

Entrenching the Precautionary Principle in Kenya for Sustainability

Kariuki Muigua, Ph.D.

Entrenching the Precautionary Principle in Kenya for Sustainability

Kariuki Muigua*

Abstract

This paper argues that there is a need for the world and especially Kenya to work towards entrenching the Precautionary Principle of environmental law as a way of reducing environmental degradation. The author argues that addressing environmental problems when they have already occurred is expensive hence the need for taking precautionary measures that ensure that the same are minimised or addressed when still easy to do so. Effective enforcement of this principle is also important in reducing the economic and social cost of environmental restoration and as an incentive for inculcating a sense of environmental ethics within the communities and the country at large.

1. Introduction

We must base our judgements on our incomplete understanding of the world since human civilization does not fully comprehend the complexity of the chain of life. The Precautionary Principle states that we must use the knowledge we currently have to avoid endangering the ecological systems on which our health and well-being depend. The German foresight or Vorsorge principle is where the Precautionary Principle gets its name. In the 1970s, Germany strengthened this idea and used it as the basis for its environmental law and policies regarding acid rain and global warming. The 1992 Rio Declaration also included an internationalization of it.¹ Principle 15 of the Declaration of the *1992 UN Conference on Environment and Development* (the ‘Rio Declaration’) states as follows:

In order to protect the environment, the precautionary approach shall be widely used by States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (UNEP, 1992).²

***PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law [May 2023].**

¹ Gilbert, S. G. Chapter 45 - Precautionary Principle. In *Information Resources in Toxicology (Fifth Edition)*; Wexler, P., Ed.; Academic Press, 2020; pp 489–494. <https://doi.org/10.1016/B978-0-12-813724-6.00045-1>.

² United Nations, *Rio Declaration* of 1992, UN Doc. A/CONF.151/26 (Vol. I).

Entrenching the Precautionary Principle in Kenya for Sustainability

Making decisions on regulations and policies is rife with uncertainty, particularly when it comes to environmental and natural resource management. There are various reasons why there is uncertainty, including our inadequate knowledge of natural events and complicated social systems. The tastes of future generations as well as future resource endowments, goods, and technology are also unpredictable.³

The Precautionary Principle requires that uncertainty be addressed and that possible risks, including those that are ill-defined or poorly understood, be taken into consideration when making decisions.⁴

Numerous international agreements and state laws pertaining to environmental protection and sustainable development have the precautionary principle as part of their provisions.⁵ This paper critically discusses the place of Precautionary Principle in efforts towards achieving sustainability.

2. The Precautionary Principle: Scope

The Environmental Management and Coordination Act (EMCA), 1999 defines precautionary principle as the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁶ The Precautionary Principle recognizes the limitations of science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where there is uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities.⁷ This is well captured under Principle 15 of the *Rio Declaration*⁸ which provides that “*where there are warnings of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason of postponing cost-effective measures to prevent environmental degradation.*”

³ Peterson, D. C. Precaution: Principles and Practice in Australian Environmental and Natural Resource Management. *Australian Journal of Agricultural and Resource Economics* 2006, 50 (4), 469–489.

⁴ Peterson, D. C. Precaution: Principles and Practice in Australian Environmental and Natural Resource Management. *Australian Journal of Agricultural and Resource Economics* 2006, 50 (4), 469–489.

⁵ Som, C.; Hilty, L.; Koehler, A. The Precautionary Principle as a Framework for a Sustainable Information Society. *Journal of Business Ethics* 2009, 85, 493–505. <https://doi.org/10.1007/s10551-009-0214-x>.

⁶ S. 2, Act No. 8 of 1999.

⁷ *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016, para. 18.

⁸ United Nations, *Rio Declaration* of 1992, UN Doc. A/CONF.151/26 (Vol. I).

Entrenching the Precautionary Principle in Kenya for Sustainability

Some scholars have identified a number of core elements to the Precautionary Principle, indicating that there are seven main themes, though each of them has a different intellectual and policy underpinning.⁹ These elements are: Firstly, *pro-action*: this is the willingness to take action in advance of scientific proof, or in the face of fundamental ignorance of possible consequences, on the grounds that further delay or thoughtless action could ultimately prove far more costly than the 'sacrifice' of not carrying on right now; Secondly, cost-effectiveness of action in that proportionality of response should be designed to show that there should be a regular examination of identifiable social and environmental gains arising from a course of action that justifies the costs; Third, safeguarding ecological space as a fundamental notion underlying all interpretations of the precautionary principle in terms of how far natural systems and social organisations are resilient or vulnerable to further change or alteration; Fourth, legitimizing the status of intrinsic value or bioethics in that vulnerable, or critical natural systems, namely those close to thresholds, or whose existence is vital for natural regeneration, should be protected as a matter of moral right; Fifth, shifting the onus of proof such that the burden of proof should shift onto the proto-developer to show '*no reasonable environmental harm*' to such sites or processes, before development of any kind is allowed to proceed; Sixth, is meso-scale planning. A meso-scale is the period, over which any major decision will have an influence; and seventh, precautionary principle requires paying for ecological debt which is a case for considering a burden-sharing responsibility for those not being cautious or caring in the past.¹⁰

3. The Place of Precautionary Principle within the Sustainable Development Debate

There are certain moral foundations in common between the Precautionary Principle and the notion of sustainable development.¹¹ Sustainability and the precautionary principle are considered as having the same goal: not just to forestall excessive utilisation of the environment, but also to stop irreparable harm.¹²

⁹ O'riordan, T., *et al.*, "The Precautionary Principle in Contemporary Environmental Politics," *Environmental Values*, Vol. 4, No. 3 (August 1995), pp. 191-212, p. 195.

¹⁰ *Ibid.*

¹¹ Som, C.; Hilty, L.; Koehler, A. The Precautionary Principle as a Framework for a Sustainable Information Society. *Journal of Business Ethics* 2009, 85, 493–505. <https://doi.org/10.1007/s10551-009-0214-x>.

¹² *Ibid.*

Entrenching the Precautionary Principle in Kenya for Sustainability

The imperfectly known causes of possibly serious or irreversible environmental damage and potentially expensive governmental solutions are bridged by precautionary principles. These concepts offer a moral defence for action even when the cause is not apparent. Decision-makers are compelled by this circumstance to deal with a number of challenges.¹³

The Precautionary Principle is the cornerstone of Sustainable Development as an integrative strategy, especially when "there are threats of serious or irreversible damage, and lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation." The purpose of Sustainable Development and the Precautionary Principle is to avert environmental deterioration, irreparable harm, and other negative effects.¹⁴

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 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.....

¹³ Ricci, P. F.; Zhang, J. Benefits and Limitations of the Precautionary Principle. In *Encyclopedia of Environmental Health*; Nriagu, J. O., Ed.; Elsevier: Burlington, 2011; pp 276–285. <https://doi.org/10.1016/B978-0-444-52272-6.00230-0>.

¹⁴ Ene, C. The Precautionary Principle – Key Element of Sustainable Development. *Knowledge Horizons - Economics* 2014, 6 (2), 150–153.

Entrenching the Precautionary Principle in Kenya for Sustainability

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.”

The judiciary is crucial in connecting the law to the idea of Sustainable Development. Therefore, it is crucial that the judiciary backs such methods as well. It takes the assistance of the judiciary for the protection of the environment to acquire legal sanctity.¹⁵

4. Entrenching The Precautionary Principle in Kenya for Sustainability

The Precautionary Principle encourages policies that protect human health and the environment in the face of uncertain risks.¹⁶ It is therefore at the heart of sustainable development agenda. Article 10 of the Constitution of Kenya, 2010 provides for sustainable development as one of the national values and principles of governance. This principle must therefore guide the law making organs while legislating on environmental management and conservation.¹⁷ Section 11 of the *Land Act*, 2012 mandates the National Land Commission to take appropriate measures to conserve ecologically sensitive public land to prevent environmental degradation and climate change. The Precautionary Principle is one of the principles of Sustainable Development guiding the Environment and Land Court as provided for under section 18 of the *Environment and Land Act*, 2012.

¹⁵ Post, G. *Analysis of The Precautionary Principle*. iPleaders. <https://blog.ipleaders.in/analysis-precautionary-principle-environmental-law-instrument/> (accessed 2023-05-28).

¹⁶ Kriebel, D., *et al*, “The Precautionary Principle in Environmental Science,” *Environmental Health Perspectives*, Vol. 109, No. 9, Sep., 2001, pp. 871-876.

¹⁷ Art. 10(1), Constitution, 2010 provides that the national values and principles must bind all State organs and all persons whenever they, *inter alia*, enact, apply or interpret any law, or make or implement public policy decisions.

Entrenching the Precautionary Principle in Kenya for Sustainability

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, 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.

The use of the precautionary approach in addressing environmental problems has for long been part of the traditional practices of indigenous communities in Kenya as far as application of indigenous ecological knowledge is concerned. This was part 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.¹⁸ 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.¹⁹ Entrenching the Precautionary Principle in the environmental conservation approaches, policy and legal making processes can go a long way in achieving sustainable development.

5. Conclusion

The Precautionary Principle is one of the key frameworks required to carry out the objective of sustainable development since it is recognized as a strategy to safeguard sustainability against its anticipated ineffectiveness.²⁰

¹⁸ Muigua, K., "Harnessing traditional knowledge for environmental conflict management in Kenya." (2016).

¹⁹ Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy*, 2012, p.2.

²⁰ Som, C.; Hilty, L.; Koehler, A. The Precautionary Principle as a Framework for a Sustainable Information Society. *Journal of Business Ethics* 2009, 85, 493–505. <https://doi.org/10.1007/s10551-009-0214-x>.

Entrenching the Precautionary Principle in Kenya for Sustainability

It is obvious that the law as it is now has flaws since the environment is still getting worse. The introduction of new legal or other instruments, the enhancement of current legal instruments, and improved enforcement methods are solutions that are frequently considered. The Precautionary Principle has been proposed as a potential means of enhancing the quality of legal documents. This notion suggests that it is preferable to be safe than sorry in non-legal contexts.²¹ It will be simpler to chart a course for a society that is marked by sustainable development by using the precautionary principle.²² Entrenching the Precautionary Principle in Kenya and elsewhere is evidently key to sustainability.

References

Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others [2017] eKLR, ELC Case No. 283 OF 2016.

Douma, W. T. The Precautionary Principle, *Úlfljóttur*, 1996, Vol. 49, nrs. 3/4, p. 417-430.

Ene, C. The Precautionary Principle – Key Element of Sustainable Development. *Knowledge Horizons - Economics* 2014, 6 (2), 150–153.

Environmental Management and Coordination Act (EMCA), No. 8 of 1999, Laws of Kenya.

Gilbert, S. G. Chapter 45 - Precautionary Principle. In *Information Resources in Toxicology (Fifth Edition)*.

Kriebel, D., *et al*, “The Precautionary Principle in Environmental Science,” *Environmental Health Perspectives*, Vol. 109, No. 9, Sep., 2001, pp. 871-876.

Muigua, K., "Harnessing traditional knowledge for environmental conflict management in Kenya." (2016).

O'riordan, T. and Jordan, A., “The Precautionary Principle in Contemporary Environmental Politics,” *Environmental Values*, Vol. 4, No. 3 (August 1995), pp. 191-212.

Peterson, D. C. Precaution: Principles and Practice in Australian Environmental and Natural Resource Management. *Australian Journal of Agricultural and Resource Economics* 2006, 50 (4), 469–489.

Post, G. *Analysis of The Precautionary Principle*. iPleaders. <https://blog.ipleaders.in/analysis-precautionary-principle-environmental-law-instrument/> (accessed 2023-05-28).

²¹ Douma, W. T. The Precautionary Principle, *Úlfljóttur*, 1996, Vol. 49, nrs. 3/4, p. 417-430.

²² *Ibid*.

Entrenching the Precautionary Principle in Kenya for Sustainability

Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy*, 2012.

Ricci, P. F.; Zhang, J. Benefits and Limitations of the Precautionary Principle. In *Encyclopedia of Environmental Health*; Nriagu, J. O., Ed.; Elsevier: Burlington, 2011; pp 276–285. <https://doi.org/10.1016/B978-0-444-52272-6.00230-0>.

Som, C.; Hilty, L.; Koehler, A. The Precautionary Principle as a Framework for a Sustainable Information Society. *Journal of Business Ethics* 2009, 85, 493–505. <https://doi.org/10.1007/s10551-009-0214-x>.

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

Wexler, P., Ed.; Academic Press, 2020; pp 489–494. <https://doi.org/10.1016/B978-0-12-813724-6.00045-1>.