainability and inclusivity.³⁸⁵

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.

Coordination and integration of institutional linkages in planning at sectoral and cross-sectoral levels to foster collaboration and decision making among different land users.

Optimum utilization of land resources to meet governance, social-economic, political and cultural obligations of the people of Kenya.

Anchoring land development initiatives that will respond positively to the market demands.

Integrated framework for the preparation of a National Spatial Plan and review of various land use plans.

Mainstreaming of gender and special interest groups in land use planning and management.

A comprehensive, efficient and affordable computer based land use information management system.

An appropriate, accountable and democratic institution for land use conflicts resolution.

Mitigating problems associated with poor land use;

381 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+B enefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 13/07/2016].

382 Ibid.

383 Ibid, p. 11.

384 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.

385 Ibid.

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*Agenda 21*³⁸⁶ 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.³⁸⁷ The overall agenda is to promote conservation and sustainable use of oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife while at the same time using these resources to address human needs.³⁸⁸

The Constitution of Kenya creates an opportunity where, through devolution, communities are supposed to be empowered by devolving power from the state to local institutions of decision-making as a way of empowering local communities to manage natural resources and environmental matters. There is also a need to put in place a framework that clearly defines the role of various stakeholders. The State should also consult widely when coming up with the methods of benefit sharing especially with regard to the local community.

It is only through mobilizing the efforts of all the relevant stakeholders that the constitutional provisions on the environment and natural resources can effectively be implemented and make it possible to achieve sustainable development. The various sectoral laws and policies must be designed in a way that protects the environment from degradation, and also involves communities through measures that encourage active participation in benefit sharing or decision-making processes, whether through incentives or otherwise.

There is a clear need to nurture the environment for sustainable development in Kenya.

9. Natural Resources Exploitation and Sustainable Development

Easing the pressure on the environment through diversification of livelihood means is essential to facilitate protection, conservation and replenishment of the environment and the resources therein. Africa is well-endowed with natural resource wealth and as a result, there are many exploration and exploitation activities going on all over the continent.³⁸⁹ Most African countries depend on agriculture for food and exports. Agricultural products from Africa are exported to the global market but fetch relatively low prices since there is little or no value addition done in Africa. Economic talks about African economy observe that Africa's resources have fueled economic growth but most Africans have not benefited.³⁹⁰

386 (A/CONF.151/26, vol. II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

387 Ibid, Clause 3.2.

388 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.

389 Rajaram, A., "*Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor*", available on

<http://blogs.worldbank.org/africacan/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor> [Accessed on 7/01/ 2014].

390 Robb, C.K., Executive Director of Africa Progress Panel "*How Africa's resources can Lift Millions out of Poverty.*" Available at www.cnn.com/2013/07/25/opinion/africas-natural-resources-millions-overty/ [Accessed on 15/01/ 2014].

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Governments bear the primary responsibility for equitably managing resources for the benefit of their people. Any act of derogation or violation of this right is greatly condemned under the various international and regional legal instruments on human rights.³⁹¹ The resources are first and foremost to be used for improving livelihoods and empowering the people in all aspects of their lives including, political, social and economic. The overall wellbeing of the people must be balanced with that of the environment in the discussion for sustainable use and management of natural resources, for sustainable development.

It has been observed that the view that poverty is a shortage of income ought to be changed to one that perceives poverty as ‘unfreedoms’ of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions.³⁹² Low income can contribute to that, but other factors such as the lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role. Therefore, poverty can be reduced through addressing all these issues.³⁹³ Addressing these issues requires mobilization of resources by the state. This mobilization depends on a number of factors which include but are not limited to sound institutional and legal frameworks, streamlining the governance system, empowering the citizenry to participate in the governance matters, amongst other measures.

In exercising permanent sovereignty over natural resources, States must as a matter of obligation use the resources for national development and the well-being of the people and ensure conservation and preservation of the same.³⁹⁴ Indeed, this is echoed under the Constitution of Kenya 2010, Article 69(1), which lay out the state obligations toward environment. To reduce poverty in Africa and steer the continent to its full potential, value addition model is the best alternative rather than a commodity export model. By this model, Africans would use the resources they have as anchors for regional growth clusters and then ensure that they attract value-addition industries.³⁹⁵ Locally produced food and other potential income earners natural resources could undergo local value addition and be exported either within African region markets or out of Africa. This would have a positive effect on the economic wellbeing of all persons starting from the grassroots levels.

Exporting fully processed goods instead of raw commodities is said to result in a much higher percentage of their value staying in African countries and many more opportunities for families to gain livelihoods and exit poverty.³⁹⁶

391 See Article 30, UDHR; Article 5, ICESCR; and Article 21.2, Banjul Charter.

392 Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), p. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, Available at http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf [Accessed on 24/02/2014].

393 Ibid.

394 UN Res. 1803/XVII, 1962.

395 Ngwenya, S., “Africa has to Shed off the Resource Curse Stigma” op. cit.

396 *Value Added in Africa*, Available at <http://www.ideaonline.ie/content/value-added-africa> [Accessed on 24/02/2014].

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Even if Africa were to improve on resource utilisation without creating jobs for the people, the revenue from resources would be inadequate to cater for the needs of the people. Thus, there is a need to create jobs for the rapidly growing population. This would of course import the need to provide good education to equip people with skills and knowledge suitable for the job market. For effective job creation, Africa must also invest in its people through quality education. The money generated from the natural resources should also be invested in the education sector so as to empower the people. Education and job opportunities will empower the poor. It is generally accepted that effective poverty reduction cannot be achieved without the empowerment of the poor.³⁹⁷

10. Climate Change and Sustainable Development

The United Nations Framework Convention on Climate Change (UNFCCC)³⁹⁸ defines climate change as a “*change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods*”.³⁹⁹ It is noteworthy that while the foregoing definition attributes climate change to human activity in a generalized manner, Kenya’s *Climate Change Act, 2016*⁴⁰⁰ 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.⁴⁰¹

The *Agenda 2030 on Sustainable Development* calls on countries to take urgent action to combat climate change and its impacts.⁴⁰² It has been argued that some of the most adverse effects of climate change will be in developing countries, where populations are most vulnerable and least likely to easily adapt to climate change, and that climate change will affect the potential for development in these countries.⁴⁰³ This vulnerability has been attributed to their reliance on agriculture, their lower tolerance to coastal and water resource changes, and lower financial, technical, and institutional capacity to adapt.⁴⁰⁴

While the foregoing assertion may bear some truth in it, it is also true that climate change has had a global impact to a point where the international community has already come together to put in place measures aimed at addressing the scourge.⁴⁰⁵ Climate change has been associated with direct economic impacts, crop failure due to climate change which could also increase unemployment,

397 United Nations High Commissioner for Human Rights, *Principles And Guidelines For A Human Rights Approach To Poverty Reduction Strategies*, HR/PUB/06/12, p. 9.

398 United Nations Framework Convention on Climate Change (United Nations, 1992), Article 1(2).

399 UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

400 No. 11 of 2016, Laws of Kenya.

401 S. 2, No. 11 of 2016, Laws of Kenya.

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

403 Beg, N., ‘Linkages between climate change and sustainable development,’ *Climate Policy*, Vol. 2, 2002, pp.129–144 at p. 129.

404 Ibid, p.133.

405 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Six, for the full discussion.

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destabilised food security, further increasing competition for scarce resources and increase social inequity, and in addition, risks associated with sea-level rise in some of the world's poorest regions, such as displacement.⁴⁰⁶ As such, climate change is relevant to priority development objectives such as combating poverty, food security, access to basic services such as clean water, sanitary living conditions and energy, and education.⁴⁰⁷

11. Environmental Security and Sustainable Development

The importance of the environment cannot be overstated since it ensures survival of all forms of life. The enjoyment of the right to life depends on a clean and healthy environment.⁴⁰⁸ A secure environment makes possible the exercise of the right to life certain by ensuring that any threats to life are neutralized. Although there have been widespread calls for a more secure environment, backed with conventions and global agreements on the present problem of an environment that is under threat, the uptake of actions to curb the same has been dismal and insufficient, to say the least. State and governmental efforts have not been satisfactory to effect the agreed upon principles and mechanisms.

Environmental security is defined as environmental viability for life support, with three sub-elements; preventing or repairing military damage to the environment, preventing or responding to environmentally caused conflicts, and protecting the environment due to its inherent moral value.⁴⁰⁹ 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.⁴¹⁰

Competition for scarce resources may lead to a 'survival of the fittest' situation.⁴¹¹ In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.⁴¹² 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).⁴¹³ This encourages the more powerful groups in a society to exercise more control and even ownership of the scarce resource, thereby

406 Beg, N., 'Linkages between climate change and sustainable development,' *Climate Policy*, Vol. 2, 2002, p. 133.

407 Ibid, p. 134.

408 See generally, Stock, A., *The Right to a Healthy Environment: How to use international legal mechanism for the protection of our environment and our health – A Manual*, (Women in Europe for a Common Future, Utrecht/Munich, September 2007).

409 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.

410 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.

411 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].

412 See Bowman, K., *et al*, "Chapter 1: Environment for Development," (United Nations), available at http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf [Accessed on 12/10/2015].

413 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.

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enhancing their wealth and power.⁴¹⁴For 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.⁴¹⁵

Environmental security is not only concerned with sustainable management of natural resources for the sake of achieving sustainable development but also incorporates the moralistic duty to conserve the environment for the sake of the other forms of life namely animals and plants. The quest for sustainable development should not only be informed by the human desire to secure their future but should also include the duty to safeguard the environment for its own sake. It is imperative that all the relevant stakeholders join hands in their efforts to conserve and protect the environment for a better, healthy and secure environment that will guarantee better lives for the human race, animals and plants. Achieving environmental security in Kenya is possible. It is an ideal that is attainable, for the sake of the environment and the people of Kenya.⁴¹⁶

12. Food Security and Environmental Sustainability in Kenya

Food security has been described as a multifaceted sustainable development topic, linked to health through malnutrition, but also to sustainable economic development, environment, and trade.⁴¹⁷ It is noteworthy that small-scale farmers dominate the agricultural sector in Kenya and derive their livelihoods from agriculture which is mainly reliant on rainfall. These farmers, it has been noted, face the challenges of land degradation, poor soil fertility management, and continuous cropping.⁴¹⁸ The agricultural sector in Kenya is said to be highly exposed to climate change and climate variability, as farming activities directly depend on climatic conditions.⁴¹⁹ This has adverse effects on both food security and environmental sustainability in the country.

A population that is food insecure and poorly equipped concerning agriculture production is desperate to survive and this is often at the expense of environmental sustainability since they engage in unsustainable agricultural practices. It is noteworthy that unsustainable agricultural practices as well as unsustainable economic activities such as charcoal burning, timber harvesting or logging are likely to endanger the environment. Unless the food insecurity problem is adequately addressed, any efforts to achieve environmental protection and sustainability in the country will be futile.⁴²⁰

414 Ibid.

415 See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

416 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Seven, for the full discussion.

417 World Health Organisation, 'Trade, foreign policy, diplomacy and health', *Food Security*, available at <http://www.who.int/trade/glossary/story028/en/> [Accessed on 17/07/2014].

418 United Nations Economic Commission for Africa, 'An Assessment of Agricultural Sector Policies and Climate Change in Kenya: Nexus between Climate Change Related Policies, Research and Practice: Final Report' December, 2013, p.1. Available at http://www.climdevafrica.org/sites/default/files/DocumentAttachments/ACPC_KIPRA_Kenya_Policy_Research_Practice%20%26%20Climate%20Change_12.12.2013_Final.pdf [Accessed on 17/07/2014].

419 Ibid, p. 2.

420 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Eight, for the full discussion on food security.

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The human right to adequate food is of crucial importance for the enjoyment of all rights.⁴²¹ The right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights.⁴²² It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfillment of all human rights for all.⁴²³ Alleviation of hunger and poverty is therefore, in the long-run interest of the human development.⁴²⁴

13. Promoting the Right to Clean and Healthy Environment for Sustainable Development

a. Defining the Right to Clean and Healthy Environment

It has been argued that the problem in declaring a *right to a clean and healthy environment* (emphasis added) as is found in various documents is that there is yet no clear definition of this right nor is its content clearly demarcated.⁴²⁵ Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated - is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante?⁴²⁶ For instance, in the Kenyan case of *Pastor James Jessie Gitahi & 202 others v Attorney General*,⁴²⁷ the Court observed that "...prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibration transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the level of noise through the Regulations.⁴²⁸ The Court also stated that "Part II of the *Regulations*⁴²⁹ has a general prohibition against, "loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment." In determining whether the noise is loud several factors are considered including the time of the day, the proximity to a residential neighbourhood, whether the noise is recurrent intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise can be controlled without effort or expense to the person making the noise. According to the Court, a violation of the general prohibition is an offence and attracts a penalty under the Act and the Regulations."

The right to a clean environment openly became an international concern first in 1968 when the UN General Assembly passed a resolution identifying the relationship between the quality of the

421 UN Committee on Economic, Social and Cultural Rights.

422 Ibid.

423 General Comment No. 12: *The Right to Adequate Food*, op. cit.

424 Ananda, D., Chapter - II, 'Food Security: the Concept and the Issue', op. cit. p. 2.

425 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Nine, for the full discussion.

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

427 [2013] eKLR, Petition No. 683 of 2009.

428 Para. 28.

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

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environment and the enjoyment of basic rights.⁴³⁰ It was not until the Stockholm conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document (Stockholm Declaration, 1972)⁴³¹. It declared that *man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations* (Emphasis added).⁴³² It is noteworthy that the Declaration did not just recognise the right to a good quality environment but also placed a responsibility on human beings to protect and improve the environment for present and future generations. This position of rights and responsibility towards the environment is now widely accepted and it goes to the core of the sustainable development discourse.⁴³³

b. Scope of the Right to Clean and Healthy Environment

The right to a clean and healthy environment is so interwoven with the realisation and enjoyment of other fundamental rights that any attempt to classify it as an inferior right sabotages the realisation of all the other basic rights, including life, health, livelihood and well-being, amongst others.⁴³⁴ This right advocates for a healthy human habitat, including clean water, air and soil that are free from toxins or hazards that threaten human health.⁴³⁵ It is no longer in dispute, at least in Kenya, that there exists a human right to a clean and healthy environment recognised even by the Constitution. Ensuring full enjoyment of a clean and healthy environment, through effective environmental management, will provide multiple benefits to society and the economy.⁴³⁶ This calls for a holistic, comprehensive and integrated approach to health and environment to protect both the environment and public health.⁴³⁷

The environment should be accorded some right, independent of the human beings. Indeed, the Constitution of Kenya elevates the environment as worthy of protection by stating in the preamble that the People of Kenya are respectful of the environment, which is their heritage, and are determined to sustain it for the benefit of future generations. The constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment. The right to a clean and healthy environment can be equated to the right to life. This is the bold declaration that must be made and captured in our legal framework so as to make it a reality.

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

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

432 Ibid, Principle 1.

433 For instance, see Article 69, Constitution of Kenya, 2010 (Government Printer, Nairobi).

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

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

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

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

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14. Environment, Trade and Sustainable Development

The United Nations observes that the global understanding of development has changed over the years, and countries now have agreed that sustainable development—development that promotes prosperity and economic opportunity, greater social well-being, and protection of the environment—offers the best path forward for improving the lives of people everywhere.⁴³⁸ 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.⁴³⁹ 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.⁴⁴⁰

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.⁴⁴¹ 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.⁴⁴² 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.⁴⁴³

Trade is considered as one of the driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.⁴⁴⁴ 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.⁴⁴⁵ 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.⁴⁴⁶

438 United Nations, 'What We Do: Promote Sustainable Development,' available at <http://www.un.org/en/s.s/what-we-do/promote-sustainable-development/index.html> [Accessed on 4/09/2016].

439 International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook* (International Institute for Sustainable Development, Geneva, 2014), p.3. Available at <http://www.unep.org/roe/Portals/139/documents/trade-green-economy-handbook-third-edition-en.pdf> [Accessed on 4/09/2016].

440 Ibid.

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

442 Ibid, para. 50.

443 Ibid, para. 50.

444 '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.

445 International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook*, op cit, pp. 3-4.

446 Ibid, pp. 3-4.

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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.⁴⁴⁷ 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.⁴⁴⁸ 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 2020.⁴⁴⁹ 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.⁴⁵⁰ 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.⁴⁵¹

It has been suggested that equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer⁴⁵², 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

447 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).

448 Ibid, para. 40.

449 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, op cit., para. 17.11.

450 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.

451 Ibid, para. 68.

452 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."

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energy.⁴⁵³ 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.⁴⁵⁴

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.⁴⁵⁵

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.⁴⁵⁶ 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 policy.⁴⁵⁷ The impact of environment policies on trade depends on the amount and frequency of the transaction, conditioned by the degree of trade liberalisation.⁴⁵⁸

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.⁴⁵⁹ 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

453 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].

454 Ibid, p.10.

455 Ibid, p.10.

456 The World Trade Organization and Sustainable Development: An Independent Assessment. A Report by the International Institute for Sustainable Development, 1996.

457 Timbur, M. & Pralea, S., 'International Trade – Environment' Relationship in the Context of Sustainable Development,' CES Working Papers.

458 Ibid.

459 Ibid.

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procedures for investment and technology choice, foreign trade incentives, and all components of development policy.⁴⁶⁰

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.⁴⁶¹ Environment, trade and development are clearly linked. An integrated approach that fully incorporates environmental concerns, fair trade and sustainable development is desirable.⁴⁶²

15. Indigenous Knowledge and Sustainable Development

The CBD may be the only international treaty that specifically acknowledges the role of traditional knowledge, innovations, and practices in biodiversity conservation and sustainable development, as well as the need to guarantee their protection, whether through intellectual property rights (IPRs) or other means.⁴⁶³

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.⁴⁶⁴ 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.⁴⁶⁵

460 Report of the World Commission on Environment and Development, *Our Common Future*, op cit., chapter 2, para. 79.

461 ‘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*.

462 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Ten, for the full discussion.

463 Dutfield, G., ‘TRIPS-Related Aspects of Traditional Knowledge,’ *Case Western Reserve Journal of International Law*, Vol. 33, Iss. 2, 2001, pp. 233-275 at pp. 261-261. The 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992), under Article 8 (j), dealing with traditional knowledge, provides that each contracting party shall, as far as possible and appropriate: “Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.” Further, Article 10(c) of the UN Convention on Biological Diversity (CBD) provides that each Contracting Party shall, as far as possible and as appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

464 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].

465 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].

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It has correctly been observed that ecological knowledge does not function in isolation but it is, instead, embedded in institutions and local social norms.⁴⁶⁶ Further, the structure and dynamics of institutions are critical for implementation of management practices based on ecological understanding in any society.⁴⁶⁷ The coordination of appropriate resource use practices is often entrusted with traditional leaders.⁴⁶⁸

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.⁴⁶⁹ 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.⁴⁷⁰

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.⁴⁷¹ 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.⁴⁷² The way how people develop such knowledge by understanding their environment through observation and experiences determine the specific group of people's knowledge.

All knowledge including traditional knowledge, traditional ecological knowledge and indigenous knowledge should be utilised in a bid to address environmental problems in Kenya. The sustainable development agenda calls for an integrated approach to natural resources governance and management to ensure that all groups and stakeholders are brought on board.

16. Attaining Gender Equity for Sustainable Development

The role of gender in the national development discourse and particularly sustainable development in Kenya is pertinent. The current Constitution of Kenya 2010 places great emphasis on the

466 Berkes, F., et. al., 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management,' op cit. p. 1258.

467 Ibid, p. 1258.

468 Ibid, p. 1258.

469 Castro, A.P. & Ettenger, K., 'Indigenous Knowledge and Conflict Management: Exploring Local Perspectives and Mechanisms for Dealing with Community Forestry Disputes,' op cit.

470 Ibid.

471 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].

472 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.

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equality of both gender and their participation in the country's development agenda.⁴⁷³ However, gender equity is an ideal that is yet to be fully realized owing to various factors that are discussed in this chapter. The author herein examines the legal and institutional framework on gender equity and human rights with a view to making a case for the practical empowerment of both gender for national development.⁴⁷⁴

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.⁴⁷⁵

The Constitution envisions a situation where women and men participate equally and competitively in national development. It is important to note that the national values and 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.⁴⁷⁶ 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.⁴⁷⁷ 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.

473 Article 1 of the Constitution emphasizes that all sovereign power belongs to the people while Article 10 sets out democracy and participation of the people and inclusiveness as some of the national values and principles of governance in Kenya; Article 27 prohibits either the State or any person from discriminating against any person on any of these grounds including: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; Article 59 thereof establishes the Kenya National Human Rights and Equality Commission whose functions include *inter alia* promoting gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development. Article 69(2) also obligates every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Further, Article 175 (c) provides that one of the principles of principles of devolved government is that no more than two-thirds of the members of representative bodies in each county government should be of the same gender; See also Article 197.

474 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Twelve, for the full discussion.

475 Strickland, R. & Duvvury, N., "Gender Equity and Peacebuilding," *From Rhetoric to Reality: Finding the Way*, International Center for Research on Women Discussion Paper, 2003. p. 5. Prepared for the Gender Equity and Peacebuilding Workshop with a grant from the International Development Research Centre (IDRC), Ottawa, Canada. Available at <http://www.icrw.org/files/publications/Gender-Equity-and-Peacebuilding-From-Rhetoric-to-Reality.pdf> [Accessed on 16/05/2015].

476 Ibid, Article 10 (1).

477 Ibid, Article 10(2) (b) (c).

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Gender equality is seen as a shared vision of social justice and human rights and one that requires concerted efforts from all to achieve.⁴⁷⁸ The effect of this is that the foregoing values and principles ought to inform any development deliberations and move towards achievement of gender equality in Kenya. It has been observed that Gender equality, centered in human rights, is both a development goal on its own and a vital tool to accelerating sustainable development and unless women and girls are able to fully realize their rights in all spheres of life, an all-inclusive human development will not be advanced.⁴⁷⁹

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.⁴⁸⁰ 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.⁴⁸¹ As such, *gender equity, which goes beyond equality*, is necessary (emphasis added).

It is noteworthy that the term 'development' is perceived differently by different people and countries and thus defined differently. That is probably the reason why there exists the 'developed' and 'developing' countries classification. There is therefore no single agreed definition of the concept of development. However, development has various angles to it and may be classified as economic development, human development, *inter alia*. However, development is not an exclusively economic phenomenon but encompasses financial as well as reorganization and reorientation of entire economic and social systems. It has been argued that in addition to improvements in incomes and output, it typically involves radical changes in institutional, social, and administrative structures as well as in popular attitudes and, in many cases, even customs and beliefs.⁴⁸² 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.⁴⁸³ 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.⁴⁸⁴

478 See generally, *Beijing Declaration and Plat form for Action Beijing+5 Political Declaration and Outcome*, United Nations 1995.

479 UNDP, *Gender equality*, available at <http://www.africa.undp.org/content/undp/en/home/ourwork/gender-equality/overview.html> [Accessed on 02/04/2015].

480 *Ibid.*

481 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].

482 M. Todaro, 'Economic Development' chapter 3, *op cit*.

483 Reeves, H. & Baden, S., "Gender and Development: Concepts and Definitions," *op cit*, p.10.

484 *Ibid.*

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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.⁴⁸⁵ Gender equality is an essential component of sustainable economic growth and poverty reduction.⁴⁸⁶ 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.⁴⁸⁷ Arguably, social sustainability will not be achieved in a society where one gender is treated as superior to the other. It is, therefore, important to promote social justice and gender equity so as to achieve an inclusive and socially sustainable development.

17. Managing Natural Resource Conflicts for Sustainable Development

Social conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. It has rightly been observed that in any society, conflict is one of the major factors negatively affecting development as it diverts resources that could have otherwise been used productively.⁴⁸⁸ 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.⁴⁸⁹ Thus, conflicts ought to be managed effectively.

Natural resource conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system. National legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.⁴⁹⁰ Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-

485 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).

486 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].

487 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].

488 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Thirteen, for the full discussion; See also Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi – 2015), Chapter sixteen which examines the various approaches to the management of natural resource based conflicts.

489 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.

490 FAO, 'Negotiation and mediation techniques for natural resource management,' *op cit*.

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nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.⁴⁹¹

There are many factors that determine the emergence, persistence, and even management of conflicts. The understanding of these factors is essential in developing policies that effectively limit and manage conflict. The factors range from internal to relational and contextual factors.⁴⁹²

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.⁴⁹³ These conflict drivers have contributed to most of the natural resource conflicts in Kenya and should therefore be adequately addressed in managing the conflicts.⁴⁹⁴

It has been argued that conflicts associated with natural resources are often due to different perceptions regarding who should benefit from the conflicts, and are an indicator of resource availability, evolution of tenure rights and systems, accessibility and control over the resource.⁴⁹⁵ They are believed to result from an imbalance in the power structure, where these power imbalances can exhibit themselves through unequal distribution of natural resource use and tenure rights.⁴⁹⁶

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.⁴⁹⁷

Conflict also often produces significant environmental degradation.⁴⁹⁸ It is difficult to justify environmental protection when other more immediate concerns exist as a result of the conflict. Therefore, environmental damage from accelerated resource extraction may be severe. The

491 Ibid.

492 Louis, K., "Factors Shaping the Course of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003. Available at <http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/> [Accessed on 17/01/2016].

493 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.

494 Campbell, D.J., et al, 'Land use conflict in Kajiado District, Kenya,' *Land Use Policy*, Vol.17, Issue 4, October 2000, pp. 337–348; Yamano, T, et al, 'Land Conflicts in Kenya: Causes, Impacts, and Resolutions,' *FASID Discussion Paper 2005-12-002*, available at [www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya \(FASID DP\).pdf](http://www3.grips.ac.jp/~yamanota/Land Conflicts in Kenya (FASID DP).pdf) [Accessed on 17/01/2016].

495 Traore, S. & Lo, H., 'Natural Resource Conflicts and Community Forestry: A West African Perspective,' in FAO, *Annex C - Summary of Discussion Papers*, available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/01/2016].

496 Ibid.

497 See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

498 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.

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Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.⁴⁹⁹ The SDGs go ahead to state that the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda.

The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peacebuilding and State building.⁵⁰⁰ They also call for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.⁵⁰¹ Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

It is, therefore, arguable that one of the way of stemming natural resource conflicts would be striking a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently building trust within communities and between communities and the national government. It has also been argued that for conflict management to be successful there is need to conduct a historical analysis (with the participation of local people) so that the major issues can be identified, analysed and discussed.⁵⁰² While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation.

Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.⁵⁰³ To them, justice would mean affording them an opportunity to get what they feel entitled to and anything less, means that they resort to other means of possessing the same. This way, conflicts become inevitable. Conflict resolution mechanisms such as negotiation and mediation affords the parties an opportunity to negotiate and reach a compromise agreement,

499 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

500 Ibid.

501 Ibid.

502 Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

503 FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 07/02/2016].

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where all sides get satisfactory outcome.⁵⁰⁴ This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.⁵⁰⁵

18. Moving beyond the Law: Sustainable Development as a Way of Life

This section offers recommendations on some of the ways that sustainable development can be achieved through nurturing the environment. However, the discussion is not exhaustive and there are more ways in which the same can be achieved, depending on the locality, amongst other factors.⁵⁰⁶

18.1 Poverty Eradication for Sustainable development

It has rightly been pointed out that at the heart of the concept of sustainable development is the fulfilment of the basic needs of the world's poor without compromising the capacity of the environment to provide similar benefits for future generations.⁵⁰⁷

18.2 Use of Science, Technology and Innovation for Sustainable Development

It has rightly been asserted that all utilisation of the renewable natural resources must be carried out on a sustained-yield basis; and all disposal of wastes (gaseous, liquid and solid) must be carried out on a sustained-discard basis, that is, at disposal rates not in excess of decomposition rates.⁵⁰⁸ 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.⁵⁰⁹

The need for technology transfer and innovation is well captured in *Maafikiano*, outcome document of the Nairobi UNCTAD 14th Conference, which states that ‘technology, including information and communications technology and innovation, plays a critical role in trade and development, including through its essential contribution to structural transformation, productive capacities, competitiveness and the diversification of production and exports as well as to advancing food security. It is thus a key means of implementation and a component of achieving the Sustainable Development Goals. It is also one of the most important levers of change for achieving inclusive and sustainable development. The development, transfer, dissemination and diffusion of environmentally sound technology to developing countries on favourable terms,

504 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.
505 See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

506 See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Fourteen, for the full discussion.

507 Mbote, P.K. & Cullet, P., ‘Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management,’ *ELRC Working Paper 1996 – 1*, (International Environmental Law Research Centre, 1996), p. 7.

Available at <http://www.ielrc.org/content/w9601.pdf> [Accessed on 12/09/2016].

508 Westing, A.H., ‘Environmental Security and Its Relation to Ethiopia and Sudan,’ *Ambio*, Vol. 20, No. 5, Environmental Security (Aug., 1991), pp. 168-171, p. 168.

509 See Republic of Kenya, *Kenya Green Economy Strategy and Implementation Plan (GESIP)*, Maanzoni-1 Draft, May 2015.

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including on concessional and preferential terms, as mutually agreed, is a means to implement the 2030 Agenda.

18.3 The Green Economy Approach

According to UNEP (now UNEA), a green economy is one whose growth in income and employment is driven by public and private investments that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services.⁵¹⁰ Arguably, green economies are not based on the demand for sacrifice, but on the idea of qualitative growth, where low-carbon and environmentally friendly technologies, as well as international cooperation in this area play a key role.⁵¹¹ The UNEA maintains that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.⁵¹²

The transition to green economy needs careful management and engagement by government, business, communities and citizens to ensure its success in achieving a truly sustainable future that promotes social equity, poverty eradication and human well-being.⁵¹³

18.4 Embracing Environmental Ethics for Sustainable Development

It has rightly been pointed out that with the increasing deterioration of ecological systems on which human beings rely and the aggravation of the environmental crisis, human beings cannot rely on economic and judicial methods alone to solve the problems of environmental pollution and ecological imbalances; we must also appeal to human beings' limitless internal ethical resources.⁵¹⁴ Only after adoption of an appropriate attitude towards nature and establishment of a new ethical relationship between human beings and nature will we be able to love and respect nature automatically as well as conscientiously; and only with the guidance of such love and respect can we successfully deal with the issues of environmental pollution and ecological imbalances.⁵¹⁵ 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.⁵¹⁶

18.5 Education for Environmental Sustainability and Sustainable Development

There is a close link between environmental degradation, lack of environmental justice and democracy, poverty and low levels of education among the citizenry, and provision of education

510 Ibid.

511 Friedrich-Ebert-Stiftung, 'Green Economy - A Sustainable Concept?' Available at <http://www.fes-sustainability.org/en/discussions/green-economy-sustainable-concept> [Accessed on 11/09/2016].

512 UNEP, 'What is an "Inclusive Green Economy"?' op cit.

513 Ten B.P., et al, *Nature and its Role in the Transition to a Green Economy*, (United Nations Environment Programme, 2012), p. 48. Available at <http://www.teebweb.org/wp-content/uploads/2013/04/Nature-Green-Economy-Full-Report.pdf> [Accessed on 11/09/2016].

514 Yang, T., 'Towards an Egalitarian Global Environmental Ethics,' *Environmental Ethics and International Policy*, (ISBN 978-92-3-104039-9, UNESCO, 2006), p.23. Available at <http://publishing.unesco.org/chapters/978-92-3-104039-9.pdf> [Accessed on 11/09/2016].

515 Ibid, p. 23.

516 See generally, Oksanen M, 'Should Trees Have Standing? Law, Morality, and the Environment' 174.

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is the crucial first step towards their elimination.⁵¹⁷ One way of empowering people is through education to give them alternative means of making a living for social sustainability⁵¹⁸ as opposed to relying on environment only, as well as enabling them make informed decisions that would contribute positively to environmental sustainability. Education is important for promoting sustainable development and improving the capacity of people to address environment and development issues.⁵¹⁹

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

18.6 Promoting Environmental Justice for Sustainable Development

There is also need to achieve environmental justice for all. Environmental justice is touted as the minimum ethical stance of environmental ethics, with two dimensions: distributive environmental justice and procedural/participatory environmental justice.⁵²⁰ Distributive environmental justice concerns the equal distribution of environmental benefits and burdens, whereas participatory environmental justice focuses on opportunities to participate in decision-making.⁵²¹

It has been suggested that to achieve environmental justice, there are four broad areas where changes in policy and practice are needed: (a) Rights and responsibilities: ensuring a right to a healthy environment is an overarching aim of policy, which must be supported by placing responsibilities on individuals and organisations to ensure this right is achieved; (b) Assessment: projects and policies need to be assessed for their distributional impacts; (c) Participation and capacity: decision-making should involve those affected, and those groups or individuals enduring environmental injustices need support in order to increase their control over decisions which affect them; and (d) Integration: of social and environmental policy aims.⁵²² Communities, with support

517 See generally UNESCO, 'Educating for a Sustainable Future: A Transdisciplinary Vision for Concerted Action', EPD-97/CONF.401/CLD.1. November 1997.

518 Social sustainability has been defined as concerning how individuals, communities and societies live with each other and set out to achieve the objectives of development models which they have chosen for themselves, also taking into account the physical boundaries of their places and planet earth as a whole. (Colantonio, A. & Dixon, T., 'Measuring Socially Sustainable Urban Regeneration in Europe,' (Oxford Brookes University: Oxford Institute for Sustainable Development (OISD), 2009) (As quoted in Woodcraft, S., et. al., 'Design for Social Sustainability: A framework for creating thriving new communities', *Social Life*, 2012, p.16. Available at http://www.futurecommunities.net/files/images/Design_for_Social_Sustainability_0.pdf [Accessed on 12/09/2016].

519 UNESCO, 1992, para. 36.3, p. 2 (as quoted in Tilbury, D., 'Environmental Education for Sustainability: Defining the New focus of Environmental Education in the 1990's', *Environmental Education Research*, Vol. 1, No. 2, 1995, 195-212 at p.198.

520 Yang, T., 'Towards an Egalitarian Global Environmental Ethics,' *Environmental Ethics and International Policy*, op cit., p. 32.

521 Ibid, p. 32.

522 ESRC Global Environmental Change Programme, 'Environmental Justice: Rights and Means to a Healthy Environment for All,' op cit., p. 11.

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from the Government, can come up with localized yet effective means of improving production, environmental conservation and reversing the effects of climate change, for enhanced environmental security and poverty eradication.

It has been suggested that translating any vision into action requires changing the way people work so that: sustainable development is the core principle underpinning the decision making process; critical issues are identified through discussion with key stakeholders; people and communities are at the centre of sustainable development planning; policies and programmes are integrated so that they are mutually reinforcing; funding and grant schemes compliment policy design and planning objectives; spending plans and budget agendas are aimed at achieving key sustainable development outcomes with realistic planning horizons; short term decisions are not contradictory to long-term objectives; the needs and opportunities of all are identified; the root causes and consequences of problems are addressed and the risks of inaction are recognized; successful examples of sustainable development are made mainstream as soon as possible; sustainable development is integrated into education and training programmes, and public understanding and awareness of the meaning of sustainable development and its day-to-day implications is increased.⁵²³

There is a need to take more action directed at addressing the challenges facing realisation of environmental security in the country. Although the international framework on environmental law has comprehensive and well-meaning provisions and principles that may help countries address environmental insecurity, most of them are merely prescriptive in nature without any force of law. As such they heavily rely on the countries' political goodwill.⁵²⁴ It is undeniable that Kenya has done a lot to domesticate the provisions of the international legal instruments but more still needs to be done by way of implementing the same. The response to climate change in Kenya must adhere to the constitutional governance framework and commitment to sustainable development, while addressing the goal of attaining low carbon climate resilient development.

The country needs to closely work with communities, private sector and various stakeholders to promote and ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources. Indeed, a recent announcement by the Environment cabinet Secretary, who called for new stakeholder partnerships to address challenges facing the community based natural resources management, is to be lauded. The cabinet Secretary noted that over-exploitation of natural resources, limited access to markets; poverty and weak policies were rampant in areas endowed with community resources posing challenges in their exploitation. According to the Secretary, the Ministry was committed to support community-based environmental initiatives that recognize equity, fair-trade and benefits sharing of natural resource management.⁵²⁵

523 Environmental Advisory Council, 'Principles of Sustainable Development,' March 2013, op cit., p. 5.

524 See generally, Lang W, 'UN-Principles and International Environmental Law' (1999) 163 Max Planck UNYB 157.

525 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].

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Society must decide how best to use its total capital stock today to increase current economic activities and welfare. Society must also decide how much it needs to save or accumulate for tomorrow, and ultimately, for the well-being of future generations.⁵²⁶

There is a need to move beyond the law and adopt other measures aimed at ensuring meaningful development. In conclusion, it is necessary that all stakeholders cooperate in nurturing the environment for the achievement of sustainable development, a prosperous and secure future for all.

⁵²⁶ UNEP, 'What is an "Inclusive Green Economy"?' op cit., p. 17.

Enhancing Environmental Governance through Law and Other Tools: The Efficacy of Kenya's Environmental Management and Coordination Act (EMCA)

Abstract

Kenya's Environmental Management and Coordination Act (EMCA), No. 8 of 1999 came into force in 2000 as a framework law meant to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Notably, this Act does not repeal any of the sectoral laws but instead seeks to coordinate any actions meant to regulate access, use and conservation of these resources. While there are sectoral institutional frameworks under different laws, EMCA establishes the National Environment Management Authority (NEMA) as the lead agency in coordination of these conservation and protection measures. Implementation of the framework law as it is has without a doubt come with its fair share of challenges, often resulting in conflicts among laws and the related institutions. This paper seeks to discuss the efficacy of a framework law approach to environmental governance generally. It also discusses the implementation of EMCA as it is and the challenges that arise and through comparative approaches, offers viable reforms that may be considered in order to enhance its effectiveness in ensuring that Kenya achieves its goals in sustainable development agenda. The author generally argues that unless the identified challenges are addressed, Kenya's dream of becoming a model country in effective environmental governance for sustainability will remain a mirage. The author also argues that law alone is not enough to achieve this and thus proposes a hybrid approach that employs both legal and other compliance tools in enhancing environmental governance in the country.

1. Introduction

Environmental governance refers to the laws, customs, guidelines, and institutions that influence how people interact with the environment.¹ Since environmental legislation is a cornerstone for environmental sustainability, it is crucial that its objectives be completely attained in light of intensifying environmental challenges.² The actions of many players, including states as well as business, nongovernmental organisations (NGOs), and the public, are increasingly included in environmental governance, which was initially the purview of local and thereafter national governments.³ Historically, states and/or governments have governed the environment in a largely top-down manner through regulation and the legal system. However, in the last two decades, non-state actors, such as businesses and communities, have become much more directly involved in governance, necessitating the use of alternative strategies that rely on market forces and/or networks of local actors.⁴ Globalization has made it easier than ever to close the gap between societies and the condition of their environs. Therefore, it has become imperative that more effective environmental laws and legal frameworks be adopted globally in order to shift economic

1 Environment UN, 'Why Does Environmental Rights and Governance Matter?' (*UNEP - UN Environment Programme*, 4 September 2017) <<http://www.unep.org/explore-topics/environmental-governance/why-does-environmental-governance-matter>> accessed 6 January 2023.

2 Norul Mohamed Rashid, 'Environmental Law' (United Nations and the Rule of Law) <<https://www.un.org/ruleoflaw/thematic-areas/land-property-environment/environmental-law/>> accessed 6 January 2023.

3 Benson, D. and Jordan, A., "Environmental Governance." In *The International Encyclopedia of Geography*. Wiley, 2017.

4 Ibid.

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development and advancement along a path toward environmental sustainability.⁵ This paper examines the effectiveness of the *Environmental Management and Coordination Act (EMCA), No. 8 of 1999*, being the framework law on environmental governance in Kenya, in responding to the ever increasing environmental challenges in the country, and proffers some recommendations on what future amendments to the Act should consider.

2. Place of Law in Governance Matters

The relationship between law and governance has been conceptualised by certain scholars in broad terms. Law and governance have been successfully connected, according to some, in the manner listed below:⁶

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 legalized 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.

Article 10 of the Constitution of Kenya outlines the national values and principles of governance that inform application or interpretation of the Constitution, enacting, application or interpretation of any legislation, or making or execution of public policy.⁷ The law thus has a significant impact on governance issues since it not only establishes the necessary governance structures but also specifies how they should operate.

5 Anshu Singh, "Principles and Development of International Environmental Law", Pen Acclaims, Volume 10, May 2020, ISSN 2581-5504, pp.1-2.

< <http://www.penacclaims.com/wp-content/uploads/2020/06/Anshu-Singh.pdf>> accessed 6 January 2023.

6 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 6/1/2023].

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

Notably, both formal and informal legal systems are recognised under the Kenyan Constitution.⁸

3. Kenya's Legal and Institutional Framework for the Management and Governance of the Environment: Overview

While there are various sectoral laws which deal with management and governance of wildlife, water, forests and agriculture, among others, and all of which have a bearing on the environment, the main focus of this paper is the 2010 Constitution of Kenya and the Environmental Management and Coordination Act (EMCA)⁹.

a. The Constitution of Kenya 2010

The Constitution captures the obligations of the State in respect of the environment which include the duty to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources¹⁰; encourage public participation in the management, protection and conservation of the environment; and establish systems of environmental impact assessment, environmental audit and monitoring of the environment, among others.¹¹ Notably, every citizen 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.¹² Although the Constitution calls for communities and the State to work together, decision-making still appears to be mostly top-down, and communities are only given an opportunity to apply for resource user rights, with little to no consultations addressing management and governance issues.¹³

b. Environmental Management and Coordination Act (EMCA), No. 8 of 1999

The main framework law on environmental governance and management in Kenya is the *Environmental Management and Coordination Act (EMCA)*¹⁴. It is meant to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.¹⁵ The existing legal and institutional framework for environmental management is disjointed because different entities are responsible for different aspects of environmental law and policy.

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

9 Environmental Management and Coordination Act (EMCA), No. 8 of 1999, Laws of Kenya.

10 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).

11 Constitution of Kenya, Art. 69(1).

12 Constitution of Kenya, Art. 69(2).

13 Sec. 29 & 47 Water Act, No. 43 of 2016, Laws of Kenya; Forest Conservation and Management Act, 2016 (No. 34 of 2016), sec. 48-52; See also Rouillé-Kielo G, 'Natural Resources Management in Kenya (Water and Forest): Centralised Policies, Between Exclusion and Participation of the Local Population' in Marie-Aude Fouéré, Christian Thibon and Marie-Emmanuelle Pommerolle (eds), *Kenya in Motion 2000-2020* (Africae 2021) <<http://books.openedition.org/africae/2515>> accessed 8 January 2023:

"The water and forest users' associations "participate" in the management activities primarily as auxiliaries to the central government, in order to help achieve the objectives set on a national level, in particular that of a 10% tree cover up to 2022."

14 Environmental Management and Coordination Act (EMCA), No. 8 of 1999, Laws of Kenya.

15 Ibid, Preamble.

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EMCA, which was enacted to improve management of Kenya's environmental resources, did little to eliminate the variety of regulatory frameworks in place for various environmental resources. Furthermore, the development of necessary legislation and rules to support the EMCA framework is still far from completion. A misleading impression of the adequacy of laws and institutions to address environmental challenges is created by this multiplicity. EMCA must be revised, and all related laws must be consolidated, so that it will be simpler to assess the efficacy of the legislation and institutions. Proper application of the law through the institutions outlined in this collection of laws still leaves many issues unsolved including overlapping of mandates. Reforms to Kenya's environmental governance policies and institutions are required to guarantee that environmental standards and laws are more strictly enforced.¹⁶

Part XII,¹⁷ 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.¹⁸ However, its decision is not final and any dissatisfied party may appeal to superior courts, starting from Environment and Land Court.¹⁹

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] eKLR²⁰ in the following words:

72. Nevertheless, NEMA is not just an investigator and a prosecutor. Its success cannot be measured in terms of successful investigations and prosecutions. It has a bigger mandate: to be the principal instrument of government and the people of Kenya in the implementation of all policies relating to the environment. Indeed, under section 9 (2), NEMA has mandatory obligations to among others co-ordinate with lead agencies to ensure the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya and to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection.

The policies, laws, and regulations in place in Kenya, some of which have already been mentioned, seem to indicate that the State should be in charge of setting policy in regard to sustainable resource management, particularly when it comes to decision-making, rather than working in partnership with local communities.

4. Kenya's Environmental Management and Coordination Act (EMCA), No. 8 of 1999: Challenges and Prospects in Implementation

This section highlights some of the issues and challenges that arise in implementation of EMCA, based on the approaches adopted therein as well as the measures it prescribes.

16 Kenya Vision 2030, p. 104.

17 SS. 125-136, No. 8 of 1999.

18 S. 125, No. 8 of 1999.

19 Sec. 130, EMCA.

20 *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

4.1 Command and Control Approach

Although this paper does not aim to minimize its importance in some cases, the command-and-control approach to environmental governance focuses primarily on achieving conservation objectives and addressing environmental degradation issues at the expense of also trying to ensure that these resources help achieve social justice for the people with regard to the use of environmental resources.²¹ The standards established by numerous legislation for institutional accountability, public participation, and consultations are sometimes taken for granted as mere formality. Social justice-related objectives seem to be put on the back bench.²²

Where EMCA provides for consultations, the same are mainly meant to be between the state agencies charged with environmental governance as lead agencies with minimal or no input from affected communities.²³ 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 command and control mechanism therefore involves the 'command' of the law and the legal authority of the State. Typically, it entails regulatory law, backed by criminal sanctions.²⁴ It is based on potential coercion rather than voluntary goodwill and on penalties rather than positive incentives.²⁵ The command and control mechanism is what has predominantly informed the development of Kenya's natural resources protection regime.²⁶ Its fundamental component is the concentration of power for managing natural resources in the hands of the public authorities, with minimal responsibility being delegated to other authorities or communities and little involvement from local communities.²⁷

4.1.1 Effectiveness of Command and Control Mechanisms

The criminality component of regulation is what makes command and control methods successful.²⁸ It establishes a form of societal control over the use of natural resources.

21 Muigua, K., "Revisiting the Role of Law in Environmental Governance in Kenya." (2019) <<http://kmco.co.ke/wp-content/uploads/2019/06/Revisiting-the-Role-of-Law-in-Environmental-Governance-in-Kenya-Kariuki-Muigua-June-2019.pdf>> accessed 6 January 2023.

22 Ibid; Tyler, T.R., "Social justice: Outcome and procedure." *International journal of psychology* 35, no. 2 (2000): 117-125; Abebe, B.A. and Jones, K., "Social Equity Outcomes in Ethiopia."

23 See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulation 17 which provides for public participation albeit inadequately.

24 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit.*, pp.3 & 5.

25 Davies J.C. & Mazurek, J., *Pollution Control in the United States: Evaluating the System*, *op. cit.*, p.15.

26 Ochieng', B.O., 'Institutional Arrangements for Environmental Management in Kenya,' in Okidi C.O., et al, *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers Ltd, 2008), p.200.

27 Ochieng, B.O, 'Institutional Arrangements for Environmental Management in Kenya,' *op. cit.*, p.200; cf. Ribot, J.C., 'Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation,' *World Resources Institute*, 2002.

28 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit.*, pp. 3 & 5; cf. Ashworth, A., 'Conceptions of Over criminalization,' *Ohio State Journal of Criminal Law*, Vol. 5, 2008. pp. 407-425.

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New categories of illegal acts and criminal legislation have been developed through command and control systems.²⁹ Under the penal law in Kenya, when a body corporate commits an offence it is its managers who are held culpable³⁰ but under environmental law, culpability is assigned to the body corporate in its capacity as such, together with its managers.³¹ This is crucial to ensure huge enterprises, which are frequently responsible for pollutants that may have a harmful impact on natural resources, comply with the law.

Under command and control approaches, criminal law is used as a preventative tool by use of punitive sanction.³² This is because from an economic perspective, criminal sanctions when effectively enforced raise the cost of certain conduct and therefore encourages compliance with laws.³³ The EMCA proposes further sanctions in addition to fines, including the seizure of used products and the termination of licences and licences.³⁴ Corporations will fear shutting down due to cancelled permits and losing their assets as these will directly impact their profits.

Another reason that makes command and control effective is that, environmental laws are regarded as protective of public good.³⁵ Most environmental problems, pollution among them, must be solved by government action to avoid the tragedy of the commons.³⁶ Activities of relatively powerful groups are regulated in favour of a less powerful majority.³⁷

4.1.2 Criticisms Against the Command and Control Approach

One persistent complaint is that regulatory bodies risk becoming "regulatory captured" by the people they are supposed to be protecting if they get overly intertwined with their interests and become less vigilant about upholding the law.³⁸ The apparent disparity in capabilities between regulatory bodies and the industry they are supposed to supervise also points to regulatory capture.³⁹ This means that occasionally private enterprises may have an advantage over public regulators because they have more resources, specialized staff, the ability to challenge the regulator

29 See Bethell, E., 'Environmental Regulation: Effective or Defective? Assessing Whether Criminal Sanctions Provide Adequate Protection of the Environment,' *Plymouth Law Review*, 2009, p.1.

30 S. 23, Penal Code (Cap 63), Laws of Kenya.

31 S. 145(1), Act No. 8 of 1999.

32 Mbote, P.K. 'The Use of Criminal Law in Enforcing Environmental Law' in Okidi, C.O., *et al*, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Ltd, 2008) 110, p.112.

33 *Ibid*, p. 110.

34 S.146, Act No. 8 of 1999.

35 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op cit*, pp. 3 & 11.

36 Krier, J.E. 'The Pollution Problem and Legal Institutions: A Conceptual Overview' in Michael C. Blumm (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992) 181, p.181; See also Hardin, G. 'The Tragedy of the Commons,' *Science*, New Series, Vol. 162, No. 3859 (Dec. 13, 1968), pp. 1243-1248, p. 1245.

37 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit*, pp. 3 & 11; See also generally Stewart, K. 'Avoiding the Tragedy of the Commons: Greening Governance through the Market or the Public Domain?' Available at http://www.yorku.ca/drache/talks/pdf/apd_stewartfin.pdf, [Accessed on 6/01/2023].

38 Ma, H., Shen, G. and Zou, J., "Does Excess Capacity Strengthen Firms' Dependence on the Polluting Path? Evidence from Chinese Iron and Steel Firms," *Evidence from Chinese Iron and Steel Firms*;

39 *Ibid*.

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more effectively on both technical and legal grounds, and a better understanding of the environmental problem, its scope, and potential technological solutions.⁴⁰

The incapacity of the agencies to carry out their missions is a problem as well due to a lack of staffing resources.⁴¹ There are not enough employees at lead agencies, NEMA and the Kenya Wildlife Service to monitor and police any environmental impact. For example, lead agencies' inspectors have the discretion to decide what constitutes an offence and whether to refer a case for prosecution or not. Their interpretation of the law becomes quite important as it constitutes the bridge between the government's decision to intervene and protect the environment and the impact of the intervention upon both the environment and the regulated.⁴² In such scenarios, incentive-based mechanisms become more useful.

The fact that command and control systems use a deterrent/sanction approach presents another difficulty in terms of enforcement. In this paradigm, a penal type of enforcement gives prosecution a significant role because its primary goal is to prohibit specific acts. It is also accusatory and intended to apprehend criminals.⁴³ Standards tend to be less cost-effective, and standards must be regularly amended to be successful, which is not the case as legislation generally does not keep up with change. Additionally, fines for standards violations are typically too light, and enforcement is frequently ineffective.⁴⁴

Due to its simplistic understanding of issues and methods for controlling them, command and control mechanisms have also been criticized for being effective primarily in delivering short-term economic advantages as opposed to long-term benefits.⁴⁵ The strategy is said to implicitly presume that the specific issue at hand is well-defined, well-bounded, straightforward, and typically linear in terms of cause and effect.⁴⁶ When used in complicated real-world scenarios, it may not provide the intended and expected results, posing a serious ecological, social, and economic danger.⁴⁷ Effective natural resource management should promote long-term system viability instead of short-term benefit through command and control. This is based on knowledge of the key processes that

40 Hutter, B.M. "A Reader in Environmental Law", (Oxford University Press, 1999); See also Stallworthy, M, *understanding: Environmental Law* (Sweet & Maxwell, 1st ed., 2008), pp. 79-81; See also Laura Tlaiye, L. & Biller, D, 'Successful Environmental Institutions: Lessons from Colombia and Curitiba, Brazil,' *LATEN Dissemination Note*, No.12, December, 1994, p. 5.

41 See Amechi, E.P., "Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realisation of the Right to Environment," *5/2 Law, Environment and Development Journal*, 2009, pp. 119-120.

42 *Ibid.*

43 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.

44 Sourced from http://www.unescap.org/drrpad/vc/orientation/M5_10.htm, [Accessed on 6/01/2023]; See also Bethell, E. 'Environmental Regulation: Effective or Defective? Assessing Whether Criminal Sanctions Provide Adequate Protection of the Environment,' *op cit.*

45 Holling C. S. & Meffe, G.K. "Command and Control and the Pathology of Natural Resource Management," *Conservation Biology*, Vol. 10, No. 2 (Apr., 1996), pp. 328-337, p. 329.

46 *Ibid*; See also generally Sposito, V.A & Faggian, R., 'Systemic Regional Development-A Systems Thinking Approach,' *Informationen zur Raumentwicklung Heft*, January, 2013. Available at http://www.researchgate.net/publication/268180957_Systemic_Regional_Development__A_Systems_Thinking_Approach [Accessed on 6/01/2023]

47 *Ibid.*

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structure and drive ecosystems and acceptance of both the natural ranges of ecosystem variation and the constraints of that variation for long-term success and sustainability.⁴⁸

Some economists and legal academics contend that excessive bureaucratic centralization and rigidity cause delays and time wasting thus impairing the effectiveness of command and control systems.⁴⁹ With little to no responsibility being delegated to local communities, a command and control strategy places the power for environmental management in the hands of public institutions⁵⁰ This leaves little room for participation of local communities.⁵¹ In this way, a command and control approach may ignore local and other traditional knowledge relevant in natural resources management, which could be more cost effective and less time consuming.⁵² Generally, events and behaviours that pose a risk of harm are governed by criminal law. To put it another way, a crime can be committed even if no physical injury was done. Due to the intricate technical nature of the activities that are under regulation, it may be challenging to identify the source of an offence even after harm has been done.⁵³ Under EMCA, any individual who has harmed the environment or who is still doing so may be subject to an environmental restoration order from the court.⁵⁴ It, therefore, seeks to regulate a situation where harm has not yet actually occurred.

Aside from that, geographical and chronological considerations make it challenging to assess environmental impact.⁵⁵ The government agency evaluates the risk of each activity to determine if regulation is necessary, which is a labour- and resource-intensive process.⁵⁶ Industries continuously add to the hundreds of pollutants and hazards already present.⁵⁷ EMCA, for example, has legislated on standards for water quality among others.⁵⁸ It only identifies poisons, toxic substances⁵⁹ and effluent⁶⁰ as water pollutants. There are several causes of water contamination, though, that NEMA has not yet identified or regulated. Regulators must balance environmental concerns with the economic implications of risk reduction when determining an acceptable level of risk once hazards have been assessed.⁶¹

48 *Ibid*, p. 335; See also generally Simon A. Black, S. A., *et al*, "Using Better Management Thinking to Improve Conservation Effectiveness," *ISRN Biodiversity*, vol.2013, 2013.

49 Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate' in Michael C. Blumm (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992) 343, p. 345.

50 Ochieng', B.O., 'Institutional Arrangements for Environmental Management in Kenya,' *op. cit*, p. 200.

51 *Ibid*.

52 See generally, Berkes, F., 'Alternatives to Conventional Management: Lessons from Small-Scale Fisheries,' *Environments*, Vol. 31, No.1, 2003.

53 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit*, pp.3 & 6

54 S. 111(1), Act No. 8 of 1999.

55 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op cit*, pp.3 & 7; See also generally, Koomey, J. & Krause, F., 'Introduction to Environmental Externality Costs,' available at <http://enduse.lbl.gov/Info/Externalities.pdf>[Accessed on 6/01/2023].

56 Babich, A., 'Understanding the New Era in Environmental Law,' *op cit* p.367; See also, Eskeland, G. S. & Jimenez, E., "Policy Instruments for Pollution Control in Developing Countries," *The World Bank Research Observer*, vol. 7(2) (July 1992), pp. 145-169.

57 *Ibid*, p. 367.

58 S. 71, EMCA.

59 S. 72(1) EMCA.

60 S. 73 EMCA.

61 Babich, A., 'Understanding the New Era in Environmental Law,' *op. cit*, p. 370.

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Mechanisms of command and control can also have unfavourable effects when they attempt to govern activities that are vital to a nation's economic development.⁶² For example, one of the flagship projects under Vision 2030 is the development and creation of at least five small and medium enterprise industrial parks.⁶³ How useful will the law be as a regulatory tool, particularly when it is attempting to control activities which may be regarded as central to the economy?⁶⁴ It may fail in this quest depending on what the government is seeking to achieve at any particular time.

Last but not least, the lack of self-enforcing nature of command and control methods is one of their main drawbacks. The legislation does not provide the regulated community's members with any incentives to keep an eye on one another and themselves.⁶⁵ The regulated community's only duty under the command and control system is to obey orders from the government.⁶⁶ An activity is legal to participate in if it is not prohibited by law or regulation. The public is therefore exposed to the danger that environmental risks have evaded regulatory oversight and scientific

4.1.3 Application of Command and Control in Kenya

The command and control method has long been the basis for environmental regulation in Kenya. For instance, Part IX of the Environmental Management and Coordination Act⁶⁷ provides for environmental restoration orders, environmental conservation orders and environmental easements.⁶⁸ Additionally, the EMCA makes environmental degradation-related actions criminal and lays out consequences for breaking the law as a deterrence. The command and control system in Kenya has, however, often failed owing to the extremely low fines and lack of synchronization between sectoral legislation and the EMCA. Additionally, the EMCA allows for the employment of environmental inspectors to help with the Act's requirements being enforced.⁶⁹ Some sectoral laws in Kenya have gone as far as para-militarizing enforcement agencies in an attempt to enhance command and control such as a 'uniformed and disciplined' service under the *Wildlife Conservation and Management Act, 2013*⁷⁰ while Kenya Forest Service provides for 'uniformed and disciplined' enforcement officers.⁷¹ Both Services are authorized to use fire arms to ensure

62 See generally, 'Regulation.' Available at <http://www.treasury.govt.nz/publications/briefings/1990/big90-11.pdf> [Accessed on 6/1/2023]; See also Coglianesi, C., 'Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy,' *OECD Expert Paper No. 1*, August 2012.

Available at http://www.oecd.org/gov/regulatory-policy/1_coglianesi%20web.pdf [Accessed on 6/01/2023].

63 Republic of Kenya, *Kenya Vision 2030 Popular Version*, (Government of Kenya, 2007) p.14.

64 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op cit*, pp. 3 & 6.

65 Babich, A., 'Understanding the New Era in Environmental Law,' *op. cit*, p.375; See 'Chapter xv. Regulatory And Economic Instruments For Solid Waste Management,' UNEP Division of Technology, Industry and Economics (DTIE), Available at <http://www.unep.org/ietc/Portals/136/SWM-Vol1-Part4.pdf> [Accessed on 6/01/2023].

66 *Ibid*; See also Aalders, M.V.C. & Ton Wilthagen, T., 'Moving beyond command-and-control: reflexivity in the regulation of occupational safety and health and the environment,' *UvA-DARE, the institutional repository of the University of Amsterdam (UvA)*, 1997. Available at <http://dare.uva.nl/document/2/27432> [Accessed on 6/01/2023].

67 No. 8 of 1999, Laws of Kenya.

68 Ss. 108-115, No. 8 of 1999.

69 *Ibid*, S. 117.

70 *Wildlife Conservation and Management Act*, No. 47 of 2013, Laws of Kenya.

71 *Forest Conservation and Management Act, 2016* (No. 34 of 2016), sec. 16.

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compliance with the conservation standards provided for under the law.⁷² For the purpose of regulating access to and use of natural resources, the EMCA and other sectoral legislation employ mechanisms including permits, registrations, and certifications. Such licenses and certifications have requirements that must be satisfied in order to avoid penalties like having the licence revoked.⁷³

4.2 Market-Based Approaches

Market-based methods make use of market-based instruments, which are described as laws that encourage environmental behaviour through market signals rather than through explicit orders.⁷⁴ The misuse, depletion, and unsustainable management of environmental assets have all been attributed in large part to the absence of a price on them.⁷⁵

4.2.1 Application of Market-Based Approaches

By offering suitable legal and financial incentives that may be used to encourage the business community to incorporate environmental requirements into their planning and operational processes, the National Environment Action Plan under EMCA attempts to incorporate market-based approaches in environmental management.⁷⁶

i. Incentives

Market-based methods seem to advocate for the government to replace command and control systems with one that generates incentives to improve natural resource preservation in a more effective way.⁷⁷ Therefore, it is necessary to change natural resources regulations to include incentives.⁷⁸ People need strong incentives to reconsider and adjust their behaviour toward the environment if substantial changes are to be made that will stop the ecosystem from being destroyed completely.⁷⁹ Cooperative regulation, which prefers persuasion over punishment and rewards (incentives) over punishment, should be changed from coercive regulation in an effort to move away from command and control.⁸⁰ It is asserted that environmental responsibility actions

72 Forest Conservation and Management Act, 2016 (No. 34 of 2016), sec. 63; *Wildlife Conservation and Management Act*, 2013, sec. 12.

73 See *Waweru v Republic* (2007) AHRLR 149 (KeHC 2006).

74 Stavins, R.N., 'Experience with Market-Based Environmental Policy Instruments.' *The Handbook of environmental Economics*, 2001, p 1. Available at http://www.hks.harvard.edu/fs/rstavins/Papers/Handbook_Chapter_on_MBI.pdf [Accessed on 6/1/2023].

75 See 'Protecting the Environment and Economic Growth: Trade-Off or Growth-Enhancing Structural Adjustment?' p.2. Available at http://ec.europa.eu/economy_finance/publications/publication7726_en.pdf [Accessed on 6/1/2023]; See also Rosegrant, M.W., *et al*, 'Water policy for efficient agricultural diversification: market-based Approaches,' *Food Policy*, 1995, Vol. 20, No. 3, pp. 203-223.

76 S. 38(c), No. 8 of 1999.

77 Babich, A., 'Understanding the New Era in Environmental Law,' *op cit*, p.375; See also Porto, M. & Lobato, F., 'Mechanisms of Water Management: Command & Control and Social Mechanisms,' Parte 1 de 2. Available at <http://socinfo.eclac.org/samtac/noticias/documentosdetrabajo/7/23397/InBr01605.pdf> [Accessed on 6/1/2023].

78 Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate,' *op cit*, p. 345.

79 Babich, A., 'Understanding the New Era in Environmental Law,' *op cit*, p. 361; See also Bhat, S., *Natural Resources Conservation Law* (SAGE, Publications India, 2010).

80 Braithwaite, J., "Rewards and Regulation," *Journal of Law and Society*, Vol. 29, No. 1, New Directions in Regulatory Theory (Mar., 2002), pp. 12-26, p. 13.

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adopted by individuals and organisations may benefit companies by minimising negative effects of industry prior to the implementation of restrictive laws.⁸¹ EMCA provides for tax incentives, fiscal incentives, customs and excise waivers and tax rebates.⁸² Rewards in the form of incentives are given to business participants in an effort to persuade them to embrace environmental stewardship measures while avoiding or rejecting those that contribute to the environment's destruction.⁸³

Under EMCA, taxes and other financial incentives, disincentives, or levies can be suggested to the government to encourage or promote effective management of the environment and natural resources or to avoid or stop environmental deterioration.⁸⁴ Customs and excise waivers in relation to imported capital goods that avoid or significantly decrease environmental damage caused by an activity may be included in these taxes, fiscal incentives, disincentives, or fees.⁸⁵ Tax breaks are also provided to businesses or organisations who put in place machinery and facilities for flood protection, waste recycling, water harvesting and conservation, pollution control, and employing alternative energy sources in place of fossil fuels.⁸⁶ Tax disincentives to discourage harmful environmental conduct that results in the depletion of natural resources or that causes pollution are also covered under Section 57 (1).⁸⁷ Last but not least, it addresses user fees designed to make sure that individuals use natural resources pay fair value for doing so.⁸⁸ Thus, it may be concluded that financial incentives can be a key factor in ensuring that natural resources are utilized, managed, and protected in a way that is consistent with the Constitution.⁸⁹

4.2.2 Effectiveness of Incentive Based Mechanisms

As with every social regulation, the success of natural resources legislation depends more on voluntary compliance.⁹⁰ The overall degree of natural resource protection achieved via incentives is the same as that of command and control methods, but the cost of this protection is distributed more effectively among industries.⁹¹ Under EMCA, the National Environment Action Plan should include suitable legal and financial incentives that might be utilised to encourage the business community to include environmental standards in their planning and operating process.⁹² This

81 Forsyth, T., "Environmental Responsibility and Business Regulation: The Case of Sustainable Tourism," *The Geographical Journal*, Vol. 163(3), Nov., 1997, pp. 270-280, p. 271.

82 S. 57 EMCA.

83 See 'The Cost Effectiveness and Environmental Effects of Incentive Systems: The U. S. Experience with Economic Incentives for Protecting the Environment,' 2001, available at

[http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0216B-04.pdf/\\$file/EE-0216B-04.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0216B-04.pdf/$file/EE-0216B-04.pdf) [Accessed on 6/1/2023].

84 S. 57 (1), EMCA.

85 *Ibid*, S. 57 (2) (a).

86 EMCA, S. 57 (2) (b).

87 *Ibid*, S. 57 (2) (c).

88 *Ibid*, S. 57 (2) (d).

89 Art. 69 (1) (a) of the Constitution of Kenya, 2010.

90 Clarence, D. J & Mazurek, J., *Pollution Control in the United States: Evaluating the System*, (Resources for the Future, 1998) p.15.

91 André, F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *Ethical Boundaries of Capitalism: Corporate Social Responsibility Series* (Ashgate Publishing Ltd., 2005), p.209.

92 S. 38(c).

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shifts responsibility for environmental protection from the government to business.⁹³ The private sector can benefit from incentives in a variety of ways. They inspire enterprises to develop innovative goods or manufacturing techniques to lessen environmental impact and promote flexibility in the usage of pollution control systems.⁹⁴ This encourages businesses to pursue cost-efficient solutions as well as increased research and development in an effort to find more effective and affordable damage mitigation methods.⁹⁵

Since incentives may be utilised to give the government additional revenue streams, government agencies also profit from this.⁹⁶ Incentives are also far less expensive than command and control expenses.⁹⁷ Because costs are absorbed by business, the government is not as financially burdened.⁹⁸ Additionally, since fewer law enforcement agents are needed, both the expense of maintaining the law and the government's pay budget are greatly lowered.

4.2.3 Critique of Incentive Based Mechanisms

Incentives do not work for every issue and thus they are not employed more frequently as a strategy for environmental conservation due to varying levels of pollution and needs.⁹⁹ In this case, a conventional command and control approach such as uniform standards may be the preferred policy.¹⁰⁰ In addition, using incentives successfully may be hampered by bureaucratic hurdles, such as the complexity of the necessary economic computations.¹⁰¹ For instance, it's possible that the emissions involved may not be measured precisely because the measurement cannot be done with a trustworthy method.¹⁰² In order to get around this issue, EMCA mandates that the Cabinet Secretary in charge of finances be the one to provide incentives.¹⁰³

The fact that environmentalists see the pollution issue more as a moral failing of business and governmental leaders than as a social by-product that can be effectively controlled via the application of incentives is another reason why incentives are not commonly employed.¹⁰⁴ Instead of incentives, ethics dominates the discussion. They are concerned that the amount of

93 Clarence D. J & Mazurek, J., *Pollution Control in the United States: Evaluating the System, op cit*, p.15.

94 Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate' in Michael C. Blumm (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992) p.343-346.

95 André, F., 'Firms and the Environment: Ethics or Incentives?' *op cit*, p.209; S. 49(b), EMCA.

96 Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate' in Blumm, M.C., (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992), p.343, p.346.

97 André F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *op. cit*, p.210.

98 Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview' in Hutter, B.M., (ed), *op. cit*, p. 23.

99 André F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *op. cit*, p.210.

100 *Ibid*, p.210; See also 'Why Regulatory Governance Matters,' *CRC Policy Brief*, No. 2, 2004, p. 3.

101 Hutter, B.M. 'Socio-Legal Perspectives on Environmental Law: An Overview,' in Hutter, B.M., (ed), *op cit*, p. 23.

102 *Ibid*, p.23.

103 S. 57(1).

104 André F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *op cit* p.210; See also Stavins, R.N. & Whitehead, B.W., "The Greening of America's Taxes: Pollution Charges and Environmental Protection," CSIA Discussion Paper 92-03, (Kennedy School of Government, Harvard University, March, 1992).

environmental protection would be reduced by the more flexible approach to pollution management that incentives suggest.¹⁰⁵

4.3 Efficiency of Systems of Environmental Impact Assessment, Environmental Audit and Monitoring of the Environment

Environmental Impact Assessment (EIA) may offer the chance for public scrutiny and involvement in decision-making, as well as introducing aspects of independence and impartiality. It may also help decision-makers make better-informed decisions when balancing environmental and developmental demands.¹⁰⁶ Public engagement is also promoted under EIA because, when stakeholders have had a chance to voice their thoughts, they could be more willing to accept the decision made by the regulators since they have had a chance to do so.¹⁰⁷ EMCA also provides for Strategic Environmental Assessments¹⁰⁸; Environmental Impact Assessment¹⁰⁹; Environmental Audit¹¹⁰; and Environmental Monitoring¹¹¹, all of which are meant to protect the environment from environmentally degrading human activities. 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.¹¹² EMCA requires all entities, including corporations, to undertake preparations for SEAs at their own expense and submit them to NEMA for approval.¹¹³ 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.¹¹⁴ These exercises should just not only be a question of paperwork and formality.¹¹⁵ The impacted communities should be given a chance to actively engage and provide

105 *Ibid*, p.210.

106 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> [Accessed on 6/1/2023].

107 *Ibid*, p. 6.

108 *Ibid*, sec. 57A.

109 *Ibid*, sec. 58.

110 *Ibid*, sec. 68.

111 *Ibid*, sec. 69.

112 EMCA, s. 2.

113 EMCA, s. 57 A (3).

114 Environmental protection Agency, ‘Strategic Environmental Assessment,’ Available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> [Accessed on 5/1/2023]; 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 5/1/2023].

115 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/text/ONUbr.pdf> [Accessed on 6/1/2023]; 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 6/1/2023]. 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,

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input on the expected implications on the community's social, economic, and environmental elements.

The evolution of scientific knowledge, as well as numerous societal and political shifts, have all influenced how natural resource management has changed through time. Arguably, EIA procedures should not be different. They should be adoptive to the changing environmental conditions due to climate change and other factors adversely affecting the environment and biological resources. These processes should be expanded to include Biodiversity Impact Assessment especially where the EIA relates to a parcel of land or environmental resources that are rich in biological resources, such as those contemplated under section 42 of EMCA. The challenge for researchers, it has been suggested, is to shift their focus from discovery to the science of implementation, while managers and policy-makers must give up their socio-political norms and institutional frameworks in order to adopt new thinking and effectively utilise the wealth of potent new scientific tools for learning by doing.¹¹⁶

4.4 Effectiveness of Civil and Criminal Liability Regime under EMCA

EMCA outlines several measures for protection and conservation of the environmental subsectors including rivers, lakes, seas, wetlands, mountain areas, forests, biological resource and the ozone layer.¹¹⁷ These provisions bind both the state and individuals and their violation could result in commission of environmental offences set out under the Act.

4.4.1 Civil Liability Regime

Environmental violations by companies are subject to civil responsibility in the form of restitution and damages intended to restore injured property or individuals as closely as possible to their pre-violation state.¹¹⁸ Civil remedies for environmental protection can be classified according to their intended function which could be preventive, compensatory, reparatory or natural restitution.¹¹⁹ In addition to these remedies, EMCA provides for environmental restoration orders, conservation orders, and easements as part of civil remedies for environmental breaches.¹²⁰ Consequently, corporations in Kenya found liable for environmental breaches have been imposed with civil consequences.¹²¹

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.

116 Keith, D., Martin, T., McDonald-Madden, E. and Walters, C., "Uncertainty and adaptive management for biodiversity conservation." (2011) <https://www.sciencedirect.com/science/article/abs/pii/S0006320710004933?via%3Dihub> accessed 6 January 2023.

117 Ibid, Part V.

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

119 Muigua, K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

120EMCA, Part IX (Sec. 108-116).

121 John Mutungu Waititu –vs- China Wuyi (Kenya) Co. Ltd, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR.

4.4.2 Criminal Liability Regime

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).¹²² The Act also prescribes penalties for these offences.¹²³ The Act also empowers environmental inspectors appointed under the Act, subject to the Constitution and section 29 of the Office of the Director of Public 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).¹²⁴ Offences under EMCA relate among other things, failing to submit to inspection¹²⁵, offences relating to Environmental Impact Assessment¹²⁶; offences relating to records¹²⁷; offences relating to standards¹²⁸; offences relating to hazardous waste¹²⁹; offences relating to pollution¹³⁰; and offences relating to restoration orders¹³¹.

While it is easy to deal with civil cases, the challenge comes in with the criminal liability convictions. Since the amendment of the law that gave all power back to the Director of Public Prosecutions (DPP) instead of the delegated specially appointed prosecutors under EMCA and based in NEMA, it is increasingly becoming difficult to convict violators due to the challenge of appreciating the actual offences.¹³² There may be a need to either revert this power back to NEMA's special prosecutors or ensure that the DPP's officers undergo special training periodically to ensure that they are well versed with EMCA and the offences therein.

4.5 Adoption of Integrated Approaches to Environmental Governance

It has been proposed that excellent governance is the key to achieving sustainable development on a global scale in a just and efficient way.¹³³ Environmental legislation forms the platform for better environmental governance by fusing environmental requirements with the fundamental components of the rule of law. By relating it to basic rights and duties, it draws attention to environmental sustainability. It is a reflection of ethical standards of conduct and universal moral ideals, and it serves as the basis for environmental rights and duties.¹³⁴ Furthermore, it is argued that natural resources may serve as both an engine for Sustainable Development and a foundation

122 EMCA, s. 137-146.

123 Ibid.

124 EMCA, s. 118 (b).

125 Sec. 137, EMCA.

126 Sec. 138, EMCA.

127 Sec. 139, EMCA.

128 Sec. 140, EMCA.

129 Sec. 141, EMCA.

130 Sec. 142, EMCA.

131 Sec. 143, EMCA.

132 See Kevin Musau Mulei v Chief Magistrate's Court, Machakos & another; Syokimau Residents Association (Interested Party) [2021] eKLR.

133 United Nations, *Introduction to Environmental Governance*, 2017. Available at <https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf> [Accessed on 6/1/2023].

134 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 6/1/2023].

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for peace and justice if they are managed in a way that is fair, open, and consistent with the law.¹³⁵ The realisation of social justice for Kenyans should, in theory, be the goal of environmental governance systems. When individuals have concerns outside their narrowly defined economic prosperity, legitimate environmental choices must take both distributive and procedural justice considerations into account.¹³⁶

When decisions must be made at the expense of someone else's interests or ideals, procedural fairness can help explain such actions. Additionally, it can help the participating actors learn and change their values and motives. Therefore, governance solutions go beyond only defining entitlements; they also encourage involvement and make available dispute resolution to all parties concerned.¹³⁷

Poverty and rising social inequality are caused by environmental factors such as climate change, biodiversity loss, water shortages, air and water pollution, and soil degradation, among others.¹³⁸ Environmental governance must explicitly include a wider range of environmental actors, organisations, and institutions and become more adaptable, responsive, and inventive in order to deal with stresses like climate change, economic instability, and sociopolitical or ideological upheavals.¹³⁹ In the processes of environmental decision-making and enforcement, there is a need for more cooperation between governmental and private-sector players.

The Kenyan Constitution offers a chance for communities to be empowered by transferring authority from the state to local institutions of decision-making as a means of enabling local communities to manage natural resources and environmental issues.¹⁴⁰ Additionally, a structure that outlines the functions of different stakeholders must be put in place. The formulation of laws and institutions must be based on the national values and principles of governance.¹⁴¹ The active engagement of the people and the people-centered approach to governance issues are the common threads throughout the majority of these values and principles. They serve as a reflection of the goals that should be pursued in the development, application, and interpretation of the law. Any outcome of such legislation that does not represent these ideals should be reconsidered, and the law itself should be examined to ensure that it is consistent with the Constitution.

A system of incentives as well as a framework of rights and information are also necessary for citizens acting as an additional resource for environmental policy.¹⁴² The rights to knowledge,

135 Environment UN, 'Environmental Rule of Law' (*UNEP - UN Environment Programme*, 5 October 2017) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0>> accessed 8 January 2023.

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

137 Ibid., p. 97.

138 United Nations, "Environmental Rule of Law", op. cit.

139 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.

140 See Chapter 11 of the Constitution on Devolved Government.

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

142 Wehn U and Almomani A, 'Incentives and Barriers for Participation in Community-Based Environmental Monitoring and Information Systems: A Critical Analysis and Integration of the Literature' (2019) 101 *Environmental Science & Policy* 341.

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participation, and access to justice for individuals and environmental groups are all included in this.¹⁴³ Transparency regarding the environmental certifications of products in the market is also included. The desire to engage also assumes that environmental reporting in the media is at least somewhat truthful and problem-focused. Once again, there is an extensive demand for capacity building.¹⁴⁴

Environmental customary laws and cultural norms should be incorporated into environmental governance issues in Kenya. A bottom-up approach to lawmaking is also desirable. A significant component of ensuring that these laws benefit communities in their interactions with environmental resources and that their human rights are protected from any possible violations as a result of such laws is to guarantee that those communities have meaningful participation in those laws.

Communities may hold those who violate environmental rules accountable once they are given the capacity to do so, whether they be organisations or individuals. Getting the attention of a population that feels like it belongs is simpler than getting the attention of one that feels ignored by the state actors.¹⁴⁵ Their traditional legal procedures and expertise on environmental problems may greatly improve Kenya's environmental governance, and they should be included into the country's official laws.

5. Conclusion

We must take action in the face of environmental crises and rising inequality, which includes creating laws governing supply chains and extended producer responsibility, ensuring green public procurement, encouraging technical innovation to improve resource circularity, and implementing inclusive and respectful decision-making processes for both and local communities.¹⁴⁶ Some academics have argued that it is necessary to investigate the normative and institutional responses in international law to such environmental change by concentrating on two key issues: first, whether law can foresee, prevent, and adapt to environmental transformations; and second, whether international legal responses to social, economic, and technological innovation can adequately reflect the evolving needs of contemporary societies at national and international scales.¹⁴⁷ These topics require ongoing debate because they have an impact on both the implementation of the sustainable development agenda and the management of related environmental conflicts.

143 Ibid.

144 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.

145 United Nations Department of Economic and Social Affairs. "Creating an Inclusive Society: Practical Strategies to Promote Social Integration." (2008) < <https://www.un.org/esa/socdev/egms/docs/2009/Ghana/inclusive-society.pdf>> accessed 6 January 2023.

146 Bansard, J. and Schroder, M., 'The Sustainable Use of Natural Resources: The Governance Challenge' (*International Institute for Sustainable Development*) < <https://www.iisd.org/system/files/2021-04/still-one-earth-natural-resources.pdf> > accessed 6 January 2023.

147 Craik, Neil, Cameron Jefferies, Sara Seck, and Timothy Stephens. "Global Environmental Change and Innovation in International Law." *Articles, Book Chapters, & Popular Press*, January 1, 2018. https://digitalcommons.schulichlaw.dal.ca/scholarly_works/248. Accessed on 3 September 2022.

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It is, therefore, important for EMCA and other environmental laws to respond to this approach through creating channels for participation of people through local solutions.¹⁴⁸ There is a need to adopt environmental governance approaches that ensure that EMCA and other instruments effectively respond to and address Political, Economic, Social, Technological, Legal and Environmental factors that affect natural resources and environmental management. This thus calls for an integrated approach to governance geared towards achieving sustainable development agenda.

148 Smith, G. and Bastidas, E.P., *Conflict and Sustainability in a Changing Environment: Through the Eyes of Communities*. Anthem Press, 2017<<https://anthempress.com/conflict-and-sustainability-in-a-changing-environment-hb>> accessed 6 January 2023.

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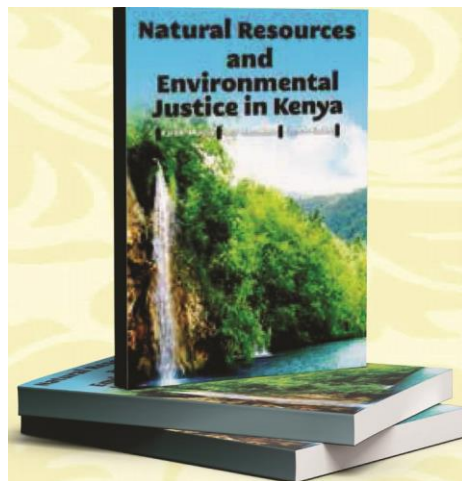
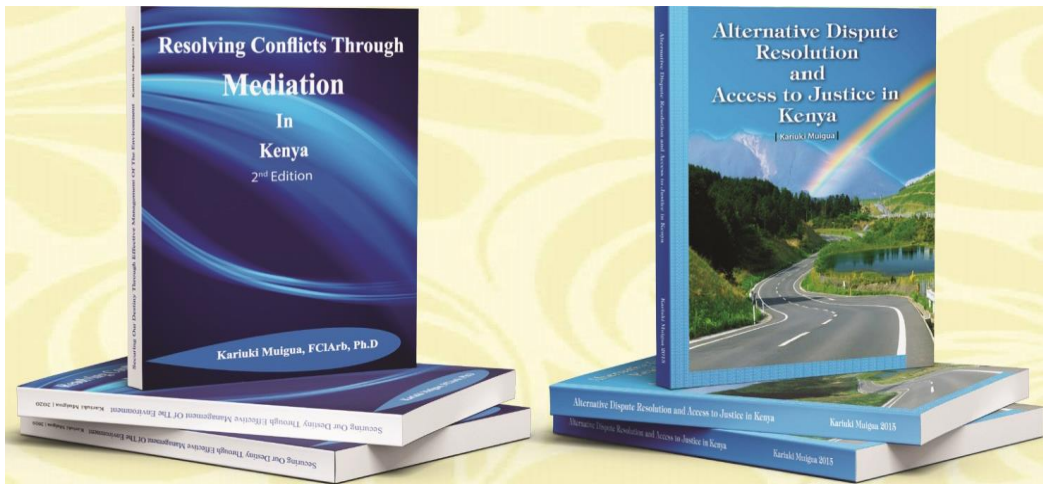
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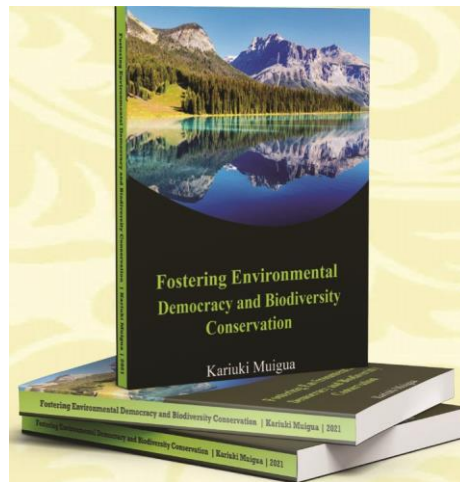
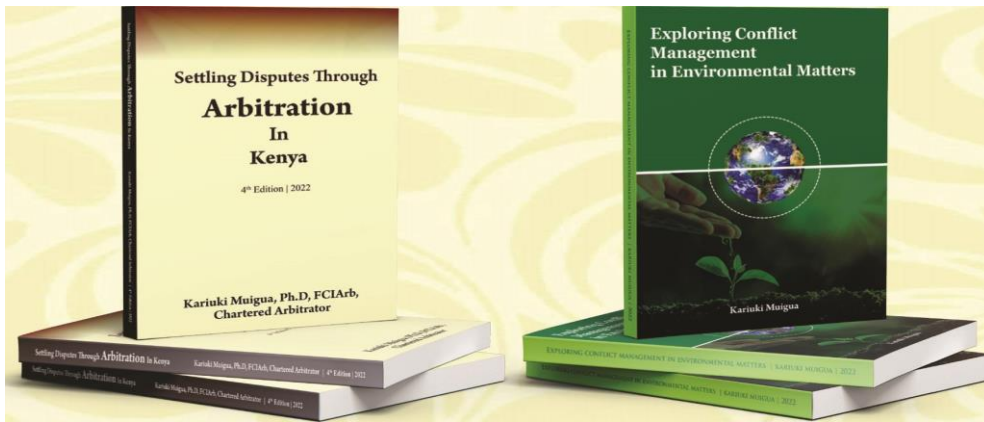
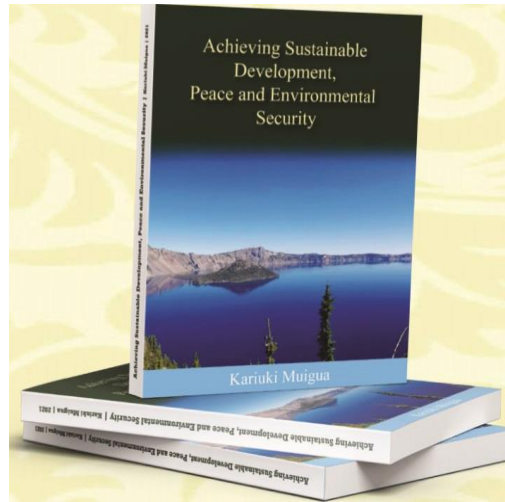
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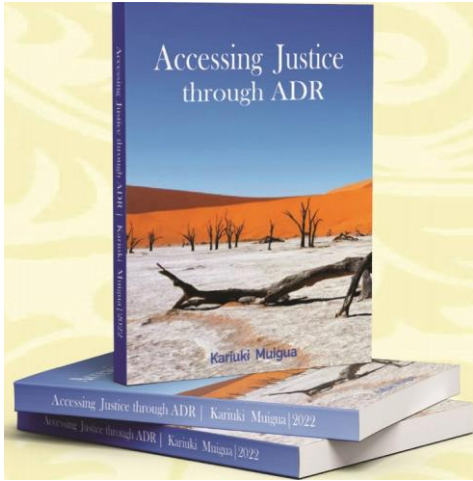
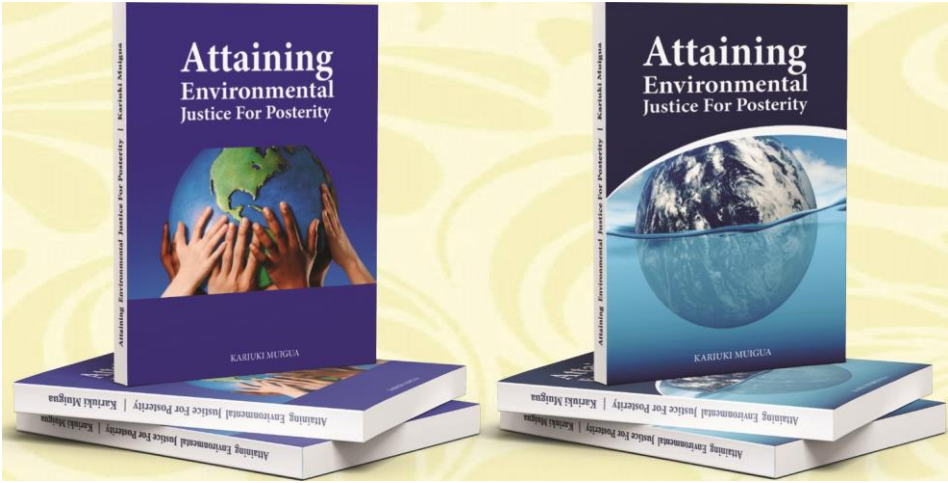
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Author's Bio-data

Dr. Kariuki Muigua a holder 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 awarded 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.

Chambers and Partners Global Guide 2023 ranked him in Band 1 of Dispute Resolution (Arbitrators), the ranking which recognizes the Top 6 Arbitrators in Kenya noting that he is "highly recommended as a leading lawyer". He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CI Arb) Africa Trustee from 2019 to 2022 by CI Arb Kenya Branch at the CI Arb Kenya Branch ADR Excellence Awards 2022. His book, *Settling Disputes through Arbitration in Kenya 4th Edition*; Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CI Arb Kenya Branch at the CI Arb Kenya Branch ADR Excellence Awards 2022. 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. In 2022, Chambers and Partners ranked him in Band 1 of Dispute Resolution (Arbitrators) noting that "He has been involved in several ground-breaking arbitrations," "has an astute understanding of arbitration" and "is respected for litigation." 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, 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); *Fostering Environmental Democracy and Biodiversity Conservation*, (Glenwood Publishers 2021); *Exploring Conflict Management in Environmental Matters* (Glenwood Publishers 2022); *Attaining Environmental Justice for Posterity*, Volume 1 and 2, (Glenwood Publishers 2022); and *Accessing Justice Through ADR*, (Glenwood Publishers 2022).

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