

Promoting Human Rights Impact Assessment in Environmental Governance for Sustainable Development

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Kariuki Muigua*

Abstract

The paper critically discusses the place of human rights in environmental governance. It gives an overview of the concept of environmental governance and examines various approaches adopted towards achieving it. The paper argues that human rights are integral in sound environmental governance towards Sustainable Development. It explores the concept of Human Rights Impact Assessment (HRIA) as a tool of environmental governance in Kenya. The paper highlights some of the challenges facing HRIA in Kenya and proposes interventions towards integrating the place of human rights in environmental governance in Kenya for purposes of fostering Sustainable Development.

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1.0 Introduction

Environmental governance refers to the laws, customs, guidelines, and institutions that influence how people interact with the environment¹. It has also been defined as a set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes². It entails the institutions, structures and processes involved in environmental decision making³. The goal of environmental governance is to achieve sound, effective, equitable and responsive management of the environment for Sustainable Development⁴.

The Constitution of Kenya recognizes the importance of the environment as the heritage of the Kenyan people and sets out mechanisms to sustain it for the benefit of future generations⁵. It further captures Sustainable Development as one of the national values and principles of governance⁶. In addition, the Constitution sets out the right to a clean and healthy environment and stipulates certain obligations in respect of the environment aimed at protecting and conserving the environment in order to foster Sustainable Development⁷. Environmental governance is thus a fundamental concern in Kenya.

Various approaches have been adopted towards fostering environmental governance for purposes of Sustainable Development. An anthropocentric approach to environmental governance focuses on themes such as poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information and conflict management among others⁸. It takes a human

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 on 20/06/2023)

² Lemos. C & Agrawal. A., 'Environmental Governance.' *Ann. Rev. Environ. Resourc.* 31 (2006): 297-325

³ Bennett. N., 'Environmental Governance: A Practical Framework to guide Design, Evaluation, and Analysis.' *Society for Conservation Biology Journal*, 2018

⁴ Ibid

⁵ Constitution of Kenya 2010, Preamble, Government Printer, Nairobi

⁶ Ibid, Article 10 (2) (d)

⁷ Ibid, Articles 42 & 69

⁸ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

centered approach towards environmental governance⁹. An ecocentric approach dwells on themes such as combating climate change, impact of resource extraction, environmental health and environmental conservation¹⁰. This approach takes an ecological dimension towards environmental governance¹¹.

This paper critically discusses the place of human rights in environmental governance. The paper argues that human rights are integral in sound environmental governance towards Sustainable Development. It explores the concept of Human Rights Impact Assessment (HRIA) as a tool of environmental governance in Kenya. The paper highlights some of the challenges facing HRIA in Kenya and proposes interventions towards integrating the place of human rights in environmental governance in Kenya for purposes of fostering Sustainable Development.

2.0 The Nexus between Human Rights and Environmental Governance

Human rights have been defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination¹². They are inherent to every human being by the virtue of existence and are not granted by any state¹³. Every person is thus entitled to human rights without discrimination based on grounds such as sex, religion, nationality, race, ethnicity, colour, religion among others. The place of human rights across the globe received widespread attention following the adoption of the *Universal Declaration of Human Rights*¹⁴ (UDHR) by the General Assembly of the United Nations on 10th December, 1948. The UDHR stipulates fundamental human rights to be universally protection and common standards for achievement of these rights for all

⁹ Kopnina. H., 'Anthropocentrism: More than Just a Misunderstood Problem.' *Journal of Agricultural and Environmental Ethics*, No. 31, 2018

¹⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

¹¹ Kopnina. H., 'Anthropocentrism: More than Just a Misunderstood Problem.' Op Cit

¹² The Office of the High Commissioner for Human Rights., 'What are Human Rights.' Available at <https://www.ohchr.org/en/what-are-human-rights> (Accessed on 19/06/2023)

¹³ Ibid

¹⁴ Universal Declaration of Human Rights., Available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (Accessed on 19/06/2023)

people in all nations. According to the UDHR recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world¹⁵.

Since adoption of the UDHR the concept of human rights has become increasingly important both in academic debate and in political decision-making¹⁶. Human rights continue to shape the political, economic, social, environmental and legal agendas across the globe¹⁷. Human rights occupy a central place in environmental governance. Indeed, it has been argued that environmental governance should be treated as a human rights issue since a human rights perspective to the environment directly addresses environmental impacts on the life, health and property of human beings thereby securing higher standards of environmental quality based on the obligation of the state to control environmental concerns such as pollution which affect human life and health¹⁸.

The relationship between human rights and the environment can be considered from three perspectives¹⁹. On the first part, the environment can be considered as the precondition to the enjoyment of human rights such as the right to food, the right to clean and safe water in adequate quantities, the right to reasonable standards of sanitation, the right to housing among others²⁰. In Kenya, the Constitution specifically enshrines the human right to a clean and healthy environment²¹. This demonstrates the special relationship between human rights and the environment in Kenya. The second perspective views human rights as tools to promote environmental governance both procedurally and substantively²². Consequently, Environmental governance can be

¹⁵ Ibid

¹⁶ Hannam. M., 'On Human Rights.' Available at <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=4f2fdd2bf949c6521b433897da4e1f169eba9e90> (Accessed on 19/06/2023)

¹⁷ Ibid

¹⁸ Boyle. A., 'Human Rights and the Environment: Where Next' *The European Journal of International Law* Vol. 23 no. 3

¹⁹ Ibid

²⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

²¹ Constitution of Kenya 2010., Article 42

²² Boyle. A., 'Human Rights and the Environment: Where Next' Op Cit

achieved through promoting human rights such as the right to food, right to health, the right to a clean and healthy environment, the right to clean water and sanitation, the right to clean and affordable energy among others²³.

Finally, human rights can also be integrated with the environment under the concept of Sustainable Development²⁴. Sustainable Development has been defined as the development which meets the needs of the present generations without compromising the ability of future generations to meet their own needs²⁵. It combines elements such as environmental protection, economic development and social concerns²⁶. Human rights are integral in the Sustainable Development agenda. Indeed, it has been observed that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature²⁷. Further, the *United Nations 2030 Agenda for Sustainable Development* recognizes realization of human rights as crucial in the attainment of Sustainable Development²⁸. The Sustainable Development goals seek to realize the United Nations vision on Sustainable Development by achieving several human rights across the globe such as the right to food, the right to good health and well-being, the right to quality education, the right to clean water and sanitation, the right to affordable and clean energy among others²⁹. In Kenya, Sustainable Development has been captured as one of the national values and principles of governance that is supposed to influence all decision making including decisions on human rights and environmental

²³ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

²⁴ Ibid

²⁵ Report of the World Commission on Environment and Development., '*Our Common Future*' 1987 (Brundtland Report)

²⁶ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1.

²⁷ Report of the United Nations Conference on Environment and Development., 'Rio Declaration on Environment and Development.' A/CONF.151/26 (Vol. I)

²⁸ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 19/06/2023)

²⁹ United Nations Development Programme., 'Sustainable Development Goals.' Available at https://www.undp.org/sustainable-development-goals?gclid=CjwKCAjw-b-kBhB-EiwA4fvKrPUgLSjuH3S1nlqYCF4fkaIXWQ5yubzINfX2A9seUbRGisgHsS7OBhoC0IYQAvD_BwE (Accessed on 19/06/2023)

governance³⁰. Human rights thus occupy a very important place in environmental governance.

3.0 Conceptualizing Human Rights Impact Assessment

The human rights framework draws attention to the importance of addressing environment and development policies, measured by overall human rights objectives, including through assessing possible effects of such policies and measures on human rights³¹. In the context of environmental governance, Human Rights Impact Assessment (HRIA) is a framework for examining policies, legislation, programs and projects to identify and measure their effects on human rights³². HRIA has emerged as a promising tool for protecting human rights and achieving Sustainable Development³³.

HRIA has developed out of the concerns raised by Environmental Impact Assessment (EIA) which has been the major tool of integrating environmental and social concerns in decision making processes³⁴. Environmental impact assessment is the process of identifying potential environmental effects of proposed development and the required mitigation measures³⁵. EIA has also been defined as a procedure for evaluating the likely impact of a proposed activity on the environment³⁶. Its object is to provide decision

³⁰ Constitution of Kenya, 2010., Article 10 (2) (d)

³¹ United Nations Environment Programme., 'Factsheet on Human Rights and the Environment.' Available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/9933/factsheet-human-rights-environment.pdf?sequence=1&isAllowed> (Accessed on 19/06/2023)

³² The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Available at <https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf> (Accessed on 19/06/2023)

³³ CIEL., 'EIAs In Practice: Potential Lessons for Human Rights Impact Assessment.' Available at https://www.ciel.org/Publications/EIA_Brief_Jun10.pdf (Accessed on 19/06/2023)

³⁴ Ibid

³⁵ 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 19/06/2023)

³⁶ Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' available at <http://kmco.co.ke/wpcontent/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf> (Accessed on 19/06/2023)

makers with information about the possible effects of a project before authorizing it to proceed³⁷. 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 made³⁸. Despite its important role in environmental governance, the EIA framework in most countries has often been faced with challenges such as lack of effective public participation, failure to enhance access to information and failure to implement mitigation measures which could potentially affect human rights such as the right to a clean and healthy environment, right to health and the right to water³⁹. The concept of HRIA has emerged out of these concerns in order to entrench the place of human rights in environmental decision making⁴⁰.

HRIA requires projects and policies to be evaluated to the extent to which they comply with human rights both in substance and process⁴¹. It focuses on the impacts of such policies and projects on the fulfillment and progressive realization of international human rights standards⁴². HRIA aims at preventing negative effects and maximizing positive effects of projects, programmes and policies on the attainment of fundamental human rights and freedoms⁴³. It encapsulates certain key elements including public participation, equality and non-discrimination, transparency and access to information and accountability in decision making which have a bearing on the achievement of human rights⁴⁴. The concept is thus an important tool for protecting human rights and promoting Sustainable Development.

³⁷ Ibid

³⁸ Ibid

³⁹ CIEL., 'EIAs In Practice: Potential Lessons for Human Rights Impact Assessment.' Op Cit

⁴⁰ Ibid

⁴¹ The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Op Cit

⁴² Maassarani. T et al., 'Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment.' *Cornell International Law Journal* Vol. 40

⁴³ The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Op Cit

⁴⁴ Ibid

4.0 Human Rights Impact Assessment in Kenya: Opportunities and Challenges

The Constitution of Kenya enshrines human rights as among the national values and principles that is supposed to guide decision making by all persons in matters including environmental governance⁴⁵. The Constitution further requires the state to encourage public participation in the management, protection and conservation of the environment⁴⁶. Public participation is among the key elements of HRIA⁴⁷. The Constitution also requires the state to establish systems of environmental impact assessment, environmental audit and monitoring of the environment which systems are required to consider human rights⁴⁸. The concept of HRIA in Kenya is thus anchored in the Constitution.

The *Environmental Management and Co-ordination Act*⁴⁹ sets out the requirement for EIA in Kenya. Under the Act, all policies, plans and programmes in respect of the environment shall be subject to EIA⁵⁰. The Act requires a project proponent to submit an EIA study report for evaluation and report before an EIA licence is issued allowing the project to commence on such terms and conditions as may be appropriate and necessary to facilitate Sustainable Development and sound environmental management⁵¹. The process of EIA in Kenya is stipulated under the *Environmental (Impact Assessment and Audit) Regulations*⁵². The regulations envisage human rights considerations in the EIA process. Under the regulations a project report should state a plan to ensure the health and safety of the workers and neighbouring communities and the economic and socio-cultural impacts to the local community and the nation in general among other factors⁵³. These considerations involve a human rights approach. The regulations further set out the need

⁴⁵ Constitution of Kenya, 2010., Article 10 (2) (b)

⁴⁶ Ibid, Article 69 (1) (d)

⁴⁷ The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Op Cit

⁴⁸ Constitution of Kenya, 2010., Article 69 (1) (f)

⁴⁹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya

⁵⁰ Ibid, S 57 A (1)

⁵¹ Ibid, S 63

⁵² The Environmental (Impact Assessment and Audit) Regulations, 2003., Legal Notice No. 101

⁵³ Ibid, Regulation 7 (1) (h) & (i)

for public participation in the EIA process which is a key concern in HRIA⁵⁴. The need for HRIA is thus firmly set out under the EIA process in Kenya.

HRIA has the potential to be a sound tool for environmental management by striking a balance between anthropocentric and ecocentric approaches towards environmental governance⁵⁵. It can ensure attainment of human rights while simultaneously promoting sound management of the environment⁵⁶. However, despite its efficaciousness, several factors have hindered effective implementation of HRIA in Kenya. The process requires implementation of the concept of Free, Prior and Informed Consent (FPIC) in order to ensure that people are adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin⁵⁷. However, concerns have always emerged during implementation of development projects in Kenya about how FPIC considerations such as public participation should be embraced⁵⁸. Consequently, some of these projects have been stopped through cancellation of EIA licences for failure to adhere to the requirements of public participation. Further, human rights violations have been well documented in environmental projects such as mining and resource extraction by multinational corporations⁵⁹. Multinational corporations operating in most developing countries have been accused of gross human rights violations, such as killings and land injustices⁶⁰. These challenges demonstrate that more

⁵⁴ Ibid, Regulation 17

⁵⁵ Kemp. D & Vanclay. F., 'Human Rights and Impact Assessment: Clarifying the Connections in Practice.' *Impact Assessment and Project Appraisal*, 31:2, 86-96

⁵⁶ Ibid

⁵⁷ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Right-to-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf> (Accessed on 21/06/2023)

⁵⁸ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> (Accessed on 21/06/2023)

⁵⁹ Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf>

⁶⁰ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' *Share the World Resources*, 3rd October 2006, available at <http://www.stwr.org/multinationalcorporations/multinational-corporations-mnccs-beyond-the-profit-motive.html#legalrights> (accessed on 21/06/2023)

still needs to be done in order to fully embrace the place of human rights in environmental governance. Promoting HRIA is thus essential in order to foster Sustainable Development.

5.0 Way Forward

Promoting human rights in environmental governance is essential towards fostering Sustainable Development. It has been observed that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature⁶¹. HRIA is an important tool in promoting the place of human rights in environmental governance.

In order to fully promote HRIA, the state and non-state entities such as multinational corporations have an obligation to respect, protect and fulfill human rights at all times in their policies, programmes and projects⁶². Thus in addition to environmental concerns, the state and non-state entities should ensure that policies, projects and programmes adhere to human rights standards as envisaged in instruments such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights⁶³. This approach will entrench the place of human rights in environmental governance.

Further, there is need for a more systematic and integrated approach towards the EIA process in order to fully capture the concept of HRIA⁶⁴. Both processes have similarities in terms of their objective to identify and address adverse impacts; their focus on process as well as outcomes; and their consideration of how to ensure the meaningful inclusion

⁶¹ Report of the United Nations Conference on Environment and Development., 'Rio Declaration on Environment and Development.' Op Cit

⁶² Office of the High Commissioner on Human Rights., 'Guiding Principles on Human Rights Impact Assessment of Economic Reforms.' Available at https://www.ohchr.org/sites/default/files/GuidePrinciples_EN.pdf (Accessed on 21/06/2023)

⁶³ Ibid

⁶⁴ Gotzmann. N et al., 'Social and Human Rights Impact Assessments: What Can They Learn From Each Other?' *Impact Assessment and Project Appraisal*, Volume 34, 2016

of vulnerable individuals and groups⁶⁵. The EIA process in Kenya puts into account human right considerations⁶⁶. The two processes can be integrated or conducted alongside each other in order to ensure sound environmental governance. In addition, there is need to put in place a governing legal framework in order to ensure effective implementation of HRIA in Kenya.

The place of human rights in environmental governance can also be realized by maximizing the right to Free, Prior, and Informed Consent (FPIC) in Kenya⁶⁷. It has been argued that the right to FPIC is a fundamental right of self-determination that ensures participation by indigenous communities in development projects in order to ensure that they are conducted in a sustainable manner taking into account their economic, social and cultural impacts⁶⁸. FPIC can thus guarantee human rights such as the right to participation and economic rights whilst promoting environmental protection and conservation⁶⁹. There is need to realize FPIC requirements such as public participation and access to information in order to fully enhance the role of HRIA as a tool of environmental governance in Kenya⁷⁰.

Finally, there is need to foster Sustainable Development in order to enhance the role of human rights in environmental governance. Sustainable Development combines elements such as environmental protection, economic development and social concerns⁷¹. Human rights are central to the Sustainable Development agenda. Indeed, the Sustainable Development Goals envisage attainment of the ideal of Sustainable Development by promoting human rights such as the right to food, the right to good health and wellbeing, the right to quality education, the right to clean water and

⁶⁵ Ibid

⁶⁶ The Environmental (Impact Assessment and Audit) Regulations, 2003., Op Cit, Regulation 7 (1) (h) & (i)

⁶⁷ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit

⁶⁸ Owen, J.R. and Kemp, D., "Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing A Knowledge Base," *Resources Policy*, Vol.41 (2014): 91-100

⁶⁹ Ibid

⁷⁰ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit

⁷¹ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' Op Cit

sanitation, the right to affordable and clean energy among others⁷². Sustainable Development has the ability to strike a balance between anthropocentric and ecocentric approaches towards environmental governance by promoting human rights and ensuring sound environmental management⁷³. Fostering Sustainable Development is thus critical in promoting HRIA in environmental governance.

6.0 Conclusion

Human rights play an important role in promoting sound environmental governance towards Sustainable Development⁷⁴. However, human rights have often been neglected or abused by entities such as the state and multinational corporations in development programmes, projects and policies⁷⁵. This hinders attainment of human rights and the Sustainable Development agenda⁷⁶. HRIA is a concept that has the ability to strike a balance between anthropocentric and ecocentric approaches towards environmental governance by promoting human rights while simultaneously ensuring sound environmental management⁷⁷. There is need to fully embrace and promote HRIA in order to fast-track the journey towards Sustainable Development in Kenya.

⁷² United Nations Development Programme., 'Sustainable Development Goals.' Op Cit

⁷³ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁷⁴ Ibid

⁷⁵ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' Op Cit

⁷⁶ Ibid

⁷⁷ Kemp. D & Vanclay. F., 'Human Rights and Impact Assessment: Clarifying the Connections in Practice.' Op Cit

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<https://wedocs.unep.org/bitstream/handle/20.500.11822/9933/factsheet-human-rights-environment.pdf?sequence=1&isAllowed>

United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at
<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

Universal Declaration of Human Rights., Available at
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