



# **Embracing Environmental, Social and Governance (ESG) Tenets for Sustainable Development**

**Kariuki Muigua**

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# **Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development**

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## **Dedication**

This book is  
Dedicated to the idea  
that we must embrace  
Environmental  
Social  
And Governance Tenets  
For  
Sustainable Development

We must take care of  
Mother Earth  
We must nurture nature  
For nature to take care  
of us  
In a bright and green  
Tomorrow

To those who believe in pursuing  
the right to a Clean  
Healthy  
and Sustainable Environment

To those whose protect Human  
Rights  
And ensure they have meaning

To those who believe  
in true  
Sustainability

This book is dedicated  
To the idea

that people  
should live in peace

That they can live in a  
Clean Environment  
In dignity and freedom

That it is our duty  
to protect Mother Earth  
from pollution, degradation

Dedicated  
To the idea  
that  
we must combat Climate  
Change  
And sustainably utilise  
Our resources  
bearing in mind the  
needs  
of the present and  
future generations

This book is for those  
who believe  
in fostering harmonious societies  
Societies that enjoy  
Equity and prosperity

Dedicated to the Investors  
who are careful  
Not to harm the environment  
who treat their workers  
well

And who know  
that development  
Can be undertaken  
In harmony with nature

To  
The person  
Who subscribes to the  
Sustainable Development  
Agenda  
-A plan of action for  
People, planet  
and prosperity

This book is  
dedicated  
To those who watch the  
rising sun with awe  
and enjoy the beauty of the setting sun

Knowing that tomorrow  
will be a day  
-a warm day  
worth looking forward to

This book is for those  
who never ever give up  
Those who dream  
big dreams  
Dreams so big  
that they scare them

This book is for those  
Who know

that we become  
what we think of most

And that 'luck'  
is something that can be  
built

And to those who know  
that there is nothing  
impossible.

All is possible.

This book is for those  
who seek to address  
Social concerns  
such as poverty, hunger, health  
education, gender equity

-Have faith  
Keep hope alive  
Your dreams will one day  
Come true.



## Acknowledgements

I was able to watch the sun rise today. Rays that warmed the land. Sunlight that gives us life. It reminded me that the maker is still in control. I am humbled and grateful to be alive.

I appreciate all those who have made this work possible. Those who believe in me and keep encouraging me. I am grateful to those who have stood by me in trying times. You are true heroes.

I extend my sincere gratitude to those colleagues and sages who have shared their wisdom and experience with me. I hope to pass on the knowledge to this and the next generation.

I am indebted to those who see potential in me; those that have given me a chance to walk towards the fulfilment of my dreams.

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Finally, I extend my deepest gratitude to my family. My family has been my pillar of strength. They urge me to keep hope alive. And never to give up. And to pursue my dreams. May God bless them all.

## Author's Note

The main theme that cuts across this book is Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development.

Sustainable Development has been defined by the Environmental Management and Coordination Act (EMCA) as 'that development that meets the needs of the present generations without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems'.<sup>1</sup>

It is linked to "sustainable use" which means the present use of the environment or natural resources which does not compromise the ability to use the same by future generations or degrade the carrying capacity of the supporting ecosystems.<sup>2</sup>

ESG refers to a model through which corporations and investors integrate Environment, Social and Governance tenets into business models.

ESG entails monitoring and reporting environmental concerns such as carbon emissions, water consumption, waste generation, social concerns such as political lobbying, anticorruption initiatives and board diversity.

ESG principles are paramount since social, environmental and governance issues have become a societal focal point in light of the Sustainable Development Agenda.

The Sustainable Development goals<sup>3</sup> seek to achieve global development within the ESG framework by addressing social challenges such as poverty, hunger, health, education, gender equality, access to clean water and employment by promoting investments in areas such as energy, industry, innovation and infrastructure while mitigating the effects of climate change.

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<sup>1</sup> Sec. 2, *Environmental Management and Coordination Act, No. 8 of 1999*, Laws of Kenya.

<sup>2</sup> Ibid

<sup>3</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1

Good governance is integral in achieving the Sustainable Development Agenda.

National laws such as the Constitution of Kenya capture ESG by enshrining National values and principles of governance such as Social Justice, good governance and Sustainable Development.<sup>4</sup>

ESG seeks to address sustainable, responsible and ethical investment. It seeks to achieve socially responsible investments by incorporating ESG in investment decisions over and above profitability.

ESG principles have shaped economic behaviour with an increasing number of corporations and investors considering ESG in their investment decisions.

ESG is important in Africa in promoting sustainable investment and development.

The growing threat of Climate Change and Climate crisis has forced many investors to embrace sustainability as a key factor to decision making.

The continent continues to face environmental challenges such as drought and famine that can be attributed to climate change. Further, social matters such as unemployment, gender inequality, poverty, access to education and housing are well documented.

The continent also faces difficulties as evidenced by cases of poor governance and corruption in some countries.

ESG principles are thus important. Embracing the same may enable the continent to reap benefits from its vast resources.

Corporations and investors should thus take into account ESG in order to promote Sustainable Development in Africa.

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<sup>4</sup> Article 10, Constitution of Kenya 2010 Government Printer

The discourse also covers ESG disputes and how best they can be handled. These include disputes involving Climate Change, compensation for environmental damage, human rights, benefit sharing, labour rights, transparency, accountability, reporting and disclosure.

The underlying theme in ESG is Sustainable Development.

Some of the papers in this book have been published in peer reviewed Journals and books. Their compilation in one volume makes it easier for the reader to access the content related to the theme of Embracing ESG tenets for Sustainable Development.

**Dr. Kariuki Muigua PhD, FCI Arb, C.Arb**  
**July 2023.**

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*Adrian Kamotho Njenga vs. Council of Governors & 3 others* [2020] eKLR.

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

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*Dobs Entertainment Limited v National Environment Management Authority* [2021] eKLR, Tribunal Appeal 016 of 2019.

*John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR, ELC. Petition No. E06 of 2020.

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

*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).

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## **List of Abbreviations**

ACHPR	African Charter on Humans and People’s Rights
ADR	Alternative Dispute Resolution
AfCFTA	African Continental Free Trade Area
CBD	Convention on Biological Diversity.
CBDR	Common But Differentiated Responsibilities
CDP	Carbon Disclosure Programme
CO2	Carbon Dioxide
COP	Conference of the Parties
CSR	Corporate Social Responsibility
DFIs	Development Finance Institutions
EBA	Ecosystem-Based Approaches
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EIA	Environmental Impact Assessment.
ELC	Environment and Land Court
EMCA	Environmental Management and Coordination Act
ENACT	Enhancing Nature-based Solutions for an Accelerated Climate Transformation

EPR	Extended Polluter Responsibility.
ESG	Environmental, Social, and Corporate Governance
GHG	Green House Gases.
GIS	Geographic Information System
ICC	International Chamber of Commerce
ICESR	International Covenant on Economic, Social and Cultural Rights
INDC	Intended Nationally Determined Contribution.
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
NACOSTI	National Commission for Science, Technology and Innovation
NAPs	National Adaptation Plans
NbS	Nature-based Solutions
NDC	Nationally Determined Contribution.
NEMA	National Environment Management Authority
NET	National Environment Tribunal
NGOs	Non-Governmental Organisations
OECD	Organization for Economic Co-operation and Development.

PCA	Permanent Court of Arbitration
REDD	Reducing Emissions from Deforestation and Forest Degradation
SDGs	Sustainable Development Goals
SEA	Strategic Environmental Assessment
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme.
UNFCCC	UN Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGC	UN Global Compact
WMO	World Meteorological Organization

## **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.*

### **1.0 Introduction**

The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making<sup>1</sup>. 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 ever<sup>2</sup>. 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 consumers<sup>3</sup>. 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 companies<sup>4</sup>.

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<sup>1</sup> De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008).

<sup>2</sup> Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

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

<sup>4</sup> 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

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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 investment<sup>5</sup>. 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 companies<sup>6</sup>. ESG “is a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company’s carbon footprint and ensuring there are systems in place to ensure accountability<sup>7</sup>.” 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.<sup>8</sup>

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 investors<sup>9</sup>. Issues touching on climate change and sustainability dominate current ESG focus. In addition, human rights and especially the rights of

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Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

<sup>5</sup> 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.

<sup>6</sup>The Financial Times Lexicon, Available at:

<https://markets.ft.com/glossary/searchLetter.asp?letter=E> (accessed on 21/07/2022)

<sup>7</sup> Ibid

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

<sup>9</sup> 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)

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indigenous peoples and governance structures of companies are enjoying prominent attention<sup>10</sup>. 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 funding<sup>11</sup>.

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)<sup>12</sup>. 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 2021<sup>13</sup>. At the same time, as at 2020 ESG ratings were being applied to companies representing around 80% of market capitalization<sup>14</sup>.

This paper seeks to critically examine the extent to which ESG principles have been embraced in Kenya. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards realising ESG tenets for sustainable development in Kenya.

### **2.0 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

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<sup>10</sup> Ibid

<sup>11</sup> 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)

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

<sup>13</sup> Ibid

<sup>14</sup> Ibid



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valuable forward-looking information on firms' climate transition risks and opportunities<sup>15</sup>. 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 chains<sup>16</sup>. 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 value<sup>17</sup>. 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 2030<sup>18</sup>.

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 facts<sup>19</sup>. Companies are beginning to appreciate the role taking social

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<sup>15</sup> 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)

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> 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)

<sup>19</sup> Create Research, "Passive Investing 2021: Rise of the social pillar of ESG," Available at:

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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 goals<sup>20</sup>.

The “G” Pillar in ESG is the oldest as governance has been an integral part of robust investment for ages<sup>21</sup>. 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 shareholders<sup>22</sup>. 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 ethics<sup>23</sup>. 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)<sup>24</sup>.

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<https://cdn.efundresearch.com/files/RcfPdrQdAaVI9tiBgrgLq4baO7Wciz6eepZTODEO.pdf>  
(accessed on 21/07/2022)

<sup>20</sup>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)

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

<sup>22</sup>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)

<sup>23</sup> Ibid

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

### **3.0 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 basis<sup>25</sup>. In financial reporting, materiality is the threshold for influencing the economic decisions of those using an Organisation's financial statements<sup>26</sup>. 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 them<sup>27</sup>." 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 topics<sup>28</sup>.

The ESG Manual requires that listed companies have a structured, documented process on assessment of materiality for ESG disclosure topics<sup>29</sup>. 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 report<sup>30</sup>. The Global Reporting Initiative (GRI) gives guideline for what is material by providing that the ESG report should cover topics that Reflect the reporting organisation's significant economic, environmental, and social impacts; or substantively influence the assessments and decisions of stakeholders. In other words, for a topic to be relevant and

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<sup>25</sup> 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)

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

<sup>27</sup> 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)

<sup>28</sup> Ibid

<sup>29</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

<sup>30</sup> Ibid

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potentially material, it should be based on only one of these dimensions<sup>31</sup>.

It is recommended that a materiality assessment grid be used as a structured guide in prioritizing ESG topics to report on<sup>32</sup>. 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 materiality<sup>33</sup>. 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 topics<sup>34</sup>. The starting point is using the sector standards to understand the sector's content and then deduce the organization content from it<sup>35</sup>.

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 society<sup>36</sup>. 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 reporting<sup>37</sup>. 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

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

<sup>32</sup> Ibid

<sup>33</sup> Ibid

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

<sup>35</sup> 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.'

<sup>36</sup> Ibid

<sup>37</sup> Ibid

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nature of its impacts<sup>38</sup>. 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 topics<sup>39</sup>.

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 regulations<sup>40</sup>. Further, the Capital Markets Authority (CMA) Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 provides examples of topics that the Boards of listed companies should treat as material<sup>41</sup>. As per CMA code, material information means any information that may affect the price of an issuer's securities or influence investment decisions<sup>42</sup>. Listed firms are advised to refer to the Code when selecting material topics for disclosure<sup>43</sup>. 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 SDGs<sup>44</sup>.

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";

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

<sup>39</sup> Ibid

<sup>40</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

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

<sup>42</sup> Ibid

<sup>43</sup> Ibid

<sup>44</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

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and environmental and social impact of the company's activities on a broad range of stakeholders<sup>45</sup>. 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 development<sup>46</sup>.

The GRI white paper also revealed that reporting material sustainable development issues can enhance financial performance, improve stakeholder engagement and enable more robust disclosure<sup>47</sup>. 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)<sup>48</sup>. 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.

### **4.0 The ESG Reporting Frameworks Applicable in Kenya**

In addition to the ESG Disclosure Manual formulated by the Nairobi Securities Exchange, there are several other organizations that have adopted ESG reporting requirements relevant to listed companies in Kenya<sup>49</sup>. These include the Capital Markets Authority, the United Nations Global Compact, various

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<sup>45</sup> European Commission 'Guidelines on Non-Financial Reporting', available at [https://ec.europa.eu/info/publications/non-financial-reporting-guidelines\\_en](https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en) (accessed on 21/07/2022)

<sup>46</sup> 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/jrbntbyo/griwhitepaper-publications.pdf> (accessed on 21/07/2022)

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> 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)

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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 Banks<sup>50</sup>. 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 2015<sup>51</sup>. It requires listed companies to explain in their annual reports how they have applied the recommendations contained in the Code<sup>52</sup>. Within the Code, the CMA also provides examples of topics that the Boards of listed companies should treat as material<sup>53</sup>. 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 code<sup>54</sup>. These include by identifying the CMA as a key stakeholder for listed companies within the situational analysis and stakeholder engagement phases<sup>55</sup>. Second, it involves analysing the CMA's expectations of the organisation and the reporting requirements contained in the CMA Code<sup>56</sup>.

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 disclosure<sup>57</sup>. 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

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<sup>50</sup> Ibid

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

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

<sup>55</sup> 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.

<sup>56</sup> Ibid

<sup>57</sup> Ibid

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submitting extracts or the full ESG report discussing performance on these indicators to the CMA within the agreed timelines with the CMA. In this case, the ESG report should be published within the reporting timelines required for CMA submissions.

### **4.2 Investor groups**

As a way of managing assessed environmental and social risk in debt and equity investments, some institutional investors typically require the implementation of an environmental and social management system<sup>58</sup>. 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 metrics<sup>59</sup>. 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 period<sup>60</sup>. 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 investments<sup>61</sup>.

### **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)<sup>62</sup>. The UNGC has developed a set of 10 principles that organisations can voluntarily adopt and

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<sup>58</sup> 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)

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> International Finance Corporation., 'Performance Standards on Environmental and Social Sustainability' available at [https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2b3395d204279/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk](https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk) (accessed on 21/07/2022)

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



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integrate into their own strategies and operations<sup>63</sup>. These principles cover four issue areas including Human Rights, Labour, Environment and Anti-corruption<sup>64</sup>. 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 areas<sup>65</sup>. 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 report<sup>66</sup>. 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 requirements<sup>67</sup>. Organisations can also refer to the UNGC guidance document on Using GRI's Guidelines to Create a CoP.

### **4.4 The Carbon Disclosure Project (CDP)**

The CDP is a non-profit charity helps in promoting transparency in environmental reporting by cities and companies around the world<sup>68</sup>. Signatory companies provide performance data on climate change, water security and deforestation on a self-disclosure basis<sup>69</sup>. This self-reported data is then used by investors and other stakeholders to make informed data driven

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<sup>63</sup> Ibid

<sup>64</sup> 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)

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

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

<sup>69</sup> 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.'

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decisions with regards to the reporting company's environmental impacts<sup>70</sup>. For example, investors can use data in the CDP database to calculate the carbon intensity of their portfolio<sup>71</sup>. Investors can also select entities that demonstrate climate resilience by evidenced implementation of strategies that future proof their organisations against climate related policies and regulations<sup>72</sup>. 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 sector<sup>73</sup>. Further, recently the Central Bank of Kenya (CBK) has developed Guidance on Climate Related Risk Management for the banking sector<sup>74</sup>. The aim of the Guidance is to sensitize the banking sector on mitigation of climate-related risks and harnessing of opportunities<sup>75</sup>. It also offers guidance on the development and implementation of appropriate climate-related strategies and policies<sup>76</sup>. 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.

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<sup>70</sup> Ibid

<sup>71</sup> Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

<sup>72</sup> Ibid

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

<sup>74</sup> 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)

<sup>75</sup> Ibid

<sup>76</sup> Ibid

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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.

### **5.0 ESG Concerns in Kenya**

The concept of ESG acknowledges some of the Environmental, Social and Governance concerns that arise from the activities of corporations. From an environmental perspective, the activities of corporations have resulted in direct and indirect greenhouse gas emissions contributing to the climate change menace<sup>77</sup>. 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 populations<sup>78</sup>.

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 corporations<sup>79</sup>. 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.

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<sup>77</sup> 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)

<sup>78</sup> 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

<sup>79</sup> 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)

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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 controls<sup>80</sup>. 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.

### **6.0 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 expectations<sup>81</sup>. 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 standards<sup>82</sup>.

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 uncertainties<sup>83</sup>. 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 information<sup>84</sup>. The principles include accuracy, balance, clarity,

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<sup>80</sup> Seth.A., 'Corporate governance challenges in emerging economies." *Corporate Governance: An International Review, Forthcoming* (2017).

<sup>81</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> GRI., 'The Global Standards for Sustainability Reporting' Op Cit

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comparability, completeness, sustainability context, timeliness and verifiability<sup>85</sup>.

According to a 2020 Global Survey on Sustainability reporting conducted by KPMG, the GRI Standards are the most widely used framework for sustainability reporting<sup>86</sup>. 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 Manual<sup>87</sup>. 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 diversity and air emissions<sup>88</sup>.

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 6<sup>89</sup>. 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).

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<sup>85</sup> Ibid

<sup>86</sup> 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](https://assets.kpmg/content/dam/kpmg/be/pdf/2020/12/The_Time_Has_Come_KPMG_Survey_o) (accessed on 22/07/2022)

<sup>87</sup> Ibid

<sup>88</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

<sup>89</sup> Ibid

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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 future<sup>90</sup>. According to the Manual, along with national policies and directives, ESG considerations in investments have become the most important driving force for ESG integration and disclosure in capital markets. As such, companies seeking to attract responsible investors are incentivized to ensure that they adopt the top ESG metrics commonly sought by investors<sup>91</sup>. 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 chain<sup>92</sup>.

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 allocation<sup>93</sup>. 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

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<sup>90</sup> 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)

<sup>91</sup> Ibid

<sup>92</sup> 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)

<sup>93</sup> Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' Op Cit

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performance, resulting in more efficient capital allocation<sup>94</sup>. 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 firms<sup>95</sup>.

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 production<sup>96</sup>. By adding and demonstrating ESG integration into their supply chains, production systems and service delivery, the listed companies applying the manual will benefit from preferential access to new markets. ESG value creation framework also helps organisations to proactively address non-financial but critical environmental and social risks, thereby preserving and creating long term value for stakeholders. ESG integration enhances regulatory compliance and helps anticipate the impact of future ESG related regulations and policies. Finally, organizations are perceived as responsible corporate citizens and achieve brand value enhancement by systematically identifying and responding to stakeholder needs and expectations<sup>97</sup>.

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 annually<sup>98</sup>. 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

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<sup>94</sup> Ibid

<sup>95</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

<sup>96</sup> Ibid

<sup>97</sup> 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)

<sup>98</sup> Ibid

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issuance of the guidelines (29<sup>th</sup> November 2021) to interact and familiarize themselves with the ESG reporting steps contained in these guidelines for implementation<sup>99</sup>. Thus, listed companies will after 29<sup>th</sup> November 2022 be expected to include a sustainability/ESG report in their annual integrated reports<sup>100</sup>. 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.

### **7.0 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.

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<sup>99</sup> Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

<sup>100</sup> Ibid



## **Linking Alternative Dispute Resolution (ADR) and Environmental, Social and Governance (ESG) Tenets for Sustainable Development**

### ***Abstract***

*The paper focuses on the nexus between Alternative Dispute Resolution (ADR) mechanisms and Environmental, Social and Governance (ESG) tenets. It argues that linking ADR and ESG tenets can foster the realization of the Sustainable Development agenda. The paper gives an overview of the concepts of ADR, ESG and Sustainable Development. It then critically examines the relationship between ADR mechanisms and ESG tenets and highlights some of the fundamental concerns thereof. The paper further suggests measures through which ADR mechanisms can be linked with ESG tenets in order to achieve Sustainable Development.*

### **1.0 Introduction**

Alternative Dispute Resolution (ADR) has been defined as an all-encompassing term that entails multiple non-judicial methods of managing conflicts<sup>1</sup>. ADR has also been defined as a set of mechanisms for resolving conflicts that function outside formal court litigation processes<sup>2</sup>. ADR thus generally refers to a set of processes that are used to manage conflicts without resort to courts<sup>3</sup>. These mechanisms include negotiation, mediation, arbitration, adjudication, neutral evaluation, enquiry, expert determination and conciliation<sup>4</sup>. In Kenya, ADR mechanisms have been recognized under the Constitution which mandates courts and tribunals to promote alternative forms of dispute resolution<sup>5</sup>. ADR mechanisms have been hailed for their advantages which include informality, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes<sup>6</sup>. ADR mechanisms are thus viable in enhancing access to justice.

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<sup>1</sup> Block. M. J., 'The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes.' *Rutgers Law Record.*, Volume 44, 2016-2017

<sup>2</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

<sup>3</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

<sup>4</sup> Ibid

<sup>5</sup> Constitution of Kenya, 2010, article 159 (2) (c), Government Printer, Nairobi

<sup>6</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

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Issues such as climate change, corporate corruption and financial inequality have become pressing global concerns<sup>7</sup>. In turn, corporations have faced growing calls to be more environmentally sustainable, socially responsible and culturally transparent in how they run business<sup>8</sup>. This has led to the emergence of the concept of Environmental, Social and Governance (ESG). This is a concept that seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance concerns in corporate decision making<sup>9</sup>. ESG is usually a standard and strategy used by investors to evaluate corporate behaviour and to determine the future financial performance of companies<sup>10</sup>. ESG entails a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company's carbon footprint and ensuring there are systems in place to ensure accountability<sup>11</sup>.

It involves monitoring and reporting environmental concerns such as carbon emissions, water consumption and waste generation; social concerns such as employee, product and customer related data and governance concerns such as political lobbying, anti-corruption initiatives and board diversity<sup>12</sup>. The goal of ESG is to integrate Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities<sup>13</sup>. ESG concerns have never been more important. They play into everything; increasingly driving investment decisions and

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<sup>7</sup> CMS., 'Putting the 'S' in 'ESG'- a Corporate Guide.' Available at <https://cms.law/en/int/publication/social-aspect-of-esg-lexicon-of-most-important-terms-and-phrases> (Accessed on 11/07/2023)

<sup>8</sup> Ibid

<sup>9</sup> 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.

<sup>10</sup> Li. T.T et al., 'ESG: Research Progress and Future Prospects.' *Sustainability*, No. 13 of 2021.

<sup>11</sup> Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' Op Cit

<sup>12</sup> Ibid

<sup>13</sup> Li. T.T et al., 'ESG: Research Progress and Future Prospects.' Op Cit

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commercial contracts to company strategy and culture<sup>14</sup>. The concept of ESG is pertinent since Environmental, Social and Governance concerns have become a societal focal point in light of the Sustainable Development agenda<sup>15</sup>. Sustainable Development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs<sup>16</sup>. It combines elements such as environmental protection, economic development and social concerns<sup>17</sup>. The importance of this concept led to the adoption of the 2030 Agenda for Sustainable Development by member states of the United Nations in 2015 as a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development<sup>18</sup>. At the heart of the 2030 Agenda for Sustainable Development are 17 Sustainable Development Goals which seek to strike a balance between social, economic and environmental sustainability<sup>19</sup>. The Sustainable Development Goals seek to achieve global development within the ESG framework by addressing social concerns such as poverty, hunger, health, education, gender equality, access to clean water and employment through investments in areas such as energy, industry, innovation and infrastructure while mitigating the effects of climate change<sup>20</sup>. The paper critically examines the relationship between ADR and ESG. It has been posited that ADR mechanisms such as arbitration and mediation can be

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<sup>14</sup> Lexology., 'Real Estate Disputes and ESG - A Rise in Mediation?' Available at <https://www.lexology.com/library/detail.aspx?g=75560ce7-518f-4ea4-9dbb-399c2feedf9a> (Accessed on 11/07/2023)

<sup>15</sup> Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' *Business Strategy and the Environment*, No. 26 of 2017.

<sup>16</sup> World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

<sup>17</sup> Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1.

<sup>18</sup> 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 08/07/2023)

<sup>19</sup> Ibid

<sup>20</sup> Ibid

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used to enforce ESG requirements such as human rights, environmental compliance and good corporate governance<sup>21</sup>. The paper explores some of the ESG concerns in ADR. It further discusses practical ways through which ADR mechanisms can be used to realize ESG tenets in the quest towards Sustainable Development.

### **2.0 The Nexus between ADR and ESG**

It has been pointed out that ADR mechanisms such as arbitration can aid in enforcing ESG concerns including human rights standards<sup>22</sup>. Business entities such as Multinational Corporations have been accused of perpetrating human right abuses through acts such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices, displacement of people and land injustices against the neighbouring communities while undertaking investment activities in developing countries<sup>23</sup>. 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 populations<sup>24</sup>. This affects realizing the Environmental and Social tenets of the ESG framework<sup>25</sup>. ADR mechanisms can thus be used to enforce ESG standards by holding businesses responsible for violation of environmental and human rights standards<sup>26</sup>. Indeed there has been rise in investment treaty arbitration across the globe including Africa where Multinational Corporations are contractually bound through investment treaties to comply with ESG standards such as environmental governance and respect for human rights and are further subjected to ADR mechanisms

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<sup>21</sup> Gramatidis.B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Available at <https://www.bahagram.com/sustainability-in-dispute-resolution-mediation-as-an-esg-practice/> (Accessed on 08/07/2023)

<sup>22</sup> 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

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Li. T.T et al., 'ESG: Research Progress and Future Prospects.' Op Cit

<sup>26</sup> Ismayilova. A & Jedrzejowski. P., 'ESG and ADR.' Available at <https://www.cpradr.org/news/at-the-council--esg-and-adr##> (Accessed on 11/07/2023)

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especially arbitration when they violate ESG requirements stipulated in investment treaties<sup>27</sup>. Further, the *United Nations Guiding Principles on Business and Human Rights* provide a framework for realizing Environmental, Social and Governance standards by enshrining the corporate responsibility to respect human rights towards attaining the ESG pillars through sound environmental management, protection of human rights and good corporate governance<sup>28</sup>. The *Hague Rules on Business and Human Rights Arbitration* flow from the UN Guiding Principles on Business and Human Rights and provide a framework through which business entities can be compelled to comply with ESG standards through arbitration<sup>29</sup>. The nexus between ADR and ESG is therefore demonstrated through the use of ADR mechanisms to enforce ESG tenets.

ADR mechanisms are also ideal in managing ESG disputes by fostering privacy, cost effective and expeditious management of disputes while also allowing parties to select experts to hear and determine contentious ESG matters<sup>30</sup>. Business would normally prefer to have their disputes managed in a private manner in order to prevent ruining their image in public and also in an expeditious and cost effective manner in order to protect business interests<sup>31</sup>. ADR mechanisms such as International Commercial Arbitration and International Commercial Mediation allows businesses to attain these benefits by ensuring privacy, confidentiality, cost effectiveness and expeditiousness in management of disputes and further promoting the

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<sup>27</sup> Dagbanja, D., 'The Environment, Human Rights, and Investment Treaties in Africa: A Constitutional Perspective.' *Handbook on International Investment Law and Policy*, 2020, P 1-30

<sup>28</sup> United Nations Guiding Principles on Business and Human Rights., Available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (Accessed on 11/07/2023)

<sup>29</sup> The Hague Rules on Business and Human Rights Arbitration., Available at [https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration\\_CILC-digital-version.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf) (Accessed on 11/07/2023)

<sup>30</sup> Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Available at <https://thac.or.th/alternative-dispute-resolution-significance-esg-arbitration/> (Accessed on 11/07/2023)

<sup>31</sup> Ibid

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enforceability of decisions<sup>32</sup>. ADR mechanisms also allow business to select expert decision makers such as arbitrators and mediators who are knowledgeable on ESG issues such as human rights, renewable energy and climate change thus fostering effective and efficient management of disputes<sup>33</sup>. The growing interest of governments, regulators, Non-Governmental Organisations (NGOs) and private companies in ESG has led to a corresponding increase in the number of disputes involving ESG concerns<sup>34</sup>.

Such disputes may be cross border in nature therefore requiring interpretation of laws from different nations<sup>35</sup>. ADR mechanisms such as International Commercial Arbitration and International Commercial Mediation are thus ideal in managing ESG related disputes since they have a transnational applicability and can foster privacy, confidentiality, expeditious and cost effective management of disputes. Further, mechanisms such as arbitration can ensure grant of interim reliefs in ESG related disputes important in instances like irreversible environmental damage or gross violation of human rights<sup>36</sup>. Injunctive relief can be obtained in an expedited manner, and since ESG disputes usually require initial adjudication that cannot be delayed, injunctive reliefs from arbitration proceedings are best suited for such purposes<sup>37</sup>. For instance, in the event that a business practice could cause irreparable environmental damage, the parties concerned could take advantage of emergency arbitration procedures before the constitution of the arbitral tribunal<sup>38</sup>. It has also been pointed out that the use of ADR mechanisms

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<sup>32</sup> Moses. M., 'The Principles and Practice of International Commercial Arbitration.' Cambridge University Press, 2017

<sup>33</sup> Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/04/The-Viability-of-Arbitration-in-management-of-Climite-Change-Related-Disputes-in-Kenya-11th-April-2022.pdf> (Accessed on 11/07/2023)

<sup>34</sup> Financier Worldwide., 'The Rise of ESG Disputes and the Role of Arbitration in Resolving Them.' Available at <https://www.financierworldwide.com/the-rise-of-esg-disputes-and-the-role-of-arbitration-in-resolving-them> (Accessed on 11/07/2023)

<sup>35</sup> Ibid

<sup>36</sup> Mondaq., 'International Arbitration and ESG: A New Trend in Dispute Resolution.' Available at <https://www.mondaq.com/pdf/1273354.pdf> (Accessed on 11/07/2023)

<sup>37</sup> Ibid

<sup>38</sup> Ibid

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such as mediation in managing ESG related disputes is a practical demonstration of a sustainability-oriented business culture since mediation can offer a quick, flexible, consensual and win-win solution based on the mutually accepted interests of the parties<sup>39</sup>. Consequently, it has been asserted that mediation is an ESG tool and its use adds ESG value to businesses<sup>40</sup>. It is thus ideal in managing ESG disputes including real estate disputes, environmental disputes and disputes relating to consumer and business relationships<sup>41</sup>. ADR mechanisms are thus viable in managing ESG related disputes.

In addition, it has been argued that parties can use ADR mechanisms such as negotiation to achieve ESG requirements at workplaces such as fair labour practices that entails the right to equal pay, workplace safety and leave among other entitlements<sup>42</sup>. Fair labour practices are a crucial component of the 'Social' pillar in the ESG debate<sup>43</sup>. Social factors in the ESG debate include working conditions, health and safety, employee relations, diversity, equity & inclusion, operations in conflict regions, and a vast array of further topics connected with sustainable labour relations<sup>44</sup>. It has been pointed out that negotiation is a big part of life and can be used effectively at workplaces by employees to negotiate with their employers for favorable working terms and conditions including fair labor practices which are vital in the ESG debate<sup>45</sup>. Negotiation has been described as an informal process that involves the parties meeting to identify and discuss issues at hand so as to arrive at a mutually

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<sup>39</sup> Gramatidis. B & Emvalomenos. D., '*Sustainability in Dispute Resolution -Mediation as an ESG Practice.*' Op Cit

<sup>40</sup> Ibid

<sup>41</sup> Lexology., '*Real Estate Disputes and ESG - A Rise in Mediation?*' Op Cit; See also Teixeira. A., '*The ESG Concept and Mediation.*' Available at <https://www.linkedin.com/pulse/esg-concept-mediation-antonio-carlos-menezes-teixeira/> (Accessed on 11/07/2023)

<sup>42</sup> ESG., '*The Path to Equal Pay is Through Negotiation.*' Available at <https://esgnews.bg/en/the-path-to-equal-pay-is-through-negotiation/> (Accessed on 11/07/2023b)

<sup>43</sup> Stuart. L.G et al., '*Firms and social responsibility: A review of ESG and CSR research in corporate finance.*' Op Cit

<sup>44</sup> CMS., '*Putting the 'S' in 'ESG' - a Corporate Guide.*' Op Cit

<sup>45</sup> ESG., '*The Path to Equal Pay is Through Negotiation.*' Op Cit

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acceptable solution without the help of a third party<sup>46</sup>. It can facilitate parties in coming up with creative solutions in various contexts including the workplace<sup>47</sup>. ADR mechanisms such as negotiation are thus viable in achieving ESG requirements by businesses such as fair labour practices.

It is thus evident that ADR and ESG are interrelated concepts. ADR mechanisms can foster efficient management of ESG related disputes such as those concerning human rights and climate change<sup>48</sup>. Further, ADR mechanisms such as arbitration can aid in enforcing ESG concerns including human rights standards<sup>49</sup>. In addition, mechanisms such negotiation can be used to achieve ESG requirements at workplaces such as fair labour practices<sup>50</sup>. Linking ADR and ESG tenets is thus vital in fostering Sustainable Development by addressing social concerns such as poverty, hunger, health, education, gender equality, access to clean water and employment through investments in areas such as energy, industry, innovation and infrastructure while mitigating the effects of climate change as envisaged under the United Nations 2030 Agenda for Sustainable Development<sup>51</sup>. It is therefore imperative to link ADR and ESG tenets in order to achieve Sustainable Development.

### **3.0 Way Forward**

There is need to link ADR and ESG tenets in order to expedite the realization of the Sustainable Development agenda across the globe. One way through which this goal can be achieved is by incorporating ESG clauses in commercial contracts such as those concerning respect for human rights, environmental management and climate change<sup>52</sup>. This can ensure enforcement and

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<sup>46</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>47</sup> ESG., 'The Path to Equal Pay is Through Negotiation.' Op Cit

<sup>48</sup> Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Op Cit

<sup>49</sup> Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' Op Cit

<sup>50</sup> ESG., 'The Path to Equal Pay is Through Negotiation.' Op Cit

<sup>51</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit

<sup>52</sup> Millar. L., 'Reviewing and Negotiating Climate Change and other ESG clauses in Commercial Contracts.' Available at [http://in-houseblog.practicallaw.com/reviewing-and-](http://in-houseblog.practicallaw.com/reviewing-and-27)



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compliance with ESG requirements by businesses<sup>53</sup>. In addition, parties should consider managing disputes concerning ESG requirements through ADR mechanisms such as arbitration and mediation. It has been observed that ESG disputes are increasingly being managed through ADR mechanisms such as arbitration which are very suitable means of resolving ESG related disputes<sup>54</sup>. Businesses should tap into this opportunity and embrace ADR mechanisms in managing ESG disputes in order to promote flexibility, privacy, confidentiality, expeditiousness and cost effective management of such disputes<sup>55</sup>.

In addition, it is imperative for ADR practitioners such as arbitrators, mediators and adjudicators become familiar with ESG-related trends, regulations and standards, and ensure that they are proactive in complying with best practices so as to promote appropriate ADR procedures for ESG-related disputes<sup>56</sup>. ADR practitioners should also seek expert assistance on complex ESG matters such as determining compliance with climate change commitments<sup>57</sup>. Organizations can also seek expertise from qualified personnel to help them navigate the complexity of ESG and put in place measures to ensure compliance with ESG standards<sup>58</sup>.

It is also pertinent for organizations to uphold ESG practices such as green innovation in order to foster Sustainable Development<sup>59</sup>. Green innovation

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*negotiating-climate-change-and-other-esg-clauses-in-commercial-contracts/* (Accessed on 12/07/2023)

<sup>53</sup> Ibid

<sup>54</sup> Mondaq., 'International Arbitration and ESG: A New Trend in Dispute Resolution.' Op Cit

<sup>55</sup> Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Op Cit

<sup>56</sup> Mondaq., 'International Arbitration and ESG: A New Trend in Dispute Resolution.' Op Cit

<sup>57</sup> Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya.' Op Cit

<sup>58</sup> CEDR., 'Environmental, Social and Governance (ESG) Expertise.' Available at <https://www.cedr.com/commercial/esg/> (Accessed on 12/07/2023)

<sup>59</sup> Zhang. F et al., 'The Interaction Effect between ESG and Green Innovation and Its Impact on Firm Value from the Perspective of Information Disclosure.' Available at

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incorporates technological improvements that save energy, prevent pollution or enable waste recycling and can include green product design<sup>60</sup>. This will ensure compliance with ESG requirements such as environmental protection while promoting the financial performance of organizations<sup>61</sup>. In the context of ADR, it is essential for practitioners such as mediators, arbitrators and adjudicators to embrace sustainable practice through measures such as 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 ADR-related travel<sup>62</sup>. This will enhance Sustainable Development while also achieving ESG tenets such as sound environmental management. ADR practitioners such as arbitrators should also ensure that their awards promote ESG tenets such as respect for human rights<sup>63</sup>. It is also imperative for ADR practitioners to enforce good governance practices such as transparency,

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<https://pdfs.semanticscholar.org/103a/4aa7542fe368e99c42614c11b05a1f4097d7.pdf>  
(Accessed on 12/07/2023)

<sup>60</sup> Chouaibi. S & Chouaibi. J., 'ESG and Corporate Financial Performance: The Mediating Role of Green Innovation: UK common Law versus Germany Civil Law.' Available at

[https://www.researchgate.net/profile/Jamel-Chouaibi/publication/348476713\\_ESG\\_and\\_corporate\\_financial\\_performance\\_the\\_mediating\\_role\\_of\\_green\\_innovation\\_UK\\_common\\_law\\_versus\\_Germany\\_civil\\_law/links/61fedadd702c892cef07ac56/ESG-and-corporate-financial-performance-the-mediating-role-of-green-innovation-UK-common-law-versus-Germany-civil-law.pdf](https://www.researchgate.net/profile/Jamel-Chouaibi/publication/348476713_ESG_and_corporate_financial_performance_the_mediating_role_of_green_innovation_UK_common_law_versus_Germany_civil_law/links/61fedadd702c892cef07ac56/ESG-and-corporate-financial-performance-the-mediating-role-of-green-innovation-UK-common-law-versus-Germany-civil-law.pdf) (Accessed on 12/07/2023)

<sup>61</sup> Ibid

<sup>62</sup> Muigua. K., 'Green Arbitration: Aligning Arbitration with Sustainable Development.' Available at <http://kmco.co.ke/wp-content/uploads/2023/04/Green-Arbitration-Aligning-Arbitration-with-Sustainable-Development-Kariuki-Muigua-April-2023.pdf> (Accessed on 12/07/2023)

<sup>63</sup> Muigua. K., 'Reflections on Human Rights in Arbitration.' Available at <http://kmco.co.ke/wp-content/uploads/2023/06/Reflections-on-Human-Rights-in-Arbitration.pdf> (Accessed on 12/07/2023)

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accountability, reporting and disclosure in their decisions<sup>64</sup>. This is will enhance good governance which is a vital component of the ESG discourse<sup>65</sup>. Through these among other measures, Sustainable Development will be achieved through linking ADR and ESG tenets.

#### **4.0 Conclusion**

ADR and ESG are connected concepts. ADR mechanisms such as arbitration, mediation and adjudication are viable in managing ESG related disputes<sup>66</sup>. ADR mechanisms can also aid in enforcing ESG standards including sound environmental management, respect for human rights and good governance<sup>67</sup>. Connecting ADR and ESG tenets is thus vital in realizing Sustainable Development by addressing social concerns such as poverty, hunger, health, education, gender equality, access to clean water and employment through investments in areas such as energy, industry, innovation and infrastructure while mitigating the effects of climate change as envisaged under the United Nations 2030 Agenda for Sustainable Development<sup>68</sup>. Linking ADR and ESG tenets for Sustainable Development is a quest worth pursuing.

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<sup>64</sup> Mazhorina. M., 'ESG Principles in International Business and Sustainable Contracts.' Available at [https://aprp.msai.ru/jour/article/view/3223?locale=en\\_US](https://aprp.msai.ru/jour/article/view/3223?locale=en_US) (Accessed on 12/07/2023)

<sup>65</sup> Ibid

<sup>66</sup> Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Op Cit

<sup>67</sup> Mazhorina. M., 'ESG Principles in International Business and Sustainable Contracts.' Op Cit

<sup>68</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit

## **Conflict Management Mechanisms for Effective Environmental Governance in Kenya**

### *Abstract*

Conflict and conflict management are considered to be a critical part of any environmental governance framework. This is due to the fact that environmental resources come with conflict among user groups due to conflicting needs and abundance or scarcity. As such, any framework designed to achieve effective environmental governance must include conflict management framework. This paper discusses the nature of environmental and natural resource related conflicts and their applicability or suitability in the management of environmental conflicts. The author does this within the context of Kenya's framework on management of environmental and natural resource related conflict, offers suggestions and recommendations on how best to harness and utilise the available conflict management mechanisms for effective environmental governance and sustainable development in Kenya.

### **1.0 Introduction**

This paper entails a critical examination and analysis of conflict management mechanisms in environmental matters for effective environmental governance. The paper has several parts that address the following: the first part defines and discusses the nature of environmental and natural resource related conflicts; the second part offers an overview of the various conflict management mechanisms and their applicability or suitability in the management of environmental conflicts; the third part offers a critique of Kenya's framework on management of environmental and natural resource related conflicts; and the last part discusses the way forward on environmental conflicts management for effective environmental governance and sustainable development in Kenya.

The Sustainable Development Goals (SDGs) provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.<sup>1</sup>

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<sup>1</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

## **2.0 Nature of Environmental and Natural Resource Related Conflicts**

The role of natural resources in society has been discussed by various authors as including sources of income, industry, and identity, with developing countries being more dependent on natural resources as their primary source of income, as many individuals depend on these resources for their livelihoods, with agriculture, fisheries, minerals, and timber as their main sources of income.<sup>2</sup> In addition, natural resources also play a prominent cultural role for many local communities and may even be a point of pride for the nation as a whole, a part of the country's patrimony, where resources such as land, water, and timber (forests) usually have historical and cultural significance, serving as the home of ancient civilizations, historical artifacts, and cultural practices.<sup>3</sup> This is well reflected in the Constitution of Kenya which recognises the environment in its preamble as the heritage of people of Kenya worthy of respect and sustenance for the benefit of future generations.<sup>4</sup> Away from the communities, natural resources, both renewable and nonrenewable, are mostly controlled by the state (which is considered to be the case in most developing countries) and are used as exports by the government to attain profit and power.<sup>5</sup>

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<sup>2</sup> United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors, 2007, p.6. Available at [www.usip.org/sites/default/files/file/08sg.pdf](http://www.usip.org/sites/default/files/file/08sg.pdf) [Accessed on 13/08/2018].

<sup>3</sup> United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors, 2007, p.7.

<sup>4</sup> Preamble, Constitution of Kenya, 2010.

<sup>5</sup> United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors, 2007, pp.6-7; See also Constitution of Kenya, 2010, Article 62 which places some resources under state control, as part of public land including, inter alia:

*(f) all minerals and mineral oils as defined by law;(g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;(j) the territorial sea, the exclusive economic zone and the sea bed;(k) the continental shelf;(l) all land between the high and low water marks;(2) Public land shall vest in and be held by a county government in trust for the people resident in the county;(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya;*

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It has been observed that environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.<sup>6</sup> 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.<sup>7</sup>

The many groups whose interests in and actions concerning a region's natural resources can lead to or exacerbate conflict may include local communities, governments, rebel groups, and outside actors.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

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

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

<sup>7</sup> *Ibid*, p. 6.

<sup>8</sup> United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors, 2007, p.7.

<sup>9</sup> 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 12/08/2018].

<sup>10</sup> 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

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resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.<sup>11</sup>

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."<sup>12</sup> An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya<sup>13</sup>, and with the distrust between local communities around the region against each other<sup>14</sup> leading to constant conflicts as well as cross border conflicts.<sup>15</sup> The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.<sup>16</sup>

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the "resource curse" – corruption, economic stagnation, and violent

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<sup>11</sup> United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors, 2007, p.8.

<sup>12</sup> Ibid, p.8.

<sup>13</sup> *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 12/08/2018].

<sup>14</sup> Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969–1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. <http://www.jstor.org/stable/25842144>. [Accessed on 12/08/2018].

<sup>15</sup> Johannes, E.M., et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

<sup>16</sup> '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/](http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/) [Accessed on 12/08/2018].

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conflict over access to revenues.<sup>17</sup> 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.<sup>18</sup> For instance, extractive industries, particularly in sub-Saharan Africa, have been marked with increasing levels of political, social, technical and environmental risk.<sup>19</sup> This has been the case in countries like Sudan, Democratic Republic of Congo<sup>20</sup> and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources. Conflict also often produces significant environmental degradation.<sup>21</sup>

Apart from the adverse effect of the conflict on the environment, the illegal trade of minerals bars communities from benefiting from its resources.<sup>22</sup> Communities expect that availability of environmental goods and services in their region will improve their livelihoods by 'real' development, which may

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<sup>17</sup> United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors, 2007, p.8.

<sup>18</sup> Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48-58, p. 48.

<sup>19</sup> Ibid, p. 48; see also Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 55. Available at <https://commdev.org/wp-content/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf>

<sup>20</sup> Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo*:

*Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at <http://pubs.iied.org/pdfs/13578IIED.pdf> [Accessed on 12/08/2018].

<sup>21</sup> 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.

<sup>22</sup> See 'Diamonds in Sierra Leone, A Resource Curse?' available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 12/08/2018]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' *Dissent Magazine*, Spring 2014, available at <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 12/08/2018]; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' *Investigative Field Report*, June 2013. Available at <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 12/08/2018].



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not always be the case.<sup>23</sup> Poor and low economic development<sup>24</sup> and consequently, failed economies result in conflicts,<sup>25</sup> as a result of environmental and natural resources' bad governance or mismanagement.<sup>26</sup> Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.<sup>27</sup>

As far as the abundance theory is concerned, 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,<sup>28</sup> which is a threat to protected human security.<sup>29</sup> Mismanagement of resources is thus associated with corruption, undermining inclusive economic growth, inciting armed conflict and damaging the environment.<sup>30</sup>

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<sup>23</sup> Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at [http://unctad.xiii.org/en/SessionDocument/suc2012d1\\_en.pdf](http://unctad.xiii.org/en/SessionDocument/suc2012d1_en.pdf) [Accessed on 12/08/2018].

<sup>24</sup> See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012).

<sup>25</sup> Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

<sup>26</sup> Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf> [Accessed on 12/08/2018].

<sup>27</sup> Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' *World Development*, Vol. 72, pp. 408–418, 2015, p. 408.

<sup>28</sup> Tsani, S., 'Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 184.

<sup>29</sup> Alao, A., *Natural Resource Management and Human Security in Africa*, in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010); Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact*, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 12/08/2018].

<sup>30</sup> Aled, W., et al, *Corruption in Natural Resource Management: An introduction* (Bergen: Michelsen Institute, 2008). Available at <http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf> [Accessed on 12/08/2018].

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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.<sup>31</sup> 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.<sup>32</sup>

Based on the foregoing possibilities, some scholars have rightly maintained that regardless of which approach describes the bigger threat, both scarcity and abundance can create environments that are ripe for violent conflict.<sup>33</sup>

### **3.0 Overview of Conflict Management Mechanisms and their Applicability in the Management of Environmental Conflicts**

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).<sup>34</sup> As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.<sup>35</sup> Despite this, there are key principles such as, inter alia, participatory

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<sup>31</sup>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 12/08/2018].

<sup>32</sup> 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.

<sup>33</sup> United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors*, 2007, p.8.

<sup>34</sup> 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 12/08/2018].

<sup>35</sup> Ibid.

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approaches<sup>36</sup>, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.<sup>37</sup>

Conflict is a process of adjustment, which can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome<sup>38</sup>, and the same can be managed, transformed, resolved or settled depending on the approach adopted. Conflict management has been 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.<sup>39</sup> It involves action that addresses how people can make better decisions collaboratively, to address the roots of conflict by building upon shared interests and finding points of agreement.<sup>40</sup>

Conflict transformation, on the other hand, 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

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<sup>36</sup> 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.

<sup>37</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

<sup>38</sup> Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*.

<sup>39</sup> 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](http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf) [Accessed on 12/08/2018].

<sup>40</sup> 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 12/08/2018].

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relationships, by focusing on long-term efforts oriented towards producing outcomes, processes and structural changes.<sup>41</sup>

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.<sup>42</sup> Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.<sup>43</sup> 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.<sup>44</sup>

Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.<sup>45</sup> 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.<sup>46</sup> Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.<sup>47</sup> Conflict

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<sup>41</sup> Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>42</sup> Ibid.

<sup>43</sup> 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.

<sup>44</sup> Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

<sup>45</sup> 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.

<sup>46</sup> See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

<sup>47</sup> Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

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resolution mechanisms include negotiation, mediation and problem solving facilitation.<sup>48</sup> 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.<sup>49</sup> This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.<sup>50</sup> 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.<sup>51</sup>

Article 33 of the Charter of the United Nations outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to including, *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of parties' own choice* (Emphasis added).<sup>52</sup> These are captured in the fig. 1 below.

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<sup>48</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

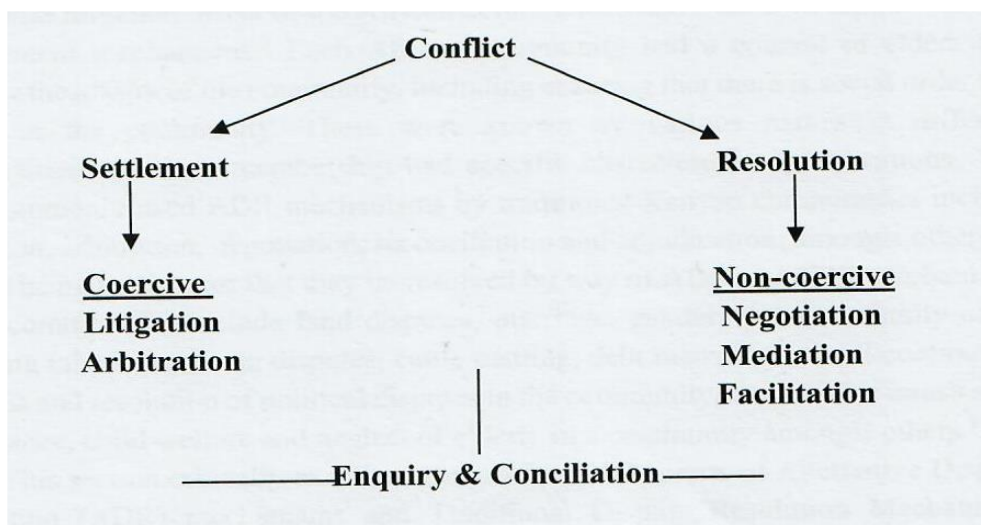
<sup>49</sup> Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' *International Encyclopedia of the Social & Behavioral Sciences* (Second Edition, 2015), pp. 937-942.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

**Fig. 1: Methods of Conflict Management**



**Source: Author**

From the foregoing figure, it is thus clear that there is a wide range of mechanisms for the avoidance of conflicts, resolution of conflicts, dispute settlement and conflict transformation. Conflict avoidance as a conflict management technique involves the application of a variety of techniques, some used consciously and some unconsciously, to avoid the escalation from normal conflict into a dispute.<sup>53</sup> Some require communication between the parties and others involve the intervention of third parties. The appropriate mechanisms depend on the particular stage of the conflict. For instance, where the conflict involves complex underlying issues and relationships have been totally destroyed, dispute settlement processes may not be the appropriate mechanisms to resolve the conflict.<sup>54</sup>

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<sup>53</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, op.cit.

<sup>54</sup> Muigua K. *Resolving Conflicts through Mediation in Kenya*, 2nd Ed., 2017, p. 55.

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Generally, interest-based or non-coercive processes are timely, cost efficient, provide more satisfaction to the disputing parties and are less destructive to the relationship of the parties than processes like litigation, and often result in more durable solutions to which disputants stay committed, therefore lessening the possibility of appeal, future conflict or dishonoring of the agreement.<sup>55</sup>

Both the power- and rights-based processes lead to results in which one side loses and the other side wins. These processes can lead to the issues in disagreement flaring up again. They can lead to resistance, violence and revolt as they are merely settlement mechanisms that do not address the underlying causes of the conflict. Although rights-based dispute resolution feels fairer and less arbitrary than power-based processes, the outcome is zero-sum since one side must win and the other loses. On the other hand, interest-based processes can lead to win-win outcomes, in that they explore the real interests, goals and motivations of disputants and aim to develop a solution which mutually satisfies those needs. Interest-based processes are also more efficient at bringing about participant satisfaction, process fairness, effectiveness, efficiency, fostering of relationships and addressing power-based issues, all of which are important considerations in the conflict resolution process.<sup>56</sup>

Environmental conflicts are perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.<sup>57</sup> Furthermore, it is believed that there are about four key factors that contribute in the creation of environmental conflict: poverty, vulnerable livelihoods,

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<sup>55</sup> Ury, B. & Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict" *Program on Negotiation at Harvard Law School Cambridge, Massachusetts 1993*, available at [www.williamury.com](http://www.williamury.com), [Accessed on 16/08/2018].

<sup>56</sup> See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, op.cit; Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, op.cit.

<sup>57</sup> Ibid.

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migration and weak state institutions – all problems that are present at the local level.<sup>58</sup>

Some authors also argue that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.<sup>59</sup> For instance, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.<sup>60</sup> There has been witnessed violence in areas around Kajiado town with Maasai community seeking to ‘evict foreigners’ in the area.<sup>61</sup> The alleged foreigners were 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.

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<sup>58</sup> Barnett, J., & Adger, W. N., ‘Climate change, human security and violent conflict,’ *Political Geography*, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/> [Accessed on 20/08/2018]).

<sup>59</sup> Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/> [Accessed on 20/08/2018]; See also Sosa-Nunez, G. & Atkins, E., *Environment, Climate Change and International Relations*, (E-International Relations, 2016). Available at <http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf> [Accessed on 20/08/2018].

<sup>60</sup> Armitage, D., ‘Adaptive Capacity and Community-Based Natural Resource Management,’ *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

<sup>61</sup> 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 12/08/2018]; *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 12/08/2018].



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Otherwise, without such a balance, erupting conflicts subsequently affect the course of development in the country.

Environmental conflicts thus 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 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.<sup>62</sup>

Some of the current conflict management mechanisms in Kenya, while they may have helped in tackling some environmental conflicts, they have not done enough in ensuring amicable resolution of environmental conflicts, since some of them are not affordable, while others such as the court have too many and complex procedural requirement. The Kenyan framework on conflict management has for long time preferred litigation as a mechanism for conflict resolution yet courts of law are often inaccessible to the poor, marginalized groups and communities living in remote areas. However, access to justice through litigation is, however, considered a potent remedy when access to environmental information or public participation has been wrongly denied or is incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or deprivation.<sup>63</sup>

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<sup>62</sup> See generally, Bercovitch, J., "Conflict and conflict management in organizations: A framework for analysis." *Hong Kong Journal of Public Administration* 5, no. 2 (1983): 104-123.

<sup>63</sup> See Akech, M., "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-xxiv. Available at <http://www.kenyalaw.org> [Accessed on 20/08/2018]; *The Fair Administrative Action Act*, 2015 (No. 4 of 2015) which is 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

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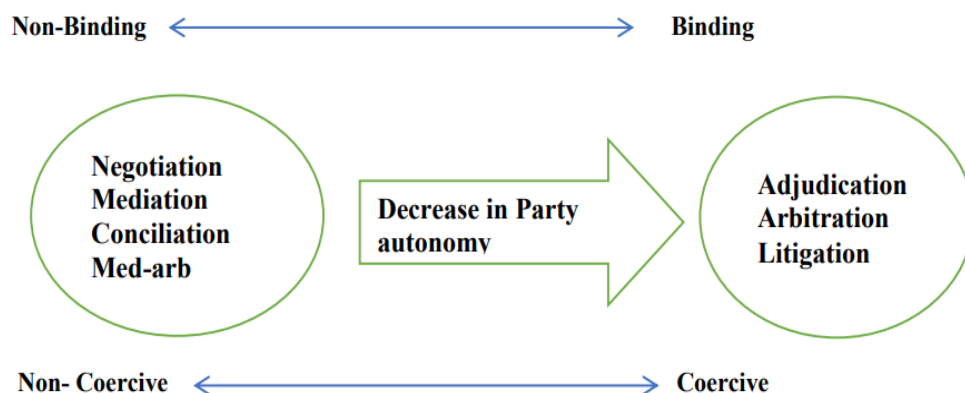
Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs), especially negotiation and mediation, have been effective in managing conflicts where they have been used. (ADR) mechanisms include mediation, conciliation, negotiation and traditional/community based dispute management mechanisms. ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control (as illustrated in fig. 2 below) 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.<sup>64</sup>

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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, *Access to Information Act, 2016*, 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. 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.

<sup>64</sup> Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit, p.10.

**Fig. 2 Degree of Party Autonomy**



**\*Source: Author.**

Arguably, negotiation and mediation have more value to the local communities than just being means of conflict management, as they present means of sharing information and participating in decision-making. They have the unique and positive attributes which include their participatory nature that can be used to manage environmental and natural resource conflicts for meaningful participation in the decision making process by enabling communities to present proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.<sup>65</sup>

Community-based approaches to conflict resolution are also deemed to be useful, particularly to promote locally based, indigenous management strategies.<sup>66</sup> Since indigenous mechanisms of conflict management are based on the very values and tenets of the people, they maintain and protect the

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<sup>65</sup> 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/webbuk.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/webbuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 14/08/2018].

<sup>66</sup> Ibid.

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customs and traditions of the society. Thus, they are able to solve long standing disputes and promote durable peace.<sup>67</sup>

### **4.0 Kenya's Framework on Management of Environmental and Natural Resource Related Conflicts: Prospects and Challenges**

Most of the sectoral laws governing environmental matters in Kenya mainly provide for conflict management through the national court system based on legislation and policy statements that are administered through regulatory and judicial institutions. Litigation, which is a state-sponsored approach to conflict management, does 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.<sup>68</sup> The Constitution provides 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.<sup>69</sup> This is also captured in various statutes such

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<sup>67</sup> Azebre, A.I., et al, 'Indigenous Mechanisms of Dispute Resolution among the People of Adaboya Traditional Area,' July 2012, available at <https://www.modernghana.com/news/534448/1/indigenous-mechanisms-of-dispute-resolution-among-.html> [Accessed on 14/08/2018].

<sup>68</sup> 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.

<sup>69</sup> Art. 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate-- to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Art. 70(2). For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

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as the Forest Conservation and Management Act, 2016, which provides that persons can sue for enforcement of environmental rights,<sup>70</sup> and the Environmental Management and Coordination Act (EMCA), 1999<sup>71</sup>, the framework law on environmental management and conservation which provides that a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment<sup>72</sup>, amongst others.

The role of courts in environmental governance has also been reaffirmed by courts around the world, including the Kenyan courts in various cases. In the Kenyan case of *Peter K. Waweru v Republic*,<sup>73</sup> the High Court held that sustainable development has a cost element which must be met by the developers.<sup>74</sup> 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.<sup>75</sup>*

Thus, courts can step in and protect the environment without necessarily looking for immediate proof of likely violation of the environment. To facilitate the same, the Constitution gives courts the power to make any order,

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<sup>70</sup> Sec. 70, Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

<sup>71</sup> No. 8 of 1999, Laws of Kenya.

<sup>72</sup> Sec. 111(1), Environmental Management and Coordination Act, 1999.

<sup>73</sup> *Peter K. Waweru v Republic* [2006] eKLR, Misc. Civil Application No. 118 of 2004.

<sup>74</sup> *Ibid*, para. 4.

<sup>75</sup> *Ibid*, p. 7.

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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.<sup>76</sup> 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.<sup>77</sup> However, to succeed in their plea one must demonstrate that their Right under Art. 42 has been or is likely to be denied, violated, infringed or threatened.<sup>78</sup>

The *suo moto* powers of the Court in environmental matters are also envisaged under provisions of the *Environment and Land Act*.<sup>79</sup> 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.

In addition to the foregoing provisions on the use of litigation, the promulgation of the 2010 Constitution of Kenya created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.<sup>80</sup> One of the principles of land policy as envisaged in the Constitution of Kenya is

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<sup>76</sup> Constitution of Kenya, 2010, Art. 70(2).

<sup>77</sup> Constitution of Kenya, 2010, Art. 70(3); See also s. 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

<sup>78</sup> *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

<sup>79</sup> 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 Art. 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.

<sup>80</sup> Constitution of Kenya 2010, Art. 159(2) (c).

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encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>81</sup> In addition, one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>82</sup> 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.<sup>83</sup>

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR<sup>84</sup>, the Court observed that: "quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The Convention on Biological Diversity which Kenya has ratified and which is now part of Kenyan law by virtue of Art. 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."

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

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<sup>81</sup> Art. 60 (1) (g).

<sup>82</sup> Art. 67(2) (f).

<sup>83</sup> 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.

<sup>84</sup> ELC Civil Suit No. 821 of 2012 (OS).

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conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.<sup>85</sup>

### **5.0 Way Forward**

#### **5.1 Public Participation and Community Empowerment**

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 *Agenda 21*<sup>86</sup> 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.

Meaningful public participation can act to preempt conflicts in environmental matters since all the important stakeholders get to own up the decisions made. Various sectoral laws and policies should be designed in ways that protect the environment from degradation, and also ensures meaningful participation of communities in such measures, first through decision-making, and then encouraging active participation, whether through incentives or otherwise.

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 and thus positively contribute to addressing them satisfactorily.

There is need for empowerment of communities which helps people gain control over their own lives, through fostering power (that is, the capacity to implement) in people, for use in their own lives, their communities, and in their society, by acting on issues that they define as important.<sup>87</sup>

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<sup>85</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>86</sup> United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

<sup>87</sup>Page, N. and Czuba, C.E., "Empowerment: What Is It?" *Journal of Extension*, October 1999, Volume 37, Number 5, Commentary, 5COM1.



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Empowerment promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.<sup>88</sup> Thus, through empowerment, poor people get the assets and capabilities to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.<sup>89</sup>

The basic aspects of empowerment that are considered important especially in the context of this discussion include: *participation, control and critical awareness* (emphasis added) where participation is the individual's actions that contribute to community contexts and processes; control is the effective or the perception of ability to influence decisions; and critical awareness is the ability to analyze and understand the social and political environment.<sup>90</sup>

Kenyan local communities should therefore be empowered to participate more productively in social, political and economic decision-making processes, especially in the areas of natural resources and environmental management, conflicts management and participation in general governance matters. These have a direct impact on the quality of the social, economic and cultural life of the local people and it is therefore important to involve them.

### **5.2 Concerted Peacebuilding Efforts**

Promotion and implementation of peacebuilding efforts in environmental governance matters as an element of sustainable development cannot meaningfully be achieved without the concerted efforts from all stakeholders. The Sustainable Development Goals (SDGs) recognise this connection and

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<sup>88</sup> Wallerstein, N., "Powerlessness, empowerment and health: Implications for health promotion programs."

*American Journal of Health Promotion*, 6(3), 197-205 (As quoted in Lord, J. and Hutchison, P., "The Process of Empowerment: Implications for Theory and Practice." *Canadian Journal of Community Mental Health*, 12:1, Spring 1993, Pages 5-22 at p. 4.)

<sup>89</sup> World Bank, *Chapter 2. What Is Empowerment?* p.11. Available at <http://siteresources.worldbank.org/INTEMPowerment/Resources/486312-1095094954594/draft2.pdf> [Accessed on 19/08/2018].

<sup>90</sup> Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," in Rappaport, J. and Seidman, E. (Eds.), *Handbook on Community Psychology*, New York: Plenum Press, 2000. p.52.

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provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.<sup>91</sup>

The non-Governmental organisations, academia, government institutions and community leaders directly concerned in peacebuilding efforts can collaborate in creating awareness and coming up with creative ways to manage environmental conflicts for peace and sustainable development. Religious organisations can also come in to facilitate the actual processes of conflict management and also foster awareness creation efforts. In Kenya, where these conflicts are clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome.<sup>92</sup> Courts are thus under an obligation to take lead role in promoting the use of traditional and community justice systems in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations. Their split role in litigation as well as ADR and other alternative justice systems is recognised under the Environment and Land Court Act 2011<sup>93</sup>.

The need to involve everyone is affirmed in the Constitution which provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.<sup>94</sup>

### **5.3 Enhanced Legal and Institutional Framework on Environmental Conflicts Management**

Natural resources and environmental conflicts negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. Despite the fact that the existing legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered

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<sup>91</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

<sup>92</sup> See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

<sup>93</sup> Sec. 20, Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

<sup>94</sup> Constitution of Kenya 2010, Art. 69(2).

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much in stemming the natural resource conflicts, due to inadequacies within the structure. It is clear that most of the sectoral laws mainly provide for conflict management through the national court system and specifically litigation. However, the recognition of ADR and TDR mechanisms in the Constitution heralds a new dawn on the use of these mechanisms and other alternative justice systems in managing environmental conflicts. ADR and TDR 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

### **6.0 Conclusion**

The political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels - developments that will prompt mass migration and, in turn, incite group conflicts - are considered to be some of the most serious problems of the twenty-first century.<sup>95</sup> It is thus important to deal with environmental conflicts if peace and stability is to be maintained. Natural resource based conflicts are unique, and left to escalate, suffering and death may be the undesirable result. The ADR conflict management mechanisms are considered suitable for use in resolution of natural resource based conflicts. However, litigation also has its own advantages. As such, there is need for synergy in application of coercive and non-coercive mechanisms, deepening on the nature of dispute.

This paper has discussed the nature and methods of conflict management in environmental and natural resources governance and suggested some of the approaches that may be employed to enhance the same for sustainable development.

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<sup>95</sup> Kaplan, R., "The Coming Anarchy," *Atlantic Monthly*, 1994.

## **Enhancing Environmental Governance for Peace Building in Kenya**

### **Abstract**

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

### **1.0 Introduction**

The *2030 Agenda for Sustainable Development*<sup>1</sup> provides a global blueprint for dignity, peace and prosperity for people and the planet, now and in the future. Goal 16 thereof seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.<sup>2</sup> The *Agenda* also rightly points out that there can be no sustainable development without peace and no peace without sustainable development. One of the elements of sustainable development is effective environmental governance. The *Agenda* states that it recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.<sup>3</sup> The *Agenda* calls for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.<sup>4</sup>

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

<sup>2</sup> Goal 16,

<sup>3</sup> Target 35, *Transforming our world: the 2030 Agenda for Sustainable Development*.

<sup>4</sup> *Ibid*, Target 35.

It is against this background that this paper discusses the fundamental principles underlying environmental governance and links the same to peacebuilding. The discussion is based on the hypothesis that there exists a link between the state of environmental governance and the peace building in any country.

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

## **2.0 Environmental Governance: Theories and Conceptualisation**

### **2.1 Theories and Conceptualisation of Environmental Governance**

There exist different definitions of the term ‘governance’ by various scholars. Governance has been defined as a system for shaping behaviour to socially useful ends, involving many participants serving various roles. Those involved in this system include government officials, legal authorities, self-governing organisations and non-government actors such as citizens, industry stakeholders, those being governed and those who are affected by governance.<sup>5</sup>

Some scholars have discussed the theory of governance under five broad propositions, which are considered to be complementary rather than contradictory. These five propositions are: Governance refers to a set of institutions and actors that occupy government bodies and “beyond” – that is, they are also from the private and the third sector; Governance identifies the blurring of boundaries and responsibilities for tackling social and economic

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

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issues; Governance identifies the power dependence involved in the relationships between institutions involved in collective actions; Governance is about autonomous self-governing networks of actors; and Governance recognizes the capacity to get things done which does not rest within the power of government to command or use its authority.<sup>6</sup>

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.<sup>7</sup>

‘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...<sup>8</sup> 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.”<sup>9</sup>

It is thus arguable that environmental governance in any country is only as effective as the general governance framework in place. Environmental

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

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

<sup>8</sup> IUCN Resolution 3.012 on Governance of natural resources for conservation and sustainable development adopted in Bangkok, Thailand in 2004. Available at [https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC\\_2004\\_RES\\_12\\_EN.pdf](https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2004_RES_12_EN.pdf) [Accessed on 16/5/2019].

<sup>9</sup> Ibid.

governance does not operate in a vacuum but also relies on the effectiveness of the general governance in a given country.

## **2.2 Role of Law in Environmental Governance and Management**

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

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.<sup>11</sup> 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.<sup>12</sup>

It is noteworthy that environmentally relevant legal principles, rules and implementation arrangements come from diverse sources which include: state-created rules, including constitutions, statutes, regulations, and administrative rules and plans; judicial rules, which include judgments of courts and tribunals, and legally binding rulings of other authorities or agents of government; state-supported private rules – such as industry co-regulatory arrangements or private codes or standards – that are broadly consensual and

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

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

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

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based in law related to, inter alia, contract, property, civil rights, consumer protection, or financial regulation; international bilateral, or multilateral agreements, rules of international bodies, and other state endorsed international legal and administrative arrangements, encompassing both hard law (formally ratified as legally binding) and soft law (not ratified or not of a binding nature); general legal principles that are widely accepted in national or international jurisprudence, particularly as endorsed and clarified by judgments of international and national courts and tribunals; and rules emerging from specific communities, particularly indigenous or religious communities (sometimes referred to as customary law), which can be recognized by states through specific laws, bills of rights or constitutional provisions, linking customary rules and norms to the authority and responsibility of the state.<sup>13</sup>

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.<sup>14</sup>

In Kenya, there are intricate and detailed frameworks and sectoral laws in place to ensure proper conservation and protection of natural resources.<sup>15</sup> In addition to the statutory provisions on environmental law, constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.<sup>16</sup> It has

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

<sup>14</sup> Ibid., at p. 1.

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

<sup>16</sup> 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*



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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 resources<sup>17</sup>, 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<sup>18</sup> 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<sup>19</sup>; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment;

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*Law Review*, April 2015, Volume 6, Issue 1, pp 9–30; See also, Mwenda, A. & Kibutu, T.N., 'Implications of the New Constitution on Environmental Management in Kenya,' *Law, Environment and Development Journal*, Vol. 8, No. 1, 2012, p. 78; See also Okidi, C.O., "Concept, Function and Structure of Environmental Law", in C.O Okidi, P. Kameri -Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers, 2008), pp. 142–182: 146.

<sup>17</sup> 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).

<sup>18</sup> 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).

<sup>19</sup> 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.

and utilise the environment and natural resources for the benefit of the people of Kenya.<sup>20</sup>

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.<sup>21</sup> What is required is a strengthened framework law that gives proper attention to all sectors of natural resources as well as inclusive of all stakeholders for effective management.

### **3.0 Peace Building: Meaning and Scope**

#### **3.1 Meaning and Scope of Peace Building**

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

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.<sup>24</sup>

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<sup>20</sup> Constitution of Kenya, Art. 69(1).

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

<sup>22</sup> Spring, Ú.O., "Peace and Environment: Towards a Sustainable Peace as Seen from the South." In *Globalization and Environmental Challenges*, Springer, Berlin, Heidelberg, 2008, pp. 113-126.

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

<sup>24</sup> Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at <http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y> [Accessed on 16/5/2019].

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

In a negative peace situation, it may not see conflict out in the open, but the tension is boiling just beneath the surface because the conflict was never reconciled. Efforts to achieve negative peace emphasize: managing interpersonal and organizational conflict in order to control, contain, and reduce actual and potential violence, reducing the incidence of war by eliminating the extreme dangers of the war system and limiting war through international crisis management, preventing war through strategic deterrence and arms control. The concept of negative peace addresses immediate symptoms, the conditions of war, and the use and effects of force and weapons.<sup>26</sup>

The scope and context of this paper is limited to discussing the connection between positive peace and environmental management and how effective environmental governance can be used as one of the tools geared towards achieving positive peace. Negative peace is just to be treated as a byproduct of the efforts aimed at positive peace.

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

<sup>26</sup> Ibid., 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.<sup>27</sup> Peacebuilding approaches can also be geared towards either 'positive' or 'negative' peace.<sup>28</sup>

### **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.<sup>29</sup> 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.<sup>30</sup>

Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.<sup>31</sup> Better community relationships tend to encourage greater levels of peace, by

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

<sup>28</sup> Ibid.

<sup>29</sup> Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003),

available at <http://www.beyondintractability.org/essay/social-structural-changes> [Accessed on 17/05/2019]; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at <http://www.beyondintractability.org/essay/underlying-causes> [Accessed on 16/5/2019].

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

<sup>31</sup> Ibid, p. 2.

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discouraging the formation of tensions and reducing chances of tensions devolving into conflict.<sup>32</sup>

Some of the factors that contribute to peace, the absence of which can potentially lead to conflict, are when: everyone lives in safety, without fear or threat of violence, and no form of violence is tolerated in law or in practice; everyone is equal before the law, the systems for justice are trusted, and fair and effective laws protect people's rights; everyone is able to participate in shaping political decisions and the government is accountable to the people; everyone has fair and equal access to the basic needs for their wellbeing – such as food, clean water, shelter, education, healthcare and a decent living environment; and everyone has an equal opportunity to work and make a living, regardless of gender, ethnicity or any other aspect of identity.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup>

Also notable is the assertion that peacebuilding is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments, regional bodies and the private

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<sup>32</sup> Ibid, p. 6.

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

<sup>34</sup> Ibid.

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

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.<sup>36</sup> 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.<sup>37</sup>

It is thus worth noting that this makes the law an important ingredient in the process of peace building, whether positive peace or negative peace.

#### **4.0 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.<sup>38</sup>

Environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.<sup>39</sup> These

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

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

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

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

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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.<sup>40</sup>

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.<sup>41</sup> 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."<sup>42</sup> An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya<sup>43</sup>, and with the distrust between local communities around the region against each other<sup>44</sup> leading to constant conflicts as well as cross border conflicts.<sup>45</sup> The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. Ironically, it is the richest region in Kenya where oil deposits were to be taken into account. A

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<sup>40</sup> Ibid., p.6.

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

<sup>42</sup> Ibid., p.8.

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

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

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

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degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.<sup>46</sup>

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the “resource curse” – corruption, economic stagnation, and violent conflict over access to revenues.<sup>47</sup> 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.<sup>48</sup> For instance, extractive industries, particularly in sub-Saharan Africa, have been marked with increasing levels of political, social, technical and environmental risk.<sup>49</sup> This has been the case in countries like Sudan, Democratic Republic of Congo<sup>50</sup> and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources. Conflict also often produces significant environmental degradation.<sup>51</sup>

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<sup>46</sup> ‘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/](http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/) [Accessed on 17/5/2019].

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

<sup>48</sup> Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of ‘New Oil’ In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

<sup>49</sup> Ibid, p. 48; see also Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*,

(International Finance Corporation, February 2015), p. 55. Available at <https://commdev.org/wpcontent/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf>

<sup>50</sup> Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo:*

*Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at <http://pubs.iied.org/pdfs/13578IIED.pdf> [Accessed on 17/5/2019].

<sup>51</sup> 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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Apart from the adverse effect of the conflict on the environment, the illegal trade of minerals bars communities from benefiting from its resources.<sup>52</sup> 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.<sup>53</sup> Poor and low economic development<sup>54</sup> and consequently, failed economies result in conflicts,<sup>55</sup> as a result of environmental and natural resources' bad governance or mismanagement.<sup>56</sup> Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.<sup>57</sup>

As far as the abundance theory is concerned, rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and

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

<sup>53</sup> Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at [http://unctad.xiii.org/en/SessionDocument/suc2012d1\\_en.pdf](http://unctad.xiii.org/en/SessionDocument/suc2012d1_en.pdf) [Accessed on 12/08/2018].

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

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

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

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

corruption,<sup>58</sup> which is a threat to protected human security.<sup>59</sup> Natural and environmental resources exploitation is capable of degenerating into a war. Effective governance of these resources is thus necessary for security and peace. Competition for scarce resources as well as inequality in access to accruing environmental benefits both have the effect of heightened animosity and potential cause for violence.<sup>60</sup>

It is thus evident that any peacebuilding efforts that do not factor in streamlining environmental and natural resources governance are bound to fail as they would not capture the very basic needs of the communities in question: satisfaction of their socio-economic needs with minimal or no struggle.

## **5.0 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.<sup>61</sup>

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

<sup>59</sup> Alao, A., *Natural Resource Management and Human Security in Africa*, in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010); Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact*, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 17/5/2019].

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

<sup>61</sup> United Nations, *The Sustainable Development Goals Report, 2018*, p.15. Available at <https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf> [Accessed on 17/5/2019].

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

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

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

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

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<sup>62</sup> Art. 69.

<sup>63</sup> Art. 69(1) (d).

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

<sup>65</sup> Art.67 (2) (f).

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from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

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

### **5.2 Inclusive and Participatory Approaches to Environmental Governance**

The *UN Conference on Environment and Development, Agenda 21*<sup>66</sup> under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. It is in recognition of the fact that unless all these groups are equitably and meaningfully involved in the decision making policies, especially those on sustainable development, then the Government efforts would either fail or prove inadequate.

Further, Principle 10 of the *Rio Declaration* states that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.

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

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

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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.<sup>67</sup> 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.<sup>68</sup> Art. 69(2) of the Constitution of Kenya places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

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

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<sup>67</sup> 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:....

<sup>68</sup> Constitution of Kenya, Art. 69(2).

<sup>69</sup> Art. 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate-- to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Art. 70(2). For the purposes of this Art., an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

<sup>70</sup> Art. 42. This right includes the right – to have the environment protected for the benefit of present and future generations through legislative and other measures,

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Active participation of citizens (both gender) makes them appreciate and support government efforts and also take part in conservation measures. However, there has not been meaningful participation of the public in environmental and natural resource management matters, since majority of the sectoral laws only provide for public participation as a mere formality, and not as an empowerment tool as envisaged in international human rights instruments.<sup>71</sup>

Governance structures for all sectors, including environmental sector, should be built around the national values and principles of governance as enunciated in the Constitution of Kenya, and particularly those of inter alia--sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.<sup>72</sup>

As already pointed, people who feel meaningfully engaged in governance matters are more likely to appreciate the process and also keep peace even when resources are scarce. Local people should be actively engaged in governance matters especially those that directly affect their livelihoods. It has

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particularly those contemplated in Art. 69; and to have obligations relating to the environment fulfilled under Art. 70

<sup>71</sup> See Principle 10 of the *Rio Declaration*, which affirms that environmental issues are best handled with participation of all concerned citizens, at the relevant level. The *Aarhus Convention* also establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Convention provides for *inter alia*: the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"); the right to participate in environmental decision-making ("public participation in environmental decision-making"); and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice") (*Aarhus Convention*, Art. 4, 5, 6 & 9 respectively. Although the *Aarhus Convention* is a European region legal instrument, its provisions have gained international recognition and approval especially considering the fact that it reflects Principle 10 of the Rio Declaration on Environment and Development); See also *Access to Information Act, 2016* which deals with disclosure of information including information on dangers of public health, safety and the environment.

<sup>72</sup> *Ibid*, Art. 10(2).

rightly been observed that given that local institutions, systems and processes represent for most people the daily interface between state and society, local governance is a critical arena for these efforts. Inclusive and accountable local governance can help restore social cohesion in divided communities, facilitate participation in public life, distribute resources and opportunities equitably, safeguard minority rights, and test new forms of decision-making that blend formal and informal processes of representation and participation.<sup>73</sup>

### **5.3 Inclusive Education for Sustainable Societies**

Education has a great role to play in peace building efforts and effective environmental both of which are important components of sustainable development. This realisation forms the basis of SDG Goal 4 which provides that State Parties should ensure inclusive and equitable quality education and promote lifelong learning opportunities for all. They are to ensure that by 2030, all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development.<sup>74</sup> Education will thus be useful in creating just and sustainable societies. Environmental education and peacebuilding should also be expressly included in the curricula at every stage of learning.

## **6.0 Conclusion**

Peace building in any country is desirable and so is effective environmental and natural resources governance. The two concepts are arguably joint at the hip and both are at the core of the 2030 Agenda on sustainable development. This paper has discussed the various ways that the two are related and demonstrated how they cannot be treated as mutually exclusive if any efforts towards achieving either are to bear any fruits. While putting in place, any peace building policies, policy makers and other stakeholders ought to have the bigger picture in mind-effective environmental and natural resources

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

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

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governance must first be achieved as these resources are central in realisation of socio-economic rights of citizens. When these rights are largely achieved for all in any country, then it becomes easier to talk about and also achieve peace. There is need to move away from the command and control models of environmental governance and embrace participatory approaches that not only put into consideration the needs of the community and societies in general but also take into their account their views in order to effectively address any underlying issues of marginalisation. It is such issues, when left unaddressed, which may result in conflict.

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



## **Re-imagining the Role of Lawyers in Climate Justice**

### **Abstract**

*The United Nations 2030 Agenda for Sustainable Development envisages a world of universal respect for human rights and human dignity, the rule of law, justice, equality, and non-discrimination, among others. This is 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, on the one hand, and one in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger, on the other hand. This calls for the concerted efforts of all players if all this is to be achieved. Lawyers are seen as agents of social engineering in society as well as justice, equity, and equality, and this paper argues that they have a huge role to play, not only in ensuring that their professional roles are in line with the sustainability agenda but also advising and defending their clients on the same. This paper revisits the role of lawyers both as active players in fighting climate change and also as agents of securing climate justice for those most affected by the adverse effects of climate change in society. The author argues that as agents of social engineering and the rule of law, lawyers must take up the challenge of climate change and ensure that the environmental law principle of polluter pays, among others, is entrenched in mitigation responses to ensure that climate justice is achieved for all.*

### **1.0 Introduction**

The United Nations 2030 Agenda for Sustainable Development envisages a world of universal respect for human rights and human dignity, the rule of law, justice, equality, and non-discrimination, among others.<sup>1</sup> This is 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, on the one hand, and one in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development,

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<sup>1</sup> United Nations, Preamble, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.

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environmental protection and the eradication of poverty and hunger, on the other hand. This calls for the concerted efforts of all players if all this is to be achieved. The Sustainable Development Goals (SDGs) is a set of 17 Sustainable Development Goals and 169 targets that seek to build on the Millennium Development Goals to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls, and are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.<sup>2</sup>

Kenya's Climate Change Act 2016<sup>3</sup> seeks to provide 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 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.<sup>4</sup> Notably, the Act seeks to promote mainstreaming of climate change mitigation measures, which may be considered the use of law as a tool for promoting social change.<sup>5</sup> This is in line with SDG 13 which requires countries to take urgent action to combat climate change and its impacts, acknowledging that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change.<sup>6</sup>

The Climate Change Act 2016 also empowers the courts to uphold rights relating to climate change and spells out the role of the court as follows: "A person may, under Article 70 of the Constitution, apply to the Environment and Land Court, alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the

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<sup>2</sup> Ibid, Preamble.

<sup>3</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya.

<sup>4</sup> Sec. 2, Climate Change Act, 2016.

<sup>5</sup> See sections, 13, 18 & 19, Climate Change Act, 2016.

<sup>6</sup> United Nations, Preamble, Transforming our world: the 2030 Agenda for Sustainable Development, SDG 13.

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effects of climate change".<sup>7</sup> In such applications, the court may make an order or give directions to: prevent, stop, or discontinue an act or omission that is harmful to the environment; compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties.<sup>8</sup> It is also worth mentioning that SDG 16 encourages countries to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.

Lawyers are seen as agents of social engineering in society as well as justice, equity, and equality, and this paper argues that they have a huge role to play, not only in ensuring that their professional roles are in line with the sustainability agenda but also advising and defending their clients on the same. This paper revisits the role of lawyers both as active players in fighting climate change and also as agents of securing climate justice for those most affected by the adverse effects of climate change in society. The author argues that as agents of social engineering and the rule of law, lawyers must take up the challenge of climate change and ensure that the environmental law principle of polluter pays, among others, is entrenched in mitigation responses to ensure that climate justice is achieved for all. There are a variety of ways in which climate change affects each subfield of the legal profession, and lawyers need to be aware of how this rapidly escalating climate catastrophe and the transition to net-zero energy are affecting their particular area of practice, as well as the business of law and the provision of legal services.<sup>9</sup>

### **2.0 Pillars of Climate Justice**

The effects of climate change exacerbate the pre-existing vulnerabilities of communities that are already having a hard time making ends meet. It has a

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<sup>7</sup> Section 23(1), Climate Change Act, 2016.

<sup>8</sup> Section 23(2), Climate Change Act, 2016.

<sup>9</sup> 'Lawyers in a Warming World | Peter A. Allard School of Law' <<https://allard.ubc.ca/about-us/news-and-announcements/2023/lawyers-warming-world>> accessed 17 July 2023.

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disproportionately negative impact on the nations that are still developing.<sup>10</sup> Paying close attention to the environmental policy preferences of people living in nations with lower emissions and lower incomes is one strategy that may be used to advance climate justice.<sup>11</sup>

The concept of climate justice draws attention to how climate change is an ethical problem, as well as how the causes and impacts of climate change are related to environmental and social justice.<sup>12</sup> When developing policies about climate change, it is necessary to take into consideration not only who is directly impacted by climate-related issues but also who is primarily responsible for causing these issues. Only then can climate justice be achieved.<sup>13</sup>

The effects of climate change, both directly and indirectly, may be seen in a wide variety of internationally secured human rights. States (as duty-bearers) have an affirmative responsibility to take effective actions to avoid and rectify these climatic consequences, and as a result, to mitigate climate change, and to guarantee that all human beings (as rights-holders) have the required ability to adapt to the climate crisis. This affirmative requirement was established by the United Nations Framework Convention on climatic Change (UNFCCC) in 1992.<sup>14</sup>

To achieve climate justice, climate action must be in line with the many human rights accords, commitments, standards, and principles that are already in place. Unfairly and in disproportionate amounts, the negative effects of

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<sup>10</sup> Sachan R, 'Role of Climate Justice in Strengthening Adaptive Capacities in Developing Countries' (2020), 823.

<sup>11</sup> Running K, 'Towards Climate Justice: How Do the Most Vulnerable Weigh Environment–Economy Trade-Offs?' (2015) 50 *Social science research* 217.

<sup>12</sup> Sultana F, 'Critical Climate Justice' (2022) 188 *The Geographical Journal* 118; 'Why Climate Change Is an Environmental Justice Issue' (*State of the Planet*, 22 September 2020) <<https://news.climate.columbia.edu/2020/09/22/climate-change-environmental-justice/>> accessed 18 July 2023.

<sup>13</sup> Running K, 'Towards Climate Justice: How Do the Most Vulnerable Weigh Environment–Economy Trade-Offs?' (2015) 50 *Social science research* 217.

<sup>14</sup> OHCHR U, 'Understanding Human Rights and Climate Change', *Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the parties to the United Nations Framework Convention on Climate Change* (2015).

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climate change are borne by those who have made the smallest contribution to the problem. They have to be able to participate meaningfully in climate change mitigation efforts, they have to be the major beneficiaries of such efforts, and they have to have access to viable solutions.<sup>15</sup> Therefore, one strategy to better include justice in talks is to expand our knowledge of how individuals who have high climate vulnerability but low climate responsibility see environmental preservation as other policy goals. The reasoning behind such a strategy is predicated on the notion of increased democratic involvement, which is one of the fundamental goals of the new economic movement that promotes a socially and ecologically sustainable economy.<sup>16</sup>

### **3.0 Re-imagining the Role of Lawyers in Achieving Climate Justice**

Members of the legal profession and the legal profession as a whole must get behind the movement to protect our planet from the catastrophic effects of accelerating climate change.<sup>17</sup> Accelerating the reduction of carbon emissions from all sources is the primary tactic that will be used in the campaign.<sup>18</sup> The campaign must be conducted on all three levels: locally, nationally, and worldwide. The battle lines extend across several realms, including the

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<sup>15</sup> Ibid.

<sup>16</sup> Running K, 'Towards Climate Justice: How Do the Most Vulnerable Weigh Environment-Economy Trade-Offs?' (2015) 50 *Social science research* 217, 218.

<sup>17</sup> 'The Role Lawyers Can Play in Addressing the Climate Crisis' (WTW) <<https://www.wtwco.com/en-gb/insights/2022/02/the-role-lawyers-can-play-in-addressing-the-climate-crisis>> accessed 18 July 2023; 'The Profession's Role in Addressing the Climate Crisis' <<http://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2023/the-profession-s-role-in-addressing-the-climate-crisis>> accessed 18 July 2023.

<sup>18</sup> <https://www.facebook.com/unep>, 'The Six-Sector Solution to the Climate Crisis' (UN Environment, 7 December 2020) <<https://www.unep.org/interactive/six-sector-solution-climate-change/>> accessed 18 July 2023; 'Measures to Reduce Greenhouse Gas Emissions | Climate Change | Government.NL' <<https://www.government.nl/topics/climate-change/national-measures>> accessed 18 July 2023; 'Net Zero Coalition | United Nations' <<https://www.un.org/en/climatechange/net-zero-coalition>> accessed 18 July 2023; 'Climate Change Mitigation: Reducing Emissions' <<https://www.eea.europa.eu/en/topics/in-depth/climate-change-mitigation-reducing-emissions>> accessed 18 July 2023.

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political, economic, and cultural spheres, and lawyers have a lot to offer in each of these areas.<sup>19</sup>

### **3.1 Lawyers as Agents of Social Engineering/Change**

*The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for the law is destroyed, and rational self-government is impossible. Lawyers, as guardians of the law, play a vital role in the preservation of society(Emphasis added).*<sup>20</sup>

Arguably, environmental goals cannot be realized just through environmental legislation or in protected areas; revolutionary change needs a fundamental, system-wide reorganization spanning technical, economic, and social elements, including perspectives, goals, and values.<sup>21</sup>

As already pointed out, lawyers have been considered agents of social engineering and change. The term "social change" is used to refer to a shift or a change that happens as a variation of the accepted way of life as a result of changes in geographical circumstances, material culture, demographic composition, ideology, and ideas or discoveries in society.<sup>22</sup> Social change may

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<sup>19</sup> Journal ABA, '7 Ways Lawyers Can Join the Fight to Curb Climate Change' (*ABA Journal*) <<https://www.abajournal.com/voice/article/7-ways-lawyers-can-join-the-fight-to-curb-climate-change>> accessed 18 July 2023.

<sup>20</sup> ABA Model Code of Professional Responsibility, Preamble and Preliminary Statement (1981) in Thomas D. Morgan & Ronald D. Rotunda, 1998 Selected Standards On Professional Responsibility (1998) (as quoted in Loewy KL, 'Lawyering for Social Change' (2000) 27 *Fordham Urban Law Journal* 1869).

<sup>21</sup> Sarkki, S., Pihlajamäki, M., Rasmus, S. and Eronen, J.T., "'Rights for Life" Scenario to Reach Biodiversity Targets and Social Equity for Indigenous Peoples and Local Communities' (2023) 280 *Biological Conservation* 109958.

<sup>22</sup> Matnuh H, "Law as a tool of social engineering." In *1st International Conference on Social Sciences Education-" Multicultural Transformation in Education, Social Sciences and Wetland Environment"* (ICSSE 2017), pp. 118-120. Atlantis Press, 2017. <<https://www.atlantis-press.com/proceedings/icsse-17/25889472>> accessed 10 July 2023, p. 118; see also Utama AS, 'Law and Social Dynamics of Society' (2021) 3 *International Journal of Law and Public Policy (IJLAPP)* 107, p.108.

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also be seen as a variation of the acceptable way of life. The societal changes that take place will inevitably have repercussions for the other social institutions and will usher in a new era of living in a society that is transitioning from a more traditional to a more contemporary one.<sup>23</sup> Changes in social values, social norms, behavioural patterns, social organization, changes in the structure of social institutions, changes in society, changes in power and authority, and changes in social interaction have all been linked to social engineering.<sup>24</sup>

The overarching goal of environmental law is to remedy environmental issues, particularly those that are the result of human activity.<sup>25</sup> More specifically, environmental law seeks to combat pollution, resource depletion, and environmental degradation to build a world that is aesthetically pleasing, hospitable, and conducive to human well-being.<sup>26</sup> It is necessary to take into consideration other factors that will determine the creation of a good environment to combat the increasingly severe environmental damage. These factors include education, legal awareness, technology, and adequate funding to finance projects that prevent pollution and environmental damage, as well as efforts to improve quality.<sup>27</sup> All members of the community, not only the

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<sup>23</sup> Ibid, p. 118.

<sup>24</sup> Matnuh H, "Law as a tool of social engineering." In *1st International Conference on Social Sciences Education-" Multicultural Transformation in Education, Social Sciences and Wetland Environment"* (ICSSE 2017), p. 118.

<sup>25</sup> '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 18 July 2023; 'Framework Principles on Human Rights and the Environment (2018)' (OHCHR) <<https://www.ohchr.org/en/special-procedures/sr-environment/framework-principles-human-rights-and-environment-2018>> accessed 18 July 2023; 'International Environmental Law' <[https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/international-environmental-law/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/international-environmental-law/)> accessed 18 July 2023; Schachter O, 'The Emergence of International Environmental Law' (1991) 44 *Journal of International Affairs* 457

<sup>26</sup> Maruf A, 'Legal Aspects of Environment in Indonesia: An Efforts to Prevent Environmental Damage and Pollution' (2021) 1 *Journal of Human Rights, Culture and Legal System*.

<sup>27</sup> Kaminker C and Stewart F, 'The Role of Institutional Investors in Financing Clean Energy'; US EPA O, 'What Is Environmental Education?' (13 December 2012) <<https://www.epa.gov/education/what-environmental-education>> accessed 18 July 2023;

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government, are responsible for contributing to successful environmental law enforcement efforts.<sup>28</sup>

The American Bar Association (ABA) passed a resolution in respect of climate change in 2020, which was followed by the International Bar Association (IBA), the ABA's worldwide equivalent, passing a "Statement on the Climate Crisis." The statement from the International Bar Association "urges lawyers, acting in accordance with their professional conduct rules and the rule of law, to consider... taking a climate-conscious approach to problems encountered in daily legal practices." This includes operating "on a *pro bono*, volunteer, or reduced fee basis, for those negatively affected by the climate crisis," as well as "advising clients of the potential risks, liability, and reputational damage arising from activity that negatively contributes to the climate crisis."<sup>29</sup>

In addition to this, the IBA statement "urges lawyers, as influential figures and thought leaders within society, to live responsibly in the face of the climate crisis" by reducing "their environmental footprint" in "every-day actions" and by "supporting positive changes in the workplace, including the adoption of more sustainable practices, such as greater reliance on electronic file storage facilities and digital technologies, more energy efficient offices, and more climate-friendly practices."<sup>30</sup>

It has also been pointed out, and properly so, that eventually, large reductions in greenhouse gas emissions and systematic adaptation to climate change are not likely to occur without new and changed laws.<sup>31</sup> This is because new and modified laws are required for dramatic reductions in greenhouse gas emissions to occur. To campaign for, write, assist in implementing, and guide clients on the various laws that are necessary at the federal, state, and

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'DSD :: Resources - Publications - Core Publications' <[https://www.un.org/esa/dsd/agenda21/res\\_agenda21\\_36.shtml](https://www.un.org/esa/dsd/agenda21/res_agenda21_36.shtml)> accessed 18 July 2023.

<sup>28</sup> Ibid, p. 20.

<sup>29</sup> Dernbach JC, Russell IS and Bogoshian M, 'Advocating for the Future', *The Environmental Forum*, March/April (2021).

<sup>30</sup> Ibid.

<sup>31</sup> Dernbach JC, Russell IS and Bogoshian M, 'Advocating for the Future', *The Environmental Forum*, March/April (2021).



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municipal levels, lawyers are required.<sup>32</sup> Legal reforms are also required in private law and governance, such as certification, auditing, labeling, and reporting programmes. Supply chain contracts are another area of private law that has to be modified.<sup>33</sup> Legal counsel is sought out by clients in the business world and others for assistance with ensuring legal compliance, mitigating risk, and making other choices that substantially impact the carbon load in the atmosphere.<sup>34</sup> In addition to this, members of the bar have influential roles in the communities in which they live. Leadership is required from many different kinds of lawyers, including those who work in private practice and corporate practice, as well as those who work in non-profit organizations, academia, and the government.<sup>35</sup>

The principles of professional responsibility that have been around for a long time imply that lawyers have a responsibility to communicate to their clients the dangers and possibilities that are associated with climate change.<sup>36</sup> After concluding that climate change-related hazards and possibilities do exist, lawyers have a responsibility to educate their clients about these risks and opportunities.<sup>37</sup> To provide clients with appropriate counsel that will help them resolve a legal problem or conflict, it is necessary to examine not only the legal problems at hand but also the financial, emotional and psychological, relational and social, environmental, and ethical ramifications that various courses of action will have.<sup>38</sup> Clients can have a better understanding of the outcomes, costs, and risks connected with the various courses of action that are available to them and thus make a more informed decision.<sup>39</sup> Daily, lawyers provide clients with counsel of this comprehensive nature in a variety of practice areas of the law. This standard procedure would, of course, benefit

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Vaughan S, 'Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms' [2023] Current Legal Problems cuad005; 'Basic Principles on the Role of Lawyers' (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>> accessed 18 July 2023.

<sup>37</sup> Dernbach JC, Russell IS and Bogoshian M, 'Advocating for the Future', *The Environmental Forum*, March/April (2021).

<sup>38</sup> Preston BJ, 'Climate Conscious Lawyering' (2021) 95 Australian Law Journal 51.

<sup>39</sup> Ibid.

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from the addition of climate change's repercussions as a factor in decision-making.<sup>40</sup>

### **3.2 Lawyers as Champions of Respect for Rule of Law and Adoption of Human Rights Approaches to Governance for Climate Justice**

Better governance begins with strict respect for the rule of law, as well as the norms and guardrails that serve to keep the gears of government, business, and our legal system turning smoothly.<sup>41</sup> These standards include a dedication to the common good, mutual respect, a willingness to critically examine the viewpoints of others, respect for facts and science, civil dialogue, and respect for the scientific method.<sup>42</sup> In both public and private conversations, attorneys need to aim toward better modeling of values like these, emphasizing plainly and explicitly how important it is to adhere to the rule of law and make decisions based on facts. They need to keep the dialogue respectful, find those who reject or undermine core standards, and even challenge them.<sup>43</sup>

Applying a rights-based approach to policy and development, as called for by the Declaration on the Right to Development and agreed to in the UN Common Understanding on a Human Rights-Based Approach to Development Cooperation, is one way that human rights may be included in activities that are relevant to climate change. This can be done by recognizing that human rights are intertwined with climate change.<sup>44</sup>

A rights-based approach analyzes duties, inequalities, and vulnerabilities, and it works to rectify discriminatory practices and unequal distributions of

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<sup>40</sup> Ibid.

<sup>41</sup> Unit DS, 'What Is the Rule of Law' (*United Nations and the Rule of Law*) <<https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>> accessed 19 July 2023; 'Rule of Law | UN Global Compact' <<https://unglobalcompact.org/what-is-gc/our-work/governance/rule-law>> accessed 19 July 2023; Pomeranz EF and Stedman RC, 'Measuring Good Governance: Piloting an Instrument for Evaluating Good Governance Principles' (2020) 22 *Journal of Environmental Policy & Planning* 428.

<sup>42</sup> Dernbach JC, Russell IS and Bogoshian M, 'Advocating for the Future', *The Environmental Forum*, March/April (2021).

<sup>43</sup> Ibid.

<sup>44</sup> OHCHR U, 'Understanding Human Rights and Climate Change', *Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the parties to the United Nations Framework Convention on Climate Change* (2015).

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power. It does this through establishing plans, strategies, and programmes within the context of a framework of rights and duties that have been established by international law.<sup>45</sup>

The following are some of the most important aspects of a strategy that is focused on human rights: (a) In the process of formulating policies and programmes, the primary goal should be to fulfill human rights; (b) The rights-holders and their entitlements must be identified, as well as the corresponding duty-bearers and their obligations, to find ways for strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations; and (c) Principles and standards derived from international human rights law, particularly the Universal Declaration of Human Rights, must be adhered to.<sup>46</sup>

Any strategy that seeks to adapt to or mitigate the effects of climate change, such as the promotion of alternative energy sources, forest conservation or tree-planting projects, resettlement schemes, and others, should incorporate an approach that is centred on human rights.<sup>47</sup> Participation from affected individuals and communities, without regard to any form of bias, is required during the planning and execution of these projects. They are entitled to due process and should be able to seek recourse if their rights are violated.<sup>48</sup>

### **3.3 Adopting the Concept of Sustainable Development as a Way of Practice**

The Sustainable Development Goals (SDGs) provide the foundation that is essential to improve living standards throughout the world and to avoid the

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<sup>45</sup> OHCHR U, 'Understanding Human Rights and Climate Change', *Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the parties to the United Nations Framework Convention on Climate Change* (2015).

<sup>46</sup> OHCHR U, 'Understanding Human Rights and Climate Change', *Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the parties to the United Nations Framework Convention on Climate Change* (2015).

<sup>47</sup> Olawuyi D, 'The Human Rights Based Approach to Climate Change Mitigation: Legal Framework for Addressing Human Rights Questions in Mitigation Projects' (PhD Thesis, University of Oxford 2013); Mahadew R, 'A Human-Rights-Based Approach to Climate Change' [2021] *Revue juridique de l'Océan Indien* 155.

<sup>48</sup> OHCHR U, 'Understanding Human Rights and Climate Change', *Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the parties to the United Nations Framework Convention on Climate Change* (2015).

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potentially catastrophic impacts of climate change brought on by human activities.<sup>49</sup> SDG 13 on "Climate Action" urges the incorporation of actions for reducing the consequences of climate change into frameworks for economic development.<sup>50</sup>

Adopting the concept of Sustainable Development would assist lawyers in thinking more comprehensively and plainly about the many legal options available to choose the most appropriate course of action.<sup>51</sup> Sustainable Development is a lens or framework that may be used to handle practically any problem, including climate change. Lawyers can utilize this to their advantage. The lens offers a comprehension of the many risks and advantages, both individual and accumulated, that is inherent in a course of action that a client suggests.<sup>52</sup> This technique delves deeper to assist customers to avoid expenses and realize gains, as opposed to approaches that confine the study to surface-level economic issues and obvious legal hazards.<sup>53</sup> Among these advantages are the opportunity to enhance people's quality of life and to fight the environmental problem.<sup>54</sup>

### **3.4 Need for Continuous Professional Development and Retraining in Climate Change Matters**

To facilitate the transactions, resource development initiatives, and renewable energy projects that are essential in the transition to net zero, lawyers will play a major role as drafters of the necessary legal documents.<sup>55</sup> They will be the ones to preserve human rights, engage with Indigenous rights-holders, and

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<sup>49</sup> 'THE 17 GOALS | Sustainable Development' <<https://sdgs.un.org/goals>> accessed 20 July 2023; Economic UN D of and Affairs S, *The Sustainable Development Goals: Report 2022* (UN 2022); 'Climate Change - United Nations Sustainable Development' <<https://www.un.org/sustainabledevelopment/climate-change/>> accessed 20 July 2023.

<sup>50</sup> United Nations, Preamble, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.

<sup>51</sup> Dernbach JC, Russell IS and Bogoshian M, 'Advocating for the Future', *The Environmental Forum*, March/April (2021).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> 'Lawyers in a Warming World | Peter A. Allard School of Law' <<https://allard.ubc.ca/about-us/news-and-announcements/2023/lawyers-warming-world>> accessed 17 July 2023.

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represent people seeking responsibility for greenwashing or fighting against such accusations.<sup>56</sup> They will also be the ones to engage with Indigenous rights-holders.<sup>57</sup> It will be more important for lawyers to have a solid understanding of greenhouse gas (GHG) emissions and climate mitigation, and this will need ongoing education and retraining for them to be able to assist their clients in comprehending the evolving legal and regulatory requirements and learning how to adapt.<sup>58</sup>

If lawyers do not evaluate and tell their clients about the dangers and opportunities associated with climate change, there is a possibility that they may break the duty that they owe to their clients in certain circumstances.<sup>59</sup>

### **3.5 Role of Law the Society of Kenya in Shaping a Climate Change-Conscious Lawyer**

There has been an effort to lessen the effect that international arbitrations have on the environment called the Campaign for Greener Arbitrations.<sup>60</sup> To

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<sup>56</sup> 'Lawyers in a Warming World | Peter A. Allard School of Law' <<https://allard.ubc.ca/about-us/news-and-announcements/2023/lawyers-warming-world>> accessed 17 July 2023.

<sup>57</sup> 'How Indigenous Peoples in Africa Are Impacted by Climate Change - IWGIA - International Work Group for Indigenous Affairs' <<https://www.iwgia.org/en/news/4959-how-indigenous-peoples-in-africa-are-impacted-by-climate-change.html>> accessed 20 July 2023

<sup>58</sup> 'Lawyers in a Warming World | Peter A. Allard School of Law' <<https://allard.ubc.ca/about-us/news-and-announcements/2023/lawyers-warming-world>> accessed 17 July 2023.

<sup>59</sup> Ibid.

<sup>60</sup> alison.eyre@hsf.com, 'Inside Arbitration: Towards Greener Arbitrations Achieving Greater Environmental Sustainability in the Way We Conduct Arbitrations: An Update' (Herbert Smith Freehills | Global law firm, 25 February 2021) <<https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-towards-greener-arbitrations-achieving-greater-environmental-0>> accessed 20 July 2023; '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 20 July 2023; 'HKIAC Signs Green Pledge & Supports Green Protocols' <<https://www.hkiac.org/news/hkiac-signs-green-pledge-supports-green-protocols>> accessed 20 July 2023; 'Putting the Campaign for Greener Arbitration Protocols into Practice' (Pinsent Masons, 20 July 2023) <<https://www.pinsentmasons.com/out-law/analysis/putting-the-campaign-for-greener-arbitration-protocols-into-practice>> accessed 20 July 2023.

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radically reduce the carbon footprint of the arbitration community, international arbitrator Lucy Greenwood established the campaign in 2019.<sup>61</sup> 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 practitioners, institutions, and legal service providers.<sup>62</sup> The creation of a Framework and a set of Protocols to encourage better environmental behaviour through several action items was one of the Steering Committee's main goals. The Protocols provide useful advice for putting the Guiding Principles' principles into practice.<sup>63</sup>

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.<sup>64</sup>

The "Green Protocols" is 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.<sup>65</sup> 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.<sup>66</sup>

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<sup>61</sup> 'Campaign for Greener Arbitrations' (*Campaign for Greener Arbitrations*, 19 March 2023) <<https://www.greenerarbitrations.com>> accessed 17 July 2023.

<sup>62</sup> 'Green Protocols' (*Campaign for Greener Arbitrations*) <<https://www.greenerarbitrations.com/green-protocols>> accessed 17 July 2023.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid; '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 20 July 2023.

<sup>66</sup> Ibid.

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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-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.<sup>67</sup>

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.<sup>68</sup>

Similarly, the Law Society of Kenya could borrow a leaf from these efforts and work with other stakeholders to develop similar guidelines for law firms and law practitioners to encourage them to reduce their carbon footprint. This would go a long way in not only cultivating positive behavioral change among the lawyers but also the clients who get to interact with these lawyers.

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

#### **4.0 Conclusion**

The debate in this paper looks at legal professionals from several perspectives, including those of professionals, citizens, family members, and members of various communities.<sup>69</sup> Lawyers have a responsibility to their clients and society as a whole, and one of those duties requires them to strive for improved governance. It is difficult to address climate disruption and sustainable development unless we have effective governance at the national, regional, and international levels as well as in the business sector. These are all necessary components.<sup>70</sup>

It has been observed that although there is no silver bullet, there are a multitude of green buckshot which include relatively minor behavioural changes made by individuals, families, and communities; efforts made by towns, cities, and other administrative units; changes in business practices; litigation; and more significant actions taken at the policy and political levels.<sup>71</sup> In both their personal and professional lives, lawyers need to give careful consideration to the possibility of taking part in and lending their support to legal initiatives that aim to decrease emissions of greenhouse gases and increase resilience to the effects of climate change.<sup>72</sup> Lawyers must 'walk the talk' if they are to have any meaningful influence in the societies that they live in.<sup>73</sup> Since the maintenance of a consistent climate is essential to the functioning of our society, legal professionals cannot ignore climate change. It has been observed that the scientific evidence is unequivocal and the fight now centres on our beliefs, practices, and systems of thought, where the level of success that humanity achieves in reducing greenhouse gas emissions in the present will determine the kind of legacy that is passed down to the next

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<sup>69</sup> Dernbach JC, Russell IS and Bogoshian M, 'Advocating for the Future', *The Environmental Forum*, March/April (2021).

<sup>70</sup> Ibid.

<sup>71</sup> Magraw D and Qin L, 'Fifty Shades of Green' (2019) 32 *Geo. Envtl. L. Rev.* 467.

<sup>72</sup> Dernbach JC, Russell IS and Bogoshian M, 'Advocating for the Future', *The Environmental Forum*, March/April (2021).

<sup>73</sup> Moliterno JE, 'The Lawyer as Catalyst of Social Change' [2009] *Fordham Law Review*.



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generations.<sup>74</sup> The role of lawyers must thus be revisited and re-imagined in a way that makes them advocates of Climate Justice so as to bring about real change.

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<sup>74</sup> 'Lawyers in a Warming World | Peter A. Allard School of Law' <<https://allard.ubc.ca/about-us/news-and-announcements/2023/lawyers-warming-world>> accessed 17 July 2023.

## **Bilateral Investment Treaties and Environmental, Social and Governance in Africa**

### *Abstract*

*The paper critically investigates the relationship between Environmental, Social and Governance (ESG) and Bilateral Investment Treaties (BITs) in Africa. It argues that Environmental, Social and Governance factors have become integral in the foreign investment sphere and are being widely embraced in BITs. The paper discusses the progress made towards embracing the concept of ESG in BITs in Africa. It further highlights ESG concerns under BITs in Africa. The paper also proposes reforms towards incorporating ESG concerns in BITs in Africa in order to foster Sustainable Development.*

### **1.0 Introduction**

A Bilateral Investment Treaty (BIT) is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory<sup>1</sup>. BITs have also been defined as agreements establishing the terms and conditions for private investment by nationals and companies of one country in the jurisdiction of another<sup>2</sup>. BITs are classified as part of International Investment Agreements (IAAs) alongside Treaties with Investment Provisions<sup>3</sup>. BITs are the primary legal mechanism for protecting Foreign Direct Investment (FDI) around the world<sup>4</sup>. BITs are thought to encourage FDI by establishing a broad set of investor's rights and by allowing investors to sue a host state in an international tribunal if these rights are violated<sup>5</sup>. It has been asserted that BITs focus on four substantive areas being FDI admission, FDI treatment, FDI expropriation, and the

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<sup>1</sup> United Nations Conference on Trade and Development., 'Investment Policy Hub.' Available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya> (Accessed on 20/07/2023)

<sup>2</sup> Elkins. Z et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' University of Illinois Law Review, Volume 2008

<sup>3</sup> United Nations Conference on Trade and Development., 'Investment Policy Hub.' Op Cit

<sup>4</sup> Andrew. K., 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties.' *International Studies Quarterly*, Volume 53, Issue 1, 2009

<sup>5</sup> Ibid

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settlement of disputes<sup>6</sup>. It has been observed that BITs can create a stable investment environment to spur not only FDI but also international trade<sup>7</sup>. A BIT leads to an increase in trade flows between the home and foreign country<sup>8</sup>. BITs are thus integral components in the international investments realm.

BITs are very vital in Africa. It has been observed that Africa continues to face several challenges that make its share of global FDI to be negligible. These include the prevalence of fragmented investment policies, information asymmetry and high sovereign risk<sup>9</sup>. BITs can help overcome some of these concerns by signaling the host country's willingness to protect FDI<sup>10</sup>. It has been observed that there has been an influx of FDI into Africa in the recent past with many African countries taking measures towards to promoting and protecting such foreign investments<sup>11</sup>. Consequently, there has been proliferation of BITs, other treaties with investment provisions and foreign investment laws (FILs) in Africa, along with the parallel rise in numbers of claims brought by African investors and claims brought against African states under such instruments, thus demonstrating that investment protection is an important consideration in Africa<sup>12</sup>. African countries have implemented numerous reforms targeted at attracting foreign investors, including domestic reforms, regional integration initiatives, and signing bilateral investment BITs with potential FDI source countries<sup>13</sup>. BITs have the potential of spurring economic development in Africa through FDI.

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<sup>6</sup> Elkins. Z et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' Op Cit

<sup>7</sup> Heid. B & Vozzo. I., 'The International Trade Effects of Bilateral Investment Treaties.' Available at <https://media.adelaide.edu.au/economics/papers/doc/wp2020-08.pdf> (Accessed on 20/07/2023)

<sup>8</sup> Ibid

<sup>9</sup> Beri. P & Nubong. G., 'Impact of Bilateral Investment Treaties on Foreign Direct Investment in Africa.' Available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8268.12583> (Accessed on 20/07/2023)

<sup>10</sup> Ibid

<sup>11</sup> Wheal. R et al., 'Investment Treaty Protection: How to Safeguard Foreign Investments in Africa.' Available at <https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2022-investment-treaty-protection> (Accessed on 20/07/2023)

<sup>12</sup> Ibid

<sup>13</sup> United Nations Economic Commission for Africa., 'Investment Policies and Bilateral Investment Treaties in Africa Implications for Regional Integration.' Available at

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Environmental, Social and Governance (ESG) is an approach to investing that seeks to achieve a sustainable, responsible and ethical investment environment by incorporating Environmental, Social and Governance concerns in decision making processes<sup>14</sup>. ESG is usually a standard and strategy used by investors to evaluate corporate behaviour and to determine the future financial performance of companies<sup>15</sup>. It covers a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company's carbon footprint and ensuring there are systems in place to ensure accountability<sup>16</sup>. ESG also involves monitoring and reporting environmental concerns such as carbon emissions, water consumption and waste generation; social concerns such as employee, product and customer related data and governance concerns such as political lobbying, anticorruption initiatives and board diversity<sup>17</sup>. The goal of ESG is to integrate Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities<sup>18</sup>. It has been pointed out that the concept of ESG is very vital since Environmental, Social and Governance concerns have become a societal focal point in light of the Sustainable Development agenda<sup>19</sup>.

The paper critically examines the relationship between ESG and BITs in Africa. It argues that Environmental, Social and Governance factors have become integral in the foreign investment sphere and are being widely embraced in BITs. The paper discusses the progress made towards embracing the concept of ESG in BITs in Africa. It further highlights ESG concerns under BITs in

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[https://archive.uneca.org/sites/default/files/PublicationFiles/eng\\_investment\\_landscaping\\_study.pdf](https://archive.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf) (Accessed on 20/07/2023)

<sup>14</sup> 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

<sup>15</sup> Li. T.T et al., 'ESG: Research Progress and Future Prospects.' *Sustainability*, No. 13 of 2021.

<sup>16</sup> Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' Op Cit

<sup>17</sup> Ibid

<sup>18</sup> Li. T.T et al., 'ESG: Research Progress and Future Prospects.' Op Cit

<sup>19</sup> Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' *Business Strategy and the Environment*, No. 26 of 2017.

Africa. The paper also proposes reforms towards incorporating ESG in BITs in Africa in order to foster Sustainable Development.

## **2.0 The Nexus between ESG and BITs**

The importance of mitigating climate change, upholding good social policies and good governance have led to the rise and use of Environmental, Social and Governance (ESG) factors in the world of finance and investment<sup>20</sup>. Banks, funds and other financial institutions have increasingly sought to measure whether the investments they make promote ESG<sup>21</sup>. It has been pointed out that ESG has the ability of shaping the behavior of Multinational Corporations under BITs by fostering socially responsible, sustainable and ethical investments<sup>22</sup>. ESG is thus an essential part of the international investment law regime which can foster Sustainable Development through the investment sphere by promoting responsible business conduct<sup>23</sup>.

The United Nations 2030 Agenda for Sustainable Development recognizes the role of international trade and investments in promoting inclusive economic growth and poverty reduction whilst contributing to the promotion of Sustainable Development<sup>24</sup>. Towards this end, the Sustainable Development goals advocate for investment in areas such as industry, infrastructure and innovation for economic growth and development<sup>25</sup>. Further, towards reducing inequalities between developed and developed nations, the Sustainable Development goals encourage development assistance and FDI to

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<sup>20</sup> Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business.*, Volume 15, Issue 6, 2022

<sup>21</sup> Ibid

<sup>22</sup> Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' Op Cit

<sup>23</sup> Organisation for Economic Co-operation and Development., 'The Future of Investment Treaties.' Available at <https://www.oecd.org/daff/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf> (Accessed on 20/07/2023)

<sup>24</sup> 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 20/07/2023)

<sup>25</sup> Sustainable Development Goal 9., 'Industry, Innovation and Infrastructure' available at <https://www.undp.org/sustainable-development-goals#industry-innovation-and-infrastructure> (Accessed on 20/07/2023)

underdeveloped regions of the world<sup>26</sup>. It can thus be argued that investments through BITs are critical in the attainment of the Sustainable Development goals through FDI in areas such as infrastructure, industry, energy, and innovation in developing countries. However, such investments are required to be guided by the principle of Sustainable Development in accordance with the 2030 Agenda for Sustainable Development<sup>27</sup>. ESG concerns are at the heart of the Sustainable Development agenda<sup>28</sup>. The Sustainable Development Goals seek to achieve global development within the ESG framework by addressing social challenges such as poverty, hunger, health, education, gender equality, access to clean water and employment through investments in areas such as energy, industry, innovation and infrastructure while mitigating the effects of climate change and promoting good governance<sup>29</sup>. ESG considerations are thus important in BITs.

Consequently, many IAAs including BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development<sup>30</sup>. The Organisation for Economic Co-operation and Development (OECD) notes that many recent BITs capture ESG concerns such environmental protection, labour laws, and transparency requirements as part of the overall Sustainable Development agenda<sup>31</sup>. For example, the *Canadian Model Agreement for the Promotion and Protection of Investments* recognizes the role of investments in promoting Sustainable

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<sup>26</sup> Ibid, Goal 10

<sup>27</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development' Op Cit

<sup>28</sup> Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' Op Cit

<sup>29</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development' Op Cit

<sup>30</sup> United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Available at [https://unctad.org/system/files/officialdocument/diaepcbinf2022d6\\_en.pdf](https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf) (Accessed on 20/07/2023)

<sup>31</sup> Organisation for Economic Co-operation and Development (OECD)., 'Novel Features in Recent OECD Bilateral Investment Treaties.' *International Investments Perspectives*, 2006

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Development as part of responsible business conduct<sup>32</sup>. Further, the *United States of America Model Bilateral Investment Treaty* recognises the nexus between BITs and ESG matters such as the environment and human rights including labour rights<sup>33</sup>. It stipulates that investments shall be conducted in a manner that respects environmental laws and policies of the host state, and multilateral environmental agreements<sup>34</sup>. In terms of environmental protection, the USA Model Bilateral Investment Treaty further provides that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws<sup>35</sup>. In addition, it also sets out that investments shall be carried out in a manner that complies with domestic labour standards and international labour standards set out under the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-Up<sup>36</sup>. The USA Model Bilateral Investment Treaty further contains pertinent provisions on transparency and disclosure of information which are vital components of the Governance 'G' pillar of ESG.

At the regional level, it has been observed that many investment agreements are capturing ESG concerns such as protection of human rights and the environment, compliance with domestic law, measures against corruption and the promotion of Sustainable Development<sup>37</sup>. For example, the *Agreement Establishing the African Continental Free Trade Area* seeks to achieve among other things the promotion and attainment of Sustainable Development among state

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<sup>32</sup> Government of Canada, 'Model Agreement for the Promotion and Protection of Investments, 2021' available at [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021\\_model\\_fipa-2021\\_modele\\_apie.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng) (Accessed on 20/07/2023)

<sup>33</sup> United States of America Model Bilateral Investment Treaty, 2012, Available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (Accessed on 20/07/2023)

<sup>34</sup> Ibid, Article 12

<sup>35</sup> Ibid,

<sup>36</sup> Ibid, Article 13

<sup>37</sup> Shaw. J., 'The Advent of Investor Obligations in an African Model for International Investment Law Reform.' Available at <https://afaa.ngo/page18097/10399642#:~:text=Incorporating%20investor%20obligations%20in%20international,gained%20considerable%20traction%20in%20Africa.> (Accessed on 20/07/2023)

parties through investments<sup>38</sup>. Further, the *Southern Africa Development Community (SADC) Model Bilateral Investment Treaty Template* encapsulates ESG concerns including human rights, environment and labour<sup>39</sup>. It states that investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located<sup>40</sup>. It further provides that investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work and that further investors and their investments shall not establish, manage or operate investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are higher<sup>41</sup>.

It is thus evident that ESG matters have become part and parcel of the international investment law regime. ESG factors are being incorporated in BITs. However, there are several ESG concerns under BITs in Africa.

### **3.0 ESG Concerns under BITs in Africa**

Several ESG related concerns have emanated from BITs in Africa. It has been observed that host states are increasingly asserting claims against foreign investors for alleged breaches of their environmental obligations<sup>42</sup>. In addition, there have been allegations of foreign investors' breach of human rights, for example, access to water, or the lack of public consultation of local communities in relation to development projects<sup>43</sup>. Indeed, the activities of certain Multinational Corporations have resulted in environmental concerns

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<sup>38</sup> Agreement Establishing the African Continental Free Trade Area, available at [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (Accessed on 20/07/2023)

<sup>39</sup> Southern Africa Development Community (SADC) Model Bilateral Investment Treaty Template., Available at <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (Accessed on 20/07/2023)

<sup>40</sup> Ibid, Article 15

<sup>41</sup> Ibid

<sup>42</sup> Allen. N., 'Investment Treaty Disputes Role in Sustainability.' Available at <https://www.addleshawgoddard.com/globalassets/specialisms/litigation/esg-risk-reputation-compliance--disputes/investment-treaty-disputes-role-in-sustainability.pdf> (Accessed on 21/07/2023)

<sup>43</sup> Ibid



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including the extinction of biodiversity, contamination and destruction of soil and air pollution as a result of oil spillages<sup>44</sup>. Further, Multinational corporations operating in most developing countries especially in Africa have been accused of gross human rights violations, such as killings, bad labour practices and land injustices<sup>45</sup>. Such practices have had an impact on economic activities, social-cultural life and human health of the affected people thus hindering the attainment of Sustainable Development within the ESG framework<sup>46</sup>. Consequently, there has been rise of investment treaty arbitration between foreign investors and host states under Bilateral and Multilateral Investment Treaties where ESG concerns such environmental matters and human rights are being considered<sup>47</sup>.

It has been observed that as sustainability obligations become increasingly stringent in light of concerns about climate change, disputes related to environmental matters will inevitably rise in years to come<sup>48</sup>. Further, it has been noted that investment treaty arbitration can foster ESG requirements under BITs such as respect for human rights and sound environmental governance<sup>49</sup>. The importance of ESG factors such as respect for human rights and environmental protection is so fundamental that some decisions in investment treaty arbitration have observed that where a foreign investor violates national laws on matters such as environmental conservation and human rights, then such a situation may warrant the proportionate response

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<sup>44</sup> 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

<sup>45</sup> 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-mnncs-beyond-the-profitmotive.html#legalrights> (Accessed on 21/07/2023)

<sup>46</sup> Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' Op Cit

<sup>47</sup> Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' Op Cit

<sup>48</sup> Allen. N., 'Investment Treaty Disputes Role in Sustainability.' Op Cit

<sup>49</sup> Peterson. L & Gray. K., 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration.' Available at [https://docs.esrnet.org/usr\\_doc/Luke\\_Peterson\\_\\_\\_IHR\\_in\\_bilateral.pdf](https://docs.esrnet.org/usr_doc/Luke_Peterson___IHR_in_bilateral.pdf) (Accessed on 21/07/2023)

of a denial of treaty protection under the BIT and the International Centre for Settlement of Investment Disputes (ICSID) Convention<sup>50</sup>. ESG matters such as human rights and environmental protection are thus vital concerns under BITs in Africa.

Another fundamental ESG issue under BITs in Africa is the aspect of repatriation of profits and other benefits given to foreign investors such as tax incentives. BITs contain provisions guaranteeing transfers and repatriation of profits<sup>51</sup>. Such provisions establish a host country's obligation to permit the payment, conversion and repatriation of amounts relating to an investment, ensuring that, at the end of the day, a foreign investor will be able to enjoy the financial benefits of a successful investment<sup>52</sup>. However, it has been observed that where poor profits sharing models are adopted, the host country may end up with little benefits since most of the profits will be repatriated to the investor's home country<sup>53</sup>. Further, tax incentives for foreign investors create a disadvantage for domestic firms since they face the same conditions to sell and produce<sup>54</sup>. This could result in economic and social effects in host countries such as underdevelopment and collapse of local firms and industries<sup>55</sup>. This can hinder the attainment of Sustainable Development in host countries.

Finally, it has been observed that some foreign investors under BITs have engaged in bad governance practices thus affecting the attainment of the 'G'

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<sup>50</sup> International Centre for Settlement of Investment Disputes, Arbitration between Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited and Republic of Kenya, ICSID Case No. ARB/15/29

<sup>51</sup> Peterson. L & Gray. K., 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration.' Op Cit

<sup>52</sup> United Nations Conference on Trade and Development., 'Transfer of Funds.' Available at <https://unctad.org/system/files/official-document/psiteiitd20.en.pdf> (Accessed on 21/07/2023)

<sup>53</sup> Lebrand. M., 'Profit Shifting and FDI Restrictions.' Available at <https://thedocs.worldbank.org/en/doc/212101480958609594-0050022016/original/4Lebrandpaper.pdf> (Accessed on 21/07/2023)

<sup>54</sup> Ibid

<sup>55</sup> Lere. A., 'Multinational Corporations' (MNCs) Engagement in Africa: Messiahs or Hypocrites?' *Journal of African Foreign Affairs*, Volume 5, Issue 1, 2018

pillar of the ESG agenda<sup>56</sup>. Such practices include corruption, lack of diversity and failure to embrace Corporate Social Responsibility (CSR)<sup>57</sup>. It is thus imperative for investors to adopt good governance practices in order to enhance the role of ESG in BITs.

The foregoing discussion has addressed some of the ESG concerns in BITs. These include instances of human rights violation, failure to embrace sound environmental governance practices, lack of proper framework on repatriation of profits which results in economic and social concerns in host countries and bad governance by some investors. There is need to address these matters in order to foster ESG requirements in BITs.

#### **4.0 Way Forward**

Several measures can be undertaken towards embracing ESG as a vital component of BITs. To begin with, there is need to integrate ESG clauses in BITs. It has been observed that there has been rise of ESG investing which has brought about a paradigm shift in the world of finance as investors are increasingly looking beyond financial returns and considering the impact of their investments on the environment, society, and corporate governance<sup>58</sup>. Progress has been made towards integrating ESG clauses in BITs. It has been noted that many IAAs including BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development<sup>59</sup>. Further, in Africa, it has been observed that recent BITs such as the 2016 Morocco-Nigeria BIT are embracing innovative human rights approaches to the protection and promotion of FDI<sup>60</sup>. States should thus integrate ESG clauses in BITs in order to make investments more aligned with

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<sup>56</sup> Filatotchev, I. & Stahl, G. K., 'Towards Transnational CSR. Corporate Social Responsibility Approaches and Governance Solutions for Multinational Corporations.' *Organizational Dynamics*, Volume 44, No.2, 2015, pp. 121-129

<sup>57</sup> Ibid

<sup>58</sup> Sood. Y., 'Review Paper: 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' by Nelson Goh.' Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4466733](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466733) (Accessed on 21/07/2023)

<sup>59</sup> United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

<sup>60</sup> Zugliani. N., 'Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty.' *International & Comparative Law Quarterly*, Volume 68, Issue 3, 2019

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ESG concerns such climate action, environmental governance, respect for human rights as well as other public policy imperatives<sup>61</sup>. In order to achieve this goal, African Countries should ensure that they negotiate appropriately with foreign countries in order to capture ESG clauses in BITs.

In addition, there is need for investors to promote sustainable, ethical and socially responsible investments<sup>62</sup>. Such investments promote matters such as social justice, environmental sustainability, alternative energy and clean technology efforts<sup>63</sup>. Socially responsible investing allows market participants to conduct positive and negative screens to invest in companies that they believe are engaging in sustainable practices such as environmental stewardship, consumer protection, human rights, and racial and gender diversity<sup>64</sup>. By engaging in socially responsible investing, foreign investors can promote ESG factors including environmental stewardship and human rights protection<sup>65</sup>.

Further, it is imperative that investors comply with national laws under BITs. One of the key challenges highlighted in the investment sphere in Africa is the violation of national laws by Multinational Corporations especially those related to environmental conservation in favour of commercial interests<sup>66</sup>. As a result, many BITs have set out obligations concerning respect for national

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<sup>61</sup> United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

<sup>62</sup> Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' Op Cit

<sup>63</sup> Oehmke. M & Opp. M., 'A Theory of Socially Responsible Investment.' Available at <https://www.runi.ac.il/media/rzcpiq4a/a-theory-of-s.pdf> (Accessed on 21/07/2023)

<sup>64</sup> Ibid

<sup>65</sup> Gerard. B., 'ESG and Socially Responsible Investment: A Critical Review.' Available at [https://web.archive.org/web/20200305104050id\\_/https://biopen.bi.no/bixmlui/bitstream/handle/11250/2602369/Gerard.Beta.2019.pdf?sequence=4](https://web.archive.org/web/20200305104050id_/https://biopen.bi.no/bixmlui/bitstream/handle/11250/2602369/Gerard.Beta.2019.pdf?sequence=4) (Accessed on 21/07/2023)

<sup>66</sup> 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> (Accessed on 21/07/2023)

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laws such as environmental laws and human rights<sup>67</sup>. Investors should thus comply with such laws by ensuring that they respect human rights and foster environmental conservation. This will promote ESG matters in the BITs framework.

It also important for investors to foster good governance. It has been asserted that Multinational corporations play a significant role in shaping the global economy and politics<sup>68</sup>. Their governance practices thus have a significant impact on host countries<sup>69</sup>. It is thus vital for these entities to embrace good governance practices such as enhancing diversity, promoting good labour practices and embracing Corporate Social Responsibility<sup>70</sup>. Good governance by investors is integral in attaining the Governance 'G' pillar of ESG.

Finally, there is need for investors to promote Sustainable Development. The United Nations 2030 Agenda for Sustainable Development recognizes the role of international trade and investments in promoting inclusive economic growth and poverty reduction whilst contributing to the promotion of Sustainable Development<sup>71</sup>. Towards this end, the Sustainable Development goals advocate for investment in areas such health, energy, education, food security, industry, infrastructure and innovation for economic growth and development<sup>72</sup>. Further, towards reducing inequalities between developed and developed nations, the Sustainable Development goals encourage development assistance and FDI to underdeveloped regions of the world<sup>73</sup>.

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<sup>67</sup> See for example the United States of America Model Bilateral Investment Treaty and the Southern Africa Development Community (SADC) Model Bilateral Investment Treaty Template

<sup>68</sup> Kim, S & Milner, H., 'Multinational Corporations and their Influence through Lobbying on Foreign Policy.' Available at [https://www.brookings.edu/wpcontent/uploads/2019/12/Kim\\_Milner\\_manuscript.pdf](https://www.brookings.edu/wpcontent/uploads/2019/12/Kim_Milner_manuscript.pdf) (Accessed on 21/07/2023)

<sup>69</sup> Ibid

<sup>70</sup> Filatotchev, I. & Stahl, G. K., 'Towards Transnational CSR. Corporate Social Responsibility Approaches and Governance Solutions for Multinational Corporations.' Op Cit

<sup>71</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development' Op Cit

<sup>72</sup> Ibid

<sup>73</sup> Ibid, Goal 10

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Foreign investments are thus key in fostering Sustainable Development. Sustainable Development entails fostering environmental protection, economic development and social concerns<sup>74</sup>. Thus, while undertaking investment activities under BITs, foreign investors should ensure that they adhere to the Sustainable Development agenda by promoting environmental protection, fostering economic development and ensuring that their investments are socially conscious<sup>75</sup>.

Through these among other measures, ESG concerns in Africa will be realized through BITs.

### **5.0 Conclusion**

BITs have the potential of spurring economic development in Africa through FDI<sup>76</sup>. The importance of mitigating climate change, upholding good social policies and good governance have led to the rise and use of Environmental, Social and Governance (ESG) factors in the world of finance and investment<sup>77</sup>. Consequently, many IAAs including BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development<sup>78</sup>. However, several ESG concerns are evident in the BITs framework in Africa. These include instances of human rights violation, failure to embrace sound environmental governance practices, lack of proper framework on repatriation of profits which results in economic and social concerns in host countries and bad governance by some investors<sup>79</sup>. There is need to embrace ESG tenets in the BITs framework in Africa. This can be achieved through integrating ESG clauses in BITs, promoting sustainable, ethical and socially responsible investments,

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<sup>74</sup> Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

<sup>75</sup> Ajibo. C., 'Sustainable Development Agendas in African Investment Treaties: Reconciling Principle with Practice.' *Australasian Review of African Studies*, Volume 40, No. 2 of 2019, p 55-70

<sup>76</sup> United Nations Economic Commission for Africa., 'Investment Policies and Bilateral Investment Treaties in Africa Implications for Regional Integration.' Op Cit

<sup>77</sup> Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' Op Cit

<sup>78</sup> United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

<sup>79</sup> Peterson. L & Gray. K., 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration.' Op Cit

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compliance with national laws under BITs, fostering good governance and promoting Sustainable Development<sup>80</sup>. Embracing ESG principles in Africa can thus be realized.

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<sup>80</sup> Gerard. B., 'ESG and Socially Responsible Investment: A Critical Review.' Op Cit

## **The Viability of Arbitration in management of Climate Change Related Disputes in Kenya**

### **Abstract**

*Climate change has affected many areas of the society ranging from environmental, economic, political and even social aspects. It has also brought about disputes and conflicts that have been associated with climate change, both directly and indirectly, as it is seen as a conflict multiplier. This paper discusses the disputes related to climate change implications, and how the same can be addressed using arbitration as a dispute settlement mechanism. The author argues that arbitration has certain advantages over litigation which makes it more viable in addressing the disputes in question.*

### **1.0 Introduction**

Climate change is considered to be one of the greatest challenges facing mankind in this century and beyond.<sup>1</sup> Climate change and conflict have been linked by some observers in both industrialized and poor countries, although the connection is deemed to be indirect.<sup>2</sup> Climate change's effects on poverty, mental health, food security, and migration further complicate the link between climate change and war.<sup>3</sup> As a result, the goals of the Conference of Parties Twenty Sixth session (COP 26), held in Glasgow from 31 October to 13 November 2021 included to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver,<sup>4</sup> where countries were expected to, *inter alia* accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.<sup>5</sup> Achieving these will naturally require some adjustments by countries' leadership and

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<sup>1</sup> See Dervis, K., "Devastating for the World's Poor Climate Change Threatens the Development Gains Already Achieved," *UN Chronicle Online Edition* < <https://www.unclearn.org/wp-content/uploads/library/undp30.pdf> > accessed 6 April 2022.

<sup>2</sup> 'Does Climate Change Cause Conflict?' (IGC, 2 June 2021) <<https://www.theigc.org/blog/does-climate-change-cause-conflict/>> accessed 6 April 2022.

<sup>3</sup> Ibid.

<sup>4</sup> 'COP26 Goals' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/cop26-goals/>> accessed 5 April 2022.

<sup>5</sup> Ibid.



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other stakeholders. Arguably, climate change comes with a lot of conflicts and/or disputes that need sustainable means of handling them.<sup>6</sup>

Over the years, there has been an appreciation of the impact that climate may have in economic results, as well as rising public concern about climate change.<sup>7</sup> The term "climate" refers to observations of climatic factors such as temperature, rainfall, and water availability, as well as climate indices that serve as proxy measures for these variables.<sup>8</sup> While climatic circumstances do not generate conflict on their own, they can modify the environment under which particular social interactions take place, potentially altering the risk of conflict.<sup>9</sup> The environmental principle of polluter pays, which holds that polluters should be held accountable for destroying the environment, justifies the concept of resolving climate change disputes through restorative dispute management approaches.<sup>10</sup> It is, however, worth noting that despite the constitutional provisions that seek to promote the use of Alternative Dispute Resolution (ADR) Mechanisms in the country, Kenya's *Climate Change Act 2016*<sup>11</sup> is silent on the role of ADR in addressing climate change related disputes and conflicts and only provides for the role of Environment and Land Court.<sup>12</sup>

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<sup>6</sup> See Vally Koubi, 'Climate Change and Conflict' (2019) 22 Annual Review of Political Science 343 <<https://www.annualreviews.org/doi/10.1146/annurev-polisci-050317-070830>> accessed 11 April 2022.

<sup>7</sup> Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 27 March 2022.

<sup>8</sup> Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 Annual Review of Economics 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 27 March 2022.

<sup>9</sup> Ibid, 579.

<sup>10</sup> K. Segerson, *Environment*, in Encyclopedia of Energy, Natural Resource, and Environmental Economics Volume 3, 2013.

<sup>11</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya.

<sup>12</sup> Ibid, section 23.

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This paper critically discusses the nature of climate change related conflicts and disputes, and how arbitration, both domestic and international, can be used to address the disputes, in the context of achieving sustainability in Kenya. It is worth noting that the discussion leans more towards management of the disputes as against conflicts. The paper, in justifying the use of arbitration, will discuss the differences between conflicts and disputes, and why the climate change related disputes are more suitable for arbitration than the conflicts.

### **2.0 Nature of Climate Change Related Conflicts and Disputes**

Climate is described as a region's averaged temperature and precipitation patterns, as well as their range of fluctuation, across time.<sup>13</sup> "Climate change" is defined by the UNFCCC as "a change in climate that is ascribed directly or indirectly to human activity that modifies the composition of the global atmosphere and is in addition to natural climate variability seen over comparable time periods."<sup>14</sup> Kenya's *Climate Change Act 2016* defines "climate change" to mean 'a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period'.<sup>15</sup> Climate change mitigation is one of the key environmental goals of the United Nations' 2030 Agenda for Sustainable Development Goals (SDGs)<sup>16</sup>, as encapsulated in Sustainable Development Goal 13, which aims to help countries attain resilience and adaptability.<sup>17</sup>

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<sup>13</sup> '15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A\\_An\\_Introduction\\_to\\_Geology\\_\(Johnson\\_Affolter\\_Inkenbrandt\\_and\\_Mosher\)/15%3A\\_Global\\_Climate\\_Change/15.01%3A\\_Global\\_Climate\\_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 20 March 2022.

<sup>14</sup> Article 1(2), UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

<sup>15</sup> Section 2, *Climate Change Act*, No. 11 of 2016, laws of Kenya.

<sup>16</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

<sup>17</sup> *Ibid*, SDG 13.

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There is no universally accepted definition of a climate change-related dispute.<sup>18</sup> Some authors have observed that climate change is a "threat multiplier," which can increase human security issues such as food and water scarcity while also leading to (violent) conflict in climate-vulnerable countries.<sup>19</sup> This is as a result of the fact that climate change's negative repercussions, such as water scarcity, crop failure, food insecurity, economic shocks, migration, and displacement, can exacerbate the risk of conflict and violence<sup>20</sup>. Environmental conflicts and disputes can be divided into two categories: first, access to environmental resources as a source of livelihood and as a foundation for economic activity, and second, conflicts over what are known as "side effects" of economic activity, such as biodiversity loss and pollution.<sup>21</sup>

### **3.0 Approaches to Management of Disputes and Conflicts**

There are numerous techniques for preventing conflicts, resolving conflicts, settling disputes, and transforming conflicts.<sup>22</sup> The choice of mechanism chosen depends on whether one is dealing with conflicts or disputes, as both have different causes and underlying issues.<sup>23</sup>

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<sup>18</sup> C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O’Gorman, Holly Stebbing, Martin Valasek, “What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)”, in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021, p. 40. < <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?revision=40c8a703-6e1d-413c-8c7e-ac1201697383&revision=40c8a703-6e1d-413c-8c7e-ac1201697383>> accessed 30 March 2022.

<sup>19</sup> Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

<sup>20</sup> ‘Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict’ <<https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict>> accessed 30 March 2022.

<sup>21</sup> Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 2.

<sup>22</sup> Corissajoy, ‘Settlement, Resolution, Management, and Transformation: An Explanation of Terms’ (Beyond Intractability, 29 June 2016) <[https://www.beyondintractability.org/essay/meaning\\_resolution](https://www.beyondintractability.org/essay/meaning_resolution)> accessed 6 April 2022.

<sup>23</sup> See K. Muigua, *Resolving conflicts through mediation in Kenya*, Glenwood Publishers, Nairobi, 2<sup>nd</sup> Ed., 2017, Chapter Four.

### **3.1 Conflicts**

Conflicts are concerns of non-negotiable ideals. The parties share these wants and ideals. Needs or values are inherent in all human beings and are at the foundation of conflict, whereas interests and issues are surface-level and are not at the root of conflict.<sup>24</sup> They're limitless. Conflicts develop as a result of the conflicting parties' non-negotiable wants or values not being met. As a result, if all requirements are addressed, the outcome is non-zero-sum, resulting in integrative and innovative solutions rather than a zero-sum answer.<sup>25</sup>

A conflict usually involves at least two parties that disagree over the allocation of material or symbolic resources or who believe their underlying cultural values and beliefs are irreconcilable. Conflicts may also arise as a result of society's social and political makeup and structure, according to some theories.<sup>26</sup> This supports the viewpoint that conflict must be addressed on two levels: psychologically to overcome 'blocks' to positive communication and ontologically to discover the 'true' causes of conflict.<sup>27</sup>

Conflicts are usually resolved because they are about fundamental values, hence the term "conflict resolution." Resolution is the mutual development of a valid relationship in which each party's demands are met. It is the mutual construction of a conflict because conflict is dynamic, interactive, and ever-changing with different stages of escalation and de-escalation such as formation, escalation, crisis, and endurance, improvement and de-escalation, settlement or resolution, and finally reconstruction and reconciliation through political processes such as negotiation and mediation. As a result, conflict

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<sup>24</sup> Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153.

<sup>25</sup> Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 2-4.

<sup>26</sup> See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, available at [www.forumsec.org](http://www.forumsec.org), [Accessed on 04/06/2012].

<sup>27</sup> Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

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resolution is stated to probe into the roots or underlying causes of conflict and relationships, with the goal of resolving them completely.<sup>28</sup>

### **3.2 Disputes**

When conflicts are not or cannot be adequately managed, disputes arise.<sup>29</sup> It's about an issue or a situation that interests you. Needs are not negotiable, divisible, or finite, while interests are. They aren't negotiable due to their intrinsic nature. They are not transferable or divisible. Needs are also inexhaustible, which means that the more security I have, the less security you have. When two or more persons or groups believe their rights, interests, or aims are incompatible, they communicate their perspective to the other person or group, which can lead to a dispute. Similarly, conflicts can arise from societal power imbalances, rights, or interests. These issues or interests can be discussed and even bargained over.<sup>30</sup>

Because a dispute can be based on interests, rights, or power, the approaches to resolving it vary. Negotiation and mediation are the best ways to resolve an interest-based dispute. If the issue is about rights, the best response is litigation; if the issue is about power, the best response is the use of force, threats, and violence, such as that used by the police and the army. Understanding the roots or grounds of a dispute is critical because if it is not addressed appropriately, the likelihood of escalatory responses grows, which can lead to violence and long-term societal fission.

It's worth noting that tensions tend to repeat in specific sorts of disputes, such as those concerning natural resource use and access. The recurrence of a disagreement over time could be a sign of a much deeper conflict in which people or organizations are involved. In such circumstances, the responses

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<sup>28</sup> Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

<sup>29</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), pp.12-13.

<sup>30</sup> Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit; Mwangi, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.

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used must take into account the greater context of the dispute's interests, rights, and power imbalances. As a result, answers must be tailored to the various levels of the conflict. Some solutions could be aimed at resolving the specific conflict, such as through adjudication processes like courts and arbitration.

Other intervention techniques might seek to address the dispute's underlying causes, which are frequently considerably broader. This can be done, for example, through political negotiations or mediation involving the entire community or perhaps a number of communities, with the goal of airing complaints and injustices seen by various groups in the region. Other intervention techniques might attempt to rebuild or restore the community's broken or damaged ties as a result of disagreements or conflicts.<sup>31</sup>

Interests or concerns are only surface-level; they do not address the conflict's basic or primary causes. As a result, conflicts can be resolved, thus the term "conflict resolution." A settlement, according to eminent conflict management specialists, is an agreement on the dispute's issue(s), which frequently entails a compromise. A settlement aims to appease the opposing party without addressing the dispute's root causes. As a result, adjudicatory, legal, or coercive processes like courts and arbitration can be used to settle disputes. When it comes to disputes about interests rather than values, coercive means such as litigation and arbitration are useful.<sup>32</sup>

### **4.0 Arbitration Process and management of Disputes**

Arbitration is a mechanism for settling disputes that usually occurs in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the arbitrator's decision based on law, or, if so agreed, other considerations, following a full hearing and such decision is

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<sup>31</sup> See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, op.cit.

<sup>32</sup> Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit. pp. 109-114.

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enforceable at law.<sup>33</sup> Arbitration restricts appeals against decisions, which benefits the arbitral process' efficiency, and the arbitrator's award is final and binding on the parties save in the most glaring instances of incompetent arbitrating.<sup>34</sup>

As previously stated, adjudicatory, coercive, or legal procedures can be used to settle disputes, whereas non-legal, non-adjudicatory, or non-coercive approaches can be used to resolve conflicts. The key power- and rights-based mechanisms include litigation and arbitration. They're mechanisms for settling disputes. The parties in a disagreement have little or no autonomy, and the means for settling disputes are coercive. Legal tools like as courts, police, and the army, among others, are used to enforce a settlement.

Although the parties have considerable autonomy in choosing the venue and arbitrator in arbitration, one party will be offended when an award is made, despite the fact that the parties agree to be bound by the arbitrator's judgment at the outset. As a result, it becomes coercive because the parties must comply with the decision, diminishing its usefulness as a conflict resolution method but effective in settlement.<sup>35</sup>

Arbitration is viewed as a viable alternative to state court litigation with the purpose of getting a legally binding and enforceable outcome from a panel of legal and industrial experts.<sup>36</sup> Arbitration has great attributes which include: parties can agree on an arbitrator to decide the subject; the arbitrator has experience in the field of dispute; anybody can represent a party in the dispute; adaptability; cost-effective; confidential; quick; and the outcome is binding. Thus, unlike court procedures, which are accessible to the public, commercial arbitration proceedings are private, thus parties that want to keep their trade

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<sup>33</sup> Barnstein, R. *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998), p. 313.

<sup>34</sup> Section 35-The Arbitration Act, 1995- Grounds of setting aside an arbitral award.

<sup>35</sup> Mwangiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op.cit, pp.36-38.

<sup>36</sup> 'Arbitration in Africa | White & Case LLP'

<<https://www.whitecase.com/publications/insight/arbitration-africa>> accessed 4 April 2022.

secrets confidential may select commercial arbitration while still benefiting from the binding character of court verdicts.

## **5.0 Using Arbitration as a Tool for management of Climate Change Disputes: Challenges and Prospects**

Disputes related to climate change may increase in future due to: actions of commercial entities giving rise to groups or affected individuals having rights of action; climate change inaction – failure by states to take measures in response to climate change, giving rise to potential inter-state and investor-state disputes, and claims by groups of concerned citizens; climate change action– taking response measures, giving rise to potential inter-state and investor-state disputes; dilution or revocation of responsive measures by states, giving rise to potential renewable energy treaty arbitrations; commercial contract enforcement –private sector is central to climate change mitigation, and there may be an increase commercial contracts relating to climate change mitigation and adaptation; coming into effect of the Paris Agreement, which may give rise to arbitration.<sup>37</sup>

While discussing the role of arbitration in addressing climate change disputes, some commentators have highlighted the following disputes: 1. cases brought to either mandate or change climate-related policy or conduct; 2. cases brought to seek financial redress for damages associated with the effects of climate change; 3. contractual disputes arising out of the industry transitions which the energy sector and all major industries are currently undergoing; 4. contractual disputes resulting from climate-related weather events; 5. related disputes between foreign investors and host states; and 6. related disputes between states, and between other transnational actors, while observing that a key reason for selecting these categories is that the potential role for arbitration varies significantly depending on the category of dispute, with

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<sup>37</sup>'Resolving Climate Change Disputes through Arbitration' (Pinsent Masons) <<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 7 April 2022.



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arbitration having a greater role (in practice and in potential) in categories 3 to 6.<sup>38</sup>

Notably, Kenya's Environment and Land Court Act, 2011<sup>39</sup> provides for the jurisdiction of the Environment and Land Court as including power to hear and determine disputes relating to climate issues.<sup>40</sup> Also worth pointing out is the recognition of alternative means of dispute resolution and even affirming that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court is mandated to stay proceedings until such condition is fulfilled.<sup>41</sup> While it is to be acknowledged that the judges appointed to head environment and land courts are appointed on the basis of having relevant knowledge in the area, it must also be acknowledged that they may not always be well versed with all matters that come before them. It is during such times, either on court's own motion, with the agreement of or at the request of the parties, that the court may consider any other appropriate means of alternative dispute resolution including arbitration especially in respect of technical issues relating to climate change disputes.

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<sup>38</sup> C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), *International arbitration report*, Norton Rose Fulbright – Issue 16 – June 2021, p. 41.

<sup>39</sup> Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

<sup>40</sup> *ibid*, section 13(2)(a).

<sup>41</sup> 20. *Alternative dispute resolution*

(1) *Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.*

(2) *Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.*

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The provisions of *Climate Change Act 2016*<sup>42</sup> acknowledge the role of courts in upholding rights relating to climate change and spells out the role of the court in the following words: “a person may, pursuant to Article 70 of the Constitution, apply to the Environment and Land Court, alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change”.<sup>43</sup> In such applications, the court may make an order or give directions to: prevent, stop or discontinue an act or omission that is harmful to the environment; compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties.<sup>44</sup>

While this is a commendable step towards empowering local courts in discharging their mandate in promotion of sustainable development, parties may not always be both citizens of Kenya and where the violating party is a foreign investor, there may be need to invoke international commercial or investment arbitration. In addition, it must be noted that parties may invoke section 20 (2) of the Environment and Land Court Act 2011 which provides that ‘*where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled*’. Such parties may opt to have the dispute settled by expert arbitrators in the area of climate change disputes and only go back to court for declaratory rights and enforcement of the outcome(s).

The advantages of arbitration highlighted above make it a viable alternative way of managing climate change related disputes as against litigation, while still ensuring that the outcome thereof can be enforced. Parties, even where they already filed a case before a court, may not always be willing to let out commercial secrets and may, therefore, wish to refer the matter to arbitration, court-annexed or otherwise.

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<sup>42</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya.

<sup>43</sup> Section 23(1), Climate Change Act, 2016.

<sup>44</sup> Section 23(2), Climate Change Act, 2016.

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The distinction between conflicts and disputes, as discussed above, is important in analyzing any disagreements that are attributable to climate change in a bid to decide the most viable mechanism of addressing them. Such analysis and management of disputes may require expertise in that particular area of law, namely environmental law and climate change. This is where arbitration becomes useful because, as already pointed out, parties in arbitration proceedings are allowed to pick the third party expert with the relevant experience and knowledge to help them settle the particular aspects of the dispute.

It has also been noted that local disputes over food and water supplies can spread to neighboring nations as people seek extra resources and safety, putting further strain on other countries' resources and perhaps escalating tensions.<sup>45</sup> In light of such possibilities, addressing such problems through local courts becomes impossible. However, in addition to the specialized expertise that is potentially available to parties through arbitration, there is also the advantage of the transnational nature of arbitration process unlike litigation, and the subsequent nature of ease of enforcement of arbitral awards across borders.

Article 14.1 of 1992 *United Nations Framework Convention on Climate Change* provides that 'in the case of a dispute between two or more Parties concerning the interpretation or application of the Convention, the Parties concerned should seek a settlement of the matter by discussion or any other peaceful measures of their own choice.'" Article 14.2(b) envisages the use of arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration. Article 19 of *Kyoto Protocol* also provides that "the provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Protocol". Similarly, Article 24 of the *Paris Agreement*, a legally binding international treaty which entered into force on 4 November 2016, provides that "the

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<sup>45</sup> UNESCO, 'Climate Change Raises Conflict Concerns' (UNESCO, 29 March 2018) <<https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns>> accessed 11 April 2022.

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provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement” .

While legislators should make climate change policy, courts and arbitral tribunals also have a role to play, as climate change disputes are on the rise and will likely continue to do so in the future, and disagreements over the proper interpretation and application of climate change legislation may arise.<sup>46</sup> It has been observed that even where international dispute settlement mechanisms exist, they are deemed ineffective due to a lack of mandatory rules or enforcement procedures, so mechanisms like 'international adjudication are unlikely to provide effective relief, either in reducing emissions or compensating victims'.<sup>47</sup> Arbitration, on the other hand, has huge benefits over litigation in dealing with climate change disputes because arbitrators with the right mix of expertise can be picked, multiparty proceedings can be handled, and the New York Convention on the Enforcement of Arbitral Awards provides certainty pertaining award enforcement.<sup>48</sup> The Permanent Court of Arbitration (PCA) has been noted as a regular forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments relating to natural resources and the environment, and provides specialized rules for arbitration and conciliation of these disputes.<sup>49</sup> Notably, PCA already has in place the *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources* (“Environmental Rules”), adopted in 2001<sup>50</sup>, and the Rules are applicable

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<sup>46</sup> ‘Resolving Climate Change Disputes through Arbitration’ (Pinsent Masons) <<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 11 April 2022.

<sup>47</sup> ‘LSE Law Review Blog’ <<https://blog.lselawreview.com/2022/03/commercial-arbitration-fight-against-climate-change-role-actually-play>> accessed 11 April 2022.

<sup>48</sup> ‘Resolving Climate Change Disputes through Arbitration’ (Pinsent Masons) <<https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration>> accessed 11 April 2022.

<sup>49</sup> 'Environmental Dispute Resolution' (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>> accessed 11 April 2022.

<sup>50</sup> 'Environmental Dispute Resolution' (*PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*, 2001) <[https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and\\_or-Natural-Resources.pdf](https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf)> accessed 11 April 2022.

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where all parties have agreed in writing that a dispute that may arise or that has arisen between them shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.<sup>51</sup>

It is also worth noting that the PCA Environmental Rules provide for the establishment of a specialized list of arbitrators considered to have expertise in this area, establishment of a list of scientific and technical experts who may be appointed as expert witnesses pursuant to these Rules, and parties to a dispute are free to choose arbitrators, conciliators and expert witnesses from these Panels but with the understanding that the choice of arbitrators, conciliators or experts is not limited to the PCA Panels.<sup>52</sup>

As a way of supporting and building capacity of States, States, international organizations, and private parties involved in the creation and administration of new, specialized environmental dispute settlement procedures can seek guidance and support from the PCA.<sup>53</sup> This is possible considering that the PCA is responsible for resolving disputes between States and non-State players that arise through a variety of bilateral and multilateral investment treaties, contracts, and other instruments.<sup>54</sup>

Just like PCA has special rules for arbitration of environmental and natural resource related disputes, there may be a need, going forward, for both domestic and international institutions (both courts and arbitral institutions) to build capacity in terms of expertise and legal framework in preparation for the climate change related disputes ranging from energy, finance and technology sectors, as follows: Energy – in particular, the transition away from

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<sup>51</sup> Article 1 (1), *PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*, 2001.

<sup>52</sup> 'Panels of Arbitrators and Experts for Environmental Disputes' (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/>> accessed 11 April 2022.

<sup>53</sup> 'Environmental Dispute Resolution' (*Permanent Court of Arbitration*, 2022) <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>> accessed 11 April 2022.

<sup>54</sup> *ibid.*

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fossil fuels to renewables, and the growth especially of the solar and wind sectors; Finance – carbon trading and green certificates; and Technology – the drive for efficient power grids, as well as low emission energy and data storage.<sup>55</sup> The other areas that may need special attention have already been identified by the International Chamber of Commerce Commission on Environment and Energy task force on “Arbitration of Climate Change Related Disputes” (the “Task Force”) in their 2019 Report titled *Report on Resolving Climate Change Related Disputes through Arbitration and ADR* (the “Report”)<sup>56</sup> where they observed that a number of specific features of international arbitration that may assist in resolving climate change related disputes going forward include utilization and optimization of: use of and recourse to appropriate scientific and other expertise; existing measures and procedures for expediting early resolution of disputes or providing urgent interim or conservatory relief; integration of climate change commitments and principles of international law, including arising out of the UNFCCC and Paris Agreement; enhanced transparency of proceedings; potential third-party participation, including through amicus curiae briefs; and costs, including advances and allocation of costs, to promote fair, transparent and appropriate conduct of climate change related disputes.<sup>57</sup>

As already observed, Kenya’s Climate Change Act, 2016 does not make reference to the use of ADR mechanisms, including arbitration in addressing disputes that arise therefrom. However, it makes reference to Environment and Land Court Act 2011 (ELC Act) which empowers Environment and Land Court to hear and determine disputes relating to climate issues. The ELC Act, however, gives these courts the power to resort to ADR mechanisms. There is

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<sup>55</sup> ‘Arbitrating climate change disputes | Actualités | DLA Piper Global Law Firm’ (DLA Piper) <<https://www.dlapiper.com/fr/france/insights/publications/2020/01/arbitrating-climate-change-disputes/>> accessed 11 April 2022.

<sup>56</sup> ‘ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR’ (ICC - International Chamber of Commerce) <<https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/>> accessed 11 April 2022.

<sup>57</sup> *Report on Resolving Climate Change Related Disputes through Arbitration and ADR*, p. 19.

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a need for policy makers and other stakeholders to borrow a leaf from the PCA Environmental Rules and the recommendations from the 2019 ICC Task Force Report to consider coming up with special rules and panel of experts that may either address disputes requiring specialized knowledge such as those relating to climate change or those who may offer specialized guidance to courts while dealing with these disputes. Arbitral institutions such as Chartered Institute of Arbitrators and Nairobi Centre for International Arbitration, among others, should also be left behind in building specialized capacity along the same lines. Climate change related disputes are unlikely to go away in the near future and stakeholders should, therefore, prepare adequately.

### **6.0 Conclusion**

Climate change related disputes come with many implications across all sectors of economy from environmental, political, economic and even social, where they also come with disputes and conflicts. While different approaches to conflict management apply to conflicts and disputes due to the underlying issues therein, this paper has focused on disputes relating to climate change. As already pointed out by various commentators, this paper acknowledges that some of these disputes may be indirectly linked to climate change, which is seen as a multiplier of already existing causative factors. However, the settlement of these disputes may require specialized knowledge, may be of transnational nature and may require coercion in abiding by outcome. This paper argues that these features may not be met through litigation, hence the need to explore arbitration, both domestic and international, in addressing the said disputes.

Arguably, putting in place measures meant to address the related disputes is part of the mitigation and adaptation approaches to address climate change since while mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.<sup>58</sup> There is a need for local policy

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<sup>58</sup>Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018), "Integrating mitigation and adaptation: Opportunities and challenges," In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban*

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makers and conflict management institutions, including courts and arbitral institutions, to build capacity towards utilizing arbitration in management of climate change related disputes.

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Climate Change Research Network. Cambridge University Press, New York. 101–138, 102 < [https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com\\_.pdf](https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf)> accessed 7 April 2022.



## **Managing Governance Conflicts Through Alternative Dispute Resolution in Kenya**

### ***Abstract***

*The paper critically analyses the suitability of Alternative Dispute Resolution (ADR) mechanisms in managing governance conflicts. It begins by giving an overview of governance and the importance of good corporate governance as a conflict avoidance strategy. The paper then discusses the nature, causes and underlying issues in governance conflicts to set the tone for the discussion that follows on ADR and governance conflicts. It gives a succinct overview of ADR mechanisms; their advantages and the difference between settlement and resolution in ADR. The paper then delves into the applicability of ADR in managing governance conflicts and highlights the shortcomings of ADR towards this course. Finally, the paper proposes recommendations aimed at ensuring good corporate governance through the use of ADR as a tool for managing governance conflicts.*

### **1.0 Introduction**

Governance, in the corporate context, refers to the system through which a corporation is directed and controlled in order to protect the interests of all stakeholders and ensure reasonable return on investments.<sup>1</sup> Corporate governance has also been defined as the system through which a corporation is directed and controlled and which specifies distribution of rights and responsibilities among various players in a corporation being the board of directors, shareholders and other stakeholders and further sets out the rules and procedures for corporate decision making.<sup>2</sup> The Global Corporate Governance Forum in advocating the need for good corporate governance notes that:

*“Corporate Governance has become an issue of worldwide importance. The Corporation has a vital role to play in promoting economic development and social progress. It is the engine of growth internationally, and increasingly*

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<sup>1</sup> Cadbury, A. (2002). *Corporate Governance and Chairmanship: A Personal View*. New York: Oxford University Press.

<sup>2</sup> Organisation for Economic Co-Operation and Development (OECD), *Principles of Corporate Governance*, available at

<http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> (accessed on 06/07/2020)

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*responsible for providing employment, public and private services, goods and infrastructure. The efficiency and accountability of the corporation is now a matter of both private and public interest, and governance has, thereby, come to the head of the international agenda.”<sup>3</sup>*

Good corporate governance is important in attracting investors, creating competitive and efficient corporations, enhancing accountability and performance in an organization and promoting effective and efficient use of resources in an organization.<sup>4</sup> On this basis, it is argued that good corporate governance is a prerequisite for national economic development.<sup>5</sup>

In order to give effect to the ideal of good corporate governance, several principles have been generally accepted as pillars of ideal corporate governance. The Constitution of Kenya enshrines national values and principles of governance which bind all persons. These include *inclusiveness, equality, non-discrimination, good governance, integrity, transparency, accountability and sustainable development* (emphasis added).<sup>6</sup> The Organisation for Economic Co-operation and Development (OECD) identifies the principles of corporate governance to include: *equitable treatment of shareholders; disclosure and transparency; role of stakeholders in corporate governance and responsibilities of the board* (emphasis added).<sup>7</sup>

Good corporate governance cannot thrive in an environment of conflicts. Governance conflicts are bound to occur in an organization due to the different players involved and the difference in ideas, principles and plans that such

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<sup>3</sup> Global Corporate Governance Forum, ‘Corporate Governance’ available at <https://www.ifc.org/wps/wcm/connect/0ca17952-3244-4801-a6c2-ee8b1896dc32/User%2BGuide.pdf?MOD=AJPERES&CVID=jtCxBar> (accessed on 23/07/2020)

<sup>4</sup> Private Sector Initiative for Corporate Governance, ‘Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance’ available at [https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Principles\\_of\\_good\\_corporate\\_Governance\\_Private\\_Sector\\_-\\_CS\\_Gabriel\\_Kimani\\_110.pdf](https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Principles_of_good_corporate_Governance_Private_Sector_-_CS_Gabriel_Kimani_110.pdf) (accessed on 07/07/2020)

<sup>5</sup> Ibid

<sup>6</sup> Constitution of Kenya, 2010, Article 10, Government Printer, Nairobi

<sup>7</sup> Organisation for Economic Co-Operation and Development (OECD), Principles of Corporate Governance, Op Cit

players may hold.<sup>8</sup> The parties in an organization may have a conflict about the distribution of resources, or they may have a more fundamental conflict about the very structure of their organization and the basic nature of their interaction.<sup>9</sup> A corporation entails multiple personnel including the directors, the Chief Executive Officer, shareholders and employees. In their day to day interactions, these personalities are likely to differ leading to conflicts. If such conflicts are not addressed effectively and in a timely manner, they may pose a threat to the business affairs of a corporation and defeat the core purpose of good corporate governance. The paper critically analyses governance conflicts and explores the use of Alternative Dispute Resolution in managing such conflicts. It addresses some of the causes of governance conflicts and the need to have such conflicts managed in an efficient, effective and timely manner. It highlights the benefits of using ADR in managing governance conflicts and proposes reforms aimed at enhancing good corporate governance through effective, efficient and timely conflict management.

## **2.0 Alternative Dispute Resolution (ADR) and Conflict Management**

Conflict has been described as a situation whereby two or more parties perceive that they possess mutually incompatible goals.<sup>10</sup> A conflict relates to the needs and values shared by the parties whereas a dispute concerns interests or issues.<sup>11</sup> Conflict management involves the processes required for stopping or preventing overt conflicts and aiding the parties involved to arrive at durable peaceful settlement of their differences.<sup>12</sup>

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilised to manage conflicts without resort to the often

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<sup>8</sup> Bercovitch, J., *Conflict and Conflict Management in Organizations: A Framework for Analysis*, available at <https://legacy.earlham.edu/~chris/ConflictRes/pdf%20files/Conflict.Conflict%20Management%20in%20Organizations.pdf> (accessed on 16/07/2020)

<sup>9</sup> Ibid

<sup>10</sup> Demmers J., *Theories of Violent Conflict: An Introduction*, (Routledge, New York, 2012)

<sup>11</sup> Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited (2015)

<sup>12</sup> Leeds, C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners,' *International Journal of Peace Studies*, Vol. 2, No. 2, 1997.

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costly adversarial litigation.<sup>13</sup> The *Constitution of Kenya* advocates for promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* (emphasis added).<sup>14</sup> Internationally, the *Charter of the United Nations* outlines various conflict management mechanisms and provides that the parties to any dispute shall, first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (emphasis added).<sup>15</sup> ADR mechanisms have been hailed for their advantages which include *inter alia* cost effectiveness, flexibility, expeditiousness, promoting party autonomy and preserving relationships among parties.<sup>16</sup> These advantages make ADR a preferable mode of conflict management to the adversarial litigation.

Conflict management can result in settlement or resolution. Most of the ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement.<sup>17</sup> Settlement mechanisms focus on interests of parties at the expense of human needs such as relationships, emotions, perceptions and attitudes.<sup>18</sup> Consequently, the causes of the conflict in settlement mechanisms remain unaddressed leaving the possibility of conflicts reemerging in future.<sup>19</sup> Settlement mechanisms include litigation and arbitration.

Resolution mechanisms on the other hand focus on outcomes based on mutual problem-sharing whereby parties to a conflict cooperate in order to redefine

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<sup>13</sup> Ibid

<sup>14</sup> Constitution of Kenya, 2010, Article 159 (2) (c)

<sup>15</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33

<sup>16</sup> Muigua. K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015

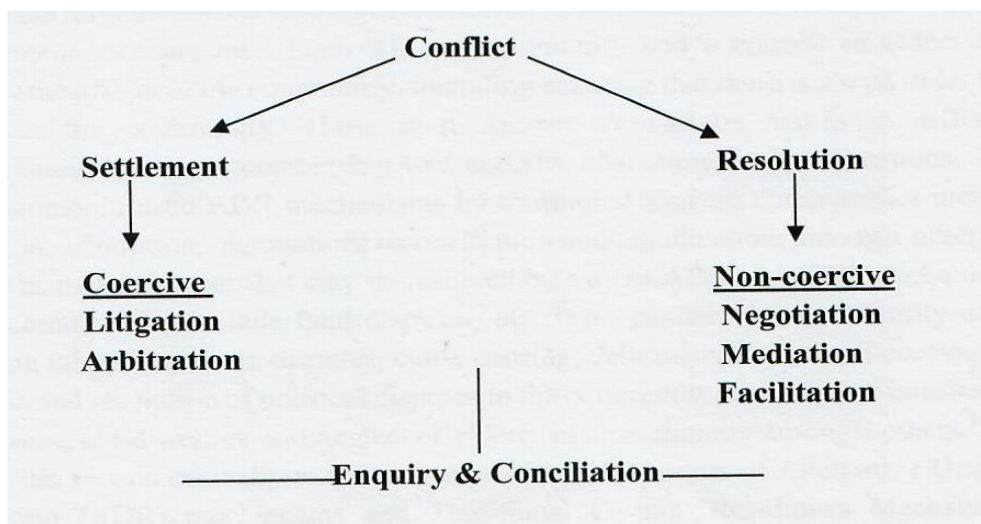
<sup>17</sup> Muigua. K., *Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER.pdf> (accessed on 07/07/2020)

<sup>18</sup> Ibid

<sup>19</sup> Muigua. K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishers, 2017

their conflict and their relationship.<sup>20</sup> This results in outcomes that are enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.<sup>21</sup> Resolution mechanisms address the root causes of conflicts and are preferred to settlement mechanisms for their effectiveness in conflict management. These mechanisms minimise the likelihood of the same conflicts reemerging in future.<sup>22</sup>

**Figure 1: Methods of Conflict Management**



**\*Source: The authors**

Figure 1 shows that there are certain methods of conflict management that can only result in settlement. These are categorised as coercive methods where parties have little or no autonomy over the process. The coercive methods are litigation and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods, parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome.

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<sup>20</sup> Ibid

<sup>21</sup> Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", The Conflict Resolution Information Source, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> (accessed on 07/07/2020)

<sup>22</sup> Ibid

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*Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.*

### **3.0 Governance Conflicts**

It has been argued that most corporate governance conflicts arise because of how board members interact with each other in discharge of their duties.<sup>23</sup> Such conflicts could take the form of disagreements between directors and top management over corporate strategy or financial policy.<sup>24</sup> Boardroom conflicts are inevitable. Decision making within the boardroom results from a process in which directors consider all the information reasonably available to them and engage in a vigorous debate on issues such as company strategy, company control and financial policy.<sup>25</sup> This increases the likelihood of disagreements within the board. Indeed, it has been argued that a board that never argues or disagrees is most likely to be an inactive or passive board.<sup>26</sup>

Governance issues, requirements and standards have been attributed as a fertile source of misunderstandings and disputes within an organization.<sup>27</sup> These can include; the relationship between directors and the Chief Executive Officer; the interplay between oversight and management; and the balancing of an organization's short and long term interests. Further, governance disputes can also arise as a result of poor corporate performance or disputes involving stakeholders.

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<sup>23</sup> Agrawal. A., & Chen. M., Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors, *Quarterly Journal of Finance*, Vol. 7, No. 3

<sup>24</sup> Ibid

<sup>25</sup> Jon Masters and Alan Rudnick, *Improving Board Effectiveness: Bringing the Best of ADR into the Corporate Boardroom* (Washington, D.C.: American Bar Association, 2005).

<sup>26</sup> Runesson. E., & Guy. M., *Mediating Corporate Governance Conflicts and Disputes*, available at <http://documents1.worldbank.org/curated/en/969191468314989975/pdf/418270NWP0Focu1ion0321443B01PUBLIC1.pdf> (accessed on 01/07/2020)

<sup>27</sup> Omisore, B.O & Abiodun, A.R., 'Organizational Conflicts: Causes, Effects and Remedies' *International Journal of Academic Research in Economics and Management Sciences*, Nov2014, Vol. 3, No. 6

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When a disagreement or dispute arises within an organization, it is in the best interest of the organization to have them managed effectively, expeditiously and efficiently. How such disagreements are managed determines whether the underlying issues can be resolved or whether the disagreement can ripen into a dispute that can have detrimental effects on the affairs of an organization including its financial performance and public image.<sup>28</sup> It is thus essential for an organization to develop and adopt efficient dispute management mechanisms. Efficient dispute management within an organization is part of good risk management since it enables an organization to cushion itself against the adverse effects of disputes whenever they occur.<sup>29</sup>

### **4.0 Applicability of ADR Mechanisms in Managing Governance Conflicts**

Well governed corporations are less likely to have conflicts.<sup>30</sup> However, where conflicts arise, there is need to have in place a suitable process and venue to manage the conflict in a timely and cost-effective manner.<sup>31</sup> A good corporate governance framework ensures availability of a reliable mechanism for managing emerging and existing disputes.

In managing governance disputes, there are several underlying issues that need to be addressed. It has been rightly pointed out that corporations hate to go public with their governance disputes.<sup>32</sup> Such disputes if brought to limelight could affect public perception of an organization and ultimately its overall performance.<sup>33</sup> Further, if governance disputes are not managed expeditiously, much of the Board's resources and time will be diverted at the expense of the success of the organization. Litigation therefore cannot effectively deal with the underlying issues in governance conflicts. It has been

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<sup>28</sup> Ibid

<sup>29</sup> International Finance Corporation, Resolving Corporate Governance Disputes, available at [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+cg/topics/resolving+corporate+governance+disputes](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/topics/resolving+corporate+governance+disputes) (accessed on 01/07/2020)

<sup>30</sup> Pondy, L., Reflections on Organizational Conflict, *Journal of organizational Behaviour*, Vol 13 (2) pp257-261

<sup>31</sup> Ibid

<sup>32</sup> International Finance Corporation, Resolving Corporate Governance Disputes, Op Cit

<sup>33</sup> Ibid

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pointed out that the court's role is dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.<sup>34</sup> Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations.<sup>35</sup> Litigation is often slow and expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.<sup>36</sup>

The shortcomings of litigation make it a less viable mechanism of managing governance conflicts due to the need for expeditious results and continued working relations. These challenges can be effectively addresses through the suitable use of ADR solutions which can be tailored by the parties to deal with ongoing situations in a manner that allows the parties to continue working together.<sup>37</sup> Indeed, most global and national corporate governance statutes, principles and codes advocate the use of ADR in managing governance conflicts.

The *OECD Principles of Corporate Governance* encourage equitable treatment of shareholders and the need to provide a framework through which shareholders can enforce their rights and initiate legal and administrative proceedings against management and board members.<sup>38</sup> Towards this end, OECD notes that "a balance must be struck between allowing investors to seek remedies for infringement of ownership rights and avoiding excessive litigation. Many countries have found that alternative adjudication procedures, such as *administrative hearings or arbitration procedures* organised

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<sup>34</sup> Ojwang', J. B. "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29

<sup>35</sup> Muigua. K., Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Utilising-Alternative-Dispute-Resolution-Mechanisms-to-Manage-Commercial-Disputes-Kariuki-Muigua-7th-September-2018.pdf> (accessed on 13/07/2020)

<sup>36</sup> Ibid

<sup>37</sup> International Finance Corporation, 'Resolving Corporate Governance Disputes, available at [https://www.ifc.org/wps/wcm/connect/cdd4b694-32b2-4609-8adc-fdf9334cb90b/ADR\\_Toolkit\\_volume1.pdf?MOD=AJPERES&CVID=jtCvQIC](https://www.ifc.org/wps/wcm/connect/cdd4b694-32b2-4609-8adc-fdf9334cb90b/ADR_Toolkit_volume1.pdf?MOD=AJPERES&CVID=jtCvQIC) (accessed on 14/07/2020)

<sup>38</sup> (OECD), Principles of Corporate Governance, Op Cit



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by the securities regulators or other regulatory bodies, *are an efficient method for dispute settlement, at least at the first instance level (emphasis added).*"<sup>39</sup>

*The King III Report on Corporate Governance for South Africa*<sup>40</sup> advocates the use of ADR as a tool of good corporate governance. It encourages directors to preserve business relationships. Consequently, when a dispute arises, in exercising their duty of care, directors should endeavour to *resolve it expeditiously, efficiently and effectively (emphasis added).*<sup>41</sup> Further, in advocating the use of mediation, the Report notes that it enables novel solutions which may not be attained in litigation which is constrained to enforce legal rights and obligations.<sup>42</sup> The Report correctly states that in mediation, *the parties' needs are considered, rather than their rights and obligations.* In Kenya, *The Code of Corporate Governance Practices for Issuers of Securities to the Public*<sup>43</sup> while providing the guidelines for managing internal and external disputes involving companies states that "Disputes involving companies are an inevitable part of doing business. Companies shall establish mechanisms for *resolving the disputes in a cost effective and timely manner. Mechanisms to avoid their recurrence shall also be established and implemented.* It is incumbent upon directors and executives, in carrying out their duty of care to a company to *ensure that disputes are resolved effectively, expeditiously and efficiently.* Further, *dispute resolution shall be cost effective and not a drain on the finances and resources of the company (emphasis added).*"<sup>44</sup>

Further, *The Code of Governance for State Corporations in Kenya* advises the Board to ensure that disputes with and among stakeholders are resolved effectively,

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<sup>39</sup> Ibid

<sup>40</sup> King Report on Governance for South Africa, available at [https://cdn.ymaaws.com/www.iodsa.co.za/resource/resmgr/king\\_iii/King\\_Report\\_on\\_Governance\\_fo.pdf](https://cdn.ymaaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf) (accessed on 13/07/2020)

<sup>41</sup> Ibid, Chapter 8 (Principles 8.6)

<sup>42</sup> Ibid

<sup>43</sup> Capital Markets Authority, Gazette Notice No. 1420, *The Code of Corporate Governance Practices for Issuers of Securities to the Public*, 2015, available at [https://www.cma.or.ke/index.php?option=com\\_phocadownload&view=category&id=92&Itemid=285](https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=92&Itemid=285) (accessed on 13/07/2020)

<sup>44</sup> Ibid, Chapter 4.3

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efficiently and expeditiously.<sup>45</sup> Under the Code, the Board is encouraged *to take reasonable steps towards managing disputes involving stakeholders through the use of Alternative Dispute Resolution Mechanisms* (emphasis added).<sup>46</sup> Board members are expected to *resolve issues in a fair and respectful manner which considers informal processes such as dialogue or mediation* (emphasis added).<sup>47</sup>

ADR mechanisms especially mediation are viable in managing governance disputes. The King Report in while advocating the use of mediation in managing governance conflicts notes that “mediation is often more appropriate where interests of the disputing parties *need to be addressed and where commercial relationships need to be preserved and even enhanced* (emphasis added).”<sup>48</sup> It has been noted that governance conflicts have at least three dimensions; emotional, legal and commercial.<sup>49</sup> Mediation is able to effectively manage such disputes since it considers all the three dimensions unlike litigation which only considers the legal dimension of a case. In *K.M. Patel and another v. United Assurance Company Ltd*<sup>50</sup>, mediation was successfully used in managing a governance conflict. In the case, two shareholders filed a petition against the Respondent company on allegations that their 40-percent shares in the company had been wrongfully and illegally diluted during the company’s restructuring and sale without prior notice. With the consent of both parties, the Commercial Court offered to mediate the case. In encouraging the parties to engage in the mediation process, the mediator stated that “Both parties should sit down as business partners and come to an amicable understanding because at the end of the day, you may find that no one has benefited if the company has wound up.” Consequently, the mediation was successful and led to a consent judgement in which the company bought out the two shareholders and amicably resolved the dispute.

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<sup>45</sup> Mwongozo, *The Code of Governance for State Corporations, 2015* Chapter 6, Stakeholder Relationships’

<sup>46</sup> Ibid

<sup>47</sup> Code of Conduct and Ethics for State Corporations, 5

<sup>48</sup> King Report on Governance for South Africa, Op Cit

<sup>49</sup> Runesson. E., & Guy. M., *Mediating Corporate Governance Conflicts and Disputes*, Op Cit

<sup>50</sup> Company Cause No 5 of 2005 (Commercial Court, Uganda)

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Arbitration is also a preferable mechanism of conflict management especially in conflicts between an organization and third parties. In Kenya, most organizations are using arbitration to manage conflicts with suppliers, dealers and other third parties.<sup>51</sup> Most contracts governing business engagements usually contain arbitration clauses which provide for referral of any dispute arising under the contract to arbitration.<sup>52</sup> Further, employment agreements between some corporations and senior executives call for the use of arbitration in case of any employment related dispute. Even though closely related to litigation, there are certain salient features of arbitration which make it an important and attractive alternative to litigation in managing governance disputes. In arbitration the parties have autonomy over the choice of the arbitrator, place and time of hearing, and as far as they can agree, autonomy over the arbitration process which may be varied to suit the nature and complexity of the conflict.<sup>53</sup>

Negotiation is also one of the most fundamental ADR mechanisms that can be effectively utilised in managing governance conflicts. It refers to the process where parties attempt to find mutually acceptable solutions to the issues at hand without the assistance of a third party.<sup>54</sup> Negotiation focuses on the common interests of parties over their relative power and positions.<sup>55</sup> This mechanism can be effectively applied in governance conflicts such as conflicts between board members or board members and shareholders. This is due to the underlying common interest at hand which is to promote success of the organization.<sup>56</sup> Parties will be more than willing to give up their individual positions and adopt a common position that is mutually acceptable and in the interest of the organization. Negotiation leads to mediation where parties have

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<sup>51</sup> Muigua. K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> (accessed on 21/07/2020)

<sup>52</sup> Ibid

<sup>53</sup> *Building Disputes Tribunal*, New Zealand, available at <http://www.buildingdisputestribunal.co.nz/html>, accessed on 21/07/2019

<sup>54</sup> Fischer, R. & Ury, W., *Getting to Yes: Negotiating Agreement Without Giving in*, (Penguin Books, New York, 1981), p. 4

<sup>55</sup> Ibid

<sup>56</sup> Nisanasala, MBS, *Win-Win Settlement: Applicability of Negotiation Principles for Dispute Negotiations in Construction Projects*, available at <http://dl.lib.uom.lk/handle/123/13841> (accessed on 23/07/2020)

reached a deadlock.<sup>57</sup> An organization should thus endeavour to use negotiation in managing governance conflicts before resorting to mediation or other ADR mechanisms such as arbitration where the negotiation fails.

### **5.0 Shortcomings of ADR as a Tool for Managing Governance Conflicts**

Despite their inherent advantages, ADR mechanisms face certain challenges that could potentially hinder their suitability in managing governance conflicts. One of the cardinal principles of ADR is party autonomy. However, in the case of an organization, it may not be possible to get a common position due to the different players at stake. Most organizations have formal procedures for identifying the persons who are authorized to speak for them but such procedures are imperfect and merely designed to facilitate transactions between the organization and outsiders, rather than to insure that the members of the organization in fact agree with a particular decision.<sup>58</sup> Consequently the management of a corporation may settle a suit through ADR mechanisms to prevent embarrassing disclosures about its managerial policies when such disclosures might well be in the interest of the shareholders of the organization.<sup>59</sup>

Unlike litigation, there is a lack of foundation for continuing judicial involvement in most of the ADR mechanisms such as mediation.<sup>60</sup> In litigation, judgment does not bring an end to a lawsuit and many other processes may follow. Parties may seek several remedies from the court which issued the judgment such as rectification of an order and review.<sup>61</sup> A dissatisfied party can also appeal to a higher court to challenge a lower court's decision. These remedies are not available in some of the ADR mechanisms where the principle of finality is emphasised. Where parties have recorded a consent decree as in the case of mediation, there no basis through which a party can seek to modify or vary the decree.<sup>62</sup>

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<sup>57</sup> Mwangiri, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p 115.

<sup>58</sup> Fiss. O, 'Against Settlement' *The Yale Law Journal*, Vol. 93: 1073, 1984

<sup>59</sup> *Ibid*

<sup>60</sup> *Ibid*

<sup>61</sup> Civil Procedure Rules, 2010, Orders 43 and 45, Government Printer (Nairobi)

<sup>62</sup> Fiss. O, 'Against Settlement' *The Yale Law Journal*, Op Cit

ADR Mechanisms also impede vigorous enforcement measures.<sup>63</sup> In litigation, measures such as contempt powers and execution of decrees and orders are available in enforcing decisions. However, decisions in ADR mechanisms such as negotiation and mediation are non-binding and their enforcement depends on the goodwill of the parties.<sup>64</sup> This could be problematic for an organization especially in dealing with outside parties such as debtors who may refuse to comply with negotiated or mediated agreements.<sup>65</sup> The organization may thus be forced to seek the judicial process due to its ability to guarantee enforcement of decisions.

## **6.0 Recommendations**

### **6.1 Conflict Avoidance**

The best conflict management strategy is conflict avoidance. It has been argued that in conflict management, individuals prefer avoidance to confrontation even at the risk of a financial loss, in the belief that confrontation might disrupt interpersonal harmony between the parties involved.<sup>66</sup> Organizations can endeavour towards conflict avoidance through simple techniques involving their day to day operations such as facilitating harmonious working relationships, Corporate Social Responsibility and adhering to principles of good corporate governance.

### **6.2 Adopting an Effective Conflict Management Strategy**

The aim of conflict management is to help parties possessing incompatible goals to find some solution to their conflict.<sup>67</sup> To achieve this aim, it is necessary to identify the source of the conflict, the participants and the most

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<sup>63</sup> Ibid

<sup>64</sup> Reza, S., *The Shortcomings of Family Mediation and Restorative Justice Proceedings*, 4 SOAS L.J. 73 (2017)

<sup>65</sup> Runesson, E., & Guy, M., *Mediating Corporate Governance Conflicts and Disputes*, Op Cit

<sup>66</sup> Zhang, Z & Wei, X., 'Superficial Harmony and Conflict Avoidance Resulting from Negative Anticipation in the Workplace' *Management and Organization Review* 13:4, December 2017, 795-820

<sup>67</sup> Bercovitch, J., *Conflict and Conflict Management in Organizations: A Framework for Analysis*, available at

<https://legacy.earlham.edu/~chriss/ConflictRes/pdf%20files/Conflict.Conflict%20Management%20in%20Organizations.pdf> (accessed on 16/07/2020)

appropriate conflict management mechanism for the particular situation.<sup>68</sup> It has been argued that there are three sources of organizational conflict; *structural conflict* arising out of the need to manage the inter-dependence between different organizational sub-units); *role conflict* arising from sets of prescribed behaviour and *resources conflict* stemming from interest groups competing for the resources of an organization.<sup>69</sup> Understanding the source of a conflict within an organization improves the probability of effective conflict management. An organization should thus adopt an effective conflict management strategy that is able to detect the source of the conflict and recommend a suitable mechanism in handling such conflict. In large organizations, it is possible to find a committee or group tasked with conflict management. For small organizations, it is important to ensure availability of an individual skilled in conflict management. Organizations can also facilitate conflict management training skills such as negotiation and mediation to the management and board members.

### **6.3 Incorporating the use of ADR in an Organization's Policy Framework**

The foregoing discussion has demonstrated that ADR mechanisms especially mediation and negotiation are effective in managing governance conflicts. Organizations should encourage their use by incorporating them in their policy framework. Further when entering into contracts with third parties such as creditors, clients and suppliers, it should be ensured that such contracts contain dispute resolution clauses which clearly stipulate the mechanism of conflict management. This prevents the uncertainties that might ensue in case a conflict arises and the possibility of such a conflict ending up in court due to absence of an ADR clause.

## **7.0 Conclusion**

Governance conflicts are inevitable. However, what sets a good organization apart is the ability to manage governance conflicts in an effective, efficient and expeditious manner without prejudicing its core business. ADR mechanisms especially mediation and negotiation offer a channel through which this goal

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<sup>68</sup> Ibid

<sup>69</sup> Robbins. S. P, *Managing Organizational Conflict: A Non-Traditional Approach* (Englewood Cliffs, N.J.: Prentice-Hall, 1974).

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can be attained. Managing governance conflicts through ADR is an ideal that can be achieved to promote sound corporate governance.

## **Realising Environmental, Social and Governance Tenets for Sustainable Development**

### *Abstract*

*This paper discusses the Environmental, Social and Governance (ESG) aspects of sustainable development agenda and how the same affect sustainability. The paper looks at the best practices as far as these tenets are concerned. The author argues that unless countries and stakeholders ensure that there is convergence of efforts in pursuit of environmental, social and governance aspects of sustainability, then the struggle for achievement of the 2030 Agenda for Sustainable Development will remain a mirage.*

### **1.0 Introduction**

The Sustainable Development Goals (SDGs) adopted by the United Nations (UN) in 2015 are widely hailed as a huge success: they represent a global agreement on a comprehensive strategy to address the social and environmental issues that are affecting people all over the world.<sup>1</sup> Instead of relying on nature for survival, as we have done for ages, sustainable development offers a framework for people to coexist with and thrive in harmony with the natural world.<sup>2</sup>

The main principles of sustainable development agenda as captured in the 2030 *Agenda for Sustainable Development*<sup>3</sup> include the economic, social and environmental sustainability. These are encapsulated in the 17 Sustainable Development Goals and 169 targets, which are meant to lay out a plan of action for people, planet, and prosperity that will strengthen universal peace in larger freedom. They also identify eradicating poverty in all of its manifestations, including extreme poverty, as the greatest global challenge and a crucial

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<sup>1</sup> Higgs, Kerryn. "How sustainable are the SDGs?" (2020): 109-130, 109 <<https://anzsee.org.au/wpcontent/uploads/2020/07/EEsolutionsFutureRoyalDraftJuly2ndFINALEbook.pdf#page=109>> accessed 13 July 2022.

<sup>2</sup> Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 531.

<sup>3</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.



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prerequisite for sustainable development.<sup>4</sup> The Sustainable Development Goals (SDGs) also envisage a world in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.<sup>5</sup> The term "governance" is used to describe "steering" in this context, which includes both processes and institutions and involves an element of authority. Process relates to how decisions are made on priorities, how conflicts are addressed and maybe handled, and how coordination of people's actions with regard to resource usage is made easier. On the other hand, the structural aspect relates to how these procedures are set up and 'managed'.<sup>6</sup>

It has been observed that COVID-19 has tremendously disrupted the world's economy where the pandemic left the world's informal employees, especially young workers and women, on their own with no support or protection against financial and health issues. This was as a result of massive job losses, enlarged market gender gap, informal workers' lack of social safety, and decreased work and education opportunities for youth.<sup>7</sup>

Despite having adopted the SDGs into its domestic laws and planning, Kenya still faces the risk of widespread poverty, natural resources and biodiversity degradation, lack of access to safe water for all, escalating climate change, desertification, land degradation, soil erosion, flooding and drought; and increased natural disaster risks.<sup>8</sup> This paper argues that these challenges

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<sup>4</sup> 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

<sup>5</sup> Ibid.

<sup>6</sup> Vatn, Arild, *Environmental governance: institutions, policies and actions*, Edward Elgar Publishing, 2015, p. 133.

<sup>7</sup> Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 8 <<https://www.mdpi.com/2071-1050/14/3/1222>> accessed 13 July 2022.

<sup>8</sup> National Environment Management Authority, *Kenya State of Environment Report 2019-2021* <[https://www.nema.go.ke/images/Docs/EIA\\_1840-](https://www.nema.go.ke/images/Docs/EIA_1840-)

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cannot and should not be addressed in a disjointed manner, if any real progress is to be made.

This paper seeks to analyze the aspects of governance as well as how they interact with the environmental and social tenets of sustainable development with the aim of ensuring that the SDGs are achieved, especially post the COVID-19 pandemic. Arguably, sustainable development as a process of transformation of the economy must, in consequence, also result in a transformation of society and its governance structures for a sustainable future.<sup>9</sup> All this must also be accomplished in a way that takes into account environmental sustainability.

The paper discusses the Environmental, Social, and Governance (ESG) approach to sustainability and how different players, including governments, communities and businesses can participate in promoting and achieving sustainability through ESG approach.

### **2.0 Environmental Aspect of Sustainable Development Agenda**

The world leaders who signed the 2030 Agenda stated in the preamble that they are "Determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources, and taking urgent action on climate change, so that it can support the needs of the present and future generations."<sup>10</sup> A number of SDGs are dependent on the health of the environment for their realisation. These include but are noted limited to: Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 6 seeks to ensure availability and sustainable management of water and

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1849/Kenya%20State%20of%20Environment%20Report%202019-2021%20final-min.pdf accessed 17 July 2022.

<sup>9</sup> Ketschau, T.J., "Social sustainable development or sustainable social development- two sides of the same coin? the structure of social justice as a normative basis for the social dimension of sustainability." *International Journal of Design & Nature and Ecodynamics* 12, no. 3 (2017): 338-347, 338.

<sup>10</sup> Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

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sanitation for all; Goal 12 seeks to ensure sustainable consumption and production patterns; Goal 13 urges State parties to take urgent action to combat climate change and its impacts; Goal 14 calls for conservation and sustainable use of the oceans, seas and marine resources for sustainable development; and Goal 15 urges State parties to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.<sup>11</sup>

In order to achieve environmental sustainability, natural resources management and disaster risk management, there is also a need for improved management of natural resources and biodiversity; access to safe water for all; climate change; desertification, land degradation, soil erosion, flooding and drought; and natural disaster risk reduction and management.<sup>12</sup> It is thus arguable that unless the environmental problems facing the planet are addressed, the other SDGs will remain a mirage.

### **3.0 Economic Aspect of Sustainable Development Agenda**

The SDGs envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.<sup>13</sup> The economic aspect is to be achieved through ensuring that every State has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity.<sup>14</sup>

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<sup>11</sup> 'List of the 17 Sustainable Development Goals | Agora' <<https://agora-parl.org/resources/aoe/list-17-sustainable-development-goals>> accessed 17 July 2022.

<sup>12</sup> Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3-5, 2014*, 3.

<sup>13</sup> 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

<sup>14</sup> *Ibid.*

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SDG 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.<sup>15</sup> Some of the related relevant targets include: Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries;<sup>16</sup> achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors;<sup>17</sup> promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro, small- and medium-sized enterprises, including through access to financial services;<sup>18</sup> improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead;<sup>19</sup> by 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value;<sup>20</sup> by 2020, substantially reduce the proportion of youth not in employment, education or training;<sup>21</sup> take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms;<sup>22</sup> protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment;<sup>23</sup> by 2030,

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<sup>15</sup> SDG 8, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

<sup>16</sup> Target 8.1.

<sup>17</sup> Target 8.2.

<sup>18</sup> Target 8.3.

<sup>19</sup> Target 8.4.

<sup>20</sup> Target 8.5.

<sup>21</sup> Target 8.6.

<sup>22</sup> Target 8.7.

<sup>23</sup> Target 8.8.

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devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products;<sup>24</sup> strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all;<sup>25</sup> increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries;<sup>26</sup> and by 2020, develop and operationalize a global strategy for youth employment and implement the Global Jobs Pact of the International Labour Organization.<sup>27</sup>

The underlying affirmation of these targets are that “economic, social, and technological progress” must occur “in harmony with nature,” envisaging “a world in which ... consumption and production patterns and use of all natural resources – from air to land, from rivers, lakes and aquifers to oceans and seas – are sustainable ... One in which humanity lives in harmony with nature and in which wildlife and other living species are protected,” but the SDGs fail to offer any quantified target for resource efficiency, and do not specify what a sustainable level of material footprint might be.<sup>28</sup>

It has been noted that in the economic debate, sustainable development is most frequently defined as the requirement to maintain a continuous flow of income for humanity, produced from non-declining capital stocks. In this perception, at least, steady stocks of human, man-made, natural, and social capital are seen as necessary and frequently sufficient criteria for sustainable development.<sup>29</sup> Economic sustainability has been defined as the meeting the economic needs

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<sup>24</sup> Target 8.9.

<sup>25</sup> Target 8.10.

<sup>26</sup> Target 8.A.

<sup>27</sup> Target 8.B.

<sup>28</sup> Hickel, J., "The contradiction of the sustainable development goals: Growth versus ecology on a finite planet." *Sustainable Development* 27, no. 5 (2019): 873-884, at 874 & 875.

<sup>29</sup> Joachim H Spangenberg, 'Economic Sustainability of the Economy: Concepts and Indicators' (2005) 8 *International Journal of Sustainable Development* 47, 48 <<http://www.inderscience.com/link.php?id=7374>> accessed 14 July 2022.

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of the present without diminishing the economic needs of the future.<sup>30</sup> Although intergenerational equity is frequently viewed as a factor in economic sustainability, it is not always clear what exactly needs to be perpetuated.<sup>31</sup> The question that has, therefore, been frequently asked is whether the world be able to sustain economic growth indefinitely without running into resource constraints or despoiling the environment beyond repair.<sup>32</sup> Thus, the relationship between economic growth and the environment is, and always remains, controversial.<sup>33</sup>

However, what may be universally accepted is that increased private earnings are only one aspect of economic growth; it may also make a substantial contribution to the production of resources that can be mobilised to enhance social services (such as public healthcare, epidemiological protection, basic education, safe drinking water, among others).<sup>34</sup> These are ultimately important in realisation of SDGs. Economic empowerment of individuals as well as investing in social services that will benefit the current wider citizenry as well as future generations is thus an important step towards achieving sustainability.

### **4.0 Social Aspect of Sustainable Development Agenda**

Social sustainability entails robust, inclusive communities where people may voice their opinions and governments act on them. In order to achieve social

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<sup>30</sup> Solin, J., "Principles for Economic Sustainability: Summary," (*a summary of John Ikerd's Principles of Economic Sustainability. It was developed based on attendance a 5-day workshop taught by John and John's Essentials of Economic Sustainability book*) <<https://www3.uwsp.edu/cnr-ap/wcee/Documents/Principles%20for%20Economic%20Sustainability%205%20page%20summary.pdf>> accessed 14 July 2022.

<sup>31</sup> Sudhir Anand and Amartya Sen, 'Human Development and Economic Sustainability' (2000) 28 *World Development* 2029, 2029 <<https://linkinghub.elsevier.com/retrieve/pii/S0305750X00000711>> accessed 14 July 2022.

<sup>32</sup> Panayotou, T., "Economic Growth and the Environment." *CID Working Paper Series* (2000), 1.

<sup>33</sup> Brock, W.A. and Taylor, M.S., "Economic growth and the environment: a review of theory and empirics." *Handbook of economic growth* 1 (2005): 1749-1821.

<sup>34</sup> *Ibid*, 2032.

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sustainability, opportunities must be increased for everyone, both now and in the future. It is essential for eradicating poverty and promoting shared wealth, together with economic and environmental sustainability.<sup>35</sup>

Social problems, in particular, prohibit individuals from living healthy lifestyles, disturb communities, and interfere with businesses. While most of these problems are universal, some are particular to particular regions or populations. These problems may include, but are not limited to, discrimination (based on race, colour, and gender), poverty, homelessness, hunger, malnutrition, and obesity, a lack of basic freedoms, the unemployment crisis, pandemics and epidemics, disabilities and chronic diseases, violence, crime, and insecurity as well as wars and political conflicts, gender inequality, and a lack of education and opportunities.<sup>36</sup>

The distribution of economic opportunities and social services while resolving power disparities constitutes the process of social development, which involves institutions at all levels, from national governments to various civil society groups.<sup>37</sup> Social development has also been defined as "a process of planned social change designed to promote people's welfare within the context of a comprehensive process of economic development".<sup>38</sup> The emphasis of social sustainability and inclusion is on the requirement to "put people first" throughout the development process. By empowering individuals, creating cohesive and resilient societies, and making institutions

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<sup>35</sup>'Overview' (World Bank)

<https://www.worldbank.org/en/topic/socialsustainability/overview> accessed 14 July 2022.

<sup>36</sup> Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 14 <https://www.mdpi.com/2071-1050/14/3/1222> accessed 13 July 2022.

<sup>37</sup> Julie L Drolet, 'Chapter 14 - Societal Adaptation to Climate Change' in Trevor M Letcher (ed), *The Impacts of Climate Change* (Elsevier 2021) <https://www.sciencedirect.com/science/article/pii/B9780128223734000112> accessed 14 July 2022.

<sup>38</sup> Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

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accessible and answerable to citizens, it fosters social inclusion of the underprivileged and vulnerable.<sup>39</sup>

Efforts towards sustainability must thus take note of these aspects of social sustainability for creation of an inclusive society.

### **5.0 Role of Law in Promoting Environmental, Social, and Governance (ESG) Approach: Governance Aspect of Sustainable Development Agenda**

The environmental rule of law is crucial to sustainable development because it combines environmental requirements with the fundamental components of the legal system and lays the groundwork for better environmental governance.<sup>40</sup> In addition, by linking environmental sustainability to fundamental rights and responsibilities, it draws attention to environmental sustainability, reflects universal moral principles and ethical standards of conduct, and establishes a basis for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and responsibilities, it is possible to argue that environmental governance will be arbitrary, that is, discretionary, subjective, and unpredictable.<sup>41</sup>

The rule of law fosters equality of treatment, increases personal and property security, and offers a fair and amicable means of resolving conflicts.<sup>42</sup> The rule of law was defined by United Nations Secretary-General Kofi Anan in 2004 as follows:

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<sup>39</sup> 'Social Sustainability and Inclusion' (World Bank)

<<https://www.worldbank.org/en/topic/socialsustainability>> accessed 14 July 2022.

<sup>40</sup> Environment UN, 'Promoting Environmental Rule of Law' (UNEP - UN Environment Programme, 5 October 2017) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law>> accessed 17 July 2022.

<sup>41</sup> Ibid.

<sup>42</sup> Michel J, *The Rule of Law and Sustainable Development*. Center for Strategic & International Studies, 2020, 5 <[https://www.researchgate.net/profile/James-Michel-3/publication/342881527\\_The\\_Rule\\_of\\_Law\\_and\\_Sustainable\\_Development/links/5f0b3464a6fdcc4ca46389c5/The-Rule-of-Law-and-Sustainable-Development.pdf](https://www.researchgate.net/profile/James-Michel-3/publication/342881527_The_Rule_of_Law_and_Sustainable_Development/links/5f0b3464a6fdcc4ca46389c5/The-Rule-of-Law-and-Sustainable-Development.pdf)> accessed 17 July 2022.



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The rule of law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>43</sup>

The place of rule of law in promoting sustainability is well captured under SDG 16 which seeks to promote just, peaceful and inclusive societies.<sup>44</sup> The law is important as it provides essential tools and institutions for governing resources sustainably.<sup>45</sup> In addition to being critical (and frequently last) stages in itself for effectively adopting sustainability solutions, laws and governance are also vital elements to assist technological and economic progress.<sup>46</sup>

It has been emphasised that the presence of robust, well-resourced public institutions at the national and international levels is essential for the execution of the 2030 Agenda's necessary policy reforms.<sup>47</sup>

It has been observed that the SDGs have thus far mostly been implemented through a top-down, government-led strategy, with goals and initiatives

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<sup>43</sup> Ibid, 8.

<sup>44</sup> Martin, 'Peace, Justice and Strong Institutions' (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 17 July 2022.

<sup>45</sup> Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 532.

<sup>46</sup> Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 *Journal of Environmental Protection* 211.

<sup>47</sup> Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20

<[https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight\\_Innenteil\\_2018\\_redefining\\_policies\\_martens.pdf](https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf)> accessed 13 July 2022.

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determined at the global (and increasingly, national) level.<sup>48</sup> To achieve the SDGs, grassroots action for sustainable development, also known as "solutions that react to the local context and the interests of the communities concerned," is necessary.<sup>49</sup> The SDGs' localization is based on Local Agenda 21, a bottom-up, participatory initiative allowing local governments to interact with their citizens on sustainable development.<sup>50</sup>

To co-create locally relevant sustainability routes, communities, stakeholders, and academics must collaborate, and participatory approaches are crucial for fostering this cooperation in governance issues.<sup>51</sup> Notably, the 2010 Constitution of Kenya provides that 'all State organs, State officials, public offices, and all individuals are bound by the national values and principles of governance whenever any of them: apply or interpret this Constitution; enact, apply, or interpret any legislation; or make or implement public policy choices'.<sup>52</sup> Good governance, integrity, transparency, accountability, sharing and devolution of power, the rule of law, democracy, and public participation are among the national values and guiding principles of governance. Other national values and guiding principles include good governance, integrity, transparency, and accountability, patriotism, national unity, as well as sustainable development.<sup>53</sup> "Social Development is based on positive, humane, people oriented development in society....The basic principles... are human dignity, equality, social justice, and equitable distribution of resources.... People's participation and empowerment are necessary conditions...."<sup>54</sup>

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<sup>48</sup> Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> See Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

<sup>52</sup> Article 10 (1), Constitution of Kenya 2010.

<sup>53</sup> Ibid, Article 10 (2).

<sup>54</sup> Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

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These principles are especially relevant in light of the spirit of devolution, where the Constitution states that ‘the objects of the devolution of government are, among other things – to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance their involvement in the exercise of State authority and in making decisions that affect them; to acknowledge the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities’.<sup>55</sup>

There is a need for efforts geared towards achievement of the principle of sustainable development to be molded around the foregoing national values and principles of governance to ensure that there is an inclusive approach to governance matters in the country, for the benefit of all.

### **6.0 Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward**

Integrated decision-making, or the process of incorporating environmental, social, and economic goals and factors into choices, is the key action principle of sustainable development.<sup>56</sup> It has rightly been pointed out that despite the fact that all countries, regardless of their economic, social, or environmental contexts, can benefit from the Sustainable Development Goals (SDGs) framework, norms, and principles, translating global objectives into specific national contexts is difficult because of varying starting points, capacities, and priorities, among other factors.<sup>57</sup> Global goals will be transformed into targets and indicators that take into account the specific national settings of each country in order to be relevant to all nations (and to foster national ownership).

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<sup>55</sup> Article 174, Constitution of Kenya 2010.

<sup>56</sup> Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. *Sustainability*, 3 (3), 531-540." (2011), 532.

<sup>57</sup> Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3–5, 2014*, 2

< [https://www.iisd.org/system/files/publications/sdplannet\\_africa.pdf](https://www.iisd.org/system/files/publications/sdplannet_africa.pdf) > Accessed on 25 June 2022.

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Keeping broad global aims and very different national settings coherent will be a problem.<sup>58</sup>

Economic, social and governance aspects of sustainable development must take into account the environmental aspect of sustainable development. This is because environmental protection is essential to promoting sustainable economic growth because the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon sequestration, water purification, managing flood risks, and nutrient cycling. Directly, the natural environment provides resources and raw materials such as water, timber, and minerals that are required as inputs for the production of goods and services.<sup>59</sup>

In the institutional arrangements of governments and parliaments, scholars have argued that it is crucial to reflect the encompassing nature of the 2030 Agenda and the SDGs. If competent national equivalents do not reflect and "own" the new, more cogent global government, the effort will be in vain.<sup>60</sup> To make the UN system "fit for purpose" on a global scale, it is necessary to reform already-existing institutions and establish new bodies in regions where there are governance gaps. This can only be done by making a commitment to address the unequal distribution of resources as well as access to participation and decision-making.<sup>61</sup> This is especially important considering that the SDG index, which displays each country's compliance with the SDGs and breaks down each score by SDG, reflects the fact that governments have varying degrees of commitment to the SDGs.<sup>62</sup>

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<sup>58</sup> Ibid, 2.

<sup>59</sup> UN Environment, 'GOAL 8: Decent Work and Economic Growth' (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-8>> accessed 13 July 2022.

<sup>60</sup> Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 <[https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight\\_Innenteil\\_2018\\_redefining\\_policies\\_martens.pdf](https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf)> accessed 13 July 2022.

<sup>61</sup> Ibid.

<sup>62</sup> Del-Aguila-Arcetales, S., Alvarez-Risco, A., Jaramillo-Arévalo, M., De-la-Cruz-Diaz, M. and Anderson-Seminario, M.D.L.M., 'Influence of Social, Environmental and

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The 2030 Agenda presents a challenge to UN Environment to create and improve integrated approaches to sustainable development, methods that will show how enhancing environmental health would have positive social and economic effects. UN Environment's initiatives support the environmental component of sustainable development and promote socio-economic development by aiming to lower environmental hazards and boost society's and the environment's overall resilience.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> Local communities need to concentrate on a locally relevant subset of goals and comprehend potential future pathways for key drivers which influence local sustainability because the Sustainable Development Goals (SDGs) recognise the importance of action across all scales to achieve a sustainable future.<sup>66</sup> There is need for continuous creation of public awareness, civic education and creating avenues for public participation among the communities because to guide long-term local planning and decision-making to achieve the SDGs, local communities also

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Economic Sustainable Development Goals (SDGs) over Continuation of Entrepreneurship and Competitiveness' (2022) 8 *Journal of Open Innovation: Technology, Market, and Complexity* 73, 1 <<https://www.mdpi.com/2199-8531/8/2/73>> accessed 13 July 2022.

<sup>63</sup> Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

<sup>64</sup> 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>.

<sup>65</sup> Ibid.

<sup>66</sup> Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 *Sustainability Science* 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

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need to understand the range of potential future pathways for their region and how they align with local sustainability objectives.<sup>67</sup>

It has rightly been pointed out that 'since the world's poor understand scarcity and live "closer to nature," they have a better understanding of the finite nature of natural resources than the world's powerful and affluent elite, and they have a much greater immediate and vested interest in promoting change in the way that the world does business. As a result, they have a better understanding of the need to focus social development strategies on empowering the poor. They must thus be given the authority and influence to actively shape economic policy rather than just responding to circumstances outside their control'.<sup>68</sup>

This calls for adoption of participatory and inclusive governance approaches that give all members of society and/or their representatives to air their views and actively participate in governance matters, in a meaningful way that impacts their lives positively. It has also been pointed out that while environmental law is essential to attaining sustainability, we also need to acknowledge that there is a need for a wide range of other pertinent laws, such as those governing land use and property, taxes, our governmental system, and other issues.<sup>69</sup> This is important in ensuring that sustainability is achieved in environmental, economic, social and governance aspects of development.

Corporations, through following ESG frameworks or guidelines, such as the *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, 2021*, can also play a huge role in promoting sustainability within the localities that they operate in and the country at large. ESG Reporting should be encouraged and used as a tool of promoting sustainability within the companies, communities and country. Under this, organisations make it part of their operational procedures to report publicly on their economic, environmental, and/or social

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<sup>67</sup> Ibid, 1251.

<sup>68</sup> Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 84.

<sup>69</sup> Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction," *Sustainability* 3, no. 3 (2011): 531-540, 532.

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impacts, and hence its contributions – positive or negative – towards the goal of sustainable development.<sup>70</sup> As the business community seeks to invest in various sectors, there is a need for them to take into account ESG requirements under SDGs. The law (government) and other policy makers should work towards supporting businesses in their efforts to transition to more sustainable business models, through using various legal, policy and other effective incentives. The law should move towards ensuring that non-financial reporting on ESG becomes the standard mode of operation for ease of enforcing such principles as “the polluter pays principle”, among others. This is especially important as it has been pointed out that ‘previous literature, which attempted to investigate the link between sustainability and investment performance, found that a critical barrier to ESG integration is that investors lack reliable and non-manipulated information’, at least in other jurisdictions, practices which may also take place in Kenya.<sup>71</sup> 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.<sup>72</sup>

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).<sup>73</sup>

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<sup>70</sup> Nairobi Securities Exchange ESG – Disclosures Guidance Manual, November 2021 <<https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf>> accessed 17 July 2022.

<sup>71</sup> Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., ‘Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences’ (2020).

<sup>72</sup> 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](https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2020_eb61fd29-en)> accessed 17 July 2022.

<sup>73</sup> Clune WH and Zehnder AJB, ‘The Three Pillars of Sustainability Framework: Approaches for Laws and Governance’ (2018) 9 *Journal of Environmental Protection* 211.

## **7.0 Conclusion**

According to stakeholders, the primary pillars of economic transformation and inclusive growth are: inclusive growth that reduces inequality; sustainable agriculture, food self-sufficiency and nutrition; diversification, industrialization and value addition; developing the service sector; and infrastructure development.<sup>74</sup> These focus on the economic growth as well as social aspects of development. The main goal of Social Sustainability and Inclusion's work is to support people in overcoming barriers that prevent them from fully participating in society, regardless of their gender, race, religion, ethnicity, age, sexual orientation, or disability, by collaborating with governments, communities, civil society, the private sector, and other stakeholders to create more inclusive societies, empower citizens, and foster more sustainable communities.<sup>75</sup>

It has rightly been pointed out that 'every objective and target in the SDG framework is implied to depend on and impact one another, although the precise nature of these connections is yet unknown at this time. Due to the goals' and targets' integrated structure, advancements made toward one objective or another are connected to other goals and targets via causal chains and feedback loops. For these reasons, an integrated and systems-based approach to the SDGs is required to guarantee that these feedbacks are understood and handled. Countries will be better positioned to realise the transformational potential of the 2030 Agenda if mutually reinforcing activities are implemented and target trade-offs are minimised'.<sup>76</sup> As already pointed out, achieving sustainable development agenda requires an integrated approach that looks at the economic welfare of the people and the nation at

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<sup>74</sup> Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3–5, 2014*, 3  
<[https://www.iisd.org/system/files/publications/sdplannet\\_africa.pdf](https://www.iisd.org/system/files/publications/sdplannet_africa.pdf)> Accessed on 25 June 2022.

<sup>75</sup> 'Social Sustainability and Inclusion: Overview' (World Bank)  
<<https://www.worldbank.org/en/topic/socialsustainability/overview>> accessed 14 July 2022.

<sup>76</sup> Cameron, A., Metternicht, G. and Wiedmann, T., "Initial progress in implementing the Sustainable Development Goals (SDGs): a review of evidence from countries." *Sustainability Science* 13, no. 5 (2018): 1453-1467, 1453.



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large, while adopting a socially inclusive approach in all governance matters. Economically and socially empowered people are more likely to participate in governance matters objectively, without being distracted by poverty and other social ills, in order to also on the intergenerational aspect of sustainable development agenda for the sake of future generations. Thus, it is necessary at the local level, to support the economic and social self-determination of oppressed individuals and groups by enlisting the help of community leaders and the general public in creating locally tailored institutional responses to issues (such as fostering environmentally friendly industries as a means of combating unemployment) and encouraging communication between local interest groups regarding issues of sustainable development, and at the national level, for the government to offer all necessary support in promoting sustainability.<sup>77</sup> 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.<sup>78</sup>

What can be deduced from the foregoing discussion is that it is not enough to achieve sustainable development, as conceptualized by the ruling class and those in positions of decision-making; communities must actively be involved in decision-making to come up with strategies and approaches that take into account the unique economic, social and governance needs of particular group or class of people. The fundamental principles and values have already been captured under Article 10 of the 2010 Constitution of Kenya and if fully adopted and implemented within the development agenda, they can go a long way in ensuring that Kenya achieves satisfactory results as far as implementation and localization of the 2030 Agenda for Sustainable Development, and the SDGs are concerned. This is the only way that sustainability can be truly achieved and appreciated by all the people affected, while leaving a positive mark on their lives and the country in general.

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<sup>77</sup> Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 85.

<sup>78</sup> *Ibid*, 89.

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Development*

Realising Environmental, Social and Governance (ESG) tenets of Sustainable Development is an imperative whose time is ripe.

## **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.*

### **1.0 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.

### **2.0 Environmental Governance: Meaning and Scope**

Environmental governance comprises the rules, practices, policies and institutions that shape how humans interact with the environment.<sup>1</sup> Environmental governance has also been defined as the set of regulatory

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<sup>1</sup> 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](https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y) [Accessed on 26/5/2019].

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processes, mechanisms and organizations through which political actors influence environmental actions and outcomes.<sup>2</sup>

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.<sup>3</sup>

One scholar has convincingly suggested that environmental governance is best understood as the establishment, reaffirmation or change of institutions to resolve conflicts over environmental resources.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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;

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

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

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

<sup>5</sup> *Ibid.*, p.94.

<sup>6</sup> *Ibid.*, p.94.

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*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.<sup>7</sup>

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.<sup>8</sup>

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

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<sup>7</sup> 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].

<sup>8</sup> 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](https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y) [Accessed on 26/5/2019].

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.<sup>9</sup> 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.

### **3.0 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:<sup>10</sup> *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

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<sup>9</sup> 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.

<sup>10</sup> 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](http://www.politicalsettlements.org/wp-content/uploads/2017/09/2015_BP_4_Bell_Governance-and-Law.pdf) [Accessed on 26/5/2019].

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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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> Article 10 of the 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.<sup>14</sup> 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.<sup>15</sup>

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

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<sup>11</sup> Bell, C., "Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions," *op cit*.

<sup>12</sup> Constitution of Kenya 2010, Art. 10(1).

<sup>13</sup> Constitution of Kenya 2010, Article 4(2).

<sup>14</sup> Constitution of Kenya 2010, Art. 10(2).

<sup>15</sup> Constitution of Kenya 2010, Art. 10(1).

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.<sup>16</sup> 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.

#### **4.0 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 resources<sup>17</sup>, 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<sup>18</sup> and the genetic resources of the communities;

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<sup>16</sup> Constitution of Kenya 2010, Art. 2(4).

<sup>17</sup> 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).

<sup>18</sup> 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



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encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity<sup>19</sup>; 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.<sup>20</sup>

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.<sup>21</sup>

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<sup>22</sup>, stated that in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the

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Convention provides for national reporting of efforts to implement the provisions of the Convention).

<sup>19</sup> 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.

<sup>20</sup> Constitution of Kenya, Art. 69(1).

<sup>21</sup> *Ibid.*, Art. 69(2).

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

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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.<sup>23</sup>

While this paper is not intended to downplay the place of command-and-control approach to environmental governance in some cases, this approach has a tendency to focus more on achieving conservation goals and tackling environmental degradation challenges at the expense of also seeking to ensure that these resources help in achieving social justice for the Kenyan people as far as the use environmental resources is concerned.

The public participation, consultations and institutional accountability requirements as provided for under different laws are at times treated as a formality. Social justice goals seem to be relegated to a secondary place.

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

This section seeks to re-evaluate the effectiveness of the enforcement power of the state as against solutions or approaches based on voluntary cooperation within the environmental governance framework in Kenya. Some scholars have observed that institutions resolve environmental conflicts by striking a particular balance between conflicting interests by either establishing, reaffirming or redefining entitlements in environmental resources.<sup>24</sup> 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,

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

<sup>24</sup> Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *op cit.*, at p.95.

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public participation, gender equity, access to information and conflicts management, amongst others.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

The Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR<sup>28</sup>, 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.<sup>29</sup> 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.<sup>30</sup> In addition, citizens serving as an added resource for environmental policy need a system of incentives and an infrastructure of

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<sup>25</sup> See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi - 2016.

<sup>26</sup> Ibid.

<sup>27</sup> 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>

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

<sup>29</sup> Ibid, para. 22.

<sup>30</sup> 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.

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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.<sup>31</sup>

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.

### **5.0 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.<sup>32</sup> 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

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<sup>31</sup> Jänicke, M., & Jörgens, H., "New approaches to environmental governance," *op cit.*, at p.192.

<sup>32</sup> 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].

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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.<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup>

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<sup>33</sup>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].

<sup>34</sup> Ibid.

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

<sup>36</sup> Ibid., p. 97.

<sup>37</sup> United Nations, "Environmental Rule of Law", op. cit.

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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.<sup>38</sup> 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.<sup>39</sup> 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)

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<sup>38</sup> 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.

<sup>39</sup> Constitution of Kenya 2010, Art. 10(2).

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Act, 1999<sup>40</sup> EMCA<sup>41</sup> include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.

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

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<sup>40</sup> No. 8 of 1999, Laws of Kenya.

<sup>41</sup> EMCA, S. 3(5).

## **6.0 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.



## **Fostering Climate Justice for Sustainable Development**

### **Abstract**

*The paper explores the concept of Climate Justice. It highlights and discusses some of the justice concerns arising from the effects of climate change. The paper further examines global, regional and national efforts towards fostering Climate Justice. It also considers the challenges affecting the attainment of Climate Justice and proposes measures towards fostering Climate Justice for Sustainable Development.*

### **1.0 Introduction**

Climate change is the defining global development challenge of our time, with significant implications for the achievement of the 2030 Agenda for Sustainable Development<sup>1</sup>. Climate change has been defined as 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<sup>2</sup>. The consequences of climate change such as intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world<sup>3</sup>. Climate change can affect human health, food security, housing, safety and work<sup>4</sup>. Further, conditions like sea-level rise and saltwater intrusion have advanced to the point where whole communities have had to relocate, and protracted droughts are putting people at risk of famine<sup>5</sup>. It is expected that the number of climate change

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<sup>1</sup> International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Available at <https://www.idlo.int/publications/climate-justice-rule-law-approach-transformative-climate-action> (Accessed on 29/07/2023)

<sup>2</sup> United Nations Framework Convention on Climate Change (United Nations, 1992), Article 1 (2), Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 28/07/2023)

<sup>3</sup> United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 28/07/2023)

<sup>4</sup> Ibid

<sup>5</sup> European Commission., 'Consequences of Climate Change.' Available at [https://climate.ec.europa.eu/climate-change/consequences-climate-change\\_en](https://climate.ec.europa.eu/climate-change/consequences-climate-change_en) (Accessed on 28/07/2023)

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refugees across the globe will continue to rise due to the effects of climate change<sup>6</sup>.

Climate change impacts the attainment of the Sustainable Development agenda<sup>7</sup>. It affects the availability of basic necessities like freshwater, food, and energy, while efforts to redress climate change, both through adaptation and mitigation similarly inform and shape the global development agenda<sup>8</sup>. It has also been observed that climate change results in food insecurity, water scarcity, depletion of natural resources, displacement of people, health hazards, social inequity and unemployment thus hindering the attainment of Sustainable Development<sup>9</sup>.

The global threat of climate change has led to concerted efforts through various legal instruments geared towards mitigating and adapting to its effects. *The United Nations Framework Convention on Climate Change* (UNFCCC) is geared towards combating climate change by achieving stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system<sup>10</sup>. The *Paris Agreement* is aimed at strengthening the global response to the threat of climate change towards Sustainable Development<sup>11</sup>. It seeks to achieve this goal through measures such as holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change and increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions

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<sup>6</sup> Ibid

<sup>7</sup> International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit

<sup>8</sup> United Nations Sustainable Development Goals., 'Climate Change.' Available at <https://sustainabledevelopment.un.org/topics/climatechange> (Accessed on 28/07/2023)

<sup>9</sup> Muigua.K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

<sup>10</sup> United Nations Framework Convention on Climate Change., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 28/07/2023)

<sup>11</sup> United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at [https://unfccc.int/sites/default/files/resource/parisagreement\\_publication.pdf](https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf) (Accessed on 28/07/2023)

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development, in a manner that does not threaten food production<sup>12</sup>. Further, the *United Nations 2030 Agenda for Sustainable Development*<sup>13</sup> urges the global community to take urgent action to combat climate change and its impacts through measures such as strengthening the resilience and adaptive capacity to climate-related hazards and natural disasters in all countries; integrating climate change measures into national policies, strategies and planning; and improving education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning<sup>14</sup>. In Kenya, the *Climate Change Act*<sup>15</sup> is an Act of Parliament that provides a regulatory framework for enhanced response to climate change and sets out mechanisms and measures to enhance climate change resilience and low carbon climate development for the Sustainable Development of Kenya<sup>16</sup>.

However, despite these global and national efforts to respond to the threat of climate change, the effects of climate change continue to persist resulting in justice concerns<sup>17</sup>. It has been observed that some people and communities are more vulnerable to climate impacts, such as people living in small island nations and developing countries<sup>18</sup>. Further, the communities that have contributed the least to climate change are the ones that are the most affected by its impacts<sup>19</sup>. The concept of Climate Justice has thus emerged to deal with the justice concerns brought about by climate change. Climate Justice seeks to address the causes and impacts of climate change in a manner that recognizes

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<sup>12</sup> Ibid

<sup>13</sup> 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 28/07/2023)

<sup>14</sup> Ibid, Sustainable Development goal 13

<sup>15</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya

<sup>16</sup> Ibid

<sup>17</sup> International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit

<sup>18</sup> United Nations., 'What is Climate Change?' Op Cit

<sup>19</sup>Sultana. F., 'Critical Climate Justice' Available at <https://www.farhanasultana.com/wpcontent/uploads/Sultana-Critical-climate-justice.pdf> (Accessed on 28/07/2023)

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and fosters the rights and concerns of vulnerable people, communities and countries<sup>20</sup>.

The paper explores the concept of Climate Justice. It highlights and discusses some of the justice concerns arising from the effects of climate change. The paper further examines global, regional and national efforts towards fostering Climate Justice. It also considers the challenges affecting the attainment of Climate Justice and proposes measures towards fostering Climate Justice for Sustainable Development.

### **2.0 Defining Climate Justice**

It has been pointed out that climate change has had uneven and unequal burdens across the globe with nations and communities that contribute the least to climate change suffering the most from its consequences<sup>21</sup>. Recently, Pakistan which contributes less than 1 % of global greenhouse gases which lead to climate change suffered extreme flooding which resulted in the deaths of over 1,700 people, destroyed around 2 million homes, and swept away almost half the country's cropland<sup>22</sup>. There is a general consensus in the scientific community that the flooding was made worse by climate change since global warming makes air and sea temperatures rise resulting in more evaporation taking place thus increasing the intensity of rainfall<sup>23</sup>. The melting of glaciers in the country's northern region, again due to the increase in global temperatures, compounded the problem by releasing even more water and debris into the floods<sup>24</sup>. Further, it has been observed that the Horn of Africa, a region with very little contribution to the climate change problem, is facing a severe drought following the worst performing rains in 73 years and five

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<sup>20</sup> Schlosberg, D & Collins, L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' WIREs Clim Change 2014

<sup>21</sup> Sultana, F., 'Critical Climate Justice' Op Cit

<sup>22</sup> Giles, M., 'The Principles of Climate Justice at CoP27.' Available at <https://earth.org/principles-of-climatejustice/#:~:text=That%20response%20should%20be%20based,the%20consequences%20of%20climate%20change>. (Accessed on 28/07/2023)

<sup>23</sup> Ibid

<sup>24</sup> Ibid

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successive failed rainy seasons<sup>25</sup>. Further, it has been pointed out that the frequency and severity of the drought is likely to increase affecting more than 36 million people due to food insecurity, with women and girls disproportionately affected by the direct and indirect impacts of the drought<sup>26</sup>. Further, small island nations in the Caribbean and Pacific islands such as Vanuatu and the Solomon Islands have suffered from severe impacts of climate change cyclone that killed residents, displaced thousands and damaged infrastructure<sup>27</sup>. Despite their little contribution to climate change, sea level rise, increasing temperatures and frequency and intensity of tropical cyclones, and storm surges are some of the climate change impacts facing island nations, some of which are in low-lying areas of just 5 meters above sea level at the highest point making them more vulnerable to these impacts<sup>28</sup>.

It is thus evident that the climate change has adverse impacts especially on nations and communities that contribute the least to its threat. The concept of Climate Justice acknowledges this concern. It recognizes that some countries mainly the large industrialised economies of Europe and North America have benefitted much more from the industries and technologies that cause climate change than have developing nations in places such as Africa, Asia, the Caribbean Islands and the Pacific Islands which due to an unfortunate mixture of economic and geographic vulnerability, continue to shoulder the brunt of the burdens of climate change despite their relative innocence in causing it<sup>29</sup>. It seeks to promote justice in climate related concerns. Climate justice links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable people and sharing the burdens

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<sup>25</sup> United Nations Development Programme., 'Can Groundwater act as a Catalyst for Sustainable Development in Africa's borderlands?' Available at [https://www.undp.org/africa/africa-borderlands-centre/blog/can-groundwater-act-catalyst-sustainable-development-africasborderlands?gclid=EAIaIQobChMIpM6GnoGxgAMV1uZ3Ch0bkAPOEAMyAAEgLKG\\_D\\_BwE](https://www.undp.org/africa/africa-borderlands-centre/blog/can-groundwater-act-catalyst-sustainable-development-africasborderlands?gclid=EAIaIQobChMIpM6GnoGxgAMV1uZ3Ch0bkAPOEAMyAAEgLKG_D_BwE) (Accessed on 28/07/2023)

<sup>26</sup> Ibid

<sup>27</sup> Bafana. B., 'Climate Change is No 'Future Scenario' for Pacific Island Nations; Climate Change is 'Real' Available at <https://reliefweb.int/report/world/climate-change-no-future-scenario-pacific-island-nations-climate-change-real> (Accessed on 28/07/2023)

<sup>28</sup> Ibid

<sup>29</sup> Giles. M., 'The Principles of Climate Justice at CoP27.' Op Cit

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and benefits of climate change and its impacts equitably and fairly<sup>30</sup>. It entails understating climate change as an issue that relates to equity, fairness, ethics and human rights and not just an environmental phenomena<sup>31</sup>. Climate Justice is a framework that focuses on the intersection between climate change and social inequalities<sup>32</sup>. This is achieved by linking the effects of climate change to the notions of justice particularly environmental and social justice by examining the concepts of equality and human rights within the lens of climate change<sup>33</sup>. It focuses on how climate change impacts people differently, unevenly and disproportionately and seeks to address the resultant injustices in fair and equitable ways<sup>34</sup>.

Climate Justice encapsulates various facets of justice including distributive justice, procedural justice and justice as recognition<sup>35</sup>. Distributive justice concerns itself with the disproportionate impact that climate change has on the people, communities and countries that are least responsible for climate change and its impacts<sup>36</sup>. Climate Justice seeks to ensure the just distribution of the burdens and benefits of climate change among nations<sup>37</sup>. It further insists on redressing the imbalances caused by the effects of climate change by imposing what is sometimes referred to as a climate debt on those nations primarily responsible for causing climate change<sup>38</sup>. Procedural justice on the other hand is aimed at addressing distributive climate injustices by creating processes that are participatory, fair, inclusive and accessible<sup>39</sup>. Procedural justice requires that citizens be informed about and involved in decision-

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<sup>30</sup> Mary Robinson Foundation Climate Justice., 'Principles of Climate Justice.' Available at <https://www.mrfcj.org/principles-of-climate-justice/> (Accessed on 28/07/2023)

<sup>31</sup> United Nations Environment Programme., 'Climate Justice.' Available at <https://leap.unep.org/knowledge/glossary/climate-justice> (Accessed on 28/07/2023)

<sup>32</sup> Ibid

<sup>33</sup> Sultana. F., 'Critical Climate Justice' Op Cit

<sup>34</sup> Ibid

<sup>35</sup> Monica. T & Bronwyn. L., 'Community Lawyering and Climate Justice: A New Frontier.' *Alternative Law Journal* (47) 3 pp 199-203

<sup>36</sup> Ibid

<sup>37</sup> Giles. M., 'The Principles of Climate Justice at CoP27.' Op Cit

<sup>38</sup> Ibid

<sup>39</sup> Monica. T & Bronwyn. L., 'Community Lawyering and Climate Justice: A New Frontier.' Op Cit

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making on climate change matters<sup>40</sup>. Justice as recognition on its part seeks to give a voice to people who have been traditionally marginalized in climate change matters as a result of structural inequality<sup>41</sup>. Climate Justice is thus a multidimensional idea that requires the various facets of justice to be recognized and upheld simultaneously<sup>42</sup>.

The idea of Climate justice is therefore significant for the entire world since it stands seeks to achieve an agenda that links the struggle for a prosperous, safe future for all with a fight against inequalities and exclusion<sup>43</sup>. It envisages linking human rights with development and climate action, having a people centred approach to climate action, understanding that not everyone has contributed to climate change in the same way and combatting injustices resulting from climate change social, gender, economic, intergenerational and environmental injustices<sup>44</sup>. It seeks to achieve equal access to natural resources, fair and effective solutions in response to climate change and the assigning of responsibility for those who contribute most to the global threat of climate change<sup>45</sup>. Climate Justice is thus guided by several principles including the protection and empowering of vulnerable individuals and communities, promoting public participation in decision making, fostering global collaboration in the response to climate change, achieving intergeneration equity in order to protect future generations from the effects of climate change and assigning of responsibility to nations that contribute most to global

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<sup>40</sup> Ibid

<sup>41</sup> Sultana. F., 'Critical Climate Justice' Op Cit

<sup>42</sup> Ibid

<sup>43</sup> Foundation for European Progressive Studies., 'United for Climate Justice.' Available at <https://feps-europe.eu/wpcontent/uploads/downloads/publications/short%20united%20for%20climate%20justice%20-%204.pdf> (Accessed on 28/07/2023)

<sup>44</sup> UNICEF., 'What is Climate Justice? and What can we do Achieve it?' Available at <https://www.unicef.org/globalinsight/what-climate-justice-and-what-can-we-do-achieve-it#:~:text=Utilizing%20a%20climate%20justice%20approach,vulnerability%20to%20the%20climate%20crisis.> (Accessed on 28/07/2023)

<sup>45</sup> New Internationalist., 'Four Principles for Climate Justice.' Available at <https://newint.org/features/2009/01/01/principles-climate-justice> (Accessed on 28/07/2023)

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greenhouse gas emissions<sup>46</sup>. Climate Justice is thus vital in ensuring effective climate change mitigation and adaptation towards Sustainable Development.

### **3.0 Fostering Climate Justice: Prospects and Challenges**

Various attempts have been made towards fostering Climate Justice at the global, regional and national levels. The *Rio Declaration on Environment and Development*<sup>47</sup> encapsulates fundamental principles of Climate Justice. It enshrines the principles of access to information, participation in decision making and access to effective remedies in all environmental matters including those concerning climate change<sup>48</sup>. The Declaration is important in fostering Climate Justice at the global level. *The United Nations Framework Convention on Climate Change (UNFCCC)*<sup>49</sup> calls for *cooperation* and *participation* by all countries in combating climate change. The Convention also calls upon state parties to promote and facilitate *public access to information* on climate change and its effects and *public participation* in addressing climate change and its effects and the development of adequate responses<sup>50</sup>. The UNFCCC thus upholds the principles of *access to information* and *public participation* which are key elements of procedural justice in the climate justice debate. The *Paris Agreement*<sup>51</sup> also affirms the importance of public awareness, public participation, public access to information and cooperation at all levels in combating climate change<sup>52</sup>. In addition, the Paris Agreement recognizes the specific and special needs of developing countries which are most vulnerable to the adverse effects of climate change<sup>53</sup>. It thus calls for equity and the promotion of the principle of Common but Differentiated Responsibilities and capabilities in light of different national circumstances in combating climate change<sup>54</sup>. This is key towards promoting distributive justice in climate change matters.

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<sup>46</sup> Giles. M., 'The Principles of Climate Justice at Cop27.' Op Cit

<sup>47</sup> Report of the United Nations Conference on Environment and Development., 'Rio Declaration on Environment and Development.' A/CONF.151/26 (Vol. I),

<sup>48</sup> Ibid, Principle 10

<sup>49</sup> 'United Nations Framework Convention on Climate Change.' Op Cit

<sup>50</sup> Ibid, Article 6 (a)

<sup>51</sup> 'Paris Agreement', Op Cit

<sup>52</sup> Ibid, Preamble

<sup>53</sup> Ibid

<sup>54</sup> Ibid, Article 2 (2)



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At the regional level, the *Africa Union Agenda 2063*<sup>55</sup> to promote environmentally sustainable and climate resilient economies and communities through sustainable natural resource management; biodiversity conservation; promoting renewable energy and climate resilience and natural disasters preparedness and prevention<sup>56</sup>. Agenda 2063 is vital in fostering Climate Justice in Africa. In Kenya, the *Climate Change Act*<sup>57</sup> seeks to facilitate capacity development for public participation in climate change responses through awareness creation, consultation, representation and access to information<sup>58</sup>. The Act further seeks to mainstream the principle of Sustainable Development into the planning for and decision making on climate change response<sup>59</sup>. The Climate Change Act is integral in attaining Climate Justice in Kenya.

In addition to the above mentioned legal instruments, there have been various actions and decisions adopted by the global community and individual countries towards fostering Climate Justice. The United Nations Climate Change Conferences which serve as the formal meeting of the UNFCCC parties (Conference of the Parties i.e COP) have been vital in assessing global progress in responding to climate change<sup>60</sup>. At the COP 27 (Sharm El-Sheikh Climate Change Conference – 6 November-20 November 2022) held in Egypt, the UNFCCC agreed on several issues that are vital in enhancing Climate Justice<sup>61</sup>. These include establishing a dedicated fund to cater for loss and damage for vulnerable countries hit hard by floods, drought and other climate disasters; holding businesses and institutions accountable for actions which contribute to climate change; mobilizing more financial support for developing countries and implementation of climate change mitigation and

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<sup>55</sup> African Union., 'Agenda 2063: The Africa We Want.' Available at [https://au.int/sites/default/files/documents/33126-doc-framework\\_document\\_book.pdf](https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf) (Accessed on 28/07/2023)

<sup>56</sup> Ibid

<sup>57</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya

<sup>58</sup> Ibid, S 3 (2) (h)

<sup>59</sup> Ibid, S 3 (2) (k)

<sup>60</sup> United Nations Framework Convention on Climate Change., 'Conference of the Parties (COP).' Available at <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> (Accessed on 28/07/2023)

<sup>61</sup> United Nations Framework Convention on Climate Change., 'Sharm El-Sheikh Climate Change Conference - November 2022.' Available at <https://unfccc.int/cop27> (Accessed on 28/07/2023)

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adaptation measures across the world<sup>62</sup>. Implementing the outcome of COP 27 will foster Climate Justice.

There has been an increase in climate change funding where developed countries, multilateral development banks and multilateral climate funds have provided funding to developing and underdeveloped countries to aid in their climate change mitigation and adaptation measures<sup>63</sup>. It has been asserted that financial resources and sound investments are needed to address climate change, to both reduce emissions, promote adaptation to the impacts that are already occurring, and to build resilience<sup>64</sup>. The World Bank which is the largest multilateral funder of climate investments in developing countries notes that climate finance is crucial in fostering Climate Justice through investments in programs that reduce or avoid greenhouse gas emissions such as clean technology, renewable energy and sustainable forestry<sup>65</sup>. Climate finance is thus essential in fostering Climate Justice by enhancing the capacity of vulnerable countries and communities to respond to the effects of climate change.

Finally, Climate Justice has also been promoted through climate change litigation. Climate change litigation entails filing of lawsuits pertaining the causes and consequences of climate change<sup>66</sup>. Through climate change litigation, courts and tribunals are able to adjudicate upon pertinent issues in climate change such mitigation and adaptation measures as well as climate

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<sup>62</sup> Ibid

<sup>63</sup> Hong, H., 'Climate Finance.' *Review of Financial Studies*, Volume 33, No. 3, 2020

<sup>64</sup> United Nations., 'Financing Climate Action.' Available at <https://www.un.org/en/climatechange/raising-ambition/climate-finance> (Accessed on 28/07/2023)

<sup>65</sup> The World Bank., '3 Things You Need to Know About Climate Finance.' Available at <https://www.worldbank.org/en/topic/climatechange/brief/3-things-you-need-to-know-about-climate-finance> (Accessed on 28/07/2023)

<sup>66</sup> Setzer, J., 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance.' Available at [https://www.researchgate.net/profile/JoanaSetzer/publication/331499727\\_Climate\\_change\\_litigation\\_A\\_review\\_of\\_research\\_on\\_courts\\_and\\_litigants\\_in\\_climate\\_governance/links/5e89690d92851c2f527f820d/Climate-change-litigation-A-review-ofresearch-on-courts-and-litigants-in-climate-governance.pdf](https://www.researchgate.net/profile/JoanaSetzer/publication/331499727_Climate_change_litigation_A_review_of_research_on_courts_and_litigants_in_climate_governance/links/5e89690d92851c2f527f820d/Climate-change-litigation-A-review-ofresearch-on-courts-and-litigants-in-climate-governance.pdf) (Accessed on 28/07/2023)

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change-related loss and damage<sup>67</sup>. It has been used as a tool to enforce the principles of Climate Justice across the world such as public participation, access to information, access to justice and access to remedies<sup>68</sup>. Climate change litigation has consequently become a tool to enforce or enhance climate commitments by countries across the globe<sup>69</sup>. It can be used to foster Climate Justice by promoting its principles and holding countries accountable in respect of laws and policies on climate change<sup>70</sup>.

From the foregoing discussion, it is evident that there has been progress towards fostering Climate Justice across the world. However, despite these efforts, climate injustices are still prevalent. Geographical injustices are evident from the demonstrable fact that many of the countries least responsible for the current climate crisis are, nevertheless, those feeling its effects most acutely<sup>71</sup>. The studies have highlighted the example of countries of Pakistan, countries in the Horn of Africa, countries in the Caribbean and Pacific Islands among others<sup>72</sup>. Further, it has been pointed out that gender inequalities are evident in the climate change discourse with women often bearing the brunt of climate disasters since they depend more heavily on natural resources like water and firewood, meaning that if these items become scarce, they may need to travel further for them<sup>73</sup>. Further, gender inequalities within communities may leave women more vulnerable to the immediate aftermath of natural disasters occasioned by the effects of climate change, or excluded from the decision-making table when disaster risk reduction solutions and other climate change responses are designed and implemented<sup>74</sup>. Climate change has also resulted in other injustices such as

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<sup>67</sup> Ibid

<sup>68</sup> Setzer, J. & Higham, C., 'Global Trends in Climate Change Litigation: 2022 Snapshot' Available at <https://www.ccecp.ac.uk/wp-content/uploads/2022/06/Global-trends-in-climate-change-litigation2022-snapshot.pdf> (Accessed on 28/07/2023)

<sup>69</sup> Ibid

<sup>70</sup> Setzer, J., 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance.' Op Cit

<sup>71</sup> Concern Worldwide., '10 Climate Injustices and How to Fight Them.' Available at <https://www.concern.net/news/climate-injustices> (Accessed on 28/07/2023)

<sup>72</sup> Bafana, B., 'Climate Change is No 'Future Scenario' for Pacific Island Nations; Climate Change is 'Real' Op Cit

<sup>73</sup> Pearse, R., 'Gender and Climate Change.' *WIREs Climate Change*, 2016

<sup>74</sup> Ibid

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economic inequalities, intergenerational injustices with future generations predicted to bear the most burden due to the effects of climate change, discrimination, environmental racism and displacement of people resulting in climate refugees<sup>75</sup>. There is need to address these problems in order to realize Climate Justice.

### **4.0 Way Forward**

In order to foster Climate Justice there is need to promote access to information and public and community participation and access to in decision making processes including the design and implementation of projects and formulation of laws, policies and guidelines concerning climate change<sup>76</sup>. Access to information and public participation are fundamental principles of Climate Justice and have been captured in various legal instruments on climate change<sup>77</sup>. Public participation is fundamental in climate change mitigation and adaptation since it enhances the capacity to cope with climate change risks and further ensures that decisions reflect local values<sup>78</sup>. It can also foster investment in people-centered laws and institutions to promote transformative climate action and adoption of customary, informal and indigenous approaches to protect biodiversity and promote sustainable use of natural resources<sup>79</sup>. Public participation should thus be embraced in order to realize Climate Justice.

There is also need to eliminate structural inequalities in climate action including gender and intragenerational inequalities<sup>80</sup>. It has been asserted that women often bear the brunt of climate disasters since they depend more

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<sup>75</sup> Concern Worldwide., '10 Climate Injustices and How to Fight Them.' Op Cit

<sup>76</sup> Brower. A., 'Fighting Climate Injustice: 10 Strategies for Action.' Available at <https://www.gensler.com/blog/fighting-climate-injustice-10-strategies-for-action> (Accessed on 29/07/2023)

<sup>77</sup> See for example Principle 10 of the Rio Declaration; Article 6 (a) of the United Nations Framework Convention on Climate Change (UNFCCC); The Preamble to the Paris Agreement and, S 3 (2) (h) of the Climate Change Act, No. 11 of 2016 Laws of Kenya.

<sup>78</sup> Hugel. S., & Davies. A., 'Public Participation, Engagement, and Climate Change Adaptation: A Review of the Research Literature.' *WIREs Climate Change*, 2020

<sup>79</sup> International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit

<sup>80</sup> Ibid

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heavily on natural resources like water and firewood, meaning that if these items become scarce, they may need to travel farther for them<sup>81</sup>. However, women, youth and person with disabilities among other marginalized groups are often excluded from the decision-making table when disaster risk reduction solutions and other climate change responses are designed and implemented contributing to climate injustices<sup>82</sup>. Unequal participation in decision-making processes and labour markets by these groups compound inequalities and often prevent them from fully contributing to climate-related planning, policy-making and implementation<sup>83</sup>. Women can and do play a critical role in response to climate change due to their local knowledge of and leadership in areas such as sustainable resource management and leading sustainable practices at the household and community level<sup>84</sup>. It has also been asserted that the voice of the youth is pertinent in climate action since the younger generation, will suffer the consequences of climate change more greatly than their parents and grandparents<sup>85</sup>. In addition, people with disabilities may be severely affected by the effects of climate change due to the difficulty in accessing vital resources in case of food insecurity and water scarcity and difficulties in responding to emergencies in case of disasters associated with climate change such a floods<sup>86</sup>. It is thus imperative to foster the participation of women, youth, person with disabilities and other marginalized groups in climate action in order to realize Climate Justice. It is also essential to increase funding to developing countries and regions of the world in order to enhance their ability to respond to the effects of climate change<sup>87</sup>. It has been observed that developing countries in Africa, Asia, the Caribbean Islands and the Pacific Islands which due to an unfortunate mixture

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<sup>81</sup> Pearse. R., 'Gender and Climate Change.' Op Cit

<sup>82</sup> Ibid

<sup>83</sup> United Nations Framework Convention on Climate Change., 'Introduction to Gender and Climate Change.' Available at <https://unfccc.int/gender> (Accessed on 29/07/2023)

<sup>84</sup> Ibid

<sup>85</sup> United Nations Children's Fund., 'What is Climate Justice? And what can we do Achieve It?' Available at <https://www.unicef.org/globalinsight/what-climate-justice-and-what-can-we-do-achieve-it> (Accessed on 29/07/2023)

<sup>86</sup> Almomani. S., 'Climate Justice for People with Disabilities.' Available at <https://www.worldforgottenchildren.org/blog/climate-justice-for-people-with-disabilities/154> (Accessed on 29/07/2023)

<sup>87</sup> Hong. H., 'Climate Finance.' Op Cit

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of economic and geographic vulnerability, continue to shoulder the brunt of the burdens of climate change despite their relative innocence in causing it<sup>88</sup>.

Consequently, these countries have suffered from catastrophic consequences of climate change including severe storms, tropical cyclones, flooding and drought resulting in loss of lives, destruction of property and vital infrastructure and food insecurity among others<sup>89</sup>. Due to their geographical vulnerability and low economic development, most of these countries are unable to effectively respond to the effects of climate change thus compounding the problem<sup>90</sup>. Therefore, it is imperative for developed countries and international financial institutions such as the World Bank to increase climate funding to these countries in order to enhance their climate resilience through measures such as investments in food security, clean technology, renewable energy and sustainable forestry<sup>91</sup>.

There is also need for developed countries which are the largest contributors to global greenhouse emissions to comply with their climate commitments under the Paris Agreement<sup>92</sup>. At the heart of the Paris Agreement are national pledges to contribute to global mitigation and adaptation goals<sup>93</sup>. The Paris Agreement sets out a mechanism under which each country produces a Nationally Determined Contribution (NDC), which must be submitted at a maximum of five-yearly intervals<sup>94</sup>. These NDCs are determined unilaterally and are expected to include targets for greenhouse gas emission reductions and adaptation<sup>95</sup>. Consequently, countries such as the United States of America (USA), which accounts for 12.74% of global greenhouse gas emissions have committed to reducing their net greenhouse gas emissions by 50-52 %

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<sup>88</sup> Giles. M., 'The Principles of Climate Justice at CoP27.' Op Cit

<sup>89</sup> United Nations Development Programme., 'Can Groundwater act as a Catalyst for Sustainable Development in Africa's borderlands?' Op Cit

<sup>90</sup> Giles. M., 'The Principles of Climate Justice at CoP27.' Op Cit

<sup>91</sup> The World Bank., '3 Things You Need to Know About Climate Finance.' Op Cit

<sup>92</sup> Mace. M., 'Mitigation Commitments under the Paris Agreement and the Way Forward.' *Climate Law*, No. 6 of 2016, pp 21-39

<sup>93</sup> European Bank for Reconstruction and Development., 'The Paris Agreement.' Available at <https://www.ebrd.com/paris-agreement> (Accessed on 29/07/2023)

<sup>94</sup> Paris Agreement, Article 4

<sup>95</sup> Mace. M., 'Mitigation Commitments under the Paris Agreement and the Way Forward.' Op Cit

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below 2005 levels by the year 2030<sup>96</sup>. Further, China which accounts for 27.79% of global greenhouse gas emissions has set various targets under its NDC including having CO<sub>2</sub> emissions peak before 2030; achieving carbon neutrality before 2060 and lowering CO<sub>2</sub> emissions per unit of GDP by over 65% from the 2005 level<sup>97</sup>. It is important for developed countries to comply with their commitments under NDCs in order to foster Climate Justice.

Finally, it is vital to enhance climate litigation in order to realize Climate Justice. Climate litigation has become a tool to enforce or enhance climate commitments by countries across the globe<sup>98</sup>. It can be used to foster Climate Justice by promoting its principles such as public participation, access to information, access to justice and access to remedies and holding countries accountable in respect of laws and policies on climate change<sup>99</sup>. Climate litigation can also strengthen prospects for sustaining peace and stability by preventing and resolving climate-related disputes<sup>100</sup>. The public, environmental activists, Non-Governmental Organizations and members of the legal profession can foster Climate Justice through climate litigation<sup>101</sup>. Climate litigation should thus be embraced as a tool to promote Climate Justice.

Through these measures, the idea of Climate Justice will be fostered.

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<sup>96</sup> United Nations Framework Convention on Climate Change., 'The United States of America Nationally Determined Contribution.' Available at <https://unfccc.int/sites/default/files/NDC/202206/United%20States%20NDC%20April%2021%202021%20Final.pdf> (Accessed on 29/07/2023)

<sup>97</sup> United Nations Framework Convention on Climate Change., 'China's Achievements, New Goals and New Measures for Nationally Determined Contributions.' Available at <https://unfccc.int/sites/default/files/NDC/202206/China%E2%80%99s%20Achievements%20C%20New%20Goals%20and%20New%20Measures%20for%20Nationally%20Determined%20Contributions.pdf> (Accessed on 29/07/2023)

<sup>98</sup> Setzer, J & Higham. C., 'Global Trends in Climate Change Litigation: 2022 Snapshot' Op Cit

<sup>99</sup> Setzer, J., 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance.' Op Cit

<sup>100</sup> International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit

<sup>101</sup> Muigua. K., 'Redefining the Role of Lawyers in Climate Justice.' Available at <http://kmco.co.ke/wp-content/uploads/2023/06/Redefining-the-Role-of-Lawyers-in-Climate-Justice-.pdf> (Accessed on 29/07/2023)

## **5.0 Conclusion**

The effects of climate change and the ensuing mitigation and adaptation measures have resulted in justice concerns including economic inequalities, gender inequalities, inter and intra generational inequalities, discrimination, environmental racism and displacement of people resulting in climate refugees<sup>102</sup>. Climate Justice seeks to address the causes and impacts of climate change in a manner that recognizes and fosters the rights and concerns of vulnerable people, communities and countries<sup>103</sup>. It seeks to achieve the ideal of public participation, access to information, access to justice and access to remedies in climate action<sup>104</sup>. There have been efforts to foster Climate Justice through measures such as adoption of the principles of Climate Justice in laws and policies, climate funding and climate litigation<sup>105</sup>. However, in the wake of continued climate injustices, there is need to foster Climate Justice through promoting public participation and access to information, giving voice to women, youth and person with disabilities in climate action, increasing climate funding to developing countries, complying with NDCs especially for developed countries and enhancing climate litigation<sup>106</sup>. Through these measures, the ideal of Climate Justice will be fostered at the national, regional and global levels in the quest towards Sustainable Development.

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<sup>102</sup> Concern Worldwide., '10 Climate Injustices and How to Fight Them.' Op Cit

<sup>103</sup> Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

<sup>104</sup> Sultana. F., 'Critical Climate Justice' Op Cit

<sup>105</sup> United Nations., 'Financing Climate Action.' Op Cit

<sup>106</sup> International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit



## **Streamlining Water Governance in Kenya for Sustainable Development**

### **Abstract**

*Good governance is not only important for the national government but also for the various sectors in discharging service to the people. One such area is the provision of basic needs such as water which is critical for human survival and securing of livelihoods. Water sector governance is an area that involves various state laws, regulations, and formal and informal players. It involves balancing the conflicting interests and needs of various stakeholders through clearly defined responsibilities, transparency and accountability of formal and informal players. Water resources governance has to consider and balance various interests which range from cultural, economic, social, legal and political contexts. This paper approaches water governance in this perspective and affirms the need to accommodate the various users and their diverse needs as far as water is concerned. To assess the current measures and attempts by the state to achieve the constitutionally guaranteed right of access to clean and safe water in adequate amounts, the paper offers an overview and analysis of the provisions of Water Act 2016 in light of the international best practices in water governance and the sustainable development agenda.*

### **1.0 Introduction**

Good governance frameworks are said to embrace the relationships between governments and societies, including laws, regulations, institutions, and formal and informal interactions which affect the ways in which governance systems function, stressing the importance of involving more voices, responsibilities, transparency and accountability of formal and informal organizations associated in any process.<sup>1</sup> The concept of good governance as used in this paper is informed by the foregoing definition of the term due to the important elements such as stakeholders' voices, responsibilities, transparency and accountability.

Water governance may be defined as the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different

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<sup>1</sup> Tortajada, C., 'Water Governance: Some Critical Issues,' *International Journal of Water Resources Development*, Vol. 26, No.2, 2010, pp.297-307, p. 298.

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levels of society.<sup>2</sup> It comprises mechanisms, processes, and institutions through which all involved stakeholders, including citizens and interest groups, articulate their priorities, exercise their legal rights, meet their obligations and mediate their differences.<sup>3</sup> It is, however, noteworthy that different people and institutions use the concept in different ways, and within varying cultural, economic, social, legal and political contexts.<sup>4</sup> This paper approaches water governance in this perspective considering that the discussion looks at the various users and their diverse needs as far as water is concerned.

The current law,<sup>5</sup> was enacted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.<sup>6</sup> This paper offers an overview and analysis of the provisions of this law in light of the international best practices in water governance and the sustainable development agenda.

### **2.0 Water Governance in Kenya**

Water Resources governance in Kenya has come a long way from the colonial times when, as it has been observed, in many African states, colonial water laws, which have largely been continued by the independent states, emphasised the use of water for commercial agriculture and provision of water services to the settler population and largely ignored the local population's need for water for domestic and productive purposes.<sup>7</sup> Even in the independent African states, most laws on water governance and management have been adopting a top-down approach to governance, effectively sidelining communities and their water needs.

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<sup>2</sup> K'Akumu, O.A., 'Toward effective governance of water services in Kenya,' *Water Policy*, Vol. 9, 2007, pp.529-543 at p. 530.

<sup>3</sup> Tortajada, C., 'Water Governance: Some Critical Issues,' op cit, p. 299.

<sup>4</sup> Ibid, p. 299.

<sup>5</sup> No.43 of 2016, Laws of Kenya.

<sup>6</sup> Ibid, s. 3.

<sup>7</sup> Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' in Hellum A., et al (eds), *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa*, (Weaver Press, Harare, 2015), p. 10.

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Over the years, the State has attempted to come up with laws, rules and regulations aimed at addressing issues related to water governance and curbing mismanagement of water resources. However, these objectives may not have been adequately realized and this has often led to a critical situation in many parts of the country with many communities suffering from acute water shortages. Kenya is often classified as a water-scarce country with renewable fresh water per capita standing at 647m<sup>3</sup> against the United Nations recommended minimum of 1,000m<sup>3</sup>.<sup>8</sup> They have difficulties accessing safe water for drinking and other domestic needs.

The right to water is recognised internationally and this has been captured in many international documents, as well as regional legal instruments on basic human rights. The right to water is the fundamental human right of access to water of a quality and quantity sufficient to satisfy basic human needs: consumption, hygiene and sanitation (e.g. bathing or laundry), cleaning, cooking, and subsistence agriculture.<sup>9</sup> The *General Comment No. 15 on the Right to Water* provides that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.<sup>10</sup>

Principle 4 of the Dublin Conference Water Principles states that "... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price". With regard to the user water rights, the Water Act 2016 provides that every person has the right to access water resources, whose administration is the function of the national

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<sup>8</sup> Concern Worldwide Kenya, 'Five year ASAL Water Hygiene and Sanitation Strategy for Marsabit County 2013 - 2018,' (Dublin Institute of Technology), p.4. Available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKewjm5YbYvMXPahVrBsAKHfN7Cz4QFgg3MAQ&url=http%3A%2F%2Fwww.dit.ie%2Fdtc%2Fmedia%2Fditdct%2FConcern%25205%2520Year%2520WASH%2520Strategy%252010%2520December%25202012\\_draft1.doc&usg=AFQjCNHUDMkjrzy1fsQnCsUm47prfTDsBQ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKewjm5YbYvMXPahVrBsAKHfN7Cz4QFgg3MAQ&url=http%3A%2F%2Fwww.dit.ie%2Fdtc%2Fmedia%2Fditdct%2FConcern%25205%2520Year%2520WASH%2520Strategy%252010%2520December%25202012_draft1.doc&usg=AFQjCNHUDMkjrzy1fsQnCsUm47prfTDsBQ) [ Accessed on 5/10/2016].

<sup>9</sup> Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 25.

<sup>10</sup> United Nations, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11), para. 2.

government as stipulated in the Fourth Schedule to the Constitution.<sup>11</sup> Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution. Section 37(l) provides that a permit is not required- for the abstraction or use of water, without the employment of works, from any water resource for domestic purposes by any person having lawful access to the water resource; for the abstraction of water in a spring which is situated wholly within the boundaries of the land owned by any one landholder and does not naturally discharge into a watercourse abutting on or extending beyond the boundaries of that land; or for the storage of water in, or the abstraction of water from a reservoir constructed for the purpose of such storage and which does not constitute a water course for the purposes of this Act. This exception to the requirement for an operation permit is essential in ensuring that the right of access to water resources for domestic use is not curtailed. This is especially relevant in light of the Constitutional right to right to clean and safe water in adequate amounts for all.<sup>12</sup>

### **3.0 Institutional and Regulatory Arrangements**

#### **3.1 Institutional Framework on Water Governance**

All water resources in Kenya are vested in the state where the Ministry of Water and Irrigation is responsible for creating institutions to manage water resources and provide water services. The Water Act 2016 provides that every water resource is vested in and held by the national government in trust for the people of Kenya.<sup>13</sup>

The Water Resources Authority established in Section 11(l) of the Water Act 2016 is to serve as an agent of the national government and regulate the management and use of water resources.<sup>14</sup> The functions of the Authority include, inter alia, to: formulate and enforce standards, procedures and Regulations for the management and use of water resources and flood mitigation; regulate the management and use of water resources; enforce

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<sup>11</sup> S. 9, No.43 of 2016, Laws of Kenya.

<sup>12</sup> Art. 43, Constitution of Kenya 2010.

<sup>13</sup> Water Act 2016, s.5.

<sup>14</sup> Ibid, S. 6.

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Regulations made under this Act; receive water permit applications for water abstraction, water use and recharge and determine, issue, vary water permits; and enforce the conditions of those permits; collect water permit fees and water use charges; determine and set permit and water use fees; provide information and advice to the Cabinet Secretary for formulation of policy on national water resource management, water storage and flood control strategies; coordinate with other regional, national and international bodies for the better regulation of the management and use of water resources; and advise the Cabinet Secretary generally on the management and use of water resources.<sup>15</sup>

Water Act 2016 also establishes the National Water Harvesting and Storage Authority whose functions and powers shall be to- undertake on behalf of the national government, the development of national public water works for water resources storage and flood control; maintain and manage national public water works infrastructure for water resources storage; collect and provide information for the formulation by the Cabinet Secretary of the national water resources storage and flood control strategies; develop a water harvesting policy and enforce water harvesting strategies: undertake on behalf of the national government strategic water emergency interventions during drought; and advise the Cabinet Secretary on any matter concerning national public water works for water storage and flood control.<sup>16</sup>

Section 29(1) of the Water Act 2016 provides that Water Resource Users Associations may be established as associations of water resource users at the sub-basin level in accordance with Regulations prescribed by the Authority. A Water Resource Users Association should be a community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.<sup>17</sup>

Section 25 tasks the Cabinet Secretary to establish a Basin Water Resources Committee for each respective basin area which shall be responsible for the management of the water resources within a respective basin area.

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<sup>15</sup>Ibid, s.12.

<sup>16</sup> Ibid, S. 30 & 32.

<sup>17</sup> Ibid, S. 29(2).

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The Cabinet Secretary may, by notice in the Gazette, establish one or more waterworks development agencies and define the geographical area of jurisdiction of each such agency.<sup>18</sup> The powers and functions of the water works development agency shall be to- undertake the development, maintenance and management of the national public water works within its area of jurisdiction; and operate the waterworks and provide water services as a water service provider, until such a time as responsibility for the operation and management of the waterworks are handed over to a county government, joint committee, authority of county governments or water services provider within whose area of jurisdiction or supply the waterworks is located.<sup>19</sup>

Section 69(1) of the Act provides that as soon as possible, following the commissioning of the waterworks, the waterworks development agency should enter into an agreement with the county government, the joint committee or authority of the county governments within whose area of jurisdiction the water works is located, jointly with the water service provider within whose area of supply the water works are located for the use by the joint committee, authority or water services provider, as the case may be, of the water works to provide water services.<sup>20</sup>

Section 70(1) of the Water Act 2016 establishes the Water Services Regulatory Board whose principal object is to protect the interests and rights of consumers in the provision of water services. Section 64(l) of the Water Act 2016 provides that the Cabinet Secretary should, within one year of the commencement of this Act and every five years thereafter, following public participation, formulate a Water Services Strategy. The object of the Water Strategy shall be to provide the Government's plans and programs for the progressive realization of the right of every person in Kenya to water.<sup>21</sup>

The Water Strategy should contain, among other things, details of-existing water services; the number and location of persons who are not provided with a basic water supply and basic sewerage services; standards for the

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<sup>18</sup> Ibid, S. 65(l).

<sup>19</sup> Ibid, S. 68.

<sup>20</sup> Ibid, S. 69(1).

<sup>21</sup> Ibid, S. 64(2).

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progressive realisation of the right to water; and a resource mobilization strategy for the implementation of the plans.<sup>22</sup>

The Cabinet Secretary should in consultation with county governments, provide a national water sector investment and financing plan aggregated from the county government plans which should include, among other details, the time frames for the plans and an investment programme based on the investment plans.<sup>23</sup>

The basin area water resources management strategy should facilitate the establishment and operation of Water Resources Users Associations.<sup>24</sup> The Basin Water Resources Committees may contract water resource users associations as agents to perform certain duties in water resource management.<sup>25</sup>

Upon the designation of a basin area, the Basin Area Water Authority is required to prescribe requirements and a time frame for resources the formulation of a basin area water resources management strategy.<sup>26</sup> The basin area water resources management strategy should be formulated by a basin water resources committee in consultation with the Authority and the county governments whose areas of jurisdiction lie within the basin area.<sup>27</sup>

A basin area water resources management strategy should-be consistent with the national water resources policy; put in place measures to fulfill the water resource quality objectives for each class of water resource in the basin area; describe the measures to be put in place for the sustainable management of water resources of the basin area; contain a water allocation plan for the water resources of the basin area; provide systems and guidelines to enable the users of water resources within the basin area to participate in managing the water

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<sup>22</sup> Water Act 2016, S. 64(3).

<sup>23</sup> Ibid, S.64(5).

<sup>24</sup> Ibid, S. 29(3).

<sup>25</sup> Ibid, S.29(4).

<sup>26</sup> Ibid, S. 28(1)

<sup>27</sup> Ibid, S. 28(2).

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resources of the basin area; and provide a strategy for financing the management of the water resources of the basin area.<sup>28</sup>

A basin water resources committee should consist of- not less than four and not more than seven members appointed by the Authority in consultation with the Cabinet Secretary; and a representative of each county government whose area falls within the basin appointed by the appointing authority after approval by the county assembly.<sup>29</sup>

The persons appointed to the Basin Water Resources Committee must be residents of the respective basin area and should include- a representative of a ministry responsible for matters relating to water resources; a representative of farmers or pastoralists within the basin area concerned; a representative of a public benefits organisation engaged in water resources management programmes within the basin area concerned; and a representative of the business community operating within the basin area concerned.<sup>30</sup>

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.<sup>31</sup>

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<sup>28</sup> Ibid, S. 28(3).

<sup>29</sup> Water Act 2016, S. 26(1).

<sup>30</sup> Ibid, S.26(3).

<sup>31</sup> Ibid, S. 27.



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The Water Act 2016 also provides that it shall be the duty of a licensee receiving trade effluent into its sewerage system to ensure that it has in place measures for the receipt and handling of the effluent without causing-pollution of the environment; harm to human health; damage to the sewerage system: or a contravention of applicable laws or standards set by the Regulatory Board.<sup>32</sup> A person should not discharge any trade effluent from any trade premises into the sewers of a licensee without the consent of the licensee.<sup>33</sup>

In order to deal with disputes, the Act also establishes a Water Tribunal<sup>34</sup> and the same is empowered to exercise the powers and functions set out in this Act and in particular to hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.<sup>35</sup> In addition to the powers set out in subsection (l), the Tribunal has the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.<sup>36</sup>

A person aggrieved by a decision of the Tribunal may, within twenty-one days from the date of that decision, appeal to the Land and Environmental Court, established under article 162(2) of the Constitution on an issue of law.<sup>37</sup> A decision of a water basin organization, the Authority, the Regulatory Board or the Tribunal against which no appeal has been preferred within thirty days from the date on which the decision was made, becomes binding on all parties.<sup>38</sup>

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<sup>32</sup> Ibid, S. 108(1).

<sup>33</sup> Ibid, S. 108(2).

<sup>34</sup> Ibid, S. 119(1).

<sup>35</sup> Water Act 2016, S. 121(1).

<sup>36</sup> Ibid, S. 121(2).

<sup>37</sup> Ibid, S.124.

<sup>38</sup> Ibid, S. 125.

### **3.2 Establishment of Protected Areas and Ground Water Conservation Area**

Section 22(l) of the Water Act 2016 provides that where the Authority is satisfied that in order to conserve a vulnerable water resource, special measures are necessary for the protection of a catchment area or a part thereof, it may by Order published in the Gazette declare such catchment area to be a protected area.

Section 23(l) of the Water Act provides that the Authority may declare the area to be a ground water conservation area, where it is satisfied that, in any area, special measures for the conservation of ground water are necessary in the public interest for- the protection of public water or water supplies used for industry, agriculture or other private purposes; the conservation of the water resources of the aquifer of the ground water resources; or ecological reasons. Section 24(l) requires the Water Resources Authority, in consultation with the Cabinet Secretary, may designate a defined area from which rain water flows into a watercourse to be a basin area for the purposes of this Act.<sup>39</sup>

### **3.3 Operational Permits**

One of the characteristics of privatisation and commercialisation of water resources is the need for operational permits for various uses of water. Section 36 of the Water Act 2016 provides that a permit is required for any of the following purposes- any use of water from a water resource, except as provided by section 37; the drainage of any swamp or other land; the discharge of a pollutant into any water resource; and any other purpose, to be carried out in or in relation to a water resource, which is prescribed by Regulations made under this Act to be a purpose for which a permit is required.

Further, Section 42(1) provides that the conditions on a permit may require that on the issue of the permit and at prescribed intervals thereafter, the permit holder shall pay charges to the Authority for the use of water in accordance with the terms of the permit and the Regulations prescribed by the Authority. The charges are to be determined by reference to a schedule of charges published in the Gazette by the Authority following public consultation.<sup>40</sup>

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<sup>39</sup> Ibid, S.24(1).

<sup>40</sup> Water Act 2016, S. 42(2).

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Where there is an agreement between the Authority and a water resources users' association, the Authority may make available a portion of the water use charges to be used for financing such regulatory activities as the water resources users association has agreed to undertake on behalf of the Authority.<sup>41</sup>

Section 43(1) provides that in issuing a permit, and in fixing any conditions to be imposed on a permit, the Authority shall take into account such factors as it considers relevant, including- existing lawful uses of the water; efficient and beneficial use of water in the public interest; any basin area water resources management strategy applicable to the relevant water resource; the likely effect of the proposed water use on the water resource and on other water users; the classification and the resource quality objectives of the water resource; the investments already made and to be made by the water user in respect of the water use in question; the strategic importance of the proposed water use; the quality of water in the water resource which may be required for the reserve; and the probable duration of the activity or undertaking for which a water use is to be authorised.

The water Act 2016 provides that where, in the opinion of the Authority, it is desirable that water use in respect of one or more water resources, including ground water, within a specific geographic area be rationalized or reviewed so as to- achieve a sustainable allocation of water from a water resource which is under stress; achieve equity in allocations; promote beneficial use of water in the public interest; facilitate efficient management of water resources, or protect water resource quality, the Authority may issue a notice in the Gazette requiring all water users, including permit holders, to apply or reapply for permits for one or more types of water use.<sup>42</sup>

The Act requires that the proposed allocation schedule must be subjected to public consultation, after which the basin water resources committee should prepare a preliminary allocation schedule and ought to, by notice published in the Gazette advertise the times and places at which a copy of the schedule

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<sup>41</sup> Ibid, S. 42(3).

<sup>42</sup> Water Act 2016, S. 47(l).

may be inspected.<sup>43</sup> A person dissatisfied with the preliminary allocation schedule may appeal to the Water Tribunal within thirty days of the publication under subsection (3).<sup>44</sup> The Authority may also in the case of an inter basin water transfer cancel or vary a permit if such cancellation or variation is necessary for the accommodation of additional water users of a water source.<sup>45</sup>

### **3.4 Privatisation and Commercialisation of Water Resources**

The United Nations estimates that over one billion people across the world do not have access to safe, clean drinking water, although this is a basic human need.<sup>46</sup> This may be attributed to different problems and challenges which may range from water availability, supply and access, amongst others. Water, being mainly a public good commodity, is mostly vested in the state and hence public institutions are tasked with its management and distribution. However, over the years this has changed internationally, with more private players entering the scene in order to enhance efficiency. It has been observed that when public companies entrusted with the supply of water in the vast majority of developing countries failed to make the infrastructural investments required to provide water services to all, reforms involving commercialization of water services—the application of principles of cost recovery and profit maximization—and private sector participation were proposed as a way to increase investment in water delivery networks, improve access for all sectors of the population and reduce the burden of public services on government finances.<sup>47</sup>

It has been argued that water should be treated “as an economic good”, a proclamation that originated in the International Conference on Water and the

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<sup>43</sup> Ibid, S. 47(3).

<sup>44</sup> Ibid, S. 47(4).

<sup>45</sup> Ibid, S. 48(I).

<sup>46</sup> United Nations Research Institute for Social Development, ‘Commercialization, Privatization and Universal Access to Water,’ available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA) [ Accessed on 5/1/2017].

<sup>47</sup> Ibid.

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Environment (Dublin Conference 1992).<sup>48</sup> Managing water as an economic good is said to be an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.<sup>49</sup>

It has however been argued that water's characteristics that make it difficult to marketize include its status as a public good, a natural monopoly, a merit good and/or basic (human) right and a scarce resource.<sup>50</sup> The UN Committee on Economic, Social and Cultural Rights, in their publication, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*<sup>51</sup>, asserts that water is a limited natural resource and a public good fundamental for life and health. Furthermore, the human right to water is indispensable for leading a life in human dignity, and it is a prerequisite for the realization of other human rights.<sup>52</sup> According to the Committee, the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.<sup>53</sup>

The right to water falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most

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<sup>48</sup> Perry, C.J., et al, *Water as an Economic Good: A Solution, or a Problem?* Research Report 14, (International Irrigation Management Institute, Colombo, 1997), p. 1.

<sup>49</sup> Ibid.

<sup>50</sup> Akech, J.M.M., 'Governing Water and Sanitation in Kenya: Public Law, Private Sector Participation and The Elusive Quest for A Suitable Institutional Framework,' *Paper prepared for the workshop entitled 'Legal Aspects of Water Sector Reforms' to be organised in Geneva from 20 to 21 April 2007 by the International Environmental Law Research Centre (IELRC) in the context of the Research partnership 2006-2009 on water law sponsored by the Swiss National Science Foundation (SNF)*, p. 6. Available at [http://www.ielrc.org/activities/workshop\\_0704/content/d0702.pdf](http://www.ielrc.org/activities/workshop_0704/content/d0702.pdf) [Accessed on 5/01/2017].

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11. Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11).

<sup>52</sup> Ibid, para.1.

<sup>53</sup> Ibid, para. 2.

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fundamental conditions for survival.<sup>54</sup> It is also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food.<sup>55</sup> Priority in the allocation of water must be given to the right to water for personal and domestic uses, and also to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.<sup>56</sup>

The foregoing assertions by the UN Committee on Economic, Social and Cultural Rights have been captured in the Constitution of Kenya which provides that every person has the right – to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities.<sup>57</sup>

Section 43(2) of the Water Act provides that the use of water for domestic purposes shall take precedence over the use of water for any other purpose, and the Authority may, in granting any permit, reserve such part of the quantity of water in a water resource as in its opinion is required for domestic purposes. These are important provisions considering that providing access to water not only for domestic uses, but also for growing, preparing and selling food and other products that are vital for family welfare and food security is a key element in the realisation of the right to water as a part of the right to food, the right to health, and the right to an adequate living standard.<sup>58</sup> The Act also provides that nature and degree of water use authorized by a permit should be reasonable and beneficial in relation to other persons who use the same sources of supply or bodies of water.<sup>59</sup>

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<sup>54</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), *op cit.* Para. 3.

<sup>55</sup> *Ibid*, para. 3.

<sup>56</sup> *Ibid*, para. 6.

<sup>57</sup> Article 43(1), Constitution of Kenya 2010.

<sup>58</sup> Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' *op cit.*, p. 23.

<sup>59</sup> Section 43(2), Water Act 2016.

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The International Conference on Water and the Environment which resulted in the Dublin Statement on Water and Sustainable Development<sup>60</sup> came up with four guiding principles which should inform water governance at both international and national levels. The fourth Dublin principle on water is that water has an economic value in all its competing uses and should be recognized as an economic good. The argument has been that this principle should be interpreted to mean that water should be provided by private companies and that consumers should pay the full cost of water provision (full-cost recovery), signaling a radical shift from the subsidized public provision of water that had previously been the norm in many parts of the world.<sup>61</sup>

In the water sector, one of the most common ways of bringing in the private sector is through concession agreements, via which the state, while retaining ownership, transfers the right of operating the water utility to a private company.<sup>62</sup> Section 93(1) of the Water Act 2016 provides that a water services provider may enter into a public private partnership or public partnerships for the exercise and performance by another person of some or all of its functions as a licensee with respect to a part or the whole of its area of water service provision.

The advocates for private sector participation on the water and sanitation policy agenda for the South saw it as a means of achieving greater efficiency and expansion in the water and sanitation sector.<sup>63</sup> This is because there is

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<sup>60</sup> United Nations, The Dublin Statement on Water and Sustainable Development, Adopted January 31, 1992 in Dublin, Ireland, International Conference on Water and the Environment. Dublin, Ireland, International Conference on Water and the Environment, available at <http://un-documents.net/h2o-dub.htm> [Accessed on 05/10/2016]

<sup>61</sup> Miroso, O. & Harris, L.M., 'Human Right to Water: Contemporary Challenges and Contours of a Global Debate,' *Antipode*, Vol. 44, No. 3, 2012, pp. 932-949 at p. 935.

<sup>62</sup> United Nations Research Institute for Social Development, 'Commercialization, Privatization and Universal Access to Water,' available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA)

<sup>63</sup> Budds, J. & McGranahan, G., 'Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America,' *Environment & Urbanization*, Vol. 15, No. 2, October 2003, pp. 87-114 at p. 87.

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general agreement that public utilities have been too slow in extending access to services and that they can be inefficient and corrupt, and increasing private sector involvement was meant to address these problems.<sup>64</sup>

It has been argued that under the right circumstances, it may well be possible for private sector participation to improve efficiency and increase the financial resources available for improving water and sanitation services.<sup>65</sup> However, it can also direct finance to urban centres and neighbourhoods that are already comparatively well served, further polarize the politics of water and sanitation (especially when prices increase) and create new regulatory problems. Much depends on the way privatization is developed and the local context.<sup>66</sup> This seems to be the approach that was adopted by the water Act 2016, with much emphasis being on the provision of water to the urban areas and extension to the rural areas only being a matter left to the licensing authorities.

For instance, the Water Act 2016 empowers county governments to establish water services providers, which may be a public limited liability company established under the Companies Act, 2015 or other body providing water services as may be approved by the Regulatory Board. In establishing a water services provider, a county government must comply with the standards of commercial viability set out by the Regulatory Board.<sup>67</sup> A water services provider shall be responsible for- the provision of water services within the area specified in the licence; and the development of county assets for water service provision.<sup>68</sup> The Act also provides that a county water services provider may with the approval of the relevant licensing authority extend water services to rural or developing areas.<sup>69</sup> The Act further provides that nothing in its provisions should deprive any person or community of water services on the grounds only that provision of such services is not commercially viable.<sup>70</sup>

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<sup>64</sup> Ibid, p. 87.

<sup>65</sup> Ibid, p. 88.

<sup>66</sup> Ibid, p.88.

<sup>67</sup> Water Act 2016, S. 77.

<sup>68</sup> Ibid, S. 78(1).

<sup>69</sup> Ibid, S. 81.

<sup>70</sup> Ibid, S. 94(l).



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The Act also requires every county government to put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.<sup>71</sup> The measures referred to in subsection (2) shall include the development of point sources, small scale piped systems and standpipes which meet the standards set by the Regulatory Board and which may be managed by the Water community associations, public benefits organizations or a private person under a contract with the county government.<sup>72</sup> Further, in order to implement its obligations under this section, a county government should formulate and submit annually to the Regulatory Board and to the Cabinet Secretary, a five year development plan incorporating an investment and financing plan for the provision of water services in the rural areas referred to subsection (1) within its area of jurisdiction.<sup>73</sup> The Cabinet Secretary is also to provide technical, financial and other assistance to a county government to enable the county government to discharge its responsibility under this section.<sup>74</sup>

Under the Water Act 2016, there is also established a water sector financing institution to be known as the Water Sector Trust Fund.<sup>75</sup> The object of the Fund is to provide conditional and unconditional grants to counties, in addition to the Equalisation Fund and to assist in financing the development and management of water services in marginalized areas or any area which is considered by the Board of Trustees to be underserved including- community level initiatives for the sustainable management of water resources; development of water services in rural areas considered not to be commercially viable for provision of water services by licensees; development of water services in the under-served poor urban areas; and research activities in the area of water resources management and water services, sewerage and sanitation.<sup>76</sup>

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<sup>71</sup> Ibid, S. 33(2).

<sup>72</sup> Ibid, S. 33(3).

<sup>73</sup> Ibid, S. 33(4).

<sup>74</sup> Ibid, S. 33(5).

<sup>75</sup> Water Act 2016, S. 113(1).

<sup>76</sup> Ibid, S. 114.

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It has been argued that, in practice rather than in theory, many stakeholders, including water users associations, non-governmental organizations (NGOs) and local communities, may build on local knowledge and networks, but may often lack support, funds, institutional and technical capacities or even membership to significantly contribute to the management of water resources.<sup>77</sup> It is therefore a laudable move to have in place a fund that seeks to community level initiatives and ensuring that all persons have access to clean and safe water in adequate amounts, as a matter of right. This is especially important in areas that may have been sidelined on the basis of not being commercially viable for provision of water services by licensees. The fund however needs to be scrupulously guarded against misappropriation and diversion by self-seeking stakeholders, if the above objectives are to be realized.

It is noteworthy that most of the institutions established under this law comprise of professionals and even where the Act provides for consultations, the same is provided for in simplistic terms. The main players in the water governance matters are the government organs and private sector players, with little or no role for communities who may usually be the most affected by policies and state actions on water. It has been suggested that by directly involving users of water in the governance of the resource, the knowledge on which this participation is based may be more meaningful than otherwise may have been possible since local stakeholders may often be more familiar with the peculiarities of local economic, social, cultural and environmental situations.<sup>78</sup> Further, it might also mean that users involved may accept the regulations as appropriate and consistent with their values and interests and may also be more willing to comply with them.<sup>79</sup>

### **3.0 Bridging the Gap**

It has been posited that the basic principles for effective water governance include open and transparent, inclusive and communicative, coherent and integrative, equitable and ethical approaches while in terms of performance, the basic attributes include accountable, efficient, responsive and sustainable

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<sup>77</sup> Tortajada, C., 'Water Governance: Some Critical Issues,' *op cit*, p. 300.

<sup>78</sup> *Ibid*, p. 300.

<sup>79</sup> *Ibid*, p. 300.

operations.<sup>80</sup> The degree of integration of the principles and attributes in any system serve as good indicators of whether the system will be able to achieve effective governance or not.<sup>81</sup>

#### **4.1 A Human Rights Approach to Water**

It has been acknowledged that one of the problems believed to contribute to inequitable access to water is a perception among community members that there are cartels comprising of powerful politicians, employees of water service providers, water vendors, and government employees, among others who are out to ensure that the status quo of the existing water problems is maintained.<sup>82</sup> It is estimated that over 50% of Kenya's households do not have access to safe drinking water and the proportion is higher for the poor.<sup>83</sup>

It is noteworthy that the user water rights are different from the human right to water in that while water rights are the legal authorization to use a specified quantity of water "for a specific purpose under specific conditions," the human right to water focuses on the amount and quality of water required by human beings to meet their basic needs, which should serve as a minimum requirement for water rights to be granted to each individual.<sup>84</sup>

From the Act, it seems that the law places greater emphasis on the water rights while sidelining the human right to water. This is seen from the emphasis on licenses for the various uses of water. There are inadequate provisions placing elaborate responsibility on the various institutions and governance bodies in implementation of the human right to water. The UN General Assembly Resolution on the human right to water and sanitation<sup>85</sup> formally recognises the right to water and sanitation and acknowledges that clean drinking water

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<sup>80</sup> K'Akumu, O.A., 'Toward effective governance of water services in Kenya,' op cit at p. 531.

<sup>81</sup> Ibid, p. 531.

<sup>82</sup> Moraa, H., Water governance in Kenya: Ensuring Accessibility, Service delivery and Citizen Participation, (iHub Research, July 2012), p.9. Available at [http://ihub.co.ke/ihubresearch/uploads/2012/july/1343052795\\_\\_537.pdf](http://ihub.co.ke/ihubresearch/uploads/2012/july/1343052795__537.pdf).

<sup>83</sup> Ibid, p.5.

<sup>84</sup> Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 26.

<sup>85</sup> The United Nations General Assembly Resolution, the human right to water and sanitation, A/RES/64/292, July 2010.

and sanitation are essential to the realisation of all human rights. The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all. The implementation of the Act should adopt a human rights approach which would help in addressing the inequitable distribution and access to water resources.

#### **4.2 Opportunities for Public Participation in Water Governance**

Public participation means different things to different people and may take several forms, ranging from information supply – to consultation, discussions with the public, co-decision making – to a situation in which the “public” is in charge of parts of natural resources management, for example, through water users’ associations.<sup>86</sup> Public participation would improve the quality of decision making by opening up the decision-making process and making better use of the information and creativity that is available in society. Moreover, it would improve public understanding of the management issues at stake, make decision making more transparent, and might stimulate the different government bodies involved to coordinate their actions more in order to provide serious follow-up to the inputs received. Management itself would become less controversial, less litigation would take place, and implementation of decisions would be much smoother. Finally, public participation could improve democracy. Public participation would be imperative whenever government does not have enough resources (information, finance, power, etc.) to manage an issue effectively, as is usually the case in water management.<sup>87</sup>

Scholars have argued that inclusiveness requires wide participation throughout the policy chain right from conception to implementation.<sup>88</sup> Furthermore, participation is necessary to make decisions more politically

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<sup>86</sup> Huitema, D., et al, ‘Adaptive Water Governance: Assessing the Institutional Prescriptions of Adaptive (Co-)Management from a Governance Perspective and Defining a Research Agenda,’ *Ecology and Society*, Vol. 14, No.1, pp.1-26 at p. 5.

<sup>87</sup> Ibid, p.5.

<sup>88</sup> K’Akumu, O.A., ‘Toward effective governance of water services in Kenya,’ op cit at p. 538.

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acceptable and to foster accountability and stakeholders should collectively design and implement policies and management strategies that meet their goals effectively and acceptably.<sup>89</sup>

It has been argued that the community-based water governance systems anchored in unwritten customary norms and values shape perceptions of water rights and water governance at local levels.<sup>90</sup> The Community-based norms and practices often referred to as 'living customary law,' have endured in spite of efforts by both colonial and independent African governments to redefine citizen's relationship to water through state laws and policies.<sup>91</sup>

### **4.3 Effective Water Governance for the Realisation of Sustainable Development Agenda**

Water is a finite and irreplaceable resource that is fundamental to human well-being. It is only renewable if well managed. Today, more than 1.7 billion people live in river basins where depletion through use exceeds natural recharge, a trend that will see two-thirds of the world's population living in water-stressed countries by 2025. While water scarcity can pose a serious challenge to sustainable development, if managed efficiently and equitably, it can play a key enabling role in strengthening the resilience of social, economic and environmental systems in the light of rapid and unpredictable changes. Water is one of the natural resources at the core of sustainable development debate and it is critical for socio-economic development, healthy ecosystems and for human survival itself.<sup>92</sup> Goal 6 of the United Nation's *Transforming our world: the 2030 Agenda for Sustainable Development* acknowledges states' obligation to ensure availability and sustainable management of water and sanitation for all. It requires that by 2030, states should achieve universal and equitable access to safe and affordable drinking water for all.<sup>93</sup> States are also

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<sup>89</sup> Ibid, p. 538.

<sup>90</sup> Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' op cit., pp. 6-7; 20.

<sup>91</sup> Ibid, p. 7.

<sup>92</sup> United Nations, 'International Decade for Action 'water for Life 2005-2015': Water and sustainable development,' available at [http://www.un.org/waterforlifedecade/water\\_and\\_sustainable\\_development.shtml](http://www.un.org/waterforlifedecade/water_and_sustainable_development.shtml) [Accessed on 05/10/2016].

<sup>93</sup> Paragraph 6.1, *Transforming our world: the 2030 Agenda for Sustainable Development*.

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required to achieve access to adequate and equitable sanitation and hygiene for all.<sup>94</sup> By 2030, they are also required to substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity.<sup>95</sup>

In order to protect the water sources and guarantee supply, states are also required to protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.<sup>96</sup> This is besides the obligation to achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment.<sup>97</sup> They are also required to ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements.<sup>98</sup> It is worth pointing out that focus should not only be on the water resources and their access and use, but there should also be the responsibility to ensure that the resources are not depleted. Hence, there should be an integrated approach to water resources governance.

Access to safe water and sanitation are crucial for human survival and are believed to be essential considerations when addressing socioeconomic development, poverty, and health problems.<sup>99</sup> The United Nation's 2030 Agenda on Sustainable Development affirms that social and economic development depends on the sustainable management of our planet's natural resources. As such, it captures the determination to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife, and also to

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<sup>94</sup> Ibid, Para. 6.2.

<sup>95</sup> Ibid, Para. 6.4.

<sup>96</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, para.6.6.

<sup>97</sup> Ibid, Para. 12.4.

<sup>98</sup> Ibid, Para. 15.1.

<sup>99</sup> Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit., p. 25.

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promote sustainable tourism, to tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.<sup>100</sup> To achieve this, the 2030 Agenda requires the states to implement integrated water resources management at all levels, including through transboundary cooperation as appropriate.<sup>101</sup>

Scarcity and misuse of fresh water is believed to pose a serious and growing threat to sustainable development and protection of the environment.<sup>102</sup> This is because, human health and welfare, food security, industrial development and the ecosystems on which they depend, are all at risk, unless water and land resources are managed more effectively in the present decade and beyond than they have been in the past.<sup>103</sup>

The United Nations affirms that water is also at the heart of adaptation to climate change, serving as the crucial link between the climate system, human society and the environment.<sup>104</sup> It is vital for reducing the global burden of disease and improving the health, welfare and productivity of populations.<sup>105</sup> This is affirmed in the 2030 Agenda on Sustainable Development which obligates states to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials,

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<sup>100</sup> Target 33, United Nation 2030 Agenda on Sustainable Development.

<sup>101</sup> Ibid, Para.6.5.

<sup>102</sup> United Nations, The Dublin Statement on Water and Sustainable Development, 1992, op cit.

<sup>103</sup> Gorre-Dale, E., 'The Dublin Statement on Water and Sustainable Development', *Environmental Conservation*, Vol. 19, No.2, 1992, p. 181. Available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/843EB9B98E0F63A3DA36041F7BF3BF16/S0376892900030733a.pdf/div-class-title-the-dublin-statement-on-water-and-sustainable-development-div.pdf> [Accessed on 05/10/2016].

<sup>104</sup> United Nations, 'International Decade for Action 'water for Life 2005-2015': Water and sustainable development,' op cit.; See generally, UN Water, 'Climate Change Adaptation: The Pivotal Role of Water,' available at [http://www.unwater.org/downloads/unw\\_ccpol\\_web.pdf](http://www.unwater.org/downloads/unw_ccpol_web.pdf) [Accessed on 05/2/2016].

<sup>105</sup> Ibid.

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halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.<sup>106</sup>

It is notable that Kenya's Water Act 2016 has provisions covering these areas, by mainly obligating licensed water providers and users to take particular measures. However, this Act does not have clear provisions on the role of local communities in water provision, use and conservation measures. While it is notable that a number of provisions provide for consultations and public participation, there is the risk of communities being sidelined in governance issues and having them reduced to mere spectators and recipients of institutional policies and decisions. This would be against the constitutional principles and values of governance including democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.<sup>107</sup> It is imperative to ensure that these principles and values are implemented in water resources governance for realisation of the human right to water and sustainable development agenda.

The 2030 Agenda on Sustainable Development tasks states to support and strengthen the participation of local communities in improving water and sanitation management.<sup>108</sup> Arguably, sustainable use of resources such as water requires the meaningful participation of all. This is alongside the obligation to expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.<sup>109</sup> Kenya should ensure that local communities are actively involved in water resources governance in the country for realisation of sustainable development agenda. This will ensure that policy measures adopted by the state agencies incorporate the unique but useful knowledge of these communities in conservation measures.

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<sup>106</sup> United Nation 2030 Agenda on Sustainable Development, Para. 6.3.

<sup>107</sup> Art. 10(2), Constitution of Kenya 2010 (Government Printer, 2010, Nairobi)

<sup>108</sup> United Nation 2030 Agenda on Sustainable Development, Para. 6.b .

<sup>109</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, Para. 6.a.



#### **4.0 Conclusion**

From the highlighted provisions in this paper, the Water Act 2016 mainly seeks to address depletion, inefficient consumption and pollution of water resources in the country, through a number of measures, as discussed. While this law can be hailed as a positive step towards addressing the ever worsening problem of access, use and governance of water resources, there is need for periodic review of the performance especially as far as the implementation of provisions on the access, use and public participation are concerned.

Under the current constitutional dispensation, the right of access to clean and safe drinking water is recognised as significant in the quest for realisation of the human right to economic and social rights such as the highest attainable standard of health, reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality. This reflects the international human rights law position on the issue. Arguably, these rights cannot be reasonably achieved without first securing the right to clean and safe water in adequate amounts. Streamlining water governance in Kenya for sustainable development is thus urgent and necessary.

## **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.*

### **1.0 Introduction**

The need for the UN Framework Convention on Climate Change (UNFCCC)<sup>1</sup> 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

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

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emissions in general, including through the application of new technologies on terms which are affordable to them.<sup>2</sup>

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.<sup>3</sup>

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

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.<sup>5</sup> 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.<sup>6</sup>

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<sup>2</sup> Ibid, Preamble.

<sup>3</sup> Ibid, Article 2.

<sup>4</sup> 'Conference of the Parties (COP) | UNFCCC'

<<https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>> accessed 10 January 2023.

<sup>5</sup> Ibid.

<sup>6</sup> 'Biodiversity Day - COP27' (UNEP - UN Environment Programme)

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

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The 27<sup>th</sup> Session of the Conference of the Parties of the UNFCCC (COP 27) took place in Sharm el-Sheikh, Egypt, held from November 6<sup>th</sup> to 20<sup>th</sup> November, 2022.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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.

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

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

<sup>9</sup> ‘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.

## **2.0 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).<sup>10</sup>

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).<sup>11</sup> 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.<sup>12</sup>

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

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<sup>10</sup> 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.

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

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

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coexisting in a limited environment to global ecosystems.<sup>13</sup> 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.<sup>14</sup> This thus makes biodiversity conservation a crucial part of the journey towards achieving sustainable development goals.

### **3.0 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 16<sup>th</sup> November 2022, whose goal was to advance and institutionalize action towards valuing, conserving, restoring, and sustainably using biodiversity across terrestrial, freshwater, coastal, and marine 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.<sup>15</sup> Notably, this was the first COP to dedicate a day to biodiversity.<sup>16</sup>

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

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

<sup>14</sup> 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.

<sup>15</sup> 'Biodiversity Day - COP27' (UNEP - UN Environment Programme) <<http://www.unep.org/events/conference/biodiversity-day-cop27>> accessed 13 February 2023.

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

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of pollution and climate change.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

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,

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

<sup>18</sup> Ibid.

<sup>19</sup> '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.

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

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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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup>

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

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<sup>21</sup> Ibid.

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

<sup>23</sup> Ibid.



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the UNEA-5 definition<sup>24</sup>, are not used for greenwashing<sup>25</sup>, 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.<sup>26</sup>

The *Sharm el-Sheikh Implementation Plan*<sup>27</sup>, 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 climate change and biodiversity loss in a comprehensive and synergetic manner.<sup>28</sup> In addition, the Plan stresses the significance of safeguarding, conserving, and restoring nature and ecosystems in order to meet the Paris Agreement temperature goal,

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<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> ‘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.

<sup>27</sup> 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](https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf)> accessed 14 February 2023.

<sup>28</sup> *Ibid*, Preamble.

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including through the protection of biodiversity, forests, and other terrestrial and marine ecosystems that act as sinks and reservoirs for greenhouse gases.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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

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<sup>29</sup> Ibid, Para. 15.

<sup>30</sup> Ibid, para. 48.

<sup>31</sup> 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.

<sup>32</sup> '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.

<sup>33</sup> 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.

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funds on other pressing socio-economic issues affecting their populace.<sup>34</sup> It is hoped that there will be goodwill in making this climate change funding mechanism a reality.

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.<sup>35</sup>

Such funding can go a long way in not only enhancing climate change mitigation measures but also narrowing the gap between climate change

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<sup>34</sup> '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.

<sup>35</sup> '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](https://www.nema.go.ke/index.php?option=com_content&view=article&id=262&Itemid=385)> accessed 14 February 2023.

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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.<sup>36</sup>

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.<sup>37</sup> Ecosystem-based adaptation, which is basically a strategy for coping with change, can decrease greenhouse gas emissions caused by habitat loss and ecosystem degradation, which in turn helps to mitigate the effects of climate change.<sup>38</sup>

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<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> Ibid.

#### **4.0 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.<sup>39</sup>

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.

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<sup>39</sup> '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.

## **Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession**

### **Abstract**

*The COVID-19 pandemic has destabilized the traditional ways through which many professions operated and ushered in a new era of technology. One of the sectors that has been caught by the wind of change is the legal profession. The use of technology as a tool of access to justice has been embraced by the legal profession as a matter of necessity. Such technology includes the use of virtual court sessions, digital filing through the e-filing platform, electronic case management systems and digitization of land services. This has arguably marked the beginning of a worldwide trend that is likely to proceed post COVID-19.*

*Technology is revolutionizing the way businesses and various sectors operate. However, technology comes with its advantages and disadvantages. The use of technology in the legal profession has been hailed for promoting efficiency, cost effective and expeditious management of disputes. However, it has also come with its share of concerns such as data privacy and loss of employment due to automation of legal services.*

*The paper seeks to critically discuss the impact of technology on modern legal practice in Kenya. It seeks to reconcile the two opposing views by discussing both the advantages and disadvantages of technology in modern legal practice. The paper argues that the legal profession has more to gain than lose if it embraces technology as a tool of access to justice. The paper explores the various ways through which the legal profession can utilise legal technology to not only enhance access to justice but also improve the efficiency of law firms, the Judiciary and even law schools. It suggests practical ways through which the legal profession can embrace technology as a tool of trade in commerce and dispute resolution while also noting to address the concerns associated with the use of technology in the legal profession.*

### **1.0 Introduction**

Technology has impacted the nature and practice of the legal profession in Kenya and across the globe in the 21<sup>st</sup> century. Traditionally, legal practice in many parts of the world including Africa has been through physical processes such as in person court room attendances where different players including

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judicial officers, advocates and litigants participate in court processes<sup>1</sup>. However, this position is no longer tenable due to rapid developments that have been witnessed at the global stage. The outbreak of the Coronavirus disease (COVID-19) pandemic destabilized the global economy which resulted in a ripple effect on many sectors including the legal profession<sup>2</sup>. The preventive measures recommended by the World Health Organisation and imposed by most states such as physical distancing meant that it became difficult for most professions to operate from their traditional physical places<sup>3</sup>. The legal profession was not spared by the effects of the COVID-19 pandemic. Due to the preventive measures adopted in most states, the physical attendance of employees at places of work such as law firms became difficult<sup>4</sup>. To address this challenge, law firms devised alternative methods of work such as remote working. The Judiciary in Kenya also acknowledged the effects of the COVID-19 pandemic and adopted alternative means of access to justice such as virtual court sessions and electronic filing (e-filing) of court pleadings and documents. Conveyancing practice has also been disrupted through the digitization of services by the Ministry of Lands through the Ardhisasa platform. This has arguably disrupted the legal profession in an unprecedented manner<sup>5</sup>.

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<sup>1</sup> Could the Pandemic Be Grinding Justice to a Halt? (ALN Kenya) <<https://www.africalegalnetwork.com/kenya/news/coronavirus-pandemic-grinding-justice-halt/>> accessed 4 April 2021; 'IBA - The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months' available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=bd404ce3-3886-48a8-98f6-38eaaccd5f53> (accessed on 22/06/2022)

<sup>2</sup> Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' available at <http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> (accessed on 22/06/2022)

<sup>3</sup> Ibid

<sup>4</sup> Meganne Tillay | February 28 and 2020 at 03:39 AM, 'Baker McKenzie Shuts down London Office Following Coronavirus Scare' (*Law.com International*) available at <https://www.law.com/international-edition/2020/02/28/baker-mckenzie-shuts-down-london-office-following-coronavirus-scare> (accessed on 22/06/2022)

<sup>5</sup> Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' available at <http://kmco.co.ke/wp-content/uploads/2021/04/Embracing-Science-and-Technology-in-legal-education-for->

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The disruptions caused by the COVID-19 pandemic have brought to light, the impact of technology on modern legal practice. Processes such as virtual court sessions, electronic filing and remote working heavily rely on technology for their success. It can thus be argued that the legal profession has adopted technology as a matter of necessity. This can also be attributed to the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge<sup>6</sup>.

However, while legal technology has won critical acclaim for streamlining and improving the accuracy, efficiency and effectiveness of laborious processes within daily practice, it has also been criticized for the concerns it raises such as data privacy and loss of employment due to automation of legal services. The paper seeks to critically discuss the impact of technology on modern legal practice in Kenya. It seeks to reconcile the two opposing views by discussing both the advantages and disadvantages of technology in modern legal practice. The paper argues that the legal profession has more to gain than lose if it embraces technology as a tool of access to justice. It suggests practical ways through which the legal profession can embrace technology as a tool of trade in commerce and dispute resolution while also noting to address the concerns associated with the use of technology in the legal profession.

In this paper, 'legal technology' (Legal Tech) is used to mean the use of technology and software to provide and aid legal services<sup>7</sup>. Legal Technology applies technology and software to assist law firms in practice management, billing, big data, e-discoveries, predictive analytics, knowledge management

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Efficiency-and-Enhanced-Access-to-Justice-Kariuki-Muigua-April-2021.pdf (accessed on 22/06/2022)

<sup>6</sup> Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' From Washington Lawyer, May 2011 available at <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm> (accessed on 22/06/2022)

<sup>7</sup> What Is Legal Technology and How Is It Changing Our Industry?' (*The Lawyer Portal*, 29 January 2019) available at <https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry> (accessed on 22/06/2022)



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and document storage<sup>8</sup>. While Legal Tech is meant to enable the bigger firms improve overall efficiency in order to adapt to a progressively popular agile working environment, it also allows smaller firms and sole practitioners to compete with the leading names in the field, giving them access to powerful research tools<sup>9</sup>.

This paper discusses these new developments and proceeds on the hypothesis that the legal profession has more to gain than lose if it continues to embrace technology as a tool of access to justice.

### **2.0 Legal Practice in Kenya in the Modern Era: Challenges and Prospects**

Since the introduction of the formal justice system in Kenya during colonialism, the legal profession has been a major player in facilitating access to justice<sup>10</sup>. However, the road towards access to justice in Kenya has been riddled with many obstacles including high fees of litigation, geographical location of courts, complexity of rules and procedures among others<sup>11</sup>. These problems are compounded by economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development which directly impact on the legal profession especially among lawyers<sup>12</sup>. The changing times and the above listed issues have made clients to continue to demand efficiency and responsiveness from their lawyers for less cost.

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<sup>8</sup> Business Models for Law Firms - p.Xel Marketing Agency' available at <https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry> (accessed on 22/06/2022)

<sup>9</sup> What Is Legal Technology and How Is It Changing Our Industry?' available at <https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry> (accessed on 22/06/2022)

<sup>10</sup> Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

<sup>11</sup>Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.

<sup>12</sup> Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 242.

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These challenges have been exacerbated by the COVID-19 pandemic which changed the landscape of the legal profession. The idea of remote working which was widely embraced as a result of the pandemic has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future<sup>13</sup>. It is also argued that as law firms embrace the idea of working remotely due to the COVID-19 pandemic, there has been a growing likelihood that physical offices will look very different in the future compared to what they are now<sup>14</sup>. These are some of the expected and unexpected effects of the COVID-19 pandemic on law firms where remote working is expected to take off as never before and firms will operate with more prudent and flexible financial models<sup>15</sup>.

Despite the challenges highlighted above, modern legal practice is considered one with staggering prospects. It has been argued that the strength of the 21<sup>st</sup> century lawyer lies in the understanding and use of Technology as a practice tool and area of core competence<sup>16</sup>. For a long time, the legal profession and lawyers in particular have been characterized as technology antagonists who are slow to change and wary of innovation<sup>17</sup>. However, this position is no longer tenable in modern legal practice. The practice of law has evolved from an era of using desktop phones, filing cabinets, and yellow legal pads to a

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<sup>13</sup> Samantha Stokes | April 27 and 2020 at 06:59 PM | The original version of this story was published on The American Lawyer, 'The Coronavirus Will Change the Legal Industry's Approach to Remote Work – But How?' (Law.com International) available at <https://www.law.com/international-edition/2020/04/27/the-coronavirus-will-change-the-legal-industrys-approach-to-remote-work-but-how-378-140355/> (accessed on 23/06/2022)

<sup>14</sup> Paul Hodkinson | May 05 and 2020 at 01:00 AM | The original version of this story was published on The American Lawyer, 'Welcome to the Law Firm Office of the Future: Smaller, Higher-Tech and One-Way' (Law.com International) available at <https://www.law.com/international-edition/2020/05/05/smaller-higher-tech-and-one-way-welcome-to-the-law-firm-office-of-the-future/> (accessed on 23/06/2022)

<sup>15</sup> Ibid

<sup>16</sup> Kingsley Ugochukwu Ani, 'The 21<sup>st</sup> Century Lawyer: Challenges and Prospects' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 <https://papers.ssrn.com/abstract=3270279> (accessed on 23/06/2022)

<sup>17</sup> Ready or not: artificial intelligence and corporate legal departments' available at <https://legal.thomsonreuters.com/en/insights/articles/artificial-intelligence-ai-report> (accessed on 23/06/2022)

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period when all these have been replaced by laptops, tablets, cell phones, and other mobile devices and often virtual or cloud-based platforms<sup>18</sup>. This coupled with the challenges in legal practice that have emerged as a result of the COVID-19 pandemic means that technology has become part and parcel of the legal profession. The paper discusses the extent to which the legal profession has embraced technology in Kenya largely as a result of the COVID-19 pandemic. It further discusses the challenges and prospects associated with the use of legal technology.

### **3.0 Progress Towards Embracing Technology as a Tool of access to Justice in the legal Profession in Kenya**

#### **3.1 Virtual Court Infrastructure**

The outbreak of the COVID-19 pandemic severely affected the administration of justice. Physical court sessions were no longer tenable due to the need to avoid the risk of transmission of COVID-19 and ensure the health of judicial officers, lawyers and litigants<sup>19</sup>. At the height of the pandemic, the Judiciary in Kenya announced a scale down of court activities throughout the country due to the concerns created by the outbreak of the pandemic<sup>20</sup>. Courts were seen as possible hotspots for the spread of the pandemic owing to the large crowds of persons including judicial officers, advocates, court staff and litigants who are normally part of the day to day court operations<sup>21</sup>. This forced the judiciary in most countries including Kenya to embrace technology in order to continue administering justice in the midst of the pandemic.

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<sup>18</sup> Gaffney Nick, 'Law Practice Management: Transforming a Law Practice with Technology' available [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2017/september-october/law-practice-management-transforming-law-practice-technology/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/september-october/law-practice-management-transforming-law-practice-technology/) (accessed on 23/06/2022)

<sup>19</sup> Virtual Hearings: The Way Forward in the UK in Uncertain Times' <https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times> (accessed on 23/06/2022)

<sup>20</sup> Muigua. K., 'Virtual Arbitration Amidst Covid19: Efficacy and Checklist for Best Practices' available at <http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf> (accessed on 23/06/2022)

<sup>21</sup> Ibid

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Owing largely to the impact of the COVID-19 pandemic, the Judiciary in Kenya has enhanced the use of technology in judicial proceedings including the use of e-filing; e-service of documents; digital display devices; real time transcript devices; video and audio conferencing; digital import devices and electronic delivery of rulings and judgments<sup>22</sup>. This represents an important milestone towards embracing technology as a tool of access to justice in the legal profession.

It has been rightly pointed out that the COVID-19 pandemic may prove a catalyst for courts to embrace technology and reduce their reliance on in-person hearings and hard copy documents, particularly for case management purposes, even after the pandemic<sup>23</sup>. This calls for the continued use of legal technology post COVID-19 pandemic period as well as infrastructural investment to ensure that the processes run smoothly and efficiently<sup>24</sup>. It also calls for equipping the courts and all registries with the relevant infrastructure through setting up some permanent virtual courts and tribunals<sup>25</sup>. Embracing virtual court technology is likely to be an essential component of access to justice both now and in the future.

### **3.2 Digitization of Legal Services**

There have been significant strides towards digitization of legal services in order to enhance efficiency and service delivery. Key among these services include land registration. The Land Registration Act mandates the Registrar to maintain the register of lands and other related documents in a secure, accessible and reliable format including electronic files<sup>26</sup>. The Act further

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<sup>22</sup> Kenya Law: Electronic Case Management Practice Directions, 2020' available at <http://kenyalaw.org/kl/index.php?id=10211> , Rule 6, (accessed on 23/06/2022)

<sup>23</sup> The Remote Courtroom: Tips and Tricks for Online Hearings' available at <https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings> (accessed on 23/06/2022)

<sup>24</sup> Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

<sup>25</sup> Ibid

<sup>26</sup> Land Registration Act, No.3 of 2012, S 9 (1) (b)

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requires the Registrar to make information in the register accessible to the public by electronic means<sup>27</sup>.

To give effect to the above provisions, the Cabinet Secretary for Land and Physical Planning formulated the Land Registration (Electronic Transactions) Regulations, 2020 vide a legal notice<sup>28</sup>. The regulations mandate the Chief Land Registrar to maintain an electronic land registry<sup>29</sup>. They further provide that all registry transactions under the Land Registration Act shall be carried through the electronic registry<sup>30</sup>. This has facilitated the digitization of land records through the creation of a Document Management System (DMS) for all approved physical development plans<sup>31</sup>. Further, it has resulted in the development of a system for the management for land titles documents that involves scanning, indexing and archiving deed files and land rent cards among other digital processes.

In addition, the Ministry of Lands and Physical planning and the National Land Commission have jointly developed the Ardhisasa platform that allows citizens, other stakeholders and interested parties to interact with land information held and processes undertaken by Government<sup>32</sup>. The platform is aimed at enhancing the security of land records, speeding up land transactions, efficient allocation of settlement files, achieving reasonable timelines in all settlement transactions and curbing fraud and corruption<sup>33</sup>. This has contributed in reducing human interactions, delays and inconveniences that characterized manual registries.

The digitization of legal services has also been facilitated via other platforms such as the Kenya Law platform by the National Council for Law Reporting

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<sup>27</sup> Ibid, S 10

<sup>28</sup> The Land Registration (Electronic Transactions) Regulations, 2020, Legal Notice 130, Government Printer, Nairobi

<sup>29</sup> Ibid, Regulation 4

<sup>30</sup> Ibid, Regulation 6

<sup>31</sup> 'Digitization of Land Records in Kenya' available at <https://mmsadvocates.co.ke/digitization-of-land-records-in-kenya/> (accessed on 23/06/2022)

<sup>32</sup> What is Ardhisasa, available at <https://ardhisasa.lands.go.ke/home> (accessed on 23/06/2022)

<sup>33</sup> Ibid

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that offers access to laws of Kenya, bills pending in Parliament, judgments and rulings, publications among other services<sup>34</sup>. Further, the eCitizen platform offers a gateway to most government services some which were exclusively undertaken by lawyers such as the registration of companies and businesses<sup>35</sup>. Digitization of legal services has changed the landscape of legal practice in Kenya. While the move has been praised for enhancing efficiency and expeditiousness in the delivery of legal services, it has also been faced with its fair share of challenges as shall be discussed.

### **4.0 Challenges and Concerns with the use of technology as a tool of access to justice in the legal profession**

#### **4.1 Data Privacy/Information Security Concerns**

The use of legal technology such as videoconferencing, e-filing and e-service of documents creates data privacy/information security concerns. The technological systems supporting these processes such as e-filing platform and emails may be subject to cyberattacks such as hacking<sup>36</sup>. In such cases, unauthorized persons may access the system and engage in unwarranted practices such as stealing of information, deleting information or sending unwanted information to the detriment of some parties<sup>37</sup>. It is thus important to address the cybersecurity concerns associated with the use of legal technology in order to ensure the success and efficiency of legal technology.

#### **4.2 Challenges in using legal technology**

The fast pace of technological revolution could result in the legal profession lagging behind in keeping up with changes. This can be seen through the use of old technologies in some law firms such as old versions of desktops and hard drives used for storage of data at the expense of modern technologies such as laptops and cloud based storage systems. Further, the ability of judicial

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<sup>34</sup> Kenya Law, available at <http://kenyalaw.org/kl/> (accessed on 23/06/2022)

<sup>35</sup> eCitizen, available at <https://www.ecitizen.go.ke/ecitizen-services.html> (accessed on 23/06/2022)

<sup>36</sup> Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," (2015) 1 Alternative Dispute Resolution, pp 133-134.

<sup>37</sup> Ibid

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officers and lawyers to effectively use legal technology is also a challenge<sup>38</sup>. There have been cases of judicial officers and lawyers having challenges in joining virtual court sessions or using the e-filing platform<sup>39</sup>. The success of legal technology thus lies with judicial officers and lawyers possessing the requisite skills and keeping up with technological revolution in order to enhance efficiency.

### **4.3 Risk of Technological Failure**

Since processes such as virtual court sessions rely on internet connectivity, affordable and secure internet connectivity is crucial for the success of the process. The conduct of virtual court proceedings in Kenya has been faced with challenges such failure of video links or poor internet connectivity that hinders the success of the process<sup>40</sup>. It further becomes difficult to address such technical issues since participants would be in different locations<sup>41</sup>. In criminal cases being conducted virtually where accused persons do not have strong internet connection, their ability to fully defend themselves may be compromised undermining the right of access to justice<sup>42</sup>. Further, these challenges may be compounded by poor or limited electrical connectivity. The success of legal technology is thus predicated upon the ability to maintain the efficient working of such systems.

### **4.4 Credibility concerns during examination of witnesses**

Where witnesses are examined virtually, there are concerns that the loss of in-person observation will impair a court's ability to assess the credibility and strength of the evidence especially during cross examination<sup>43</sup>. One of the advantages of in person court hearings is that a court is able to discern the

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<sup>38</sup> Kenya Institute for Public Policy Research and Analysis (KIPPRA), 'Leveraging on Digital Technology in Administration of Justice' available at <https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/> (accessed on 24/06/2022)

<sup>39</sup> Ibid

<sup>40</sup> Walker.J., Virtual Hearings: An Arbitrator's Perspective, available at <https://int-arbitrators.com/wpcontent/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf> (accessed on 24/06/2022)

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Walker.J., Virtual Hearings: An Arbitrator's Perspective, Op Cit

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credibility of a witness by observing his/her body language, facial expressions and tone. Assessment of such non-verbal cues is essential in determining the credibility of a witness<sup>44</sup>. This purpose may be defeated through the use of legal technology such as virtual court proceedings a situation that could potentially undermine the right of access to justice.

### **4.5 Loss of Jobs**

There are concerns that embracing legal technology could result in loss of jobs due to automations of legal services. The automation of land services through the electronic land registry and Ardhisasa platforms can potentially result in loss of business for conveyancing advocates and clerks who conducted services offered by such platforms. Further, services offered by e-citizen platform such as registration of businesses and companies can be done by any person potentially resulting in loss of employment for lawyers who initially provided such services.

### **4.6 Costs**

The costs associated with the use of legal technology could result in a large majority of the population being locked out of the justice system. The use legal technology relies on devices such as computers, laptops, smartphones and internet connectivity that may be out of reach for poor citizens. It is thus important to take into account such concerns in the move towards embracing legal technology in order to ensure that the right of access to justice for all Kenyans is upheld.

## **5.0 Way Forward: Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession**

### **5.1 Investing in Legal Technology**

The challenges brought about by the COVID-19 pandemic have brought into focus the need to embrace technology as a tool of access to justice in the legal profession<sup>45</sup>. Legal technology such as the use of virtual court sessions has now

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<sup>44</sup> Ibid

<sup>45</sup> Virtual Hearings: The Way Forward in the UK in Uncertain Times available at <https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times> (accessed on 27/06/2022)



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been embraced by the judiciary. Further, law firms have embraced legal technology through aspects such as remote working. While this technology has been widely adopted due to the challenges brought about by the COVID-19 pandemic, there is need for both the judiciary and law practitioners to continue embracing legal technology post COVID-19<sup>46</sup>. This necessitates investment in legal technology in order to enhance efficiency, cost effectiveness and expeditiousness in the administration of justice<sup>47</sup>.

Investment in technology is also crucial in helping lawyers and law firms to reap from the fruits of globalization and enhance their appeal at the global stage. Lawyers can use the technology to tap into the ever growing international Alternative modes of Dispute Resolution such as international arbitration, mediation and Online Disputes Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice, with the introduction of diverse social media platforms that allow interconnectivity beyond the national boundaries and enabling cross-border relationships between clients and their lawyers and law firms amongst themselves<sup>48</sup>. They should tap into the tremendous growth of international trade, interstate deals, bilateral and multilateral treaties, where legal practice is increasingly becoming global and smart practitioners must therefore up their game with international best practices as with the advent of internet, telecommunication systems, clients are no longer limited to lawyers in their regions nor are they limited to the need for legal services within their jurisdiction<sup>49</sup>. Investment in

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<sup>46</sup> Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

<sup>47</sup> Ibid

<sup>48</sup> Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers and The Social Media in The 21st Century: Challenges and Prospects' Law, Lawyers and The Social Media in The 21st Century: Challenges and Prospects available at [https://www.academia.edu/40663364/LAW\\_LAWYERS\\_AND\\_THE\\_SOCIAL\\_MEDIA\\_IN\\_THE\\_21ST\\_CENTURY\\_CHALLENGES\\_AND\\_PROSPECTS](https://www.academia.edu/40663364/LAW_LAWYERS_AND_THE_SOCIAL_MEDIA_IN_THE_21ST_CENTURY_CHALLENGES_AND_PROSPECTS) (accessed on 27/06/2022)

<sup>49</sup> Ibid

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legal technology is likely to enhance the role of the judiciary in the administration of justice and promote the success of law firms.

### **5.2 Safeguarding the Privacy of Data**

The use of legal technology is associated with certain risks and challenges as far as data is concerned such as cyber-attacks and data breaches<sup>50</sup>. There is need for the legal profession to invest in data protection infrastructure in order to enhance efficiency and protect clients' data regardless of the status of the local data protection laws<sup>51</sup>. This may also necessitate relooking into the existing laws on data protection in order to enhance their effectiveness<sup>52</sup>. Further, it is essential to equip players in the legal profession such as judges and lawyers with necessary skills and knowledge regarding data protection including information security management<sup>53</sup>. Through this, it becomes possible to guarantee the privacy, confidentiality and integrity of data available to legal practitioners.

### **5.3 Rolling Out E-Literacy Training/Education**

As the legal profession continues to embrace technology, there is need for sustained and enhanced e-literacy training on the efficient use of such technology. The training should target all players in the legal profession including judicial officers, lawyers and staff. The Judiciary can liaise with relevant stakeholders including the government and technology firms in order to facilitate such training. Such training should also target law students whereby law schools should design relevant courses to be included in their curricula in order to arm them with relevant skills. The training should also target the public in order to enable citizens have meaningful interaction with

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<sup>50</sup> Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (Law.com) available at <https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521> (accessed on 27/06/2022)

<sup>51</sup> Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

<sup>52</sup> Ibid

<sup>53</sup> What Is Information Security Management?' (*Sumo Logic*) available at <https://www.sumologic.com/glossary/information-security-management/> (accessed on 27/06/2022)

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the justice sector through platforms such as the e-filing portal<sup>54</sup>. Such training can enhance the capacity of judicial officers and lawyers and contribute towards enhanced use of legal technology. Further, staff such as law clerks should also be trained on the use of legal technology in order to prevent the risk of losing jobs by ensuring that they are adept with new developments and are able to discharge their roles through the use of technology.

### **5.4 Capacity Building**

With the ongoing investment in physical infrastructure to enhance the use of technology in the administration of justice, there is need to put in place legal and institutional frameworks to not only facilitate the uptake of technological developments but also to ensure that there is an effective regulatory framework to deal with numerous challenges that arise from legal technology<sup>55</sup>.

Institutions such as the Law Society of Kenya should enhance their capacity and that of lawyers in legal technology through measures such as incorporating training in Information Communication Technology (ICT) in its Continuing Professional Development (CPD) training. Further, legal institutions such as the judiciary and law firms should be collaborative, diverse, international, technologically friendly, and entrepreneurial in order to enhance their capacity in the use of legal technology<sup>56</sup>.

### **5.5 Enhanced e-filing and service of Court Pleadings and Documents**

The judiciary should consider fully adopting and shifting to electronic systems for filing documents. This would save both law firms and courts enormous resources in terms of finances and storage facilities for the hardcopy documents. It would also enhance efficiency in terms of accessibility and review of the documents as both sides can access the documents from

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<sup>54</sup> Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

<sup>55</sup> Ibid

<sup>56</sup> Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' From Washington Lawyer, May 2011 available at <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm> (accessed on 27/06/2022)

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anywhere. All that is required is enhancing the security of such data to safeguard privacy. This can be achieved through investing in modern infrastructure as well as offering information management training to the staff charged with such.

### **5.6 Amendment of Remuneration order to guide on Legal fees payment by clients**

The traditional remuneration technique by lawyers generally entail billing for time and services offered based on the Advocates Remuneration Order. However, there is need to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from “legal services” and “time”, lawyers are also selling knowledge, which may include fixed, results based, hourly, graduated, or any such combination<sup>57</sup>. This situation is further enhanced by legal technology that allows lawyers to serve clients or attend court virtually without the need for physical meetings. This therefore creates a need to consider amending/revising the current Remuneration Order so as to accommodate these new possibilities.

### **5.7 A Possibility for Virtual Law Firms in Kenya**

The COVID-19 pandemic resulted in the closure of some law firms law firms with others allowing employees to work from home a situation that still persists at the moment. This situation has seen cases where some law firms have decided to close their physical offices and turning to virtual firms where their employees will permanently work from home<sup>58</sup>. There is a possibility that this trend will continue with lawyers turning to virtual law firms due to the flexibility and cost effectiveness associated with running such firms. It is thus

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<sup>57</sup> Mboya, Apollo, ‘The Bar: Challenges and Opportunities’, Op Cit.

<sup>58</sup> Meganne Tillay | May 27 and 2020 at 10:13 AM, ‘Slater & Gordon to Close London Office, Staff to Work from Home Permanently’ (Law.com International) <[https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permanently/?cmp\\_share](https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permanently/?cmp_share)> accessed 3 June 2020; Meganne Tillay, Simon Lock | May 29 and 2020 at 08:38 AM, ‘Slater & Gordon Working From Home: How Will It Work?’ (Law.com International) available at <https://www.law.com/international-edition/2020/05/29/slater-gordon-working-from-home-how-will-it-work> (accessed on 27/06/2022)

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argued that for the profession to stay relevant and thrive, lawyers should consider investing in modern legal practices such as virtual law firms in order to reap from the benefits of technology<sup>59</sup>.

However, the growth of virtual law firms will inevitably come with certain challenges including those of regulation. The regulators of provision of legal services should adequately prepare to respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing of legal services<sup>60</sup>.

### **5.8 Globalization of Legal Services through Enhanced Collaboration Between Local and Foreign Law Firms**

Some law firms in Kenya have already tapped into the benefits of legal technology by collaborating with other firms in Africa and beyond<sup>61</sup>. Examples of such law firms in Kenya include Bowmans, Iseme Kamau & Maema (IKM) Advocates and Dentons Hamilton Harrison & Mathews that have expanded their reach in Africa and beyond through alliances with other firms and opening offices in foreign countries. Such alliances give law firms a global appeal with the ability to access a wider clientele where they are able to tap into the benefits of technology to serve clients across different jurisdictions<sup>62</sup>. There is need for more local firms to consider the idea in order to broaden their services and serve clients across different jurisdictions.

### **6.0 Conclusion**

Technology has had a significant impact on the nature and practice of law. The legal profession which has hitherto been slow to adapt to change has been

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<sup>59</sup> Mboya, Apollo, 'The Bar: Challenges and Opportunities' Op Cit

<sup>60</sup> Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011) 80 Fordham L. Rev. 2661, p. 2662.

<sup>61</sup> Karangizi, S., 'Future Proofing the Legal Profession in East Africa | ALSF' available at <https://www.afslf.org/director-article/future-proofing-legal-profession-east-africa> (accessed on 27/06/2022)

<sup>62</sup> Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

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forced to embrace technology as a matter of necessity. This need was laid bare by the COVID-19 pandemic which changed the landscape of legal practice in many countries including Kenya. There is need for lawyers and law firms to embrace technology for them to remain relevant in the face of technological developments and globalization. The Judiciary is further called upon to embrace technology in order to enhance efficiency and access to justice for all. Despite the challenges posed by technology, effective adoption of legal technology can address such challenges and be a game changer in the quest towards access to justice in an efficient, affordable and expeditious manner. Embracing technology for enhanced efficiency and access to justice in the legal profession is an achievable dream.

## **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.*

### **1.0 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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Civil Case 283 of 2016, para. 17.

<sup>2</sup> Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l JL Mgmt. & Human. 77.

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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.<sup>3</sup>

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 preamble.<sup>4</sup> 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."<sup>5</sup>

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.<sup>6</sup>

As per Article 69 of the Constitution of Kenya, all persons must work in collaboration with State agencies in upholding environmental rights for all.

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<sup>3</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012, para. 272.

<sup>4</sup> *Ibid*, para. 273.

<sup>5</sup> '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.

<sup>6</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012, para. 274.



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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.

### **2.0 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:<sup>7</sup>

*"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 between people, the natural environment, and the socioeconomic and cultural foundations of such relationships.<sup>8</sup>

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<sup>7</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 275.

<sup>8</sup> *Ibid*, para. 276.

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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.<sup>9</sup>

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.<sup>10</sup>

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*

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<sup>9</sup> Ibid, para. 277.

<sup>10</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012, para. 278.*

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*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.*

*(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.

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Article 12(2)(b) of the *International Covenant on Economic, Social and Cultural Rights (ICESR)*<sup>11</sup> 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)*<sup>12</sup> 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*<sup>13</sup> 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 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).

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<sup>11</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>12</sup> 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).

<sup>13</sup> 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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The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*<sup>14</sup> 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*<sup>15</sup> 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*<sup>16</sup> 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 &

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<sup>14</sup> 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.

<sup>15</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>16</sup> 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.

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sustainable environment as a human right.<sup>17</sup> The General Assembly noted that the right to a clean, healthy and sustainable environment is related to other rights and existing international law.<sup>18</sup> 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 the principles of international environmental law.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> Notwithstanding eight nations' abstentions – Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, and Syria – the resolution on the

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<sup>17</sup> United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution / adopted by the General Assembly, UN. General Assembly (76<sup>th</sup> 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.

<sup>18</sup> United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution / adopted by the General Assembly, UN. General Assembly (76<sup>th</sup> sess.: 2021-2022)*, para. 2.

<sup>19</sup> *Ibid*, para. 3.

<sup>20</sup> *Ibid*, para. 4.

<sup>21</sup> '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.

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right to a clean, healthy, and sustainable environment was accepted unanimously.<sup>22</sup>

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.<sup>23</sup>

### **3.0 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 Cooperation and Development (OECD) formally recognised it as a fundamental tenet of environmental law in 1972, the notion of polluter pays already existed.<sup>24</sup> 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. Subsidies that would significantly distort global commerce and investment should not be used in conjunction with such policies.<sup>25</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> '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.

<sup>24</sup> Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l JL 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.

<sup>25</sup> OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, OECD/LEGAL/0102 (OECD 1972).

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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.<sup>26</sup> 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.<sup>27</sup>

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

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<sup>26</sup> 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.

<sup>27</sup> *Ibid*, p. 3.



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associated with preventing pollution or covering any harm it does. This is what the "polluter pays" idea says.<sup>28</sup> 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.*

*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:

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<sup>28</sup> *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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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 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*

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*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*

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*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 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.<sup>29</sup>

### **4.0 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.<sup>30</sup>

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

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<sup>29</sup> Elvis-Imo G, "An analysis of the polluter pays principle in Nigeria," *Ajayi Crowther University Law Journal* 1, no. 1 (2017), pp. 4-5.

<sup>30</sup> *KM & 9 others v Attorney General & 7 others* [2020] eKLR, *Petition 1 of 2016*, para. 134.

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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.<sup>31</sup>

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.<sup>32</sup>

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 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*

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<sup>31</sup> *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016, para. 163.*

<sup>32</sup> *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016, para. 164.*

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*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*

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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 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<sup>33</sup>, 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 2<sup>nd</sup> 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 *Impressa Construzioni Giuseppe Maltauro SPA & 2 others* (2019) eKLR the court held that;

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<sup>33</sup> *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* [2020] eKLR, Environment and Land Appeal 5 of 2019.

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*“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<sup>34</sup>, 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 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

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<sup>34</sup> Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012.



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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.

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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.<sup>35</sup> 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).<sup>36</sup> The Act also prescribes penalties for these offences.<sup>37</sup> Offences under EMCA relate among other things, failing to submit to inspection<sup>38</sup>, offences relating to Environmental Impact Assessment<sup>39</sup>; offences relating to records<sup>40</sup>; offences relating to standards<sup>41</sup>; offences relating to hazardous waste<sup>42</sup>; offences relating to pollution<sup>43</sup>; and offences relating to restoration orders<sup>44</sup>.

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.<sup>45</sup> It is based on potential coercion rather than voluntary goodwill and on penalties rather than positive incentives.<sup>46</sup> The command and control mechanism is what has predominantly informed the development of Kenya's natural resources protection regime.<sup>47</sup>

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<sup>35</sup> S. 111(1), Act No. 8 of 1999.

<sup>36</sup> EMCA, s. 137-146.

<sup>37</sup> Ibid.

<sup>38</sup> Sec. 137, EMCA.

<sup>39</sup> Sec. 138, EMCA.

<sup>40</sup> Sec. 139, EMCA.

<sup>41</sup> Sec. 140, EMCA.

<sup>42</sup> Sec. 141, EMCA.

<sup>43</sup> Sec. 142, EMCA.

<sup>44</sup> Sec. 143, EMCA.

<sup>45</sup> Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit.*, pp.3 & 5.

<sup>46</sup> Davies J.C. & Mazurek, J., *Pollution Control in the United States: Evaluating the System*, *op. cit.*, p.15.

<sup>47</sup> 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.

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The criminality component of regulation is what makes command and control methods successful.<sup>48</sup> 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.<sup>49</sup> This is because from an economic perspective, criminal sanctions when effectively enforced raise the cost of certain conduct and therefore encourages compliance with laws.<sup>50</sup> The EMCA proposes further sanctions in addition to fines, including the seizure of used products and the cancellation of licences.<sup>51</sup>

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] eKLR<sup>52</sup> 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.”*

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<sup>48</sup> 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.

<sup>49</sup> 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.

<sup>50</sup> *Ibid*, p. 110.

<sup>51</sup> S.146, Act No. 8 of 1999.

<sup>52</sup> *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR, ELC. Petition No. E06 of 2020.

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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:

*"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*

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*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

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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:

*"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."*

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126. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among the present generation and *inter-generational equity*, that is equity between generations. As opined in *Gabcikovo* 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] eKLR<sup>53</sup>, the Court stated as follows:

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<sup>53</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

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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,



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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 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.

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## **5.0 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.

## **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.*

### **1.0 Introduction**

Partly based on the recently concluded first ever Global Sustainable Blue Economy Conference held in Nairobi, Kenya in November 2018<sup>1</sup>, 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'.<sup>2</sup>

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

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<sup>1</sup> 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].

<sup>2</sup> 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].

country expand her economy and improve her people's livelihoods through tapping into the enormous resources contained within its blue resources.

## **2.0 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 health, livelihoods and welfare of the people in the coastal zone; and (e) fostering an ecosystem-based climate change mitigation and adaptation measures.<sup>3</sup>*

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."<sup>4</sup> 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.<sup>5</sup>

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<sup>3</sup> 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-%20Blue%20Economy%20for%20Inclusive%20and%20Sustainable%20Growth.pdf> [Accessed on 17/12/2018].

<sup>4</sup> 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].

<sup>5</sup> 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].

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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.<sup>6</sup>

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, ocean energy, and seabed mining.<sup>7</sup>

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<sup>6</sup> *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.

<sup>7</sup> UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.2.

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.

### **3.0 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.<sup>8</sup> 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.<sup>9</sup>

Furthermore, Kenya is confronted with piracy in the Indian Ocean, illegal fishing and border disputes, the dispute with Somalia over the maritime boundary<sup>10</sup>, 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.<sup>11</sup> 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

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<sup>8</sup> Ibid, p.5.

<sup>9</sup> 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].

<sup>10</sup> Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

<sup>11</sup> UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.5.

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fishing vessels which rarely land or declare their catches in the country, thus depriving the country of much needed revenue and processing jobs.<sup>12</sup>

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.<sup>13</sup> Some of the threats highlighted include climate change, pollution and waste management, illegal activities at seas including Illegal Unregulated and Unreported fishing, piracy and terrorism, destruction of marine ecosystems and management of resource in areas beyond national jurisdiction.<sup>14</sup>

The challenges facing exploitation of Kenya's coastal and marine resources have also been highlighted in the *Integrated Coastal Zone Management (ICZM) Policy 2014*<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The result of all these has been deficient pollution management, over-extraction of resources and unsustainable livelihoods, unsustainable use patterns, resulting in wide

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<sup>12</sup> 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](https://www.agrilinks.org/sites/default/files/resource/files/kenya_file.pdf) [Accessed on 20/12/2018].

<sup>13</sup> *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.4.

<sup>14</sup> *Ibid*, p.4.

<sup>15</sup> Sessional Paper No. 13 of 2014, Republic of Kenya.

<sup>16</sup> *Integrated Coastal Zone Management (ICZM) Policy 2014*, p.1.

<sup>17</sup> *Ibid*, pp.1-2.

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spread degradation and loss of critical habitats and loss of development opportunities.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

The global Sustainable Blue Economy Conference (SBEC 2018) came up with several forward looking resolutions as captured in the outcome Report.<sup>23</sup> The Conference captured concrete commitments and practical actions that can be taken today to help the world transition to the blue economy.<sup>24</sup> However, for Kenya to benefit to fully benefit from these resources there must be conscious

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<sup>18</sup> 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](https://www.ksg.ac.ke/images/bulletin/KSG_Bulletin_2nd-8th_June_2018.pdf) [Accessed on 20/12/2018].

<sup>19</sup> UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.5.

<sup>20</sup> Ibid, p.5.

<sup>21</sup> Ibid, p.5.

<sup>22</sup> USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," op. cit.

<sup>23</sup> *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.

<sup>24</sup> Ibid.



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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.<sup>25</sup>

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.<sup>26</sup> 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

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<sup>25</sup> 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](https://saiia.org.za/wp-content/uploads/2018/07/saia_spi_62_benkestein_20180718.pdf) [Accessed on 17/12/2018].

<sup>26</sup> 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].

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Heads of International Organizations, Mayors and Governors, the business and private sector, community leaders, the civil society, and women and youth organizations,<sup>27</sup> 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.

SBEC 2018 resulted in among others the *Nairobi Statement of Intent on Advancing a Sustainable Blue Economy*<sup>28</sup> 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.<sup>29</sup> Incorporating these resolutions in the national policy, legal and institutional frameworks will go a long way in enhancing Kenya's

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<sup>27</sup> *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].

<sup>28</sup> *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].

<sup>29</sup> *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.

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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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.

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.<sup>33</sup>

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<sup>30</sup> Ibid, p.3.

<sup>31</sup> Ibid, p.3.

<sup>32</sup> *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.).

<sup>33</sup> *Report on the Global Sustainable Blue Economy Conference 26th - 28th November 2018, Nairobi, Kenya*, p.3.

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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.<sup>34</sup>

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*<sup>35</sup> 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

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<sup>34</sup> *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.4.

<sup>35</sup> 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.

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capital requirements to set up such industries and the technology gap.<sup>36</sup> 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.

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

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<sup>36</sup> Ngwenya, S., "Africa has to Shed off the Resource Curse Stigma" The Star Newspaper, Friday January 3, 2014.

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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.

### **4.0 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*.<sup>37</sup>

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.

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<sup>37</sup> UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018*, April, 2018, op. cit., p.6.

## **The Role of Climate Change in Environmental Conflicts**

### **Abstract**

*The impacts of Climate Change have been felt across many dimensions of society, including the environment, economy, politics, and even society's social fabric. It has also brought about disputes and conflicts that have been related with Climate Change, both directly and indirectly, since it is considered as a conflict multiplier. These disputes and conflicts have been brought about by Climate Change. In this paper, the author analyses the disagreements that arise from the consequences of Climate Change and how such disagreements may be resolved via the implementation of efficient climate change mitigation strategies. The author contends that it is essential to address the climate change-related incentives that may lead to an increase in conflict in order to successfully mitigate the effects of Climate Change via strategies such as adaptation and the construction of resilience.*

### **1.0 Introduction**

Changes in rainfall patterns, droughts, changes in the flora, and a general lack of resources have all contributed to a number of violent wars. Conflicts involving pastoralists and these other bloody conflicts are clearly related. However, not every violent conflict is caused by climate change; often, the political, social, and economic backdrop play a significant role.<sup>1</sup> Since a major portion of the local population relies on rain-fed agriculture and pastoralism, the negative consequences of climate change on people's livelihoods may be severe. Additionally, when environmental changes are paired with other socioeconomic pressures like political marginalisation, communities may be more inclined to turn to violence to resolve conflicts or get access to resources.<sup>2</sup> This paper critically discusses the place of Climate Change in the rise and trends in environmental conflicts.

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<sup>1</sup> Mobjörk, Malin. "Exploring the climate-conflict link: The case of East Africa." Stockholm International Peace Research Institute, SIPRI yearbook 2017: Armaments, disarmament and international security (2017): 287-299, at pp. 292-93.

<sup>2</sup> Ibid, p. 293; see also Scheffran, J.; Brzoska, M.; Kominek, J.; Link, P. M.; Schilling, J. Disentangling the Climate-Conflict Nexus: Empirical and Theoretical Assessment of Vulnerabilities and Pathways. Rev. Eur. Stud. 2012, 4, 1.

## **2.0 Causes of Climate Change: Natural and Human-Induced Factors**

There are two broad categories that may be applied to the factors that contribute to Climate Change:- both naturally occurring and induced by human activity.<sup>3</sup> Natural processes, such as ocean currents, volcanic eruptions, shifts in the earth's orbit around the sun, and fluctuations in solar radiation, have a significant impact on and may profoundly alter the climate of the world.<sup>4</sup> Burning fossil fuels for power, vehicles, trains, aircraft and residences, as well as the flaring of petrol at oil fields and other activities, among other things, has been proved to be a major contributor to the production of man-made greenhouse gases, which are also implicated in the current change in climate. In addition, the way land is used and the rate of deforestation both contribute to Climate Change.<sup>5</sup>

Increased carbon emissions as a result of the intensive use of fossil fuels are one of the most prominent triggers of human-induced Climate Change. Other key triggers include the conversion of forested areas into agricultural land to fulfil the rising demand of consumers and the improper use of freshwater reservoirs. The issues posed by Climate Change have been made worse as a result of these variables.<sup>6</sup>

Although changes in average temperatures have been recorded at various times throughout history, it has been pointed out that vulnerable groups with less consumption, both at the level of countries and among social groups, suffer more than others. This is true both at the level of countries and among social groups.<sup>7</sup>

Over 75 percent of the world's greenhouse gas emissions and almost 90 percent of all carbon dioxide emissions are attributed to fossil fuels, which include

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<sup>3</sup> Onoja, U. S.; Dibua, U. M. E.; Enete, A. A. Climate Change: Causes, Effects and Mitigation Measures-a Review. *Global Journal of Pure and Applied Sciences* 2011, 17 (4), 469–479.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> AA, D. S. with. "Human-induced climate change causes global environmental injustice." *Daily Sabah*. <https://www.dailysabah.com/turkiye/human-induced-climate-change-causes-global-environmental-injustice/news> (accessed 2023-06-03).

<sup>7</sup> Ibid.



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coal, oil, and gas. This makes fossil fuels the single greatest source of pollution that contributes to global warming.<sup>8</sup> When greenhouse gases are emitted into the atmosphere, they create a blanket that covers the Earth and traps the heat of the sun. This contributes to increased temperatures throughout the world and a shifting environment. At this moment in time, the rate of global warming is accelerating at a rate that has never been seen before in human history. The gradual rise in temperature is causing noticeable shifts in weather patterns and upsetting the delicate equilibrium that normally exists in the natural world. This places a significant threat not just on humans but also on every other type of life that exists on our planet.<sup>9</sup>

### **3.0 Effects of Climate Change on Livelihoods**

Climate change has become a worldwide concern throughout time as a result of the harm it does to the environment and human lives. Climate Change is a significant issue that has an impact on many facets of the environment and human existence.<sup>10</sup> The objective of Sustainable Development and the eradication of poverty are intertwined with the battle against climate change.<sup>11</sup> One of the most important aspects of human growth is working towards a state of overall enhanced and maintained well-being for all people. The way in which Climate Change and its related stresses support or destabilize livelihood systems is a significant factor in human development. This is

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<sup>8</sup> United Nations, *Causes and Effects of Climate Change*. United Nations. <https://www.un.org/en/climatechange/science/causes-effects-climate-change> (accessed 2023-06-03).

<sup>9</sup> Ibid.

<sup>10</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

<sup>11</sup> United Nations, *Support Sustainable Development and Climate Action*. United Nations. <https://www.un.org/en/our-work/support-sustainable-development-and-climate-action> (accessed 2023-06-04); *Poverty-Environment Action for Sustainable Development Goals*. UNEP - UN Environment Programme. <http://www.unep.org/regions/asia-and-pacific/regional-initiatives/poverty-environment-action-sustainable-development> (accessed 2023-06-04); *170 actions to combat climate change - act now!* <https://sites.ungeveva.org/170actions/climate/> (accessed 2023-06-04); *Carbon emissions anywhere threaten development everywhere* | UNCTAD. <https://unctad.org/news/carbon-emissions-anywhere-threaten-development-everywhere> (accessed 2023-06-04).

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especially true for the livelihood systems of individuals who are economically disadvantaged and highly vulnerable.<sup>12</sup>

Due to factors like poverty, location, and social discrimination, vulnerable groups are exposed to serious environmental risks; however, they lack the resources necessary to deal with and combat the negative effects of climate change, which exacerbates social injustices and structural injustices.<sup>13</sup>

It is possible to draw a connection between the changing environment and many forms of discrimination, including those on the levels of class, ethnicity, and the global community. This discrimination is not just a sort of emotional response; rather, it is a strategy that assures the replication of inequality in its background and facilitates the reproduction of inequality within the group.<sup>14</sup> Women are more likely to be responsible for duties such as the production of food, the preparation of food, and the transportation of water, all of which may be directly influenced by climate-related occurrences such as droughts. As a result, women are more likely to be negatively impacted by Climate Change than males.<sup>15</sup>

There is a growing consensus that climate change constitutes a "threat multiplier" because of its involvement in aggravating the root causes of conflicts in its conventional forms. The most glaring example is the manner in which alterations in climate change affect competition for ever-decreasing supplies of resources. According to studies conducted on the so-called "heat-aggression relationship," there is a 10–20 percentage point increase in the

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<sup>12</sup> UNDP, Climate Change. "Human Development: towards Building a Climate Resilient Nation." *Zimbabwe Human Development Report* (2017).

<sup>13</sup> AA, D. S. with. "Human-induced climate change causes global environmental injustice." *Daily Sabah*. <https://www.dailysabah.com/turkiye/human-induced-climate-change-causes-global-environmental-injustice/news> (accessed 2023-06-03).

<sup>14</sup> AA, D. S. with. "Human-induced climate change causes global environmental injustice." *Daily Sabah*. <https://www.dailysabah.com/turkiye/human-induced-climate-change-causes-global-environmental-injustice/news> (accessed 2023-06-03).

<sup>15</sup> *Ibid.*

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likelihood of armed conflict connected with each 0.5-degree Celsius rise in the temperature of the surrounding environment.<sup>16</sup>

According to the findings of a research that was published in 2021, there are normally more occurrences of violence in regions that are next to communities of herders that travel periodically. Second, the research indicates that the likelihood of a dispute occurring on farmlands that are in close proximity to a herding community is increased by a factor of 35% whenever a usual and unfavourable decrease in rainfall is observed by the herding community. The researchers come to the conclusion that there is no influence on conflict when a group that does not herd animals has the same decrease in rainfall.<sup>17</sup>

### **4.0 Climate Change as a Catalyst for Environmental Conflicts**

One of the most significant challenges that the world is now confronted with is climate change, which is caused by human activity. Vulnerable members of society, such as the elderly, children, and women, as well as immigrants, and nations with shaky economies, are particularly at risk from the effects of Climate Change.<sup>18</sup>

Even though it is generally agreed that there is only an indirect correlation between climate change and conflicts, some analysts in both industrialized and developing nations have made this connection anyhow.<sup>19</sup> The connection between Climate change and conflict is made more complex by the consequences of Climate Change on issues such as poverty, mental health, food security, and migration.<sup>20</sup> As a consequence of this, the objectives of the

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<sup>16</sup> How is climate change driving conflict in Africa? - World | ReliefWeb. <https://reliefweb.int/report/world/how-climate-change-driving-conflict-africa> (accessed 2023-06-04).

<sup>17</sup> Does climate change cause conflict? International Growth Centre. <https://www.theigc.org/blogs/does-climate-change-cause-conflict> (accessed 2023-06-04).

<sup>18</sup> AA, D. S. with. "Human-induced climate change causes global environmental injustice." Daily Sabah. <https://www.dailysabah.com/turkiye/human-induced-climate-change-causes-global-environmental-injustice/news> (accessed 2023-06-03).

<sup>19</sup> 'Does Climate Change Cause Conflict?' (IGC, 2 June 2021) <<https://www.theigc.org/blog/does-climate-change-cause-conflict/>> accessed 3 June 2023; see also Gleditsch, N. P. Whither the Weather? Climate Change and Conflict. *Journal of Peace Research*, 2012, 49, 3–9.

<sup>20</sup> Ibid.

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twenty-sixth session of the Conference of the Parties (COP 26), which took place in Glasgow from the 31st of October to the 13th of November 2021, were as follows: achieve global net zero by the middle of the century and keep warming below 1.5 degrees Celsius within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver,<sup>21</sup> where countries were expected to, among other things, accelerate action to combat the climate crisis through collaboration between governments.<sup>22</sup> In order to accomplish these goals, it is going to be necessary for the leadership of each country, as well as many other stakeholders, to make certain modifications. It is arguable that Climate Change brings with it a great number of conflicts and/or disputes that call for environmentally responsible strategies of resolving them.<sup>23</sup>

There is no one single criterion that can be agreed upon for what constitutes a disagreement on Climate Change.<sup>24</sup> Some writers have made the observation that Climate Change is a "threat multiplier," meaning that it may raise human security concerns such as a lack of food and water while also contributing to (violent) conflict in nations that are particularly sensitive to the effects of climate change.<sup>25</sup> This is due to the fact that the negative implications of Climate Change, such as a lack of water, failed crops, food poverty, economic shocks, migration, and displacement, may heighten the likelihood of conflict

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<sup>21</sup> 'COP26 Goals' (UN Climate Change Conference (COP26) at the SEC - Glasgow 2021) <<https://ukcop26.org/cop26-goals/>> accessed 3 June 2023.

<sup>22</sup> Ibid.

<sup>23</sup> See Vally Koubi, 'Climate Change and Conflict' (2019) 22 Annual Review of Political Science 343 <<https://www.annualreviews.org/doi/10.1146/annurev-polisci-050317-070830>> accessed 3 June 2023.

<sup>24</sup> C. Mark Baker, Cara Dowling, Dylan McKimmie, Tamlyn Mills, Kevin O'Gorman, Holly Stebbing, Martin Valasek, "What are climate change and sustainability disputes? Key arbitration examples (Part 1 contractual disputes)", in James Rogers, London; Cara Dowling, Vancouver (eds), International arbitration report, Norton Rose Fulbright - Issue 16 - June 2021, p. 40. < <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?revision=40c8a703-6e1d-413c-8c7e-ac1201697383&revision=40c8a703-6e1d-413c-8c7e-ac1201697383>> accessed 3 June 2023.

<sup>25</sup> Froese, Rebecca, and Janpeter Schilling, "The Nexus of Climate Change, Land Use, and Conflicts." (2019).

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and violence.<sup>26</sup> Environmental conflicts and disputes can be broken down into two categories: first, conflicts over access to environmental resources as a source of livelihood and as a foundation for economic activity; and second, conflicts over what are known as the "side effects" of economic activity, such as the loss of biodiversity and pollution. Both of these categories can be broken down further into subcategories.<sup>27</sup>

The public's level of worry over Climate Change has steadily increased over the course of the years, along with a growing awareness of the potential influence that climate may have on the outcomes of economic activity.<sup>28</sup> The word "climate" refers to measurements of climatic parameters such as temperature, rainfall, and water availability, in addition to climate indices that serve as proxy measures for these variables.<sup>29</sup> These climatic factors include temperature, precipitation, and water availability. Even if the weather does not directly cause conflict, it may change the conditions under which certain social interactions take place, which in turn might affect the likelihood that they will result in a violent exchange.<sup>30</sup>

Recent years have seen the emergence of the concept "Climate Security" as a catch-all phrase for a wide variety of problems that seem to be linked to global environmental change. These problems include conflicts, vulnerabilities, and other types of insecurity.<sup>31</sup>

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<sup>26</sup> 'Tackling the Intersecting Challenges of Climate Change, Fragility and Conflict' <<https://blogs.worldbank.org/dev4peace/tackling-intersecting-challenges-climate-change-fragility-and-conflict>> accessed 3 June 2023.

<sup>27</sup> Arild Vatn, *Environmental Governance: Institutions, Policies and Actions* (Paperback edition, Edward Elgar Publishing 2016) 2.

<sup>28</sup> Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 *Annual Review of Economics* 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 3 June 2023.

<sup>29</sup> Marshall Burke, Solomon M Hsiang and Edward Miguel, 'Climate and Conflict' (2015) 7 *Annual Review of Economics* 577, 578 <<https://www.annualreviews.org/doi/10.1146/annurev-economics-080614-115430>> accessed 3 June 2023.

<sup>30</sup> *Ibid*, 579.

<sup>31</sup> Dalby, S. *Climate Change and Environmental Conflicts*. In *Routledge handbook of environmental conflict and peacebuilding*; Routledge, 2018; pp 42–53.

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The manner in which Climate Security is framed is important because it directs the formulation, scope, and speed of climate solutions, in addition to determining who should benefit. After 2007, the concept of 'Climate Security' began to acquire traction within the context of four pre-existing frames: national (or state) security, international security, human security, and ecological security.<sup>32</sup> In the field of peace and conflict studies, these frames are considered to be standard, with the first three being referred to as "vertical security frames" and the last frame being referred to as a "horizontal security frame." Whose safety is in jeopardy serves as the primary topic of interest in each of these frames.<sup>33</sup>

It has been noticed that three consequences of Climate Change (natural catastrophes, rising sea levels, and growing scarcity of resources) are widely anticipated to lead to loss of livelihood, economic decline, and increased insecurity either directly or via forced migration. This is despite the fact that there is no conclusive evidence to support these assumptions. These variables, in turn, may contribute to political and economic instability, social disintegration, migration, and incorrect responses from governments. This is because these issues interact with weak governance, societal inequities, and a terrible neighbourhood. In the long run, this leads to a rise in both the incentive for inciting violence and the chances for mobilisation.<sup>34</sup>

Several statistical studies of conflict in Africa have revealed that communal and social violence are more likely to occur during or immediately after rainy times. However, some of the studies have also showed that there is some increased risk after very dry periods. As a result, there are conflicting opinions on the scarcity scenario.<sup>35</sup>

The consequences of Climate Change are not primary predictors of conflict as politics and a history of conflict are. Instead, politics and a history of conflict

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<sup>32</sup> Lamain, C. *Conflicting Securities: Contributions to a Critical Research Agenda on Climate Security*. *Globalizations* 2022, 19 (8), 1257–1272.

<sup>33</sup> *Ibid.*

<sup>34</sup> Theisen, O. M.; Gleditsch, N. P.; Buhaug, H. *Is Climate Change a Driver of Armed Conflict?* *Climatic change* 2013, 117, 613–625.

<sup>35</sup> *Ibid.*, p. 620.

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are primary predictors of conflict. However, they are seen as "threat multipliers" because of their ability to exacerbate preexisting patterns of conflict, such as those that occur between nomadic herders and farmers. Shocks to the environment, such as variations in precipitation and temperature, may make it more probable that conflicts and acts of violence will occur, as well as make them more severe when they do.<sup>36</sup>

In addition, it has been observed that the implications of Climate Change on poverty, mental health, food security, and migration complicate the link between climate change and conflict. This has been highlighted both empirically and conceptually. Even though there is some evidence starting to surface, much more investigation is required in these areas. The function of climate adaptation in mitigating the negative consequences of Climate Change on conflict is another significant topic that should be investigated in the future. For instance, social protection and agricultural technology show a great deal of promise in terms of assisting nations in adapting to the effects of Climate Change and, possibly, in lessening conflicts that are caused by climate change.<sup>37</sup>

### **5.0 Addressing Climate Change for Peace and Sustainability**

The Intergovernmental Panel on Climate Change (IPCC) recommends that global CO<sub>2</sub> emissions should reach net zero by the year 2050 after a gradual decline over the following ten years to a level that is about half of what they were in 2010. According to the Intergovernmental Panel on Climate Change (IPCC), in order to limit the rise in global temperature to 1.5 degrees Celsius, all aspects of civilization will need to undergo transformations that are drastic, unprecedented, and urgently necessary.<sup>38</sup>

The process of adapting to new conditions is one of the most important factors in lowering people's susceptibility to the effects of climate change. In

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<sup>36</sup>*Does climate change cause conflict?* International Growth Centre. <https://www.theigc.org/blogs/does-climate-change-cause-conflict> (accessed 2023-06-04).

<sup>37</sup> Ibid.

<sup>38</sup> McGregor D, Whitaker S and Sritharan M, 'Indigenous Environmental Justice and Sustainability' (2020) 43 *Current Opinion in Environmental Sustainability* 35, p.35.

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ecological systems, adaptation refers to the process of autonomously adjusting to new conditions via ecological and evolutionary processes. When it comes to human systems, adaptation may be anticipatory or reactive, gradual or radical, and all of these things simultaneously. The latter modifies the underlying characteristics of a social-ecological system in preparation for the effects that climate change is going to have. The capacity for adaptation is constrained by both rigid and malleable boundaries.<sup>39</sup>

Understanding and assessing climate adaptation processes and measures to lower risks caused by human-induced climate change requires a recognition of the value of a variety of types of knowledge, including scientific knowledge, indigenous knowledge, and local knowledge. This is necessary in order to fulfil the requirement that the worth of these many forms of knowledge be acknowledged.<sup>40</sup>

Goal 12.2 of the Sustainable Development Goals (SDG) specifies that all states shall achieve sustainable management and efficient use of natural resources by the year 2030. This is intended to ensure sustainable consumption and production patterns. The aim is to stop the world from deteriorating, which may be accomplished by practising sustainable production and consumption, practising responsible management of the planet's natural resources, and taking prompt action to counteract Climate Change. This will allow the world to meet the needs of both the current generation and the generations to come in the future.<sup>41</sup>

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<sup>39</sup> IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Lössche, V. Möller, A. Okem (eds.)]. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Lössche, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33, doi:10.1017/9781009325844.001.

<sup>40</sup> Pörtner, Hans-Otto, et al. "IPCC, 2022: Summary for policymakers." (2022): 3-33.

<sup>41</sup> United Nations, Preamble, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.



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The Sustainable Development Goals (SDGs) offer the groundwork that is necessary to improve living conditions around the globe and to mitigate the potentially catastrophic effects of climate change brought on by human activity. The Sustainable Development Goal (SDG) 13 "Climate Action" encourages the integration of initiatives for limiting the effects of climate change into frameworks for economic growth. The Sustainable Development Goals (SDGs) 14 and 15, which focus, respectively, on life in the ocean and on life on land, call for the implementation of practices that are less harmful to the environment while extracting the natural resources of the planet.<sup>42</sup>

As a step towards fulfilling socio-economic rights of communities and other associated rights as envisioned under Sustainable Development Goals, there is a need for rapid adoption of nature-based ways to mitigating climate change and conserving biodiversity. This is a need due to the fact that nature-based approaches have been shown to be effective in the past. Once they are put into place, the finance mechanisms that were recommended at COP 27 should be used effectively as a means of establishing communities and ecosystems that are more resilient. Efforts to achieve the Sustainable Development Goals will be given a significant boost as a result of this action.<sup>43</sup>

Research has shown that oceans and seas are an essential component of any solution to the climate change problem. This is due to the fact that they store the carbon that is the primary cause of climate change and provide major benefits for climate adaptation. To protect the ocean, it is necessary to take action both on land and at sea. This involves decreasing the direct impacts that people have on the ocean, cleaning up polluted rivers, restoring polluted

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<sup>42</sup> United Nations, 'Sustainability' (United Nations) <<https://www.un.org/en/academic-impact/sustainability>> accessed 14 February 2023.

<sup>43</sup> Sachs, J.; Kroll, C.; Lafortune, G.; Fuller, G.; Woelm, F. Sustainable Development Report 2022; Cambridge University Press, 2022; UNEP, UN Environment Assembly concludes with 14 resolutions to curb pollution, protect and restore nature worldwide. UN Environment. <http://www.unep.org/news-and-stories/press-release/un-environment-assembly-concludes-14-resolutions-curb-pollution> (accessed 2023-06-04); Sarkki, S.; Pihlajamäki, M.; Rasmus, S.; Eronen, J. T. "Rights for Life" Scenario to Reach Biodiversity Targets and Social Equity for Indigenous Peoples and Local Communities. *Biological Conservation* 2023, 280, 109958. <https://doi.org/10.1016/j.biocon.2023.109958>.

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wetlands, and developing a circular economy in which potential pollutants are utilised for as long as is practically possible before being disposed of in an acceptable manner when they have reached the end of their useful life.<sup>44</sup>

The pressing need to find solutions to environmental issues has resulted in increased push for more stringent legislative measures. It has been argued persuasively that environmental goals cannot be achieved solely by environmental policies or in protected areas. Rather, transformative change requires a fundamental, system-wide reorganization across technological, economic, and social factors, including paradigms, goals, and values.<sup>45</sup> However, in order for environmental sustainability to be achieved, it is essential that individuals who are currently on the periphery and in a precarious situation not be left behind by the necessary revolutionary changes.<sup>46</sup>

Environmental problems such as Climate Change, the loss of biodiversity, water shortages, air and water pollution, and soil degradation, amongst others, are contributing factors in the rise of poverty and social inequality.<sup>47</sup> Environmental governance must explicitly involve a greater variety of environmental actors, organisations, and institutions and become more adaptive, responsive, and innovative in order to cope with pressures such as climate change, economic instability, and sociopolitical or ideological upheavals.<sup>48</sup> This is required in order for environmental governance to be able to deal with these stresses. There is a critical need for more collaboration

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<sup>44</sup> '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 2 June 2023.

<sup>45</sup> Dalby, S. *Climate Change and Environmental Conflicts*. In *Routledge Handbook of Environmental Conflict and Peacebuilding*; Routledge, 2018.

<sup>46</sup> *Ibid.*

<sup>47</sup> 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 2 June 2023.

<sup>48</sup> 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.

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between governmental and private-sector stakeholders in the decision-making and enforcement processes pertaining to the environment.

Climate change now necessitates not only protecting and reconstructing the system, but also changing the system itself, as well as transforming landscapes, ecosystems, cities, and trading arrangements, so that they are both less vulnerable to obvious hazards and flexible enough to reinvent themselves when unexpected crises occur. Governance is important when it comes to adjusting to changing times, whether in terms of alterations in the environment or changes in the global economy. In the context of the conversation on climate security, this is the most important issue that has to be reinforced in policy discussions. Instead of focusing on local environmental circumstances and straightforward scarcity tales as a potential mechanism for conflict, this should be the primary area of attention.<sup>49</sup>

### **6.0 Conclusion**

Africa is classified as one of the continents highly vulnerable to climate change due to several reasons: high poverty level, high dependence on rain-fed agriculture, poor management of natural resources, capacity/technology limitations, weak infrastructure, and less efficient governance/institutional setup.<sup>50</sup> Arguably, Kenya's challenges as far as combating climate change is concerned are not any different from the ones identified above.

Climate change impacts and the associated socio-economic losses on Kenya have been exacerbated by the country's high dependence on climate sensitive natural resources.<sup>51</sup> It is crucial to act swiftly since a disproportionate number of people are impacted by Climate Change, including women, youth, coastal populations, local communities, indigenous populations, fishermen, the

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<sup>49</sup> Dalby, S. *Climate Change and Environmental Conflicts*. In *Routledge Handbook of Environmental Conflict and Peacebuilding*; Routledge, 2018.

<sup>50</sup> Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges." <[https://www.researchgate.net/publication/346628199\\_Climate\\_Change\\_Mitigation\\_and\\_Adaptation\\_in\\_ECASADCCOMESA\\_region\\_Opportunities\\_and\\_Challenges](https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges)> accessed 4 June 2023.

<sup>51</sup> GoK, I. N. D. C. "Kenya's Intended Nationally Determined Contribution." (2015).

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underprivileged, and the elderly. Indigenous peoples, local communities, and those affected by Climate Change are also not included in international attempts to counteract it. This is true despite the fact that local economies that depend on natural resources and food sovereignty are also threatened by the consequences of Climate Change. Additionally, they have the potential to pose a threat to the wellbeing of communities all over the globe, especially those who are vulnerable and powerless, including children and the elderly.<sup>52</sup>

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<sup>52</sup> Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

## **Embracing Sustainability Audit for Enhanced Corporate Environmental Compliance in Kenya**

### ***Abstract***

*This paper examines the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya. This is an activity that would be carried out as a follow-up to the environmental impact assessment and as a component of the process of environmental auditing, both of which are specifically envisaged under the provisions of the Constitution of Kenya, 2010, as well as the Environmental Management and Co-Ordination Act, 1999. The author explores the topic of environmental compliance by corporations, discusses the challenges that are associated with it, and argues that a sustainability audit is one of the approaches that may be used to address these difficulties. The framework known as Environmental, Social, and Governance (ESG), which is used to evaluate an organization's business practises and performance on a variety of different ethical and sustainable challenges, serves as the foundation for the discussion.*

### **1.0 Introduction**

This paper discusses the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya. This is an activity that would be carried out as a follow-up to the environmental impact assessment and as a component of the process of environmental auditing, both of which are specifically envisaged under the provisions of the Constitution of Kenya, 2010, as well as the Environmental Management and Co-Ordination Act, 1999<sup>1</sup> (EMCA). In most cases, there is little evidence that most entities stick to ensuring that their activities are environmentally sustainable after the EIA process and NEMA's occasional audits for the most critical industries with higher chances of serious pollution of the environment. The author explores the topic of environmental compliance by corporations, discusses the challenges that are associated with it, and argues that a sustainability audit is one of the approaches that may be used to address these difficulties. The framework known as Environmental, Social, and Governance (ESG) will serve as the foundation for the discussion.

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<sup>1</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].

## **2.0 Environmental Impact Assessment, Audit and Monitoring Framework in Kenya**

The Environmental Management Coordination Act<sup>2</sup> (EMCA) includes provisions for environmental impact assessments (EIA) as a regulatory instrument for the purpose of protecting the environment from the effects of anthropocentric activities. Indeed, EMCA includes a variety of requirements that pertain to the execution of Environmental Impact Assessments (EIA), Strategic Environmental Assessments (SEA), Environmental Audits (EA), and management activities for air, water, wastes, and noise. Additional obligations in relation to environmental issues include the protection of wildlife, the administration of forests and water resources, and the guaranteeing of the health and safety of workers.

EIA is provided for in EMCA Section 58, which states that "notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, should before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a preliminary environmental impact assessment report.<sup>3</sup> EMCA defines "Environmental Impact Assessment" (EIA) as a systematic examination that is carried out to establish whether or not a programme, activity, or project will have any adverse impacts on the surrounding environment.<sup>4</sup>

The contents of the reports from environmental impact assessment are provided for the *Environmental (Impact Assessment and Audit) Regulations, 2003*<sup>5</sup>. On the other hand, it is important to point out that the CBD COP 6 Decision VI/7 acknowledges that the essential components of an environmental impact assessment would inevitably comprise the following

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<sup>2</sup> Environmental Management Coordination Act, No. 8 of 1999, Laws of Kenya.

<sup>3</sup> S. 58(1), EMCA.

<sup>4</sup> S. 2, EMCA.

<sup>5</sup> Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003, Laws of Kenya.

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steps notwithstanding the fact that law and practice in different countries might differ significantly from one another. Initial assessment to evaluate whether proposed projects or developments needs to be followed up with a complete or partial impact study; The first step in conducting an impact assessment is called scoping, and its purpose is to determine which possible implications are important to evaluate and then to develop terms of reference for the evaluation. Impact assessment is the process of attempting to forecast and identify the possible environmental repercussions of a proposed project or development while taking into consideration the inter-related consequences of the project proposal as well as the socio-economic implications; Identifying potential mitigation methods (which may include refraining from moving through with the development, searching for alternative designs or locations that circumvent the effects, building safeguards into the design of the project, or offering financial compensation for unintended consequences); Choosing whether or not to approve the project; monitoring and analysing the development activities, projected effects, and proposed mitigation measures to ensure that unanticipated consequences or failed mitigation measures are detected and handled in a timely manner; deciding whether or not to approve the project.<sup>6</sup>

In order to fulfil the responsibilities that are owed to the environment, Kenya's Constitution and the EMCA both mandate that environmental audits and monitoring be carried out at regular intervals.<sup>7</sup> EMCA provides the definition of environmental audit as the methodical, recorded, periodic, and objective examination of how effectively environmental organisation, management, and equipment are doing in conserving or protecting the environment.<sup>8</sup> Environmental audits and monitoring serve as follow-up instruments to establish the degree to which activities currently being carried out adhere to

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<sup>6</sup> Unit B, 'COP Decision' <<https://www.cbd.int/decision/cop/?id=7181>> accessed 9 November 2022.

<sup>7</sup> Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.

<sup>8</sup> EMCA, s. 2.

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the environmental impact assessment study report concerns that are relevant to the specific project in question.<sup>9</sup>

The purpose of this procedure is to ensure that the assessment report is not deviated from in any way, since this might have negative repercussions for the surrounding environment. In accordance with EMCA, the National Environment Management Authority (NEMA) is required to perform environmental audits on all activities that are likely to have a significant effect on the environment. Additionally, NEMA is required to monitor all environmental phenomena in consultation with lead agencies with the intention of performing an assessment of any potential changes in the environment and their potential impacts.<sup>10</sup>

As per EMCA, “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 while “environmental monitoring” means the continuous or periodic determination of actual and potential effects of any activity or phenomenon on the environment whether short-term or long term.<sup>11</sup> The Authority or its designated agents is responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment.<sup>12</sup> The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made is required to 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).<sup>13</sup>

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<sup>9</sup> National Environment Management Authority (NEMA) - Environmental Audit (EA). [https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=155&Itemid=274](https://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274) (accessed 2023-06-16).

<sup>10</sup> EMCA, s. 68 & 69.

<sup>11</sup> EMCA, s.2.

<sup>12</sup> Ibid, s. 68(1).

<sup>13</sup> Ibid, s. 68(3).



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While the Act is silent on sustainability audit, it provides that one of the general principles towards guaranteeing the right to clean and healthy environment is that every person should cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.<sup>14</sup> Such audits and monitoring can be expanded to include sustainability audit of companies as a way of enhancing sustainability of their operations.

### **3.0 Environmental, Social and Governance (ESG)**

The Environmental, Social, and Governance (ESG) framework is a tool utilised by stakeholders to gain insight into an organization's management of risks and opportunities associated with ESG criteria. These criteria encompass environmental, social, and governance factors. The ESG framework adopts a comprehensive perspective that recognises the broad scope of sustainability, encompassing not only ecological concerns but also social and governance considerations.<sup>15</sup>

The international framework for corporate environmental compliance is comprised of a variety of treaties, standards, and principles. These were created with the intention of making it easier to enforce environmental laws and regulations and ensure that businesses complied with them. Although such conventions, principles, and norms in most cases bind states, they are directly relevant to corporations due to the fact that a state is able to regulate the actions of a company within its jurisdiction in order to ensure that such activities are in line with its responsibilities under international law.<sup>16</sup>

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<sup>14</sup> Ibid, s. 3(2A).

<sup>15</sup> ESG (*Environmental, Social, & Governance*). Corporate Finance Institute. <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (accessed 2023-06-11).

<sup>16</sup> Escobar-Pemberthy, N.; Ivanova, M. *Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index. Sustainability* 2020, 12 (17), 7098; Andresen, S.; Boasson, E. L.; Hønneland, G. *International Environmental Agreements: An Introduction*; Routledge, 2012; Brown Weiss, E. *The Evolution of International Environmental Law*. 2011; *Framework Principles on Human Rights and the Environment* (2018). OHCHR. <https://www.ohchr.org/en/special-procedures/sr-environment/framework-principles-human-rights-and-environment-2018> (accessed 2023-06-11).

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Collective action may most effectively be accomplished via the establishment of global environmental agreements. They "are rarely the end product, but rather create the framework and the process that guide responses to the environmental problem in question," according to some authors.<sup>17</sup> Agreements not only facilitate contacts between nations but also encourage reciprocity and demand that governments put in place the regulations essential to addressing environmental issues. In the end, the purpose of all of these roles, outputs, and substantive measurements is to work towards enhancing the health of the environment.<sup>18</sup>

As environmental problems, such as climate change, become more widespread, it is no longer acceptable to let companies' actions and inactions go unchecked. As a means of preventing environmental harm caused by businesses on a national and international scale, the principle of environmental liability has just come into existence. In addition, concepts of corporate governance such as corporate social responsibility demand that businesses take into account the repercussions that their economic activities will have on society when making decisions.<sup>19</sup> There is a school of thought that contends the idea of environmental governance is an essential component of what is known as corporate social and environmental responsibility.<sup>20</sup>

While discharging their responsibility to promote the success of a company, directors are required under the Companies Act to take into consideration the effects that the firm's activities will have on the local community as well as the natural environment.<sup>21</sup> In addition, the Act requires that directors, while they are compiling their reports, include information regarding issues pertaining to

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<sup>17</sup> Escobar-Pemberthy, N.; Ivanova, M. Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index. *Sustainability* 2020, 12 (17), 7098. <https://doi.org/10.3390/su12177098>.

<sup>18</sup> Ibid.

<sup>19</sup> Buckley, P 'Can Corporations Contribute directly to society or only through regulated behaviour' *Journal of the British Academy*, 6 (sl), p. 323-374.

<sup>20</sup> MSV. Prasad, 'Corporate Environmental Governance: A Perception of Indian Stakeholder', available at [https://ecoinsee.org/conference/conf\\_papers/conf\\_paper\\_18.pdf](https://ecoinsee.org/conference/conf_papers/conf_paper_18.pdf), (accessed on 28/11/2019).

<sup>21</sup> Companies Act, No. 17 of 2015, s. 143 (1) (d), Government Printer, Nairobi.

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the environment and take into account the effect that the operations of the firm have on the surrounding environment.<sup>22</sup>

The Climate Change Act of 2016 establishes a legal framework for a more robust response to climate change, as well as policies and processes designed to realise low-carbon climatic development.<sup>23</sup> The Act applies to all aspects of the economy and mandates the implementation of measures aimed at incorporating responses to climate change into the process of development planning, as well as the provision of incentives and obligations for the contribution of the private sector towards the achievement of low carbon climate development and the promotion of low carbon technologies.<sup>24</sup> Additionally, it places climate change responsibilities on commercial businesses, which may also be compelled to submit reports on the status of the fulfilment of such commitments.<sup>25</sup> NEMA has been given the authority under the Act to monitor, investigate, and report on whether or not both private and public entities are complying with their responsibilities as outlined in the Act.<sup>26</sup> When carrying out their operations, corporations have a responsibility to keep in mind the provisions of the Climate Change Act of 2016, since this legislation is crucial to the corporate environmental compliance process.

It is, therefore, important for the stakeholders in environmental and corporate management and governance to work together towards ensuring that the activities of these companies promote or at least do not adversely contribute to environmental degradation and climate change.

### **4.0 Sustainability Audit: Scope and Indicators**

In 2015, the member states of the United Nations unanimously agreed to adopt the 2030 Agenda for Sustainable Development. This agenda includes 169 objectives and 17 goals related to sustainable development. The United Nations General Assembly announced in resolution 70/1 that the Sustainable

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<sup>22</sup> Ibid, s. 655 (4) (b).

<sup>23</sup> Climate Change Act, No. 11 of 2016, Government Printer, Nairobi.

<sup>24</sup> Ibid, s. 3.

<sup>25</sup> Ibid, s. 16.

<sup>26</sup> Ibid, s. 17.

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Development Goals and Targets would be monitored and evaluated using a set of global indicators that would concentrate on quantifiable results.<sup>27</sup> Therefore, the reporting done by companies is a significant data source for the framework used to track progress towards the Sustainable Development Goals. Reporting, which serves as a primary source of information on company performance, has the potential to enrich and enhance the monitoring mechanisms for the Sustainable Development Goals. It does this by providing stakeholders, such as governments and providers of capital, with the means to evaluate the economic, environmental, and social impact that companies have on sustainable development.<sup>28</sup>

Risk assessment based on sustainability from the perspectives of all stakeholders, including financial, social, environmental, and technical ones, and risk management are the main areas of attention for sustainability accounting and auditing.<sup>29</sup> The technocratic paradigm, which places an emphasis on hard data and its potential to give comprehensive control over persons, institutions, and systems, predominates in contemporary sustainability auditing.<sup>30</sup>

The use of indicators may enhance the quality of decisions and trigger more effective actions by simplifying, clarifying, and making aggregate information more available to decision-makers. This can lead to improvements in both choice quality and action effectiveness. In this particular setting, the SI have been used as instruments with the purpose of assisting in gaining an understanding of the idea of sustainability. This awareness has been achieved via the utilisation of a methodological approach that is tied to the new

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<sup>27</sup> United Nations Conference on Trade and Development. *Guidance on Core Indicators for Sustainability and SDG Impact Reporting*; 2022, p. 1.

<sup>28</sup> Ibid, p.1.

<sup>29</sup> Fagerström, A.; Hartwig, G. *Accounting and Auditing of Sustainability: A Model Inter Title*; 2016.

<sup>30</sup> Reid, J.; Rout, M. Developing Sustainability Indicators–The Need for Radical Transparency. *Ecological Indicators* 2020, 110, 105941.

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paradigms of Sustainable Development.<sup>31</sup> Indicators of Sustainability (SI) are metrics that aim to quantify the degree of sustainability and gather information for improved decision-making about policies, programmes, initiatives, and activities linked to sustainability. The SI looks to be a vital instrument for assessing development objectives as a sustainable proposition now that its significance has been shown with regard to public policy.<sup>32</sup>

Indicators of sustainability are an important tool for businesses to have. Concerns over the environment have been more prevalent throughout the years. These companies have a lot to offer, particularly in the area of minimising the negative externalities they cause. This must be accomplished via their plans and tactics, but it is very necessary that there be a technique that is adequate for judging how effective these measures have been.<sup>33</sup> These are the techniques that may be used to evaluate how well a company's strategy has been implemented. These actions are tied to certain goals and are outlined in a strategy for the corporate sustainability of the organisation. For instance, cutting down on waste or one's carbon impact throughout the manufacturing process. Implementation of these standards is used to determine whether or not progress is being achieved in the desired direction.<sup>34</sup> The use of these indicators is done mostly for the purpose of determining whether or not the organisation is successful in achieving its goals. In the event that there is a deviation, appropriate remedial actions may be taken. Therefore, sustainability indicators are used to assess not only the profitability of the organisation but also how well it carries out its aims.<sup>35</sup>

The process of developing indicators is always a two-way affair. Indicators are not only sought by policy goals, but they also serve to concretize and shape

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<sup>31</sup> Batalhao, A., de Fatima Martins, M., van Bellen, H.M., Ferreira Caldana, A.C. and Teixeira, D., 'Sustainability Indicators: Relevance, Public Policy Support and Challenges' (2019) 9 *Journal of Management and Sustainability* 173, p.174.

<sup>32</sup> *Ibid*, 173.

<sup>33</sup> APLANET. *Sustainability indicators: definition, types of KPIs and their use in the sustainability plan*. APLANET. <https://aplanet.org/resources/sustainability-indicators/> (accessed 2023-06-28).

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

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those goals in many ways. As a result, the process of producing indicators cannot be limited to a strictly technical or scientific scope; rather, it need to be characterized by open communication and a focus on policy.<sup>36</sup> Indicators that are acceptable for this function need to be straightforward and unambiguous about their purpose: a) the number of indicators should be kept to a minimum, and the process of calculating them should be made public; b) the indicators should be directionally clear, which means that they should point out items and trends that are obviously relevant in terms of their importance for sustainability, and they should be sensitive, which means that they should be able to signal either progress or the absence of progress.<sup>37</sup>

While there may be challenges in development of these indicators, stakeholders from different sectors can work together to develop a set of indicators that are both relevant to the country and easy to follow up on.<sup>38</sup> Thus, such challenges should not be used as a hindrance to not promoting development of the SI for promoting sustainability audit in the country. It has been pointed out, and properly so, that sustainability consists of environmental, economic, and social aspects (occasionally institutions are mentioned as the fourth dimension), each of which contains a lot of components that make it up. Therefore, indications of sustainability may be as varied as the components of the system, and they can also differ with respect to worldviews, objectives, and scales of time and space. There are a lot of indicators, but most of them only reflect some elements of human-environmental systems. Some of them are more integrative than others, but none of them are sufficient to measure all of the characteristics of sustainability by itself.<sup>39</sup> In addition, It is becoming more widely acknowledged that the most significant value of the terms "sustainability" and "sustainable development" rests in their focus on uniting the various aspects, the most prevalent

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<sup>36</sup> Valentin A and Spangenberg JH, 'A Guide to Community Sustainability Indicators' (2000) 20 *Environmental impact assessment review* 381, p.381.

<sup>37</sup> *Ibid*, pp. 381-82.

<sup>38</sup> See Batalhao, A., de Fatima Martins, M., van Bellen, H.M., Ferreira Caldana, A.C. and Teixeira, D., 'Sustainability Indicators: Relevance, Public Policy Support and Challenges' (2019) 9 *Journal of Management and Sustainability* 173.

<sup>39</sup> Wu J and Wu T, "Sustainability indicators and indices: an overview." *Handbook of sustainability management* (2012): 65-86.

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classifications of which are environmental, economic, and social. In light of this, efforts to promote sustainability need to centre on the holistic, integrated totality of human and environmental systems. Sustainability indicators must be more than environmental indicators; they must be about time and/or thresholds.<sup>40</sup> Development indicators should be more than growth indicators; they should be about efficiency, sufficiency, equity, and quality of life. Development indicators should be more than growth indicators; they should be about efficiency, sufficiency, equity, and quality of life. When it comes to our attempts to make sustainable development a reality, indicators and indices are very necessary for developing a scientific knowledge and formulating effective policies.<sup>41</sup> These measurements will need to continue to increase in complexity and sophistication as time goes on in order for them to keep up with the demands placed on them by the ever-worsening state of environmental and socioeconomic issues. The process of discovering suitable and efficient indicators of sustainability is one that involves evolution as well as learning new things.<sup>42</sup>

### **5.0 Embracing Sustainability Audit for Enhanced Corporate Environmental Compliance in Kenya**

It has been suggested that conceptualizing sustainable development as a decision-making strategy enables for it to truly be "used," therefore going beyond the rhetoric and converting sustainability and its "action-guiding" capacity into a notion that can "action-generate." At a minimum, the three issues listed below need to be taken into consideration if one wishes to get an understanding of the connections that exist between sustainability and decision-making, and as a result, the actualization of sustainable development as a method for making decisions: The term "sustainability" should be understood with consideration given to its organising principles, which should then be applied to a particular socio-environmental setting; information-structuring (the inherent multi-dimensional complexity of

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<sup>40</sup> Ibid, 84.

<sup>41</sup> Ibid, 84; see also Farrell, A. and Hart, M., What does sustainability really mean? The search for useful indicators. *Environment: science and policy for sustainable development*, 40(9), pp.4-31.

<sup>42</sup> Ibid, 84.

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sustainability should be organized into operational information units, such as indicators, and correctly presented in order to feed the decision-making process); and Impact (the knowledge on sustainability ought to have a significant impact both on the process of making decisions and on the process of actually implementing sustainable development).<sup>43</sup>

In Kenya, reporting on the economic, environmental, and social elements of a company's activity, in addition to the company's engagement with various stakeholders, is not a regular practice. There is a need for the country to entrench reporting especially on sustainability in its corporate and environmental laws, if sustainability goals are to be achieved in the country. This should be enforced in line with the provisions of section 655 of the Companies Act<sup>44</sup> which requires that unless the company is subject to the small companies regime, the directors shall include in their report a business review that complies with subsection (3), so far as relevant to the company.<sup>45</sup> The purpose of the business review is to inform members of the company and assist them to assess how the directors have performed their duty under section 144.<sup>46</sup> In the case of a quoted company, the directors are required to specify in the business review (to the extent necessary for an understanding of the development, performance or position of the company) – (a) the main trends and factors likely to affect the future development, performance and position of the business of the company; (b) information about – (i) environmental matters (including the impact of the business of the company on the environment); (ii) the employees of the company; and (iii) social and community issues, including information on any policies of the company in relation to those matters and the effectiveness of those policies; and (c) information about persons with whom the company has contractual or other arrangements that are essential to the business of the company.<sup>47</sup> There is a

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<sup>43</sup> Waas, T.; Hugé, J.; Block, T.; Wright, T.; Benitez-Capistros, F.; Verbruggen, A. Sustainability Assessment and Indicators: Tools in a Decision-Making Strategy for Sustainable Development. *Sustainability* **2014**, *6* (9), 5512–5534. <https://doi.org/10.3390/su6095512>.

<sup>44</sup> Companies Act. No. 17 Of 2015, Laws of Kenya. Revised Edition 2021 [2015]

<sup>45</sup> *Ibid*, s.655(1).

<sup>46</sup> *Ibid*, s.655(2).

<sup>47</sup> *Ibid*, s.655(4).



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need for stricter enforcement of these provisions coupled with sustainability audit to ensure that both quoted and unquoted companies' activities promote the Government's efforts towards achieving sustainability in the country. The Brundtland Commission's definition of sustainability is a complex and multifaceted concept, making it an aspirational goal for public policy. It gives equal weight to environmental, economic, social, and institutional considerations as it does to other factors.<sup>48</sup> The Office of the Registrar of companies should work closely the NEMA in order to enhance the effectiveness of non-financial reporting through promoting sustainability audit to ensure transmission of verifiable data on economic, social, environmental and governance data, as a way of promoting sustainable development based on true data.

### **6.0 Conclusion**

There is a pressing need for the development of well-thought-out sustainability assessment systems that involve governments, industries, and non-governmental organisations. These systems need to be able to provide certainty and assurance to either consumers or the general public regarding the sustainability of particular industry practices and activities. This would go a long way towards generating increased understanding of environmental and social concerns while encouraging the development of sustainable practices across organisations and businesses. It would also go a long way towards assessing and communicating sustainability attributes. This should be done in a way that is open, honest, and critical as we go forward with the creation of the sustainability assessment systems.<sup>49</sup> Embracing Sustainability Audit for enhanced corporate environmental compliance is the way to go as we seek to attain true Sustainable Development.

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<sup>48</sup> Valentin A and Spangenberg JH, 'A Guide to Community Sustainability Indicators' (2000) 20 Environmental impact assessment review 381, p. 381.

<sup>49</sup> Reid, J.; Rout, M. Developing Sustainability Indicators–The Need for Radical Transparency. *Ecological Indicators* 2020, 110, 105941.

## **Combating Climate Change in Kenya for Sustainable Development**

### **Abstract**

*Climate change is considered one of the major global challenges that countries have to contend with in their efforts towards achievement of the sustainable development agenda. Climate change affects not only national and global economy but also has a direct effect on the livelihoods of communities. It is for this reason that there have been global calls on governments and all other stakeholders to put in place climate change mitigation measures and ensure that their economies become resilient. Indeed, climate change is one of the main environmental goals under the United Nation's 2030 Agenda for Sustainable Development Goals as captured under Sustainable Development Goal 13 meant to help countries achieve resilience and build adaptive capacity. However, due to their development activities and approaches, both developed and developing countries have not managed to curb climate change. It is also acknowledged that due to their differing economies and unique challenges, developing countries have far much been affected by climate change compared to the developed countries. Kenya is no exception especially considering that its economy is considered to be agricultural based and much of its rural population is still highly dependent on agriculture and environment to meet their livelihood needs. This has resulted in environmental degradation due to pollution and indiscriminate use of available environmental and natural resources. This paper adds to the existing literature in this area on how the country can successfully combat climate change in its bid to achieve sustainable development. The major argument is that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders. The Government alone cannot possibly achieve this task. Climate change mitigation is an important step towards achieving sustainability in the country, without which the realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development will remain a mirage.*

### **1.0 Introduction**

Climate change remains one of the main global challenges that has affected both developed and developing countries in their efforts towards achievement of the sustainable development agenda although it is arguable that the

## *Combating Climate Change in Kenya for Sustainable Development*

developing countries have been affected in greater ways.<sup>1</sup> This is because, since the environment remains the main source of raw materials for national development and a source of livelihoods for many communities especially those living within the rural settings, and climate change affects the ability of the environment to supply these needs, climate change has a direct effect on the livelihoods of communities as well as countries' ability to achieve growth and development. The year 2020 indeed proved how harsh climate change can be and Corona Virus pandemic (COVID-19) did not make things any better. It has been observed that from wildfires in California and locust attacks in Ethiopia and Kenya to job losses caused by pandemic lockdowns across the world, climate change and COVID-19 disrupted food production and tipped millions more people into hunger in 2020.<sup>2</sup> In addition, Oxfam has estimated that more than 50 million people in East and Central Africa require emergency food aid – and those numbers are set to rise as the region braces for a harsh drought linked to the La Nina climate pattern, as well as more locust swarms.<sup>3</sup> Indeed, commentators have expressed their fears that the situation could worsen from the current year 2021 as both the coronavirus crisis and wild weather exacerbate fragile conditions linked to conflicts and poverty in many parts of the globe, with the head of the U.N. World Food Program (WFP) warning that “even before COVID-19 hit, 135 million people were marching towards the brink of starvation; this could double to 270 million within a few short months”.<sup>4</sup>

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<sup>1</sup> 'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2019/gaef3516.doc.htm>> accessed 23 January 2021; 'Untitled' <<https://unfccc.int/news/impacts-of-climate-change-on-sustainable-development-goals-highlighted-at-high-level-political-forum>> accessed 23 January 2021.

<sup>2</sup> 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse – Homeland Security Today' <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid; 'WFP Chief Warns of Hunger Pandemic as COVID-19 Spreads (Statement to UN Security Council) | World Food Programme' <<https://www.wfp.org/news/wfp-chief-warns-hunger-pandemic-covid-19-spreads-statement-un-security-council>> accessed 17 January 2021.

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Climate change thus remains a challenge to many because, as the United Nations Environment Programme observes, climate change is increasing the frequency and intensity of extreme weather events such as heat waves, droughts, floods and tropical cyclones, aggravating water management problems, reducing agricultural production and food security, increasing health risks, damaging critical infrastructure and interrupting the provision of basic services such water and sanitation, education, energy and transport.<sup>5</sup>

It is for this reason that there have been global calls on governments and all other stakeholders to put in place climate change mitigation measures and ensure that their economies become resilient. Climate change is one of the main environmental goals under the United Nation's *2030 Agenda for Sustainable Development Goals*<sup>6</sup> (SDGs) as captured under Sustainable Development Goal 13 meant to help countries achieve resilience and build adaptive capacity. SDG Goal 13 calls on countries to take urgent action to combat climate change and its impacts.<sup>7</sup> SDG Goal 13 targets require countries to: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries;<sup>8</sup> integrate climate change measures into national policies, strategies and planning;<sup>9</sup> improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning;<sup>10</sup> implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly \$100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible;<sup>11</sup> and promote mechanisms for raising

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<sup>5</sup> Environment UN, 'GOAL 13: Climate Action' (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-13>> accessed 17 January 2021.

<sup>6</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

<sup>7</sup> Sustainable Development Goal 13.

<sup>8</sup> Target 13.1, SDG Goal 13.

<sup>9</sup> Target 13.2, SDG Goal 13.

<sup>10</sup> Target 13.3, SDG Goal 13.

<sup>11</sup> Target 13.a, SDG Goal 13.

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capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities<sup>12</sup>. Notably, the 2030 Agenda acknowledges that the United Nations Framework Convention on Climate Change is the primary international intergovernmental forum for negotiating the global response to climate change.<sup>13</sup>

The above goals and targets are commendable and are meant to help countries come up with climate change mitigation and adaptation mechanisms to combat the challenge of climate change. However, due to their development activities and approaches, both developed and developing countries have not managed to combat climate change. Indeed, it has been observed that despite the growing amount of climate change concern, mitigation efforts, legislation, and international agreements that have reduced emissions in some places, the continued economic growth of the less developed world has increased global greenhouse gases emission, with the time between 2000 and 2010 experiencing the largest increases since 1970.<sup>14</sup> According to scientific reports, the Earth's mean surface temperature in 2020 was 1.25°C above the global average between 1850 and 1900, largely attributable to greenhouse gases from human activities.<sup>15</sup> It has also been reported that human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C and global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.<sup>16</sup>

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<sup>12</sup> Target 13.b, SDG Goal 13.

<sup>13</sup> See DGS Goal 13 (asterisk).

<sup>14</sup> '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019)

[https://geo.libretexts.org/Bookshelves/Geology/Book%3A\\_An\\_Introduction\\_to\\_Geology\\_\(Johnson\\_Affolter\\_Inkenbrandt\\_and\\_Mosher\)/15%3A\\_Global\\_Climate\\_Change/15.05%3A\\_Anthropogenic\\_Causes\\_of\\_Climate\\_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change) accessed 17 January 2021.

<sup>15</sup> Wilby R, 'Climate Change: What Would 4°C of Global Warming Feel Like?' (*The Conversation*) <http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625> accessed 17 January 2021.

<sup>16</sup> 'Summary for Policymakers – Global Warming of 1.5 °C' <https://www.ipcc.ch/sr15/chapter/spm/> accessed 17 January 2021.

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It must also be acknowledged that due to their differing economies and unique challenges, developing countries have far more been affected by climate change compared to the developed countries.<sup>17</sup> Kenya is no exception especially considering that its economy is considered to be agricultural based and much of its rural population is still highly dependent on agriculture and environment to meet their livelihood needs.<sup>18</sup> This has resulted in environmental degradation due to pollution and indiscriminate use of available environmental and natural resources.<sup>19</sup> This paper adds to the existing literature in this area on how the country can successfully combat climate change in its bid to achieve sustainable development. It is imperative that countries combat climate change urgently considering that it is estimated that without action, by 2050, 68% of humanity may live in urban areas and populations in the tropics will be most exposed to extreme humid heat.<sup>20</sup> The World has been struggling with COVID-19 pandemic since March 2020 and the negative effect on economies and livelihoods has been enormous. Despite this, some commentators have argued that climate change could be more devastating than Covid-19.<sup>21</sup>

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<sup>17</sup> 'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2019/gaef3516.doc.htm>> accessed 23 January 2021.

<sup>18</sup> Alila, Patrick O., and Rosemary Atieno. "Agricultural policy in Kenya: Issues and processes." *Nairobi: Institute of Development Studies* (2006); Faling, Marijn. "Framing agriculture and climate in Kenyan policies: A longitudinal perspective." *Environmental Science & Policy* 106 (2020): 228-239; Faling, Marijn, and Robbert Biesbroek. "Cross-boundary policy entrepreneurship for climate-smart agriculture in Kenya." *Policy Sciences* 52, no. 4 (2019): 525-547; Haradhan Kumar Mohajan, 'Food and Nutrition Scenario of Kenya' (2014) 2 *American Journal of Food and Nutrition* 28.

<sup>19</sup> Abioye O Fayiga, Mabel O Ipinmoroti and Tait Chirenje, 'Environmental Pollution in Africa' (2018) 20 *Environment, Development and Sustainability* 41.; '(PDF) Environmental Degradation: Causes, Impacts and Mitigation' (*ResearchGate*) <[https://www.researchgate.net/publication/279201881\\_Environmental\\_Degradation\\_Causes\\_Impacts\\_and\\_Mitigation](https://www.researchgate.net/publication/279201881_Environmental_Degradation_Causes_Impacts_and_Mitigation)> accessed 23 January 2021.

<sup>20</sup> Wilby R, 'Climate Change: What Would 4°C of Global Warming Feel Like?' (*The Conversation*) <<http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625>> accessed 17 January 2021.

<sup>21</sup> Clifford C, 'Bill Gates: Climate Change Could Be More Devastating than Covid-19 Pandemic—This Is What the US Must Do to Prepare' (*CNBC*, 8 January 2021) <<https://www.cnn.com/2021/01/08/bill-gates-climate-change-could-be-worse-than-covid-19.html>> accessed 17 January 2021.

## **2.0 Climate Change: Definition and Causes**

**Climate** is defined as the temperature and precipitation patterns and range of variability averaged over the long-term for a particular region.<sup>22</sup> On the other hand, climate change has been defined as ‘a long-term shift in the average weather conditions of a region, such as its typical temperature, rainfall, and windiness’.<sup>23</sup> The *United Nations Framework Convention on Climate Change*<sup>24</sup>(UNFCCC) defines "climate change" to mean a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.<sup>25</sup>

It has been pointed out that while prehistoric changes in climate have been very slow since climate changes typically occur slowly over many millions of years, the climate changes observed today are rapid and largely human-caused.<sup>26</sup>

According to the available scientific data, anthropogenic climate change, or, human-caused climate change is believed to be causing rapid changes to the climate, which will cause severe environmental damage.<sup>27</sup> This is mainly attributed to anthropogenic greenhouse gases emissions, mostly carbon dioxide (CO<sub>2</sub>), from fossil fuel combustion and industrial processes and the following economic sectors: electricity and heat production; agriculture,

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<sup>22</sup> ‘15.1: Global Climate Change’ (*Geosciences LibreTexts*, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A\\_An\\_Introduction\\_to\\_Geology\\_\(Johnson\\_Affolter\\_Inkenbrandt\\_and\\_Mosher\)/15%3A\\_Global\\_Climate\\_Change/15.01%3A\\_Global\\_Climate\\_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 17 January 2021.

<sup>23</sup> Canada E and CC, ‘Climate Change Concepts’ (*aem*, 26 September 2018) <<https://www.canada.ca/en/environment-climate-change/services/climate-change/canadian-centre-climate-services/basics/concepts.html>> accessed 17 January 2021.

<sup>24</sup> UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

<sup>25</sup> *Ibid*, Article 1(2).

<sup>26</sup> ‘15.5: Anthropogenic Causes of Climate Change’ (*Geosciences LibreTexts*, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A\\_An\\_Introduction\\_to\\_Geology\\_\(Johnson\\_Affolter\\_Inkenbrandt\\_and\\_Mosher\)/15%3A\\_Global\\_Climate\\_Change/15.05%3A\\_Anthropogenic\\_Causes\\_of\\_Climate\\_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

<sup>27</sup>*Ibid*.

forestry, and land use; industry; transportation including automobiles; other energy production; and buildings.<sup>28</sup>

### **3.0 The Legal Framework on Climate Change Mitigation and Adaptation**

Climate change mitigation has been defined as a human-mediated reduction of the anthropogenic forcing of the climate system that includes strategies to reduce GHG sources and emissions and enhancing GHG sinks.<sup>29</sup> At the global scene, there exist a number of related environmental legal instruments, plans and programmes aimed at combating climate change.

### **4.0 International Legal Framework on Climate Change Mitigation and Adaptation**

#### **4.1 Montreal Protocol on Substances that Deplete the Ozone Layer**

The *Montreal Protocol on Substances that Deplete the Ozone Layer* was signed in 1987 and entered into force in 1989 as a global agreement to protect the Earth's ozone layer by phasing out the chemicals that deplete it, a plan that includes both the production and consumption of ozone-depleting substances.<sup>30</sup> The Protocol is believed to have successfully met its objectives thus far as it continues to safeguard the ozone layer today.<sup>31</sup>

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<sup>28</sup> '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019)

[https://geo.libretexts.org/Bookshelves/Geology/Book%3A\\_An\\_Introduction\\_to\\_Geology\\_\(Johnson\\_Affolter\\_Inkenbrandt\\_and\\_Mosher\)/15%3A\\_Global\\_Climate\\_Change/15.05%3A\\_Anthropogenic\\_Causes\\_of\\_Climate\\_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change) accessed 17 January 2021; 'How We Know Today's Climate Change Is Not Natural' (*State of the Planet*, 4 April 2017) <https://blogs.ei.columbia.edu/2017/04/04/how-we-know-climate-change-is-not-natural/> accessed 17 January 2021; 'The Science of Carbon Dioxide and Climate' (*State of the Planet*, 10 March 2017) <https://blogs.ei.columbia.edu/2017/03/10/the-science-of-carbon-dioxide-and-climate/> accessed 17 January 2021.

<sup>29</sup> Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

<sup>30</sup> 'The Montreal Protocol on Substances That Deplete the Ozone Layer | Ozone Secretariat' <https://ozone.unep.org/treaties/montreal-protocol/montreal-protocol-substances-deplete-ozone-layer> accessed 21 January 2021.

<sup>31</sup> *Ibid.*



#### **4.2 Vienna Convention for the Protection of the Ozone Layer**

The Vienna Convention for the Protection of the Ozone Layer was the first convention of any kind to be signed by every country involved, taking effect in 1988 and reaching universal ratification in 2009.<sup>32</sup> The Vienna Convention obligates the Parties to take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.<sup>33</sup>

#### **4.3 The Kyoto Protocol**

The *Kyoto Protocol* was adopted on 11 December 1997 and entered into force on 16 February 2005, currently with 192 Parties.<sup>34</sup> The Kyoto protocol was the first agreement between nations to mandate country-by-country reductions in greenhouse-gas emissions. Kyoto emerged from the UN Framework Convention on Climate Change (UNFCCC), which was signed by nearly all nations at the 1992 Earth Summit.<sup>35</sup> The Kyoto Protocol operationalizes the United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets,<sup>36</sup> whereas the Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically.<sup>37</sup> Notably, the Kyoto Protocol only binds developed countries, and places a heavier burden on them under the principle of “common but differentiated responsibility and respective capabilities”, because it recognizes that they are largely responsible for the current high levels of GHG emissions in the

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<sup>32</sup> ‘The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat’ <<https://ozone.unep.org/treaties/vienna-convention>> accessed 21 January 2021.

<sup>33</sup> Vienna Convention for the Protection of the Ozone Layer, Article 2(1).

<sup>34</sup> ‘Untitled’ <[https://unfccc.int/kyoto\\_protocol](https://unfccc.int/kyoto_protocol)> accessed 21 January 2021.

<sup>35</sup> Extract from The Rough Guide to Climate Change, ‘What Is the Kyoto Protocol and Has It Made Any Difference?’ (*the Guardian*, 11 March 2011) <<http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>> accessed 21 January 2021.

<sup>36</sup> ‘Untitled’ <[https://unfccc.int/kyoto\\_protocol](https://unfccc.int/kyoto_protocol)> accessed 21 January 2021.

<sup>37</sup> *Ibid.*

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atmosphere.<sup>38</sup> While industrialized nations pledged to cut their yearly emissions of carbon, as measured in six greenhouse gases, by varying amounts, averaging 5.2%, by 2012 as compared to 1990, some almost achieved these targets while others like China and United States exceeded the targets by producing more carbon to the point of cancelling the progress made by all other states.<sup>39</sup> In addition, some countries such as India and China were never in the list of the original 37 developed countries bound by the Protocol yet China and India together account for approximately 35% of total carbon emissions, as of 2020, while the developed nations of the UK, France, and Germany combined, only account for 4% of the world's carbon emissions.<sup>40</sup>

### **5.0 The Kyoto Protocol was essentially replaced by the Paris Climate Accord in 2015.<sup>41</sup>**

#### **5.1 Doha Amendment to the Kyoto Protocol**

Parties to the Kyoto Protocol adopted an amendment to the Kyoto Protocol by decision 1/CMP.8 in accordance with Articles 20 and 21 of the Kyoto Protocol, at the eighth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) held in Doha, Qatar, on 8 December 2012.<sup>42</sup> As of **28 October 2020, 147 Parties** had deposited their instrument of acceptance, therefore, the threshold for entry into force of the Doha Amendment had been met.<sup>43</sup> The Doha Amendment refers to the changes made to the Kyoto Protocol in 2012, after the First Commitment Period of the Kyoto Protocol concluded. The Amendment adds new emission reduction

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<sup>38</sup> Ibid.

<sup>39</sup> Extract from The Rough Guide to Climate Change, 'What Is the Kyoto Protocol and Has It Made Any Difference?' (*the Guardian*, 11 March 2011) <<http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>> accessed 21 January 2021.

<sup>40</sup> 'Kyoto Protocol - Overview, Components, Current State' (*Corporate Finance Institute*) <<https://corporatefinanceinstitute.com/resources/knowledge/other/kyoto-protocol/>> accessed 21 January 2021.

<sup>41</sup> Ibid.

<sup>42</sup> 'Untitled' <<https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>> accessed 21 January 2021.

<sup>43</sup> Ibid.

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targets for Second Commitment Period (2012-2020) for participating countries.<sup>44</sup>

### **5.2 Paris Climate Accord, 2015**

The Paris Agreement is a **legally binding international treaty on climate change**, adopted by 196 Parties at COP 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016.<sup>45</sup> Its goal is to **limit global warming** to well below 2, **preferably to 1.5 degrees Celsius**, compared to pre-industrial levels.<sup>46</sup> Unlike the Kyoto Protocol, the Paris Agreement is a **landmark** in the multilateral climate change process because, for the first time, a binding agreement brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects.<sup>47</sup> The 26<sup>th</sup> UN Climate Change Conference of the Parties (COP26) will be held in Glasgow from 1<sup>st</sup> to 12<sup>th</sup> November 2021.<sup>48</sup> The COP26 summit is expected to bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change.<sup>49</sup>

### **5.3 United Nations Convention to Combat Desertification**

The objective of the *United Nations Convention to Combat Desertification*<sup>50</sup> 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.<sup>51</sup> This is to be

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<sup>44</sup>'Doha Amendment to the Kyoto Protocol (2012)' (COP23) <<https://cop23.com.fj/knowledge/doha-amendment-kyoto-protocol-2012/>> accessed 21 January 2021.

<sup>45</sup>'Untitled' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 21 January 2021.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> 'UN Climate Change Conference (COP26) at the SEC – Glasgow 2021' (UN Climate Change Conference (COP26) at the SEC – Glasgow 2021) <<https://ukcop26.org/>> accessed 17 January 2021.

<sup>49</sup> Ibid.

<sup>50</sup>United Nations Convention to Combat Desertification (1994).

<sup>51</sup> Article 2(1).

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achieved through long-term integrated strategies that focus simultaneously, in affected areas, on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level.<sup>52</sup>

### **5.4 Agenda 21**

Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment.<sup>53</sup>

### **5.5 United Nations Framework Convention on Climate Change (UNFCCC)**

The *United Nations Framework Convention on Climate Change*<sup>54</sup> was passed to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere, at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.<sup>55</sup>

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties are to be guided, *inter alia*, by the following principles: the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof;<sup>56</sup> the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of

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<sup>52</sup> Article 2(2).

<sup>53</sup> Agenda 21: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/outcomedocuments/agenda21>> accessed 21 January 2021.

<sup>54</sup> UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

<sup>55</sup> *Ibid*, Article 2.

<sup>56</sup> *United Nations Framework Convention on Climate Change*, Article 3(1).

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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;<sup>57</sup> the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties;<sup>58</sup> the Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change;<sup>59</sup> the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.<sup>60</sup>

### **5.6 Intergovernmental Panel on Climate Change (IPCC)**

The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body established in 1988 for assessing the science related to climate change.<sup>61</sup> The Intergovernmental Panel on Climate Change (IPCC) collects,

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<sup>57</sup> *United Nations Framework Convention on Climate Change*, Article 3(2).

<sup>58</sup> *United Nations Framework Convention on Climate Change*, Article 3(3).

<sup>59</sup> *Ibid*, Article 3(4).

<sup>60</sup> *Ibid*, Article 3(5).

<sup>61</sup> 'IPCC – Intergovernmental Panel on Climate Change' <<https://www.ipcc.ch/>> accessed 21 January 2021.

reviews, and summarizes the best information on climate change and its impacts, and puts forward possible solutions.<sup>62</sup> IPCC often discharges its work through scientific reports, summarizing current and relevant findings in the field and written for policymakers and scientists, but they are available to everyone.<sup>63</sup>

## **6.0 Kenya's Legal Framework on Climate Change Mitigation**

### **6.1 Environmental Management and Co-ordination Act, 1999**

The *Environmental Management and Co-ordination Act, 1999*<sup>64</sup>(EMCA) mandates the Cabinet Secretary in charge of environmental matters in consultation with the National Environment Management Authority, to undertake or commission other persons to undertake national studies and give due recognition to developments in scientific knowledge relating to substances, activities and practices that deplete the ozone layer to the detriment of public health and the environment.<sup>65</sup> The Cabinet Secretary in consultation with the Authority, is then required to issue guidelines and institute programmes concerning the: elimination of substances that deplete the stratospheric ozone layer; controlling of activities and practices likely to lead to the degradation of the ozone layer and the stratosphere; reduction and minimisation of risks to human health created by the degradation of the ozone layer and the stratosphere; and formulate strategies, prepare and evaluate programmes for phasing out ozone depleting substances.<sup>66</sup>

The Act also mandates the Cabinet Secretary, in consultation with relevant lead agencies, to issue guidelines and prescribe measures on climate change.<sup>67</sup> EMCA also provides for fiscal incentives that are designed to promote climate change mitigation. It empowers the Cabinet Secretary responsible for Finance, on the recommendation of the National Council of Public benefit

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<sup>62</sup> 'The Intergovernmental Panel on Climate Change' (MIT Climate Portal) <<https://climate.mit.edu/explainers/intergovernmental-panel-climate-change>> accessed 21 January 2021.

<sup>63</sup> Ibid.

<sup>64</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

<sup>65</sup> Ibid, sec. 56(1).

<sup>66</sup> Ibid, sec. 56(2).

<sup>67</sup> Ibid, sec. 56A.

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organizations, to propose to Government tax and other fiscal incentives, disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation.<sup>68</sup> The tax and fiscal incentives, disincentives or fees may include: customs and excise waiver in respect of imported capital goods which prevent or substantially reduce environmental degradation caused by an undertaking; tax rebates to industries or other establishments that invest in plants, equipment and machinery for pollution control, recycling of wastes, water harvesting and conservation, prevention of floods and for using other energy resources as substitutes for hydrocarbons; tax disincentives to deter bad environmental behaviour that leads to depletion of environmental resources or that cause pollution; or user fees to ensure that those who use environmental resources pay proper value for the utilization of such resources.<sup>69</sup>

EMCA also provides for Strategic Environmental Assessments<sup>70</sup>; Environmental Impact Assessment<sup>71</sup>; Environmental Audit<sup>72</sup>; and Environmental Monitoring<sup>73</sup>, all of which are meant to protect the environment from environmentally degrading human activities.

### **6.2 Climate Change Action Plan 2018–2022**

The Climate Change Action Plan 2018–2022<sup>74</sup> aims to further Kenya's development goals by providing mechanisms and measures that achieve low carbon climate resilient development. NCCAP 2018-2022 builds on the first action plan (2013-2017), sets out actions to implement the Climate Change Act (2016), and provides a framework for Kenya to deliver on its Nationally Determined Contribution (NDC) to the Paris Agreement.<sup>75</sup>

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<sup>68</sup>Environmental Management and Co-ordination Act, sec. 57(1).

<sup>69</sup> Ibid, sec. 57(2).

<sup>70</sup> Ibid, sec. 57A.

<sup>71</sup> Ibid, sec. 58.

<sup>72</sup> Ibid, sec. 68.

<sup>73</sup> Ibid, sec. 69.

<sup>74</sup> Government of the Republic of Kenya (2018). *National Climate Change Action Plan 2018-2022*. Ministry of Environment and Forestry, Nairobi.

<sup>75</sup> National Climate Change Action Plan: 2018-2022, p.4.

### **6.3 Climate Change Act, 2016**

The Climate Change Act 2016<sup>76</sup> 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.<sup>77</sup> The Act is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.<sup>78</sup>

### **6.4 Climate Change Mitigation in Kenya: Challenges and Prospects**

Africa is classified as one of the continents highly vulnerable to climate change due to several reasons: high poverty level, high dependence on rain-fed agriculture, poor management of natural resources, capacity/technology limitations, weak infrastructure, and less efficient governance/institutional setup.<sup>79</sup> Arguably, Kenya's challenges as far as combating climate change is concerned are not any different from the ones identified above.

Climate change impacts and the associated socio-economic losses on Kenya have been exacerbated by the country's high dependence on climate sensitive natural resources.<sup>80</sup> The main climate hazards include droughts and floods which cause economic losses estimated at 3% of the country's Gross Domestic Product (GDP) while Kenya's total greenhouse gas (GHG) emissions are relatively low, out of which 75% are from the land use, land-use change and forestry and agriculture sectors.<sup>81</sup> Kenya's Vision 2030 which seeks to convert the country into a newly industrialized middle income country by 2030 is expected to increase emissions from the energy sector.<sup>82</sup>

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<sup>76</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya.

<sup>77</sup> Ibid, Preamble.

<sup>78</sup> Ibid, sec. 3(1).

<sup>79</sup> Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges." <[https://www.researchgate.net/publication/346628199\\_Climate\\_Change\\_Mitigation\\_and\\_Adaptation\\_in\\_ECASADCCOMESA\\_region\\_Opportunities\\_and\\_Challenges](https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges)> accessed 17 January 2021.

<sup>80</sup> GoK, I. N. D. C. "Kenya's Intended Nationally Determined Contribution." (2015).

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.



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Kenya's agricultural sector has been greatly affected by climate change and has also seen growth in use of farming chemicals. The growing population in Kenya coupled with dwindling rainfall and shrinking land parcels have all led to the adoption of modern commercial approaches to agricultural production to achieve food security which has coincidentally greatly contributed to environmental degradation and climate change.<sup>83</sup>

As opposed to the highly commercialized agricultural practices, indigenous agriculture systems are believed to be diverse, adaptable, nature friendly and productive through such approaches as mixed cropping which not only decreases the risk of crop failure, pest and disease but also diversifies the food supply and the higher vegetation diversity in the form of crops and trees escalates the conversion of CO<sub>2</sub> to organic form, thus reducing global warming.<sup>84</sup>

Kenya submitted its Intended Nationally Determined Contribution (INDC) in 2015 as part of its obligations as a signatory and party to the United Nations Framework Convention on Climate Change (UNFCCC).<sup>85</sup> Their implementation is to begin in this year 2021. Some of the challenges identified are related to technical capacity and financial resource gaps.<sup>86</sup>

Kenya's updated Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change (UNFCCC) submitted on 28<sup>th</sup> December 2020 sets out two important developments from its first NDC, which was submitted in December 2016. As compared to the first NDC target of 30% GHG emission reduction, the updated NDC commits to lower GHG

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<sup>83</sup> Kioko, John, and Moses M. Okello. "Land use cover and environmental changes in a semi-arid rangeland, Southern Kenya." *Journal of Geography and Regional Planning* 3, no. 11 (2010): 322-326.

<sup>84</sup> Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

<sup>85</sup> SusWatch Kenya, 'Nationally Determined Contributions (NDCs) Implementation: The Kenyan Scenario,' *Policy Brief*, December 2019, 1 <[https://www.inforse.org/africa/pdfs/PolicyBrief\\_Kenya\\_CSO\\_view\\_on\\_NDCs\\_Dec\\_2019.pdf](https://www.inforse.org/africa/pdfs/PolicyBrief_Kenya_CSO_view_on_NDCs_Dec_2019.pdf)> accessed 17 January 2021.

<sup>86</sup> Ibid.

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emissions by 32% by 2030 relative to the business as usual (BAU) scenario.<sup>87</sup> In addition, while the first NDC was fully conditional to international support, the updated NDC intends to mobilize domestic resources to meet 13% of the estimated USD 62 Billion NDC implementation costs.<sup>88</sup>

### **7.0 Combating Climate Change for Sustainable Development: Way Forward**

#### **7.1 International Cooperation on Climate Change Mitigation**

The World Food Programme has in the recent past observed that the coronavirus crisis has shown how faster international action and better cooperation in areas like science and technology could help tackle the problem (food shortage and climate change).<sup>89</sup> There is a need for Kenya to work closely with other countries and stakeholders at the global level to combat climate change.

The Paris Agreement provides a framework for **financial, technical and capacity building support** to those countries that need it.<sup>90</sup> The Paris Agreement reaffirms that developed countries should take the lead in **providing financial assistance** to countries that are less endowed and more vulnerable, while for the first time also encouraging voluntary contributions by other Parties, as climate finance is needed **for mitigation** and adaptation.<sup>91</sup> The Paris Agreement also encourages **technology development and transfer** for both improving resilience to climate change and reducing GHG emissions, by establishing a **technology framework** to provide

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<sup>87</sup> 'NDC Update Kenya: Enhanced Reduction Target' (*Changing Transport*, 13 January 2021) <<https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/>> accessed 21 January 2021.

<sup>88</sup> Ibid.

<sup>89</sup> 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse - Homeland Security Today' <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

<sup>90</sup> 'Untitled' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 21 January 2021.

<sup>91</sup> Ibid; see also UN General Assembly, *United Nations Framework Convention on Climate Change*, Article 11.

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overarching guidance to the well-functioning Technology Mechanism.<sup>92</sup> Also, in recognition of the fact that not all developing countries have sufficient capacities to deal with many of the challenges brought by climate change, the Paris Agreement places **great emphasis on climate-related capacity-building** for developing countries and requests all developed countries to enhance support for capacity-building actions in developing countries.<sup>93</sup>

Kenya's Government should also continually work closely with the UNEP in design and execution of climate change mitigation plans. UNEP assists countries all over the world in their efforts to create National Adaptation Plans (NAPs), which process seeks to identify medium- and long-term adaptation needs, informed by the latest climate science.<sup>94</sup> NAPs are meant to: reduce vulnerability to the impacts of climate change by building adaptive capacity and resilience; and integrate adaptation into new and existing policies and programmes, especially development strategies.<sup>95</sup>

### **7.2 Integrated Approach to Reduction of Greenhouse Gases Emission**

It has been argued that the Paris Agreement's goal of staying under 2° Celsius and aiming for 1.5°C global warming, as compared to pre-industrial average global temperature, scientifically translates to limiting emissions of greenhouse gases within a finite global carbon budget.<sup>96</sup> As already pointed out, greenhouse gas emissions account for the largest causes of anthropogenic climate change. It has been reported that globally, the economic slowdown during the coronavirus pandemic was expected to slash emissions by 4-7% in 2020, bringing them close to where global emissions were in 2010.<sup>97</sup> However,

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid; 'Untitled' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/key-aspects-of-the-paris-agreement>> accessed 21 January 2021.

<sup>94</sup> UN Environment, 'National Adaptation Plans' (UNEP - UN Environment Programme, 14 September 2017) <<http://www.unenvironment.org/explore-topics/climate-change/what-we-do/climate-adaptation/national-adaptation-plans>> accessed 21 January 2021.

<sup>95</sup> Ibid.

<sup>96</sup> 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

<sup>97</sup> Raymond C and Matthews T, 'Global Warming Now Pushing Heat into Territory Humans Cannot Tolerate' (*The Conversation*) <<http://theconversation.com/global>>

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concentrations of greenhouse gases are still rising rapidly in the atmosphere.<sup>98</sup> Cutting down greenhouse gas emissions can potentially reduce the impacts and costs associated with climate change.<sup>99</sup>

With the outbreak of COVID-19 pandemic, major cities around the world have reported an increase in the numbers of people cycling and walking in public spaces.<sup>100</sup> Cities such as Bogota, Berlin, Vancouver, New York, Paris and Berlin are reported to have expanded bike lanes and public paths to accommodate the extra cycling traffic, with Australia's New South Wales government also encouraging councils to follow suit.<sup>101</sup> The result has been a decline in global daily emissions, with the fall in road traffic being the main driver of the global emissions decline.<sup>102</sup> It is estimated that daily global CO<sub>2</sub> emissions decreased by -17% by early April 2020 compared with the mean 2019 levels, just under half from changes in surface transport.<sup>103</sup>

The National and County Governments in Kenya could learn from these global trends and encourage more people to embrace cycling to and from work especially around major towns and the cities in Kenya by creating room for bike lanes and public paths as well as improving security in public places and enhancing road safety. This can potentially improve the country's chances of achieving climate mitigation due to the reduced daily emissions from traffic.

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warming-now-pushing-heat-into-territory-humans-cannot-tolerate-138343> accessed 17 January 2021.

<sup>98</sup> Ibid.

<sup>99</sup> UN Environment, 'Adaptation Gap Report 2020' (UNEP - UN Environment Programme, 9 January 2021) <<http://www.unenvironment.org/resources/adaptation-gap-report-2020>> accessed 20 January 2021; 'How to Boost Resilience to Climate Change - Adaptation Gap Report 2020 - YouTube' <<https://www.youtube.com/watch?v=KhZ16QPv2c&feature=youtu.be>> accessed 20 January 2021.

<sup>100</sup> Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (The Conversation) <<http://theconversation.com/coronavirus-is-a-sliding-doors-moment-what-we-do-now-could-change-earths-trajectory-137838>> accessed 17 January 2021.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Le Quéré C and others, 'Temporary Reduction in Daily Global CO<sub>2</sub> Emissions during the COVID-19 Forced Confinement' (2020) 10 Nature Climate Change 647.

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It has been suggested that encouraging cycling and working from home to continue beyond the current pandemic is likely to help countries in meeting their climate goals.<sup>104</sup>

There is also a need for the country to embrace vehicle technology that emits less greenhouse gases such as electric vehicles and trains. While this will certainly require massive amount of investments and time, the investment will be worth it in the long run as far as reduction of greenhouse gas emissions is concerned.

The country has however shown some intended positive steps towards this. Notably, the transport sector makes up the biggest share of petroleum consumption in Kenya; as such about 67% of Kenya's energy-related CO<sub>2</sub> emissions and 11.3% of Kenya's total GHG emissions in 2015 came from transport-related activities (GHG inventory report, 2019).<sup>105</sup> Kenya thus seeks to implement low carbon and efficient transportation systems in its December 2020 updated NDC. These are: Upscaling the construction of roads to systematically harvest water and reduce flooding; Enhancing institutional capacities on climate proofing vulnerable road infrastructure through vulnerability assessments; and Promoting use of appropriate designs and building materials to enhance resilience of at least 4500 km of roads to climate risks.<sup>106</sup> Key actions for the transport sector include: Developing an affordable, safe and efficient public transport system, including a Bus Rapid Transit System in Nairobi and non-motorised transport facilities; Reducing fuel consumption and fuel overhead costs, including electrification of the Standard Gauge Railway; Encouraging low-carbon technologies in the aviation and maritime sectors; Climate proofing transport infrastructure; Encouraging technologies such as development of electric modes of transport and research on renewable energy for powering different modes of transport; Creating awareness on issues such as fuel economy and electric mobility options;

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<sup>104</sup>Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (*The Conversation*).

<sup>105</sup>'NDC Update Kenya: Enhanced Reduction Target' (*Changing Transport*, 13 January 2021) <<https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/>> accessed 21 January 2021.

<sup>106</sup> Ibid.

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Putting enabling policies and regulations in place to facilitate implementation of the mitigation and adaptation actions.<sup>107</sup> There is also a need for the country to continually invest in renewable sources of energy such as solar, wind power, biogas, among others.<sup>108</sup>

The reduction of GHG emissions can also be done through, inter alia, involving the communities in nature-based solutions to reduce the emissions gap such as improved land use and management which may include low-emissions agriculture, agro-forestry, and ecosystem conservation and restoration all of which could achieve this task if properly implemented.<sup>109</sup> Nature-based solutions combine climate change mitigation, adaptation, disaster risk reduction, biodiversity conservation, and sustainable resource management.<sup>110</sup>

Reducing Emissions from Deforestation and Forest Degradation (REDD) is a mechanism that has been under negotiation by the United Nations Framework Convention on Climate Change (UNFCCC) since 2005, with the objective of mitigating climate change through reducing net emissions of greenhouse gases through enhanced forest management, mostly in the developing countries.<sup>111</sup> Forests play an important role in reducing GHG emissions. The Constitution of Kenya 2010 obligates the State to ensure that the country achieves a land surface tree cover of at least 10 per cent.<sup>112</sup> It has been observed

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<sup>107</sup> Ibid.

<sup>108</sup> Muigua, K., Exploring Alternative Sources of Energy in Kenya, *Journal of Conflict Management and Sustainable Development*, Volume 5, No 2, ( October, 2020); Muigua, K., Towards Energy Justice in Kenya, February 2020, available at <http://kmco.co.ke/wp-content/uploads/2020/01/Towards-Energy-Justice-in-Kenya.pdf>; Muigua, K., Access to Energy as a Constitutional Right in Kenya, available at <http://www.kmco.co.ke/attachments/article/118/Access%20to%20Energy%20as%20a%20Constitutional%20Right%20in%20Kenya-%20NOVEMBER%202013.pdf>.

<sup>109</sup> 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

<sup>110</sup> Ibid.

<sup>111</sup> Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.

<sup>112</sup> Article 69 (1), Constitution of Kenya 2010.

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that past attempts to increase forest cover and address the problem of deforestation and forest degradation in the country have not been very successful due to a number of reasons: increasing demand for land for agriculture, settlement and other developments, high energy demand and inadequate funding to support investments in the forestry sector.<sup>113</sup> In order to overcome these challenges, Kenya's participation in REDD+ is premised on the conviction that the process holds great potential in supporting: realization of vision 2030 objectives of increasing forest cover to a minimum of 10%; access to international climate finance to support investments in the forestry sector; Government efforts in designing policies and measures to protect and improve its remaining forest resources in ways that improve local livelihoods and conserve biodiversity; realization of the National Climate Change Response Strategy (NCCRS) goals; and contribution to global climate change mitigation and adaptation efforts.<sup>114</sup>

These efforts coupled with lifestyle changes and investments in cleaner technologies can potentially reduce greenhouse gases emission in Kenya thus enabling the country to meet and even exceed its global country targets.

### **7.3 Inclusion of Communities in Climate Change Impact Reduction and Early Warning Systems**

The United Nations describes early warning system as an adaptive measure for climate change, using integrated communication systems to help communities prepare for hazardous climate-related events.<sup>115</sup> Such systems are meant to save lives and jobs, land and infrastructures and supports long-term sustainability, as well as assisting public officials and administrators in their planning, saving money in the long run and protecting economies.<sup>116</sup>

The United Nations, working in diverse partnerships, has been putting in place a number of innovative early warning systems initiatives in vulnerable areas

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<sup>113</sup>Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 16.

<sup>114</sup> Ibid.

<sup>115</sup>United Nations, 'Early Warning Systems' (*United Nations*) <<https://www.un.org/en/climatechange/climate-solutions/early-warning-systems>> accessed 20 January 2021.

<sup>116</sup> Ibid.

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around the world, such as the Strengthening Climate Information and Early Warning Systems (SCIEWS) project, which is a comprehensive programme operating across Africa, Asia and the Pacific, meant to ensure preparedness and rapid response to natural disasters, using a model that integrates the components of risk knowledge, monitoring and predicting, dissemination of information and response to warnings.<sup>117</sup>

Such systems should actively and meaningfully involve local communities, because as it has been observed, indigenous people are good observers of changes in weather and climate and acclimatize through several adaptive and mitigation strategies.<sup>118</sup>

### **7.4 Environmental Education and Creating Awareness on Climate Change Mitigation and Resilience**

It has been argued that it is critically important to be aware of the geologic context of climate change processes if we are to understand the anthropogenic (human-caused) climate change because, firstly, this awareness increases the understanding of how and why our activities are causing present-day climate change, and secondly, it allows us to distinguish between natural and anthropogenic processes in the climate record in the past.<sup>119</sup>

Resilience has been defined as the ability to deal with shocks and stress without crossing tipping points and applies to human and environmental systems, from individual households to financial systems, ecosystems, and the biosphere as a whole. Resilience also includes the capacity to adapt to the change, that is, to deal with change without crossing a threshold, and the ability to transform in situations of crises – essentially, the capacity to rebuild livelihoods or functioning ecosystems after crossing a tipping point.<sup>120</sup>

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<sup>117</sup> Ibid.

<sup>118</sup> Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

<sup>119</sup> '15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A\\_An\\_Introduction\\_to\\_Geology\\_\(Johnson\\_Affolter\\_Inkenbrandt\\_and\\_Mosher\)/15%3A\\_Global\\_Climate\\_Change/15.01%3A\\_Global\\_Climate\\_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 17 January 2021.

<sup>120</sup> 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based->



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For mitigation planning, the primary goal is to reduce current and future direct and indirect GHG emissions, particularly from energy production, land use, waste, industry, the built environment infrastructure, and transportation.<sup>121</sup> The primary goal of adaptation is to adjust the built, social, and eco-logical environment to minimize the negative impacts of both slow-onset and extreme events caused by climate change, such as sea-level rise, floods, droughts, storms, and heat waves.<sup>122</sup>

Arguably, conservation, restoration, and the management of ecosystems play a crucial role in climate change mitigation (for instance, through land use forms that maintain carbon stocks, carbon sequestration and the reduction of greenhouse gas emissions), which practices can be important for climate change adaptation, buffering societies from the impacts of climate change and reducing disaster risk.<sup>123</sup>

There is a need for government bodies in charge of various but relevant sectors to work closely with communities as a way of creating awareness on how their day to day activities are likely to affect the environment and the climatic conditions in general. Dissemination of environmental knowledge as well as creating opportunities for collaborative approaches to combating climate change can go a long way in not only mitigation and adaptation measures but also creating resilient economies and livelihoods. Arguably, in many decision-making processes, perceptions matter more than facts because how we feel about a risk (subjective perceptions of risk) influences what we pay attention

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*solutions-better-climate-resilience-need-scale-ambition-and-action*> accessed 21 January 2021.

<sup>121</sup>Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 103 <[https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com\\_.pdf](https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf)> accessed 17 January 2021.

<sup>122</sup> Ibid.

<sup>123</sup> 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

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to in complicated situations and how we approach and solve problems. Failure to acknowledge this may create and widen the gap between what experts perceive as risk and what the public perceives as risk.<sup>124</sup>

Climate change knowledge should also be incorporated into the primary, secondary and all tertiary level curricula in order to inculcate a sense of environmental ethics in all people from an early age and to ensure that the knowledge acquired will go a long way in combating climate change.

These efforts should be guided by, inter alia, Article 6 of UNFCCC which states that: in carrying out their commitments under Article 4, paragraph 1 (i), the Parties shall: Promote and facilitate at the national and, as appropriate, sub regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: (i) the development and implementation of educational and public awareness programmes on climate change and its effects; (ii) public access to information on climate change and its effects; (iii) public participation in addressing climate change and its effects and developing adequate responses; and (iv) training of scientific, technical and managerial personnel; Cooperate in and promote, at the international level, and, where appropriate, using existing bodies: (i) the development and exchange of educational and public awareness material on climate change and its effects; and (ii) the development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.<sup>125</sup>

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<sup>124</sup>Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 133.

<sup>125</sup> UN General Assembly, *United Nations Framework Convention on Climate Change*, Article 6.

## **7.5 Integrating Traditional Knowledge with Mainstream Scientific Knowledge for Climate Mitigation and Adaptation**

The Organisation for Economic Co-operation and Development (OECD), countries can use technological change to address climate change without compromising economic growth through ensuring that their climate and innovation policies provide the right incentives for the development and diffusion of “climate-friendly” technologies.<sup>126</sup> OECD recommends that this can be achieved through, inter alia: providing predictable and long-term policy signals in order to give potential innovators and adopters of climate-friendly technologies the confidence to undertake the necessary investments; using flexible policy measures to give potential innovators incentives to identify the best way to meet climate objectives, and to avoid locking-in technologies that may become inefficient in future; putting a price on Green House Gas (GHG) emissions, for example through taxes or tradable permits, in order to provide incentives across all stages of the innovation cycle; providing an appropriate mix and sequencing of complementary policy measures in order to overcome barriers to development and diffusion of breakthrough technologies; balancing the benefits of technology-neutral policies with the need to direct technological change toward climate-saving trajectories, by diversifying the portfolio of technologies for which support is provided and identifying general purpose technologies with environmental benefits; since the sources of innovation are widely-dispersed, supporting research and development in a broad portfolio of complementary fields, and not just energy, “climate-friendly” or 'environmental' Research and development (R&D); ensuring that international policy efforts maximise the potential for sharing of knowledge and technologies of mutual benefit, for example through international research-sharing agreements; and supporting international technology-oriented agreements as an important complement to other international efforts (e.g. emissions-based agreements).<sup>127</sup>

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<sup>126</sup> OECD, 'Promoting Technological Innovation to Address Climate Change,' (November 2011), 1 <<http://www.oecd.org/env/cc/49076220.pdf>> accessed 17 January 2021.

<sup>127</sup> Ibid, 1.

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Kenya should review and align her science and technological innovation policies to the above recommendations from the OECD in order to ensure their maximum effectiveness in promoting innovation as a tool for combating climate change in the country. Indeed, the starting point should be the Constitution of Kenya. The Constitution of Kenya 2010 obligates the State to, *inter alia*: promote science and recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.<sup>128</sup>

The *Environmental Management and Co-ordination Act, 1999*<sup>129</sup> calls for integration of traditional knowledge for the conservation of biological diversity with mainstream scientific knowledge in conservation of conservation of biological resources *in situ*.<sup>130</sup> Investments in incentivized mitigation programmes, especially in agriculture and forestry, can offer mitigation benefits, increased productivity, improved livelihoods, biodiversity conservation and increased resilience to climate change.<sup>131</sup>

The *Science, Technology and Innovation Act, 2013*<sup>132</sup> was enacted to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes.<sup>133</sup> The Act acknowledges that reference to “innovation” under the Act includes ‘indigenous or traditional knowledge by community of beneficial properties of land, natural resources, including plant and animal resources and the environment’, where “traditional knowledge” means the wisdom developed

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<sup>128</sup> Article 11(2), Constitution of Kenya, 2010.

<sup>129</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

<sup>130</sup> Ibid, sec. 51(f).

<sup>131</sup> Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.

<sup>132</sup> Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya.

<sup>133</sup> Ibid, Preamble.

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over generations of holistic traditional scientific utilization of the lands, natural resources, and environment.<sup>134</sup>

The Act establishes the National Commission for Science, Technology and Innovation (NACOSTI)<sup>135</sup> whose objective is to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.<sup>136</sup> The Government, through NACOSTI should work closely with all learning institutions as well as stakeholders in the informal sector to not only tap into the innovations but to also identify the challenges

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<sup>134</sup> Ibid, sec. 2; see also *Protection of Traditional Knowledge and Cultural Expressions Act*, No. 33 of 2016, Laws of Kenya.

<sup>135</sup> Ibid, sec. 3.

<sup>136</sup> Ibid. sec. 4. The functions of the Commission as set out under section 6 thereof are to: develop, in consultation with stakeholders, the priorities in scientific, technological and innovation activities in Kenya in relation to the economic and social policies of the Government, and the country's international commitments; lead inter-agency efforts to implement sound policies and budgets, working in collaboration with the county governments, and organisations involved in science and technology and innovation within Kenya and outside Kenya; advise the national and county governments on the science, technology and innovation policy, including general planning and assessment of the necessary financial resources; liaise with the National Innovation Agency and the National Research Fund to ensure funding and implementation of prioritized research programmes; ensure co-ordination and co-operation between the various agencies involved in science, technology and innovation; accredit research institutes and approve all Scientific research in Kenya; assure relevance and quality of science, technology and innovation programmes in research institutes; advise on science education and innovation at both basic and advanced levels; in consultation with the National Research Fund Trustees, sponsor national scientific and academic conferences it considers appropriate; advise the Government on policies and any issue relating to scientific research systems; promote increased awareness, knowledge and information of research system; co-ordinate, monitor and evaluate, as appropriate, activities relating to scientific research and technology development; promote and encourage private sector involvement in scientific research and innovation and development; annually, review the progress in scientific research systems and submit a report of its findings and recommendations to the Cabinet Secretary; promote the adoption and application of scientific and technological knowledge and information necessary in attaining national development goals; develop and enforce codes, guidelines and regulations in accordance with the policy determined under this Act for the governance, management and maintenance of standards and quality in research systems; and undertake, or cause to be undertaken, regular inspections, monitoring and evaluation of research institutions to ensure compliance with set standards and guidelines.

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that are affecting the growth and development of this sector. Science and technological innovation should be encouraged through adequate funding as well as fiscal incentives and ensuring that there is a ready market for the same. If the Government can work with the locals, they will not only promote the development of science but will also create an opportunity to utilize the local innovations and ideas especially in environmental areas to combat climate change. NACOSTI should also closely work with the Kenya Institute for Public Policy Research and Analysis whose main functions include: identifying and undertaking independent and objective programmes of research and analysis, including macroeconomic, inter-disciplinary and sectoral studies on topics affecting public policy in areas such as human resource development, social welfare, environment and natural resources, agriculture and rural development, trade and industry, public finance, money and finance, macroeconomic and microeconomic modelling.<sup>137</sup> While coming up with approaches for reducing the country's climate risk and exposure to the main types of climate hazard, their design, implementation and management may and should indeed draw on local and traditional, as well as expert knowledge. Arguably, nature-based solutions - locally appropriate actions that address societal challenges, such as climate change, and provide human well-being and biodiversity benefits by protecting, sustainably managing and restoring natural or modified ecosystems - must become a priority when the government is coming up with solutions to the climate change challenges, with youth, women, indigenous peoples and local communities being key stakeholders.<sup>138</sup> It has rightly been pointed out that traditional knowledge is holistic in nature due to its multitude applications in diverse fields such as agriculture, climate, soils, hydrology, plants, animals, forests and human health.<sup>139</sup>

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<sup>137</sup> Kenya Institute for Public Policy Research and Analysis Act, No. 15 of 2006, Laws of Kenya, sec. 6(b).

<sup>138</sup> UN Environment, 'Adaptation Gap Report 2020' (UNEP - UN Environment Programme, 9 January 2021) <<http://www.unenvironment.org/resources/adaptation-gap-report-2020>> accessed 20 January 2021.

<sup>139</sup> Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

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The above listed recommendations by the OECD should provide cue when it comes to creating a conducive policy and legal environment for science and innovation.

### **7.6 Diversification of Economic Activities for Poverty Eradication and Climate Change Mitigation and Adaptation**

The World Bank observed in December 2020 that, considering that “the pandemic and global recession may cause over 1.4% of the world’s population to fall into extreme poverty, in order to reverse this serious setback to development progress and poverty reduction, countries will need to prepare for a different economy post-COVID, by allowing capital, labour, skills, and innovation to move into new businesses and sectors.”<sup>140</sup>

A chief scientist at the U.N. Food and Agriculture Organization (FAO) was recorded in 2020 affirming that farmers and poor urban residents have so far borne the brunt of the COVID-19 pandemic, meaning inequality between and within countries could deepen further in 2021.<sup>141</sup> This was mainly attributed to the fact that cut off from markets and with a plunge in customer demand, farmers struggled to sell their produce while informal workers in urban areas, living hand to mouth, found themselves jobless as lockdowns were imposed.<sup>142</sup> While the United Nations Sustainable Development Goals set to end hunger by 2030, the World Bank has observed that the COVID-19 pandemic is estimated to have pushed an additional 88 million to 115 million people into extreme poverty in the year 2020, with the total rising to as many as 150 million by 2021, depending on the severity of the economic contraction.<sup>143</sup>

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<sup>140</sup> ‘COVID-19 to Add as Many as 150 Million Extreme Poor by 2021’ (World Bank) <<https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>> accessed 17 January 2021.

<sup>141</sup> ‘COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse - Homeland Security Today’ <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

<sup>142</sup> Ibid.

<sup>143</sup> ‘COVID-19 to Add as Many as 150 Million Extreme Poor by 2021’ (World Bank) <<https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>> accessed 17 January 2021.

There is a need for countries, including Kenya, to create a conducive environment that will allow their citizens to invest and explore new and emerging sectors such as information technology, science and technology, among others. This should target both urban and rural dwellers. This is because the World Bank has estimated that with the effects of COVID-19 expected to continue, increasing numbers of urban dwellers are expected to fall into extreme poverty, which has traditionally affected people in rural areas.<sup>144</sup>

### **7.7 Embracing Climate Resilient Agricultural Production Methods for Climate Change Mitigation and Poverty Reduction**

It has rightly been pointed out that sustainable food production poses one of the major challenges of the twenty-first century in the era of global environmental problems such as climate change, increasing population and natural resource degradation including soil degradation and biodiversity loss, with climate change being among the greatest threats to agricultural systems.<sup>145</sup>

The adverse effect of agriculture on the environment and climate change (contributors of global warming through a share of about 10–12% increase in total anthropogenic GHG emission) has largely been attributed to the Green Revolution which though multiplied agricultural production several folds jeopardized the ecological integrity of agro ecosystems by intensive use of fossil fuels, natural resources, agrochemicals and machinery and subsequently threatened the age-old traditional agricultural practices.<sup>146</sup>

Arguably, achieving the goals of eradicating hunger and poverty by 2030 while addressing the climate change impacts need a climate-smart approach in agriculture, an approach based on the objectives of sustainably enhancing food production, climate adaptation and resilience and reduction in GHGs emission.<sup>147</sup>

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<sup>144</sup>Ibid.

<sup>145</sup> Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.



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Arguably, the negative impacts of climate change on production, incomes and well-being can be avoided or ameliorated through adaptation, which includes changes in agricultural practices as well as broader measures such as improved weather and early warning systems and risk management approaches.<sup>148</sup> Climate smart agriculture is described as an approach that provides a conceptual basis for assessing the effectiveness of agricultural practice change to support food security under climate change, with particular attention to sustainable land management.<sup>149</sup>

It has also been suggested that traditional practices like agro forestry, intercropping, crop rotation, cover cropping, traditional organic composting and integrated crop-animal farming all have potentials for enhancing crop productivity and mitigating climate change considering that indigenous farmers and local people perceive climate change in their own ways and prepare for it through various adaptation practices.<sup>150</sup>

The Government and other stakeholders should work closely with farmers to identify and explore the available opportunities for farmers to engage in sustainable farming practices, informed by both science and indigenous knowledge.

### **8.0 Conclusion**

It has been observed that responding to climate change, reducing rural poverty and achieving global food and nutrition security are three urgent and interlinked problems facing the global community today.<sup>151</sup> **The biggest threat to the 2030 Agenda is climate change, where the Sustainable Development Goals, from poverty eradication and ending hunger to conserving**

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<sup>148</sup> McCarthy, N., Brubaker, J. 2014, *Climate-Smart Agriculture and resource tenure in Sub-Saharan Africa: a conceptual framework*, Rome, FAO, 6.

<sup>149</sup> Ibid, 6.

<sup>150</sup> Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

<sup>151</sup> McCarthy, N., Brubaker, J. 2014, *Climate-Smart Agriculture and resource tenure in Sub-Saharan Africa: a conceptual framework*, Rome, FAO, 6 <[https://www.researchgate.net/publication/279912013\\_Climate\\_Smart\\_Agriculture\\_and\\_Resource\\_Tenure\\_in\\_sub-Saharan\\_Africa\\_A\\_Conceptual\\_Framework](https://www.researchgate.net/publication/279912013_Climate_Smart_Agriculture_and_Resource_Tenure_in_sub-Saharan_Africa_A_Conceptual_Framework)>accessed 17 January 2021.

**biodiversity and peace, will be unattainable if climate change is not urgently addressed.<sup>152</sup> Before the outbreak of Corona Virus pandemic, SDG Goal 13** aimed to mobilize US\$100 billion annually by 2020 to address the needs of developing countries to both adapt to climate change and invest in low-carbon development.<sup>153</sup> **However, as things stand currently, countries also have to contend with the Covid-19 pandemic, further complicating the situation.**

This paper has put across the argument is that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders. While it has been acknowledged that efforts to mitigate climate change require political action<sup>154</sup>, Governments alone cannot possibly achieve this task. Climate change mitigation is an important step towards achieving sustainability in the country, without which the realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development will remain a mirage. There is a need to adopt mitigation and adaptation approaches to address climate change. While mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.<sup>155</sup>

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<sup>152</sup> 'Aligning SDG and Climate Action' (*Sustainable Goals*, 18 June 2019) <<https://www.sustainablegoals.org.uk/aligning-sdg-and-climate-action/>> accessed 21 January 2021.

<sup>153</sup> 'Goal 13: Climate Action' (*UNDP*) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-13-climate-action.html>> accessed 21 January 2021.

<sup>154</sup> '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A\\_An\\_Introduction\\_to\\_Geology\\_\(Johnson\\_Affolter\\_Inkenbrandt\\_and\\_Mosher\)/15%3A\\_Global\\_Climate\\_Change/15.05%3A\\_Anthropogenic\\_Causes\\_of\\_Climate\\_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

<sup>155</sup> Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 102 <[https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com\\_.pdf](https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf)> accessed 17 January 2021.

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According to the *IPCC Fifth Assessment Report*:<sup>156</sup>

*“[T]he more human activities disrupt the climate, the greater the risks of severe, pervasive and irreversible impacts for people and ecosystems... [W]e have the means to limit climate change and its risks, with many solutions that allow for continued economic and human development. However, stabilizing temperature increase to below 2°C relative to pre-industrial levels will require an urgent and fundamental departure from business as usual.”*

Combating climate for Sustainable Development in Kenya is indeed a goal that is achievable.

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<sup>156</sup> ‘The Intergovernmental Panel on Climate Change’ (MIT Climate Portal) <<https://climate.mit.edu/explainers/intergovernmental-panel-climate-change>> accessed 21 January 2021.

## **Fostering Africa's Blue Economy: Problems and Promises**

### **Abstract**

*The paper critically examines the concept of Blue Economy in Africa. It gives an overview of Blue Economy and how the idea has been embraced in Africa. The paper further discusses the problems and promises of the Blue Economy in Africa. It further suggests reforms towards fostering Africa's Blue Economy.*

### **1.0 Introduction**

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 health, livelihoods and welfare of the people in the coastal zone; and (e) fostering an ecosystem-based climate change mitigation and adaptation measures<sup>1</sup>. It has also been described as the sustainable use of ocean resources for economic growth, improved livelihoods, and jobs while preserving the health of ocean ecosystem<sup>2</sup>. The concept of the Blue Economy integrates into a new approach the economic exploitation of the resources of oceans, lakes, rivers and other bodies of water and the conservation of aquatic ecosystems<sup>3</sup>. It represents a basis for rational and sustainable use and conservation of natural resources (both renewable and non-renewable) and their natural habitats<sup>4</sup>.

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<sup>1</sup> UNDP., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Available at <https://www.undp.org/sites/g/files/zskgke326/files/migration/ke/Policy-Brief--2018---6---Blue-Economy-for-Inclusive-and-Sustainable-Growth.pdf> (Accessed on 17/07/2023)

<sup>2</sup> The World Bank., 'What is the Blue Economy?' Available at <https://www.worldbank.org/en/news/infographic/2017/06/06/blue-economy> (Accessed on 17/07/2023)

<sup>3</sup> Africa Union., 'Africa Blue Economy Strategy.' Available at [https://www.au-ibar.org/sites/default/files/2020-10/sd\\_20200313\\_africa\\_blue\\_economy\\_strategy\\_en.pdf](https://www.au-ibar.org/sites/default/files/2020-10/sd_20200313_africa_blue_economy_strategy_en.pdf) (Accessed on 17/07/2023\_

<sup>4</sup> Ibid

## *Fostering Africa's Blue Economy: Problems and Promises*

The concept of Blue Economy emphasizes protecting and sustainably developing oceans, and implementing policies that ensure better stewardship of marine ecosystems, wildlife and other resources<sup>5</sup>. It aims to harmonize economic growth with environmental preservation through sustainable practices<sup>6</sup>. This concept recognizes that the oceans, which cover 71% of the Earth's surface, possess untapped potential for various sectors<sup>7</sup>. Blue Economy therefore encompasses diverse but related issues surrounding the exploitation of ocean resources including smart shipping, ports, transportation and global connectivity; employment, job creation and poverty eradication; cities, tourism, resilient coasts and infrastructure; sustainable energy, mineral resources and innovative industries; managing and sustaining marine life, conservation and sustainable economic activities; ending hunger, securing food supplies and 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 and societies<sup>8</sup>.

Blue Economy is vital in the Sustainable Development agenda. The Blue Economy can be considered a component to the larger green economy, which focuses on an efficient and equitable use of resources and emphasizes Sustainable Development without degrading the environment<sup>9</sup>. A healthy ocean is key for a sustainable future both for people and the planet<sup>10</sup>. The

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<sup>5</sup> Bove. T., 'What are the Promises of a Blue Economy?' Available at <https://earth.org/blue-economy/#> (Accessed on 17/07/2023)

<sup>6</sup> Purcell. N., 'What is the Blue Economy?' Available at <https://bluerobotics.com/what-is-the-blue-economy/#:~:text=The%20blue%20economy%20encourages%20the,reduce%20fuel%20consumption%20and%20emissions.> (Accessed on 17/07/2023)

<sup>7</sup> Ibid

<sup>8</sup> Kenya Maritime Authority., 'Report on the Global Sustainable Blue Economy Conference 26<sup>th</sup>-28<sup>th</sup> November 2018 Nairobi, Kenya.' Available at <http://kenyaforimo.kma.go.ke/wp-content/uploads/2019/11/SBEC-FINAL-REPORT-8-DECEMBER-2018-rev-2-1-2-PDF2-3-compressed.pdf> (Accessed on 17/07/2023)

<sup>9</sup> Bove. T., 'What are the Promises of a Blue Economy?' Op Cit

<sup>10</sup> United Nations Environment Programme., 'Enabling Sustainable, Resilient and Inclusive Blue Economies.' Available at <https://www.unep.org/explore-topics/oceans-seas/what-we-do/enabling-sustainable-resilient-and-inclusive-blue-economies> (Accessed on 17/07/2023)

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world's oceans – their temperature, chemistry, currents and life – drive global systems that make the Earth habitable for humankind<sup>11</sup>. A Blue Economy prioritizes all three pillars of sustainability: environmental, economic, and social<sup>12</sup>. In addition to providing goods and services measurable in monetary terms, coral reefs, mangroves, seagrass meadows and wetlands deliver critical ecosystem services such as coastal protection and carbon sequestration<sup>13</sup>. The importance of Blue Economy in the Sustainable Development discourse is recognized under the United Nations 2030 Agenda for Sustainable Development whose goals include to conserve and sustainably use the oceans, seas and marine resources for Sustainable Development<sup>14</sup>. Enhancing conservation and the sustainable use of ocean-based resources is thus integral in fostering the Blue Economy and Sustainable Development.

It has been observed that Africa has an opportunity to unleash the potential to develop a resilient Blue Economy<sup>15</sup>. With its great potential, the blue economy holds a lot of promise for Africa<sup>16</sup>. As a continent surrounded by some of the world's most important marine biodiversity, strategic maritime trade routes, abundant aquatic resources and blue carbon assets, it has become critically urgent for African countries to embrace blue economy development through impactful policies which support the African continent in meeting global and

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<sup>11</sup> United Nations Development Programme., 'Goal 14: Life Below Water.' Available at

[https://www.undp.org/sustainable-development-goals/below-water?gclid=Cj0KCQjwzdOlBhCNARIsAPMwbyodp8PZIkguJb9OPW9JC-jZ2fPWPOOvlgrRnGolWtE86-55pcSV5saAqJCEALw\\_wcB](https://www.undp.org/sustainable-development-goals/below-water?gclid=Cj0KCQjwzdOlBhCNARIsAPMwbyodp8PZIkguJb9OPW9JC-jZ2fPWPOOvlgrRnGolWtE86-55pcSV5saAqJCEALw_wcB) (Accessed on 17/07/2023)

<sup>12</sup> United Nations., 'Sustainable Blue Economy Vital for Small Countries and Coastal Populations.' Available at <https://news.un.org/en/story/2022/06/1121562> (Accessed on 17/07/2023)

<sup>13</sup> Ibid

<sup>14</sup> 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 17/07/2023)

<sup>15</sup> The World Bank., 'Blue Economy for Resilient Africa Program.' Available at <https://www.worldbank.org/en/events/2022/11/16/blue-economy-for-resilient-africa-program> (Accessed on 17/07/2023)

<sup>16</sup> Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Glenwood Publishers Limited, 2020

continental targets<sup>17</sup>. The paper critically discusses the concept of blue economy in Africa. It explores the problems and promises of Blue Economy in Africa. The paper further recommends the way forward towards fostering Africa's Blue Economy for Sustainable Development.

## **2.0 The Blue Economy in Africa**

The Blue Economy is vital in Africa. Africa's Blue Economy is made of vast lakes and rivers and an extensive ocean resource base<sup>18</sup>. A total of 38 out of the African Union's 55 member states are coastal or island states, while 64% of the African continent is covered by a network of freshwater resources such as rivers, lakes, aquifers, basins, watersheds among others<sup>19</sup>. Further, it is estimated that maritime zones under Africa's jurisdiction total about 13 million square kilometers, including territorial seas and Exclusive Economic Zones (EEZ) and approximately 6.5 million square kilometers for the continental shelf (for which countries have jurisdiction over only the seabed)<sup>20</sup>. In addition, the lacustrine (or lake) zones of Africa cover approximately 240,000 square kilometers<sup>21</sup>. These aquatic resources represent tremendous potential for blue food, nutrition and food security, ecosystem services, employment and wealth creation and innovation<sup>22</sup>. It has been argued that all African countries, including landlocked states, can be thought of as political agents in the Blue Economy and their economic futures are strongly associated

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<sup>17</sup> African Union., 'Shaping a Sustainable Blue Economy for Africa UN Oceans Conference Side Event.' Available at <https://au.int/en/newsevents/20220630/shaping-sustainable-blue-economy-africa-un-oceans-conference-side-event> (Accessed on 17/07/2023)

<sup>18</sup> Africa Renewal., 'Africa's Blue Economy: A Policy Handbook.' Available at <https://www.un.org/africarenewal/documents/africas-blue-economy-policy-handbook> (Accessed on 18/07/2023)

<sup>19</sup> African Union., 'Shaping a Sustainable Blue Economy for Africa UN Oceans Conference Side Event.' Op Cit

<sup>20</sup> United Nations Economic Commission for Africa., 'Africa's Blue Economy: A Policy Handbook.' Available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/30130/AfricasBlueEconomy.pdf?sequence=1&isAllowed=y> (Accessed on 18/07/2023)

<sup>21</sup> Ibid

<sup>22</sup> African Union., 'Shaping a Sustainable Blue Economy for Africa UN Oceans Conference Side Event.' Op Cit

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with issues described as 'marine<sup>23</sup>.' Therefore, the benefits of sound Blue Economy practices such secure coastal states spill over to landlocked states in Africa due to lower transportation and improved access to maritime countries' economies<sup>24</sup>.

The continent therefore has a huge Blue Economy potential that can enhance Sustainable Development of African states. Indeed, the African Union estimates that the Blue Economy currently generates nearly US\$300 billion for the continent, creating nearly 49 million jobs in the process<sup>25</sup>. These and other crucial benefits most notably food security, livelihoods, and biodiversity are entirely dependent on the ocean's health<sup>26</sup>. Further, it has been observed that international trade is important to many African economies, with more than 90 percent of Africa's imports and exports conducted by sea<sup>27</sup>. Further, it estimated that freshwater and ocean fish make a vital contribution to the food and nutritional security of over 200 million Africans and provide income for over 10 million<sup>28</sup>. The Blue Economy is thus at the core of Sustainable Development of African countries at the environmental, economic and social levels.

The importance of the Blue Economy in Africa is recognized under the Africa's Union *Agenda 2063* which seeks to achieve a prosperous Africa based on inclusive growth and Sustainable Development through measures such as exploiting the vast potential of Africa's blue/ocean economy<sup>29</sup>. Agenda 2063 recognizes the potential of the Blue Economy to trigger Sustainable Development in Africa through marine resources, fishing, tourism, energy, port operations, mining and marine transport<sup>30</sup>. It calls for the sustainable

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<sup>23</sup> Childs. J & Hicks. C., 'Securing the Blue: Political Ecologies of the Blue Economy in Africa.' *Journal of Political Ecology*, 2019

<sup>24</sup> Ibid

<sup>25</sup> The World Bank., 'Blue Economy for Resilient Africa Program.' Op Cit

<sup>26</sup> Ibid

<sup>27</sup> United Nations Economic Commission for Africa., 'Africa's Blue Economy: A Policy Handbook.' Op Cit

<sup>28</sup> Ibid

<sup>29</sup> Africa Union., 'Agenda 2063: The Africa we Want.' Available at [https://au.int/sites/default/files/documents/33126-doc-framework\\_document\\_book.pdf](https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf) (Accessed on 18/07/2023)

<sup>30</sup> Ibid



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utilization and management of the Blue Economy in Africa in order to realize its potential<sup>31</sup>.

In addition, the *Africa Blue Economy Strategy* seeks to achieve an inclusive and sustainable Blue Economy that significantly contributes to Africa's transformation and growth<sup>32</sup>. It aims to guide the development of an inclusive and sustainable Blue Economy that becomes a significant contributor to continental transformation and growth, through advancing knowledge on marine and aquatic biotechnology, environmental sustainability, the growth of an Africa-wide shipping industry, the development of sea, river and lake transport, the management of fishing activities on these aquatic spaces, and the exploitation and beneficiation of deep sea mineral and other resources<sup>33</sup>. The strategy outlines the key drivers of change that are shaping Africa Blue Economy development; strategic and technical challenges to Blue Economy development and identifies priority areas of intervention for sustainable blue economy development in Africa<sup>34</sup>. The Africa Blue Economy Strategy is thus vital in attaining Sustainable Development in Africa.

Finally, the *Africa' Blue Economy Policy Handbook* developed by the United Nations Economic Commission for Africa provides guidelines on mainstreaming the Blue Economy into continental, sub regional, and national policies, plans, laws, regulations, and practices for the development of African sustainable Blue Economy strategies<sup>35</sup>. It advocates for an integrated, holistic and participatory approach that includes sustainable use and management of the Blue Economy resources for societal progress in a diverse Africa<sup>36</sup>. The Policy Handbook further acknowledges that there is an emerging opportunity to develop an African Blue Economy narrative that better reflects the kinds of development goals, partnerships, and forms of social reciprocity that African

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<sup>31</sup> Ibid

<sup>32</sup> Africa Union., 'Africa Blue Economy Strategy.' Available at [https://www.auiabar.org/sites/default/files/2020-10/sd\\_20200313\\_africa\\_blue\\_economy\\_strategy\\_en.pdf](https://www.auiabar.org/sites/default/files/2020-10/sd_20200313_africa_blue_economy_strategy_en.pdf) (Accessed on 18/07/2023)

<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> United Nations Economic Commission for Africa., 'Africa's Blue Economy: A Policy Handbook.' Op Cit

<sup>36</sup> Ibid

societies need as they move further into the 21<sup>st</sup> century<sup>37</sup>. The Policy Handbook can thus enhance innovation in formulation of policies, laws, regulations and practices towards enhancing Sustainable Development of the Blue Economy in Africa.

Africa thus has a great Blue Economy potential. However, several concerns hinder development of a resilient Blue Economy in Africa.

### **3.0 Problems and Promises of the Blue Economy in Africa**

It has been noted that the potential benefits of developing the Blue Economy in Africa and across the globe are enormous<sup>38</sup>. Blue economies offer the possibilities of improved efficiency in our land and ocean management, better treatment and governance of marine ecosystems, a more equitable model of global health standards, lower emissions and resilience against climate change<sup>39</sup>. The Blue Economy in Africa provides numerous advantages such as habitat for fish and marine life; carbon sequestration; shoreline protection; waste recycling and storing; ocean processes that influence climate and biodiversity and new emerging activities such as desalination; marine biotechnologies, ocean energy and seabed mining<sup>40</sup>. The Blue Economy is thus at the core of Sustainable Development in Africa.

However, despite this promise, several concerns hinder full realization of the benefits of the Blue Economy in Africa. It has been indicated that unsustainable infrastructure development, inadequate management of natural habitats and resources, and pollution are among the problems threatening the productivity of the Blue Economy in Africa<sup>41</sup>. In addition, climate change-related events such as sea-level rise, land subsidence, storm surge, and coastal flooding are exacerbating the vulnerability of the Blue Economy in Africa<sup>42</sup>.

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<sup>37</sup> Ibid

<sup>38</sup> Bove. T., 'What are the Promises of a Blue Economy?' Op Cit

<sup>39</sup> Ibid

<sup>40</sup> UNDP., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Op Cit

<sup>41</sup> Childs. J & Hicks. C., 'Securing the Blue: Political Ecologies of the Blue Economy in Africa.' Op Cit

<sup>42</sup> Ibid

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The African Union also identifies the concerns facing the Blue Economy in Africa to include the increasing menace of illegal fishing in the Exclusive Economic Zones (EEZ) that has resulted in massive loss estimated at \$10 billion USD annually; sea piracy and illegal drug trafficking which pose a real threat not only to the safety of vessels and their crew but also to the economies of affected countries particularly in the Gulf of Guinea and South West Indian Ocean; pollution through dumping of toxic wastes as well as indiscriminate discarding of single use plastics and environmental and climate change and climate variability which impacts on Africa's aquatic systems and food production overall<sup>43</sup>.

Further, the United Nations Development Programme has identified challenges which hinder realization of the full benefits of the Blue Economy in Africa. These challenges include 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<sup>44</sup>.

The challenges facing the Blue Economy in Africa were considered at the Sustainable Blue Economy Conference held in Nairobi Kenya in November 2018. These concerns include low participation of African countries in the maritime and shipping industry; climate change, marine pollution, unsustainable extraction of marine resources and destruction of coastal habitats; lack of proper education and training framework that promotes maritime education and skills for a sector that requires highly skilled labour force; negative effects of human activities and environmental degradation on marine ecosystems which shrink the potential of the blue economy resources; inadequate capacity (human skills and technology) to tap into the energy and mineral resources within the blue economy sustainably; Unsustainable fishing practices driven by inadequate fisheries management mechanisms; rapidly decreasing fish habitats, including coral reefs and mangroves; loss of aquatic habitats, bio-diversity and shrinking water levels due to pollution and climate

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<sup>43</sup> Africa Union., 'Africa Blue Economy Strategy.' Op Cit

<sup>44</sup> UNDP., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Op Cit

change; inadequate inclusion of local communities and peoples in blue economy and a wide range of maritime security threats including piracy, Illegal, Unregulated and Unreported (IUU) fishing, smuggling of people, arms trafficking, narcotics and other illicit goods, terrorism, cybercrimes, proliferation of Weapons of Mass Destruction (WMDs), threats to freedom of navigation, environmental risks, and natural disasters<sup>45</sup>.

In addition, there have been incidences of maritime boundary disputes between African countries. A key example was the maritime boundary dispute between Kenya and Somalia over 100,000 sq km of maritime space that is believed to contain significant oil and gas deposits as well as rich fisheries<sup>46</sup>. The dispute eventually ended up being determined by the International Court of Justice<sup>47</sup>. Such disputes can potentially ruin relationships between African countries and affect the sustainable utilization of the Blue Economy in Africa. For Africa, the Blue Economy offers greater opportunity beyond the economy and the environment<sup>48</sup>. It presents African countries with a unique opportunity to achieve their national development objectives, to improve regional integration, and to exert influence in the global setting<sup>49</sup>. However, from the foregoing discussion, it is evident that there are several concerns affecting the effective utilization of the Blue Economy in Africa. There is need to address the foregoing concerns in order to foster the Blue Economy in Africa.

#### **4.0 Way Forward**

The Sustainable Blue Economy Conference identified a number of key political targets that are pertinent in fostering Africa's Blue Economy. These include promoting action-oriented global strategies that places people and the Blue Economy resources at the centre of Sustainable Development; promoting collaboration for sustainable partnerships and projects in the various sectors

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<sup>45</sup> Kenya Maritime Authority., 'Report on the Global Sustainable Blue Economy Conference 26<sup>th</sup>-28<sup>th</sup> November 2018 Nairobi, Kenya.' Op Cit

<sup>46</sup> International Court of Justice., 'Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).' Available at <https://www.icj-cij.org/case/161> (Accessed on 18/07/2023)

<sup>47</sup> Ibid

<sup>48</sup> Nagy. H & Nene. S., 'Blue Gold: Advancing Blue Economy Governance in Africa.' *Sustainability*, No. 13 of 2021

<sup>49</sup> Ibid

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of the Blue Economy; mobilizing finance from public and private sources; promoting access to technologies and innovations; sharing best practices on sustainable management of the Blue Economy; capacity building; promoting gender equality and the role and participation of women and youth in the Blue Economy; strengthening science and research to generate and disseminate evidence-based knowledge and information as well to inform policy and decision making; strengthening governance mechanisms; and promoting synergies within and between different levels of governments<sup>50</sup>. These recommendations are vital in fostering the Blue Economy in Africa and can be incorporated into national policy, legal and institutional frameworks towards enhancing the capacity of African countries to harness the Blue Economy for the realization of Sustainable Development.

In addition, several interventions are necessary in various sectors of the Blue Economy in order to foster its realization in Africa. In fisheries and aquaculture, there is need to optimize conservation and sustainable fisheries and aquaculture resources use while minimizing conflicts in order to achieve full wealth-generating potential for fisheries and aquaculture sector<sup>51</sup>. This will enhance the sustainability of the fisheries and aquaculture sector while enabling African countries reap from the benefits of the Blue Economy in this sector. Further, in the energy sector there is need to unlock the sustainable blue energy potential through measures such as creating conducive regulatory environment for the development and application of sustainable blue energy<sup>52</sup>. This will trigger investments and realization of the energy potential of the Blue Economy thus enabling African countries meet their energy targets among other goals<sup>53</sup>. African countries can also tap into the potential of the

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<sup>50</sup> United Nations Economic Commission for Africa., 'The Nairobi Statement of Intent on Advancing the Global Sustainable Blue Economy.' Available at <https://archive.uneca.org/sites/default/files/uploaded-documents/SROs/EA/HIGH-LEVEL-SUSTAINABLE-BLUE-ECONOMY-CONFERENCE-2018/nairobi-statement-of-intent-advancing-global-sustainable-blue-economy.pdf> (Accessed on 19/07/2023)

<sup>51</sup> Africa Union., 'Africa Blue Economy Strategy.' Op Cit

<sup>52</sup> Ibid

<sup>53</sup> Nagy. H & Nene. S., 'Blue Gold: Advancing Blue Economy Governance in Africa.' Op Cit

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Blue Economy in order to meet the growing demand of mineral resources and oil and gas for economic prosperity<sup>54</sup>.

There is also need for African countries to tap into the potential of the Blue Economy in the transport sector. It has been pointed out that there has been low participation of African countries in the maritime and shipping industry<sup>55</sup>. However, African countries can tap into the potential of the Blue Economy in this sector through measures such as modernization of African ports and carrying cargoes of African countries at reasonable rates<sup>56</sup>. In addition, there is need develop integrated strategies for sustainable tourism and infrastructures in order to realize the full potential of the Blue Economy in Africa<sup>57</sup>.

In addition, one of the priority areas in fostering Africa's Blue Economy is curbing pollution of Blue Economy resources such as oceans and lakes<sup>58</sup>. Efforts towards curbing pollution should include addressing the effects of agriculture residue chemicals and soil erosion from highlands which end up polluting water bodies<sup>59</sup>. In addition, it is necessary to enhance resilience of the Blue Economy through climate change mitigation and adaptation by promoting the integration of blue carbon and ecosystem services into climate change policies and Coastal and Aquatic policies<sup>60</sup>. African Countries should consider embracing nature based solution for the enhancement of Coastal and Aquatic Ecosystem contribution to Biodiversity and climate change achievements<sup>61</sup>.

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<sup>54</sup> Ibid

<sup>55</sup> Kenya Maritime Authority., 'Report on the Global Sustainable Blue Economy Conference 26<sup>th</sup>-28<sup>th</sup> November 2018 Nairobi, Kenya.' Op Cit

<sup>56</sup> Mohanty. S & Dash. P., 'Economic Opportunities in Blue Economy in Africa.' Available at [https://link.springer.com/chapter/10.1007/978-981-15-5550-3\\_6](https://link.springer.com/chapter/10.1007/978-981-15-5550-3_6) (Accessed on 19/07/2023)

<sup>57</sup> Ibid

<sup>58</sup> Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

<sup>59</sup> Ibid

<sup>60</sup> Techera..E., 'Supporting Blue Economy Agenda: Fisheries, Food Security and Climate Change in the Indian Ocean.' *Journal of the Indian Ocean Region*, Volume 14, No. 1, 2018

<sup>61</sup> Ibid

Finally, it is paramount for African countries to promote good governance in the Blue Economy sector and establish regional and sub-regional cooperation in the Blue Economy<sup>62</sup>. This will be vital in ensure security and safety in the African maritime area and addressing concerns such as piracy and drug trafficking<sup>63</sup>. It also important for African countries to foster good relationships in order to prevent disputes concerning the Blue Economy such as the maritime boundary delimitation dispute between Kenya and Somalia<sup>64</sup>. This will enable African countries to realize the full benefits of the Blue Economy.

## **5.0 Conclusion**

The concept of the Blue Economy is very pertinent in Africa and across the globe. Africa has an opportunity to unleash the potential to develop a resilient blue economy<sup>65</sup>. With its great potential, the blue economy holds a lot of promise for Africa<sup>66</sup>. The Blue Economy holds the promise of enhancing economic, social and environmental development in Africa<sup>67</sup>. However, several problems hinder Africa from realizing the full promise of the Blue Economy. These concerns include 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<sup>68</sup>. There is need

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<sup>62</sup> Roy. A., 'Blue Economy in the Indian Ocean: Governance Perspectives for Sustainable Development in the Region.' Available at [https://www.orfonline.org/wp-content/uploads/2019/01/ORF\\_Occasional\\_Paper\\_181\\_Blue\\_Economy.pdf](https://www.orfonline.org/wp-content/uploads/2019/01/ORF_Occasional_Paper_181_Blue_Economy.pdf) (Accessed on 19/07/2023)

<sup>63</sup> Ibid

<sup>64</sup> Olorundami. F., 'The Kenya/Somalia Maritime Boundary Delimitation Dispute.' Available at <http://ndl.ethernet.edu.et/bitstream/123456789/61052/1/Zeray%20Yihdego.pdf#page=173> (Accessed on 19/07/2023)

<sup>65</sup> The World Bank., 'Blue Economy for Resilient Africa Program.' Op Ci

<sup>66</sup> Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

<sup>67</sup> United Nations., 'Sustainable Blue Economy Vital for Small Countries and Coastal Populations.' Op Cit

<sup>68</sup> UNDP., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Op Cit

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to address these challenges through measures such as promoting good governance in the Blue Economy sector; establishing regional and sub-regional cooperation; pollution control; enhancing the climate resilience of the Blue Economy sector; and tapping into the benefits of the various sectors of the blue economy such as energy, mining, transport, tourism and fishing by establishing sustainable practices<sup>69</sup>. Through this, the economic, social and environmental benefits of the Blue Economy will be realized towards achieving the visions of the African Union Agenda 2063 and the United Nations Sustainable Development Goals and in particular Goal 14 that seeks to conserve and sustainably use the oceans, seas and marine resources for Sustainable Development<sup>70</sup>. Fostering Africa's Blue Economy is an achievable dream.

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<sup>69</sup> Africa Union., 'Africa Blue Economy Strategy.' Op Cit

<sup>70</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit



## **Combating Climate Change Through Sustainable Forests Management for Current and Future Generations**

### *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.*

### **1.0 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

<sup>2</sup> 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.

<sup>3</sup> 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.

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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.

### **2.0 Climate Change and the Forests: The Link**

Kenya's Climate Change Act 2016<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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'.<sup>7</sup> 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

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<sup>4</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya.

<sup>5</sup> Sec. 2, Climate Change Act, 2016.

<sup>6</sup> 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.

<sup>7</sup> '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.

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well as to safeguard watersheds that provide 75% of the world's freshwater. This is achieved through sequestering carbon from the atmosphere.<sup>8</sup>

### **3.0 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.<sup>9</sup> 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”.<sup>10</sup>

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:

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

<sup>9</sup> Sec. 56(1) (2), Forest Conservation and Management Act 2016.

<sup>10</sup> 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.<sup>11</sup>
  
  - 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.<sup>12</sup>
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.<sup>13</sup>

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

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<sup>11</sup> 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.

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

<sup>13</sup> 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.

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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.<sup>14</sup>

### **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.<sup>15</sup>

Food and 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.<sup>16</sup> 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.<sup>17</sup> 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.

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

<sup>15</sup> '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.

<sup>16</sup> 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.

<sup>17</sup> 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](https://www.un.org/esa/forests/wp-content/uploads/2014/12/Africa_case_study.pdf)> accessed 18 March 2023.

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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.<sup>18</sup>

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 report<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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 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.<sup>22</sup>

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

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

<sup>20</sup> '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.

<sup>21</sup> '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.

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

### **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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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<sup>23</sup> Article 69 (1) (b), Constitution of Kenya 2010.

<sup>24</sup> Sec. 55, Forest Conservation and Management Act 2016.

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

<sup>26</sup> '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://ntokenya.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.

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### **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.<sup>27</sup> 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 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’.<sup>28</sup> 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*<sup>29</sup> 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

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<sup>27</sup> Sec. 54(1), Forest Conservation and Management Act 2016.

<sup>28</sup> Sec. 13(5)(g), climate Change Act 2016.

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



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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 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.

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The Forest Conservation and Management Act, 2016<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> 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,

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<sup>30</sup> Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

<sup>31</sup> Sec. 4 (a) (e), Forest Conservation and Management Act 2016.

<sup>32</sup> Sec. 42(1), Forest Conservation and Management Act 2016.

<sup>33</sup> 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.

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taking into account the unique characteristics of various forest ecosystems and the socioeconomic circumstances of every nation.<sup>34</sup> 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 means to strike a balance between human requirements and concerns about the long-term viability of forest resources.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

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

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<sup>34</sup> Gondo, P.C., 'Financing of Sustainable Forest Management in Africa: An Overview of the Current Situation and Experiences' 2010, p. 61.

<sup>35</sup> 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](https://www.un.org/esa/forests/wp-content/uploads/2015/06/Enabling_SFM_highlights.pdf)> accessed 18 March 2023.

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

<sup>37</sup> 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.

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increasingly complex and diverse external and internal financial mechanisms for forests.<sup>38</sup>

### **4.0 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.<sup>39</sup> 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.<sup>40</sup>

For climate change to be 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).<sup>41</sup>

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.

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<sup>38</sup> 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-iffor>> accessed 18 March 2023.

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

<sup>40</sup> Ibid.

<sup>41</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224062)> accessed 18 March 2023.

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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).<sup>42</sup> 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.

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<sup>42</sup> '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.

## **Actualizing Africa's Green Dream**

### **Abstract**

*The paper critically discusses the concept of 'green economy' in Africa. It argues that green growth is vital in Africa in the wake of the threat of climate change among other concerns. It further asserts that green growth in Africa can aid in achieving Sustainable Development by striking a balance between human development, environmental conservation and economic development. The paper examines the progress made towards achieving green growth in Africa. It further explores the challenges facing realization of green economy in Africa. The paper also proposes solutions towards actualizing Africa's green dream.*

### **1.0 Introduction**

The concept of 'greening' economies has become a pertinent concern in global politics in the wake of challenges facing the planet including the threat of climate change<sup>1</sup>. Effects of climate change such as rising temperatures, drought, crop failure, desertification, depletion of natural resources, water scarcity and rising sea levels have had significant impacts on human development, economic development and environmental sustainability<sup>2</sup>. Consequently, climate change mitigation and adaptation are vital in fostering Sustainable Development<sup>3</sup>. Proponents of green growth view it as an opportunity to strike a balance between human development, environmental conservation and economic development<sup>4</sup>. Greening growth can thus support the realization of Sustainable Development by taking into account environmental protection, economic development and social concerns which are key considerations in the Sustainable Development agenda<sup>5</sup>.

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<sup>1</sup> Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' *Journal of Political Ecology*, 2019

<sup>2</sup> Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

<sup>3</sup> <sup>3</sup> 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 03/07/2022)

<sup>4</sup> Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' Op Cit

<sup>5</sup> Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1.

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The term 'green economy' has been defined as one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities<sup>6</sup>. It has also been defined as policy focus that emphasizes environmentally sustainable economic progress to foster low-carbon, socially inclusive development<sup>7</sup>. Green Growth is one of the strategies to achieve sustainable development that focuses on greening conventional economic systems and developing a green economy, where economic prosperity can go hand-in-hand with ecological sustainability<sup>8</sup>. Various approaches have been taken towards greening economies. In the global North, the main components in the green economy transition have been technological and market-based solutions to existing industrial sectors as well as fiscal instruments in environmental governance<sup>9</sup>. Further, in the global South, green economy implementation majorly focuses on environmental protection along with modernization and shifts in access to and control over forestry, freshwater, fisheries, energy and agriculture among other natural resources<sup>10</sup>.

The paper critically examines actualization of Africa's green dream. It explores the progress made towards greening economies in Africa. The paper further discusses opportunities and challenges facing the attainment of green growth in Africa. It also suggests recommendations towards actualizing Africa's green dream for Sustainable Development.

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<sup>6</sup> United Nations Economic Commission for Europe., 'Greening the Economy: Mainstreaming the Environment into Economic Development.' Available at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=796&menu=1515> (Accessed on 03/07/2023)

<sup>7</sup> United Nations Economic and Social Commission for Asia and the Pacific., 'Green Growth Uptake in Asia-Pacific Region.' Available at [https://unece.org/fileadmin/DAM/env/cep/CEP-20/ppp/Item10\\_b\\_\\_ESCAP\\_GreenGrowthUptake\\_e\\_sm.pdf](https://unece.org/fileadmin/DAM/env/cep/CEP-20/ppp/Item10_b__ESCAP_GreenGrowthUptake_e_sm.pdf) (Accessed on 03/07/2023)

<sup>8</sup> Ibid

<sup>9</sup> Bailey, I & Caprotti, F. 'The Green Economy: Functional Domains and Theoretical Directions of Enquiry.' *Environment and Planning*, No. 46 of 2014.

<sup>10</sup> Ibid

## **2.0 Green Growth in Africa: Opportunities and Challenges**

The concept of 'green economies' has received widespread attention since the Rio+20 conference.<sup>11</sup> The outcome of the Conference affirmed the role of green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving Sustainable Development<sup>12</sup>. It calls upon states to embrace green economies as a tool of eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems<sup>13</sup>. The outcome of the Rio+20 Conference further recognizes the importance of green economy in enhancing our ability to manage natural resources sustainably and with lower negative environmental impacts, increasing resource efficiency and reduction of waste<sup>14</sup>.

Since the outcome of the Rio+ 20 Conference, the concept of green economy has been embraced at the global, regional and national levels. The universal call for green growth is stipulated under the United Nations 2030 Agenda for Sustainable Development which envisions development which balances social, economic and environmental sustainability<sup>15</sup>. The Sustainable Development Goals seek to promote green economies through measures such as ensuring access to affordable and clean energy; promoting sustainable industrialization, innovation and infrastructure; promoting the growth of

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<sup>11</sup> Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' Op Cit

<sup>12</sup> United Nations., 'The Future we Want: Outcome document of the United Nations Conference on Sustainable Development held in Rio de Janeiro, Brazil, from 20–22 June 2012.' Available at <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> (Accessed on 03/07/2023)

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> United Nations Development Programme., 'Sustainable Development Goals.' Available at [https://www.google.com/search?q=undp&oq=UNDP&gs\\_lcrp=EgZjaHJvbWUqDwgAEAA YQxjAhixAxiKBTIPCAAQABhDGOMCGLEDGIoFMhIIARAUgEMyXwEYsQMY0QM YigUyCQgCEAAyQxiKBTIJCAMQABhDGIoFMgYIBBBFGDwyBggFEEUYPDIGCAYQ RRg8MgYIBxBFGDzSAQgyNzM2ajFqN6gCALACAA&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=undp&oq=UNDP&gs_lcrp=EgZjaHJvbWUqDwgAEAA YQxjAhixAxiKBTIPCAAQABhDGOMCGLEDGIoFMhIIARAUgEMyXwEYsQMY0QM YigUyCQgCEAAyQxiKBTIJCAMQABhDGIoFMgYIBBBFGDwyBggFEEUYPDIGCAYQ RRg8MgYIBxBFGDzSAQgyNzM2ajFqN6gCALACAA&sourceid=chrome&ie=UTF-8) (Accessed on 03/07/2023)



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sustainable cities and communities and combating climate change<sup>16</sup>. Achieving the Sustainable Development agenda is essential in fostering green economies in Africa.

At the regional level, the *Africa Union's Agenda 2063* sets out the aspirations of prosperous Africa based on inclusive growth and Sustainable Development<sup>17</sup>. It seeks to achieve this goal through measures such as promoting sustainable and inclusive economic growth; ensuring sustainable management of natural resources in Africa; fostering sustainable consumption and production patterns; fostering climate resilience and natural disasters preparedness and prevention and embracing renewable energy in Africa<sup>18</sup>. Realizing the aspirations of Agenda 2063 is paramount in actualizing Africa's green dream. In addition, the *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*<sup>19</sup> seeks to promote and attain sustainable and inclusive socio-economic development in the region. It recognizes the need to promote sustainable development in accordance with the Sustainable Development Goals as vital in achieving the economic integration of the African continent<sup>20</sup>. There is need to promote the vision of the AfCFTA in order to actualize Africa's green dream.

In Kenya, the Constitution embraces Sustainable Development as one of the national values and principles of governance<sup>21</sup>. It further encompasses several provisions that are vital in attaining green growth in Kenya including the recognition of the right to a clean and healthy environment<sup>22</sup>. The Constitution also stipulates certain obligations in respect of the environment which include ensuring sustainable exploitation, utilisation, management and conservation

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<sup>16</sup> Ibid

<sup>17</sup> Africa Union., 'Agenda 2063: The Africa we Want.' Available at [https://au.int/sites/default/files/documents/33126-doc-framework\\_document\\_book.pdf](https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf) (Accessed on 03/07/2023)

<sup>18</sup> Ibid

<sup>19</sup> African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (Accessed on 03/07/2023)

<sup>20</sup> Ibid

<sup>21</sup> Constitution of Kenya, 2010., Article 10 (2) (d), Government Printer, Nairobi.

<sup>22</sup> Ibid, Article 42

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of the environment and natural resources; achieving and maintaining a tree cover of at least ten per cent of the land area of Kenya; establishing systems of environmental impact assessment, environmental audit and monitoring of the environment and eliminating processes and activities that are likely to endanger the environment<sup>23</sup>. Implementing these among other provisions of the Constitution will enhance green growth in Kenya.

Green growth has been embraced in Africa through measures such as promoting the use of clean and renewable sources of energy. There have been increased investments in renewable sources of energy such as solar, wind, hydro, geothermal and green hydrogen<sup>24</sup>. Clean and renewable sources of energy are essential in climate change mitigation and adaptation and actualizing the green dream<sup>25</sup>. Agenda 2063 recognizes the importance of renewable sources of energy in ensuring environmental sustainability and climate resilient economies and communities towards attaining Sustainable Development in Africa<sup>26</sup>. Africa has vast resource potential in wind, solar, hydro, and geothermal energy and falling costs are increasingly bringing renewables within reach<sup>27</sup>. It has been pointed out that renewable sources of energy can help address many of Africa's social, economic, health and environmental challenges and foster the realization of a climate-safe future in which sustainable development prerogatives are met<sup>28</sup>. There is need for increased investments in renewable sources of energy in Africa in order to actualize the green dream.

In addition, green revolution is also being witnessed in the agricultural sector in Africa. Technologies such as genetic engineering have been adopted to

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<sup>23</sup> Ibid, Article 69

<sup>24</sup> Hafner. M et al., 'Prospects for Renewable Energy in Africa.' *Energy in Africa*, 2018, pp 47-75

<sup>25</sup> Crane. D., 'My Clean-Energy Green Dream.' Available at <https://www.greenbiz.com/article/myclean-energy-green-dream> (Accessed on 03/07/2023)

<sup>26</sup> Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

<sup>27</sup> International Renewable Energy Agency., 'Renewable Energy Market Analysis: Africa and its Regions.' Available at <https://www.irena.org/publications/2022/Jan/Renewable-Energy-Market-Analysis-Africa> (Accessed on 03/07/2023)

<sup>28</sup> Ibid

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transfer the nitrogen-fixing capabilities of legumes such as peas and beans into cereal crops<sup>29</sup>. This has facilitated the attainment of higher yields, without the use of expensive fertilizers<sup>30</sup>. This approach also aids in the reduction in the use of chemical nitrogen fertilizers, which contribute substantially to both carbon emissions and environmental pollution<sup>31</sup>. Some African countries have also adopted regenerative agricultural practices such as crop rotation, agroforestry, use of drought- and heat-resistant crops, integrated pest control systems, water harvesting and irrigation<sup>32</sup>. This has helped in fostering high-yielding, resilient, and adaptive practices that constitute an African approach to climate-smart agriculture<sup>33</sup>. Greening of the agricultural sector is vital in actualizing Africa's green dream.

Further, there has been progress towards actualizing Africa's green dream through the adoption of sustainable waste management practices. Countries such as Rwanda and Kenya have banned the use of plastic bags due to their negative environmental impacts<sup>34</sup>. This has promoted improved waste management and environmental conservation in these countries<sup>35</sup>. In addition there has been growth of sustainability startups aimed at promoting efficient waste management through measures such as treatment, recycling of waste and conversion of waste into useful products such as compost and biofuel briquettes<sup>36</sup>.

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<sup>29</sup>Conrow. J., 'Borlaug's Dream is Being Realized.' Available at <https://allianceforscience.org/blog/2017/04/borlaugs-dream-is-being-realized/> (Accessed on 03/07/2023)

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Available at <https://climatechampions.unfccc.int/call-to-action-for-climate-resilient-sustainable-food-systems-in-africa/> (Accessed on 03/07/2023)

<sup>33</sup> Ibid

<sup>34</sup> Behuria. P., 'Ban the (plastic) Bag? Explaining Variation in the Implementation of Plastic Bag Bans in Rwanda, Kenya and Uganda.' *EPC: Politics and Space*, 2021, P 1-18

<sup>35</sup> Ibid

<sup>36</sup> Forbes., 'Meet The African Green Entrepreneurs Showing the West How It's Done.' Available at <https://www.forbes.com/sites/davidrvetter/2021/12/14/meet-the-african-green-entrepreneurs-showing-the-west-how-its-done/?sh=6d46b5bf51cb> (Accessed on 03/07/2023)

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Progress has also been made towards fostering green growth in the African tourism sector through eco-resorts or family villages in countries such as Rwanda<sup>37</sup>. Africa is a continent that is rich in cultural and ecological heritage and recreational development has been identified as one of the measures of promoting green growth in the tourism sector<sup>38</sup>. This has enhanced sustainability and social growth through a combination of agriculture, the commitment of local businesses and educating and recruitment of local staff in such projects<sup>39</sup>.

Despite the progress made towards actualizing Africa's green dream, several concerns have hindered the attainment of this ideal. It has been pointed out that the transition towards renewable energy has not been fully embraced due to factors such as insufficient investments with only 2% of global investments in renewable energy in the last two decades being made in Africa, with significant regional disparities<sup>40</sup>. This has significantly affected access to clean cooking fuels and technologies in most parts of Africa<sup>41</sup>. Further, it has been asserted that African countries especially those in the North African region which have untapped renewable energy sources including hydrogen have struggled to meet their own renewable energy targets, often as a result of unattractive investment conditions, insufficiently developed legal frameworks for renewable energy development and uneven and inconsistent implementation of regulations<sup>42</sup>. It is necessary to address these challenges in order to actualize Africa's green dream in the energy sector.

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<sup>37</sup> MTD., 'Green Dream Rwanda.' Available at <https://www.mtdls.nl/en/news/newsarchive/q/nid/337/title/green-dream-rwanda> (Accessed on 03/07/2023)

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> International Renewable Energy Agency., 'Renewable Energy Market Analysis: Africa and its Regions.' Op Cit

<sup>41</sup> Ibid

<sup>42</sup>EN: Former., 'North Africa's Hydrogen Potential.' Available at [https://www.enformer.com/en/north-africashydrogenpotential/?etcc\\_med=SEA&etcc\\_par=Google&etcc\\_cmp=Energysystems&etcc\\_grp=135634609600&etcc\\_bky=hydrogen%20africa&etcc\\_mty=p&etcc\\_plc=&etcc\\_ctv=580888668376&etcc\\_bde=c&etcc\\_var=CjwKCAjw44mlBhAQEiwAqP3eViMmP67xkwkqMl4FIRbBPvWogaNcBckR9BJMhu0bOUf1s-OG4JKuwhoCga4QAvD\\_BwE&gad=1&gclid=CjwKCAjw44mlBhAQEiwAqP3eViMmP67](https://www.enformer.com/en/north-africashydrogenpotential/?etcc_med=SEA&etcc_par=Google&etcc_cmp=Energysystems&etcc_grp=135634609600&etcc_bky=hydrogen%20africa&etcc_mty=p&etcc_plc=&etcc_ctv=580888668376&etcc_bde=c&etcc_var=CjwKCAjw44mlBhAQEiwAqP3eViMmP67xkwkqMl4FIRbBPvWogaNcBckR9BJMhu0bOUf1s-OG4JKuwhoCga4QAvD_BwE&gad=1&gclid=CjwKCAjw44mlBhAQEiwAqP3eViMmP67)

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In addition, it has been observed that agricultural practices that supported African communities in the past such as slash-and-burn cultivation and crop rotation are now driving the sector's decline<sup>43</sup>. These practices combined with long-term ecological impacts of chemical-heavy farming systems contribute to land degradation and crop failure<sup>44</sup>. The situation is worsened by changing weather patterns as result of the threat of climate change and unstable sociopolitical dynamics hindering the attainment of food security<sup>45</sup>. There is need to address concerns in the agricultural sector in order to actualize Africa's green dream.

It also been asserted that despite the abundance of water resources in Africa including lakes, rivers, swamps and underground aquifers, there has been degradation and underutilization of these water resources<sup>46</sup>. Concerns such as pollution, poor agricultural practices and the effects of climate change have affected the quality and quantity of water resources in Africa<sup>47</sup>. This has hindered actualizing Africa's green dream in other areas including agriculture and food production, energy, manufacturing and processing, tourism and health due to the centrality of water in Africa's pursuit of the Sustainable Development Goals<sup>48</sup>. It is imperative that concerns in the water sector be addressed in order to foster Sustainable Development and actualize Africa's green dream.

As a result of the foregoing concerns, it has been observed that Africa continues to lag behind other regions of the world in achieving the Sustainable

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(Accessed on 03/07/2023)

<sup>43</sup> African Wildlife Foundation., 'Sustainable Agriculture.' Available at <https://www.awf.org/community/sustainable-agriculture> (Accessed on 03/07/2023)

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Mugagga, F, & Nabaasa, B., 'The Centrality of Water Resources to the Realization of Sustainable Development Goals (SDG). A Review of Potentials and Constraints on the African Continent.' *International Soil and Water Conservation Research*, Volume 4, No. 3, 2016

<sup>47</sup> Ibid

<sup>48</sup> Ibid

Development agenda<sup>49</sup>. The continent has huge potential to achieve green growth and the transition into green economies. There is need to deal with the above concerns in order to actualize Africa's green dream.

### **3.0 Way Forward**

In order to actualize Africa's green dream, it is necessary to upscale investments in green energy sources as renewable energy<sup>50</sup>. The continent has vast potential for renewable sources for energy which remains untapped<sup>51</sup>. Challenges such as unattractive investment conditions, insufficiently developed legal frameworks for renewable energy development and uneven and inconsistent implementation of regulations have hindered attainment of the green dream in the energy sector in Africa<sup>52</sup>. African countries must address these concerns by creating attractive investment environments, developing efficient legal frameworks on renewable energy and implementing effective regulations in order to enhance the uptake of renewable sources of energy.<sup>53</sup> Further, there is need for adoption of market liberalization policies in the energy sector such as supporting public-private investment, improved private sector access to electricity generation and issuing of green bonds in order to promote renewable sources of energy in Africa<sup>54</sup>. This will fast track realization of Africa's green dream in the energy sector.

Further, there is need to adopt green agricultural practices such as regenerative agriculture. Regenerative agricultural practices can aid in fostering climate resilient and sustainable green economies in Africa by avoiding the key problems of highly industrialized agriculture production that damage soil health, including vast tracts of mono-cultivated land, chemical runoffs, overexploitation of water resources, and high chemical and hormonal

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<sup>49</sup> Begashaw. B., 'Africa and the Sustainable Development Goals: A long Way to go.' Available at <https://www.brookings.edu/articles/africa-and-the-sustainable-development-goals-a-long-way-to-go/> (Accessed on 03/07/2023)

<sup>50</sup> Hafner. M et al., 'Prospects for Renewable Energy in Africa.' Op Cit

<sup>51</sup> Ibid

<sup>52</sup> EN: Former., 'North Africa's Hydrogen Potential.' Op Cit

<sup>53</sup> Ibid

<sup>54</sup> Ibid

residue levels in food<sup>55</sup>. This will promote the attainment of food security in Africa while also contributing towards climate change mitigation and adaptation in the quest towards Sustainable Development<sup>56</sup>. African countries should thus adopt regenerative agricultural practices such as effective soil systems including no tilling and low tilling, crop rotation, use of drought and heat resistant crops, agroforestry, water harvesting, irrigation and green pest control measures<sup>57</sup>. This will enhance actualization of the green dream in the agricultural sector in Africa.

In addition, it is vital to promote sustainable utilization and management of water resources in Africa. Water plays a fundamental role in the attainment of Sustainable Development. To this extent, it has been observed that there is a clear nexus between properly managed water resources, economic development and social wellbeing which are key pillars of the sustainable development agenda<sup>58</sup>. The importance of water is recognized under the 2030 Agenda for Sustainable Development which seeks to ensure the availability and sustainable management of water and sanitation for all<sup>59</sup>. However, challenges have been witnessed in the water sector in Africa such as degradation and underutilization of these water resources<sup>60</sup>. It has been observed that sustainable management of water resources and access to safe water and sanitation are essential for unlocking economic growth and productivity, and providing significant leverage for existing investments in

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<sup>55</sup> Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Op Cit

<sup>56</sup> Davis. L.R et al., 'Farmer Led Regenerative Agriculture for Africa.' Available at <https://discovery.ucl.ac.uk/id/eprint/10106717/1/LunnRockliffe%2C%20Davies%20et%20al.%202020%20RA%20report.pdf> (Accessed on 03/07/2023)

<sup>57</sup> Ibid

<sup>58</sup> Koudstaal.R et al., 'Water and Sustainable Development' available at <https://www.ircwash.org/sites/default/files/210-92WA-11000.pdf> (Accessed on 03/07/2023)

<sup>59</sup> United Nations, Department of Economic and Social Affairs, Sustainable Development goal 6- clean water and sanitation, available at <https://sdgs.un.org/goals/goal6> (Accessed on 03/07/2023)

<sup>60</sup> Mugagga. F, & Nabaasa. B., 'The Centrality of Water Resources to the Realization of Sustainable Development Goals (SDG). A Review of Potentials and Constraints on the African Continent.' Op Cit

health and education<sup>61</sup>. There is need to improve the management of water and water resources in Africa through measures such pollution control, effective waste management, use of water smart landscaping and irrigation and sustainable utilization of water through reusing among other measures<sup>62</sup>. This will promote the attainment of sustainable development goal 6 geared towards enhancing access to clean water and sanitation for all while also actualizing Africa's green dream in the water sector.

Further, Africa should adopt green value chains for minerals. It has been observed that Africa is endowed with a variety of minerals that are central to decarbonization such as the Democratic Republic of the Congo (DRC) which produces over 70% of the world's cobalt, DRC and Zambia which supply 10% of global copper and Mozambique and South Africa which hold significant reserves of graphite, platinum metals, lithium among other countries<sup>63</sup>. It has been observed that the opportunities presented by the global green mineral boom and domestic achievements such as the African Continental Free-Trade Area can help facilitate development of regional value chains for green economy products in the mining sector<sup>64</sup>. There is need to tap into these opportunities in order foster green value chains towards actualizing Africa's green dream.

Finally, Africa must fast track the attainment of the Sustainable Development goals and the Sustainable Development agenda. It has been argued that Africa continues to lag behind other regions of the world in achieving the Sustainable Development agenda<sup>65</sup>. The continent has made slow progress in attaining

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<sup>61</sup> United Nations Environment Programme, 'Goal 6: Clean Water and Sanitation' available at <https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6> (Accessed on 03/07/2023)

<sup>62</sup> Mugagga, F. & Nabaasa, B., 'The Centrality of Water Resources to the Realization of Sustainable Development Goals (SDG). A Review of Potentials and Constraints on the African Continent.' Op Cit

<sup>63</sup> Economic Commission for Africa., 'African Countries Urged to Prioritize Green Value Chains for Minerals.' Available at <https://www.un.org/africarenewal/magazine/february-2023/african-countries-urged-prioritize-green-value-chains-minerals> (Accessed on 03/07/2023)

<sup>64</sup> Ibid

<sup>65</sup> Begashaw, B., 'Africa and the Sustainable Development Goals: A long Way to go.' Op Cit



goals such as ending extreme poverty, promoting access to clean water and sanitation, promoting quality education and achieving gender equality<sup>66</sup>. There is need to enhance the attainment of Sustainable Development Goals in Africa through measures such as increased funding, improved public and private partnerships, strengthening domestic legislations, embracing technology and support from the international community<sup>67</sup>. This will accelerate attainment of Sustainable Development in Africa whilst actualizing Africa's green dream.

#### **4.0 Conclusion**

The concept of 'green economy' is vital in fostering Sustainable Development at the global, regional and national levels<sup>68</sup>. Green growth has been embraced in Africa through measures such as adoption of renewable sources of energy, regenerative agricultural practices and sustainable waste management<sup>69</sup>. However, despite this progress, several concerns hinder effective attainment of green growth in Africa. These include insufficient investments in renewable energy, underutilization and degradation of water resources, poor agricultural practices in some areas and failure to accelerate attainment of the Sustainable Development Goals<sup>70</sup>. There is need to address these challenges by upscaling investments in green energy sources such as renewable energy, adopting green agricultural practices such as regenerative agriculture, promoting sustainable utilization and management of water resources, adopting green value chains for minerals and fast tracking attainment of the Sustainable Development Goals<sup>71</sup>. This will enhance green growth and attainment of Sustainable Development in Africa. Actualizing Africa's Green Dream is an idea worth implementing.

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<sup>66</sup> UNDP., 'New Africa SDGs Report shows Slow Progress, Calls for Greater Action to Meet Targets.' Available at <https://www.undp.org/africa/press-releases/new-africa-sdgs-report-shows-slow-progress-calls-greater-action-meet-targets> (Accessed on 03/07/2023)

<sup>67</sup> Ibid

<sup>68</sup> Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' Op Cit

<sup>69</sup> Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Op Cit

<sup>70</sup> Begashaw. B., 'Africa and the Sustainable Development Goals: A long Way to go.' Op Cit

<sup>71</sup> UNDP., 'New Africa SDGs Report shows Slow Progress, Calls for Greater Action to Meet Targets.' Op Cit

## **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.*

### **1.0 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 making<sup>1</sup>. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making<sup>2</sup>. 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 ever<sup>3</sup>. 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 companies<sup>4</sup>.

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<sup>1</sup> 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.

<sup>2</sup> De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

<sup>3</sup> Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

<sup>4</sup> 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.

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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 investors<sup>5</sup>. Matters touching on climate change and sustainability dominate current ESG focus<sup>6</sup>. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention<sup>7</sup>. 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 funding<sup>8</sup>. 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 stakeholders<sup>9</sup>.

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts<sup>10</sup>. These commitments can take various forms including respect for the environment, human rights and labour laws.<sup>11</sup> 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

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<sup>5</sup> 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)

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> 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)

<sup>9</sup> Ibid

<sup>10</sup> Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at [https://www.vonwobeser.com/index.php/publication?p\\_id=1650](https://www.vonwobeser.com/index.php/publication?p_id=1650) (accessed on 28/09/2022)

<sup>11</sup> Ibid

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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.

### **2.0 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 litigation<sup>12</sup>. 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 resolution<sup>13</sup>. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution<sup>14</sup>.

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 achieved<sup>15</sup>. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts<sup>16</sup>. 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 emissions<sup>17</sup>. The Paris Agreement on Climate Change

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<sup>12</sup> Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4<sup>th</sup> Edition, 2022

<sup>13</sup> Ibid

<sup>14</sup> Constitution of Kenya, 2010, Article 159 (2) (c)

<sup>15</sup> Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at [https://aprp.msai.ru/jour/article/view/3223?locale=en\\_US](https://aprp.msai.ru/jour/article/view/3223?locale=en_US) (accessed on 28/09/2022)

<sup>16</sup> Ibid

<sup>17</sup> 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-arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/> (accessed on 28/09/2022)

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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 goal<sup>18</sup>. Further, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG<sup>19</sup>.

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 production<sup>20</sup>. 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 Africa<sup>21</sup>. 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 contracts<sup>22</sup>. 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 disruptive<sup>23</sup>. 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 with<sup>24</sup>. ESG issues are not only reshaping corporate behavior across the globe but can also be a

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<sup>18</sup> Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> 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)

<sup>22</sup> International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' Op Cit

<sup>23</sup> 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)

<sup>24</sup> Ibid

### *The Place of Environmental, Social and Governance (ESG) in Arbitration*

potential battleground in international disputes<sup>25</sup>. 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 disputes. 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 system<sup>26</sup>. In international commercial and investment arbitration, parties are reluctant to submit to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system<sup>27</sup>. Further, arbitration has the potential of facilitating expeditious management of disputes<sup>28</sup>. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.<sup>29</sup> 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*<sup>30</sup> 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 agreements<sup>31</sup>. ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to

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<sup>25</sup> 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)

<sup>26</sup> Moses. L.M., *The Principles and Practice of International Commercial Arbitration* 2<sup>nd</sup> Edition, 2017, Cambridge University Press

<sup>27</sup> Ibid

<sup>28</sup> 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>

<sup>29</sup> Ibid

<sup>30</sup> United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

<sup>31</sup> Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

determine issues relating to climate change, corruption and human rights<sup>32</sup>. 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 ESG<sup>33</sup>. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well positioned to manage ESG disputes<sup>34</sup>. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

### **3.0 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 arbitration<sup>35</sup>. 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 2021<sup>36</sup>. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns<sup>37</sup>. 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.

#### **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

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<sup>32</sup> Ross. A., 'We need talk about ESG' available at <https://globalarbitrationreview.com/we-need-talk-about-esg> (accessed on 28/09/2022)

<sup>33</sup> Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit

<sup>34</sup> Ibid

<sup>35</sup> Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

<sup>36</sup> 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)

<sup>37</sup> Ibid

generations to meet their own needs<sup>38</sup>. This concept entails a combination of elements including environmental protection, economic development and social issues<sup>39</sup>. The importance of Sustainable Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development<sup>40</sup>. 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 action<sup>41</sup>. 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 bearing<sup>42</sup>.

### **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 rights<sup>43</sup>. However, corporate behavior especially in the investment sphere in Africa has resulted in gross violation of human rights<sup>44</sup>. Some corporations which have invested in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture<sup>45</sup>. 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

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<sup>38</sup> World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).

<sup>39</sup> Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

<sup>40</sup> United Nations., 'Sustainable Development Goals' available at <https://sdgs.un.org/goals> (accessed on 28/09/2022)

<sup>41</sup> Ibid, Goals 6, 7, 9 and 13.

<sup>42</sup> 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>

<sup>43</sup> Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

<sup>44</sup> Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

<sup>45</sup> Maiangwa.B & Agbibo.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' *Africa Spectrum* 2/2013: 71-83



sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities<sup>46</sup>. Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues<sup>47</sup>. Arbitrators should thus seek to uphold human rights in such disputes by rendering awards that are in line with human rights standards<sup>48</sup>. 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 conduct<sup>49</sup>. 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)<sup>50</sup>. 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 crisis<sup>51</sup>. However, in some instances, arbitration has been slow to act to act in response to the climate

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<sup>46</sup> 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)

<sup>47</sup> Amao. O., 'Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.' Routledge, 2011.

<sup>48</sup> Krajewski, M. 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.' Available at SSRN 3133529 (2018).

<sup>49</sup> 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)

<sup>50</sup> Sustainable Development' available at <https://sdgs.un.org/goals> (accessed on 29/09/2022)

<sup>51</sup> Greenwood. L., 'The Canary is Dead: Arbitration and Climate Change' *Journal of International Arbitration*, Volume 38, Issue 3 (2021)

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crisis<sup>52</sup>. 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 concepts<sup>53</sup>. This may require expert analysis and guidance from persons with requisite knowledge in environmental matters<sup>54</sup>. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

### **4.0 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 disputes<sup>55</sup>. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change<sup>56</sup>. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously promoting Sustainable Development. There is need to enhance the viability of arbitration in management of ESG related disputes.

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<sup>52</sup> Ibid

<sup>53</sup> 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](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)

<sup>54</sup> 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)

<sup>55</sup> Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

<sup>56</sup> Ibid

## **Reconceptualizing Corporate Governance for Sustainable Development**

### ***Abstract***

*The paper critically explores the role of Corporate Governance in the Sustainable Development agenda. It asserts that the activities of corporations have a great effect in either promoting or hindering the attainment of Sustainable Development. The paper highlights some of the corporate governance practices that have fostered Sustainable Development including the concepts of Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG). It further analyzes some of the corporate governance practices that have impeded the attainment of Sustainable Development. The paper argues a case for reconceptualizing corporate governance in order to realize Sustainable Development.*

### **1.0 Introduction**

Corporations play a fundamental role in the society since the vast majority of economic activities around the world are organized through them<sup>1</sup>. In modern times, the global role of corporations rivals that of national and local governments<sup>2</sup>. It has been observed that some of the largest corporations have a higher corporate revenue than the Gross Domestic Product (GDP) of most nations across the globe<sup>3</sup>. Further, some corporations have undergone dynamic growth and gained powers traditionally vested only upon states thus asserting influence on the global stage and affecting the lives of millions of people around the world<sup>4</sup>. Consequently, most functions that were previously vested in the state are now exercised by private actors such as multinational corporations<sup>5</sup>. These services include energy, telecommunications, transport,

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<sup>1</sup>Rauterberg. G, 'The Corporation's Place in Society' available at [http://michiganlawreview.org/wpcontent/uploads/2016/04/114MichLRev.913\\_Rauterberg.pdf](http://michiganlawreview.org/wpcontent/uploads/2016/04/114MichLRev.913_Rauterberg.pdf) (Accessed on 14/07/2023)

<sup>2</sup> Milne Library., 'Corporations and their Social Responsibility.' Available at <https://milnepublishing.geneseo.edu/good-corporation-bad-corporation/chapter/1-corporations-and-their-social-responsibility/> (Accessed on 14/07/2023)

<sup>3</sup> Ibid

<sup>4</sup>Monshipouri. M, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' *Human Rights Quarterly*, No. 25 of 2003, p. 965-989

<sup>5</sup> The East African Centre for Human Rights., 'A compendium on economic and social rights cases under the Constitution of Kenya, 2010' available at [https://eachrights.or.ke/wpcontent/uploads/2020/07/A\\_Compendium\\_On\\_Economic\\_And\\_S](https://eachrights.or.ke/wpcontent/uploads/2020/07/A_Compendium_On_Economic_And_S)

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water and sanitation among others<sup>6</sup>. Corporations thus continue to shape the political, economic, social, technological, environmental and legal discourse in the world.

The vast powers yielded by corporations in modern times has also been susceptible to abuse. Indeed, decisions of large multinational corporations are capable of doing more harm to natural persons in terms of human rights violations when compared to states<sup>7</sup>. It has been argued that the activities of corporations have often resulted in societal concerns such as environmental pollution and human rights abuses as a result of too much focus on economic growth<sup>8</sup>. Indeed, the activities of corporations especially Multinational Corporations in the investment sphere in Africa have resulted in gross human rights violations and environmental damage<sup>9</sup>. These concerns have led to the emergence of the concept of corporate governance.

Corporate governance is the system of rules, practices and processes by which an organization is directed and controlled<sup>10</sup>. It encompasses every sphere of management from action plans and internal controls to performance measurement and corporate disclosure<sup>11</sup>. Corporate governance has also been referred to the interaction between the board of directors, the senior

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ocial\_Rights\_Cases\_Under\_The\_Constitution\_Of\_Kenya\_2010.pdf (Accessed on 14/07/2023)

<sup>6</sup> Ibid

<sup>7</sup> Mwenda. M., 'The Context of Transformative Constitutionalism in Kenya' available at

[https://www.academia.edu/13738064/The\\_Context\\_of\\_Transformative\\_Constitutionalism\\_in\\_Kenya](https://www.academia.edu/13738064/The_Context_of_Transformative_Constitutionalism_in_Kenya) (Accessed on 14/07/2023)

<sup>8</sup> 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.

<sup>9</sup> 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> (Accessed on 14/07/2023)

<sup>10</sup> Investopedia., 'Corporate Governance Definition: How it Works, Principles, and Examples.' Available at <https://www.investopedia.com/terms/c/corporategovernance.asp> (Accessed on 14/07/2023)

<sup>11</sup> Ibid

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management team, and the stockholders within an organization<sup>12</sup>. It generally entails striking a balance between the needs of all of a company and its shareholders, including investors, senior management, clients, suppliers, financiers, the government, and the community<sup>13</sup>. Corporate governance covers the areas of environmental awareness, ethical behavior, corporate strategy, compensation, and risk management<sup>14</sup>. Corporate governance is thus a system of direction and control within an organization aimed at enhancing good governance practices in the organization.

The corporate governance framework within an organization is guided by several principles including the rights and equitable treatment of shareholders, promoting the role of stakeholders, transparency and disclosure and accountability of the Board of Directors<sup>15</sup>. The purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies<sup>16</sup>. Sound corporate governance can also enhance Sustainable Development<sup>17</sup>.

The paper critically explores the role of Corporate Governance in the Sustainable Development agenda. It asserts that the activities of corporations have a great effect in either promoting or hindering the attainment of Sustainable Development. The paper highlights some of the corporate governance practices that have fostered Sustainable Development while also analyzing those that have impeded its attainment. The paper argues a case for

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<sup>12</sup> Almashhadani, H & Almashhadani, M., 'Corporate Governance Science, Culture and Financial Performance.' *International Journal of Business and Management Invention*, Volume 12, Issue 4, 2023

<sup>13</sup> Ibid

<sup>14</sup> Peterdy, K., 'Corporate Governance.' Available at <https://corporatefinanceinstitute.com/resources/esg/corporate-governance/> (Accessed on 14/07/2023)

<sup>15</sup> Organisation for Economic Co-operation and Development., 'OECD Principles of Corporate Governance.' Available at <https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> (Accessed on 14/07/2023)

<sup>16</sup> Ibid

<sup>17</sup> Buckley, P 'Can Corporations Contribute Directly to Society or Only through Regulated Behaviour' *Journal of the British Academy*, 6 (sl), p. 323-374.

reconceptualizing corporate governance in order to realize Sustainable Development.

## **2.0 Corporate Governance and Sustainable Development**

The concept of Sustainable Development received global attention following the release of the Report of the World Commission on Environment and Development which defined it as development that meets the needs of the present without compromising the ability of future generations to meet their own needs<sup>18</sup>. Sustainable Development aims to maintain economic advancement and progress while protecting the long-term value of the environment<sup>19</sup>. It provides a framework for the integration of environment policies and development strategies<sup>20</sup>. The overall goal of sustainable development is the long-term stability of the economy and environment which can only be achieved through the integration and acknowledgement of economic, environmental, and social concerns throughout the decision making process<sup>21</sup>. Sustainable Development thus combines elements such as environmental protection, economic development and social concerns<sup>22</sup>. This concept has been adopted as the leading global framework for international cooperation as envisaged by the United Nations 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs)<sup>23</sup>. Sustainable Development has also been enshrined as among the national values and

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<sup>18</sup> World Commission on Environment and Development., *'Our Common Future.'* Oxford, (Oxford University Press, 1987)

<sup>19</sup> Emas. R., *'The Concept of Sustainable Development: Definition and Defining Principles.'* Available at [https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015\\_SD\\_concept\\_definiton\\_rev.pdf](https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf) (Accessed on 14/07/2023)

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Fitzmaurice. M., *'The Principle of Sustainable Development in International Development Law.'*

*International Sustainable Development Law., Vol 1*

<sup>23</sup> 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 14/07/2023)

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principles of governance in Kenya<sup>24</sup>. Sustainable Development is thus a vital concept and its realization is a shared global endeavour.

Corporate governance plays an integral role in the Sustainable Development agenda. Traditionally, corporate governance was viewed as a model designed to protect shareholder investments from misuse by opportunistic managers within the organization<sup>25</sup>. In relation to sustainability, there was widespread belief that attention to environmental impacts was part of the company's social responsibility, with purely legal or even ethical and moral implications, while such an impact was disconnected from the corporation's business model and market expectations<sup>26</sup>. However, in the recent past, corporate governance has been increasingly applied to a more extensive form of monitoring of corporate activities, including their impacts on society and the environment<sup>27</sup>. Several factors have induced corporations to rethink their traditional approach and increase investments in sustainability practices.

These factors include sensitivity towards the sustainable goals of the companies themselves, the need to adapt to the regulatory evolution, the need to increase the quality of products and simultaneously reduce production costs, the desire to improve the image and reputation of corporations in the eyes of consumers who are increasingly sensitive to environmental concerns and new market opportunities<sup>28</sup>. As a result, corporations have become aware of the growing link between green practices and success so that sustainability has broadened its boundaries from being merely related to environmental issues to now encompass the company's overall business model<sup>29</sup>.

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<sup>24</sup> Constitution of Kenya, 2010., Article 10 (2) (d), Government Printer, Nairobi

<sup>25</sup> Roberts, D. J., & Van den Steen, E., 'Shareholder Interests, Human Capital Investment and Corporate Governance. *Stanford GSB Working*. Available at <https://doi.org/10.2139/ssrn.230019> (Accessed on 14/07/2023)

<sup>26</sup> Naciti, V et al., 'Corporate Governance and Sustainability: A Review of the Existing Literature.' *Journal of Management and Governance*, 2021

<sup>27</sup> Roberts, D. J., & Van den Steen, E., 'Shareholder Interests, Human Capital Investment and Corporate Governance. *Op Cit*

<sup>28</sup> Poddar, A., Narula, S. A., & Zutshi, A., 'A study of Corporate Social Responsibility Practices of the Top Bombay Stock Exchange 500 companies in India and their Alignment with the Sustainable Development Goals.' *Corporate Social Responsibility and Environmental Management*, No. 26(6) of 2019, 1184-1205

<sup>29</sup> Ibid

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Consequently, sustainability has become an integral component of the strategies pursued by corporations and of the relationships they establish with various players in the corporate value chain<sup>30</sup>.

The definition and characteristics of Sustainable Development envisage building of a society where there is a balance between economic, environmental and social goals<sup>31</sup>. The integration of these three dimensions needs to be embraced as a condition for achieving a long-term corporate sustainability<sup>32</sup>. Indeed, corporate sustainability is seen as the ability of a corporation by its management practices and market presence to positively affect the ecosystem, the community and the economic development<sup>33</sup>. Corporate governance can foster Sustainable Development through corporate sustainability. Sustainable Development in the corporate context has been defined as the creation of sustainable organizations through integrated economic, social and ecological systems<sup>34</sup>. It entails examining a corporation's development over time, taking into account its commitment to a healthy environment, economic and social systems so that the company can be more stable and resistant both to internal and external shocks<sup>35</sup>.

The Sustainable Development Goals envisage attainment of the Sustainable Development agenda by meeting targets such as ending extreme poverty, promoting food security, promoting access to health and education, achieving gender equality, promoting access to clean water and sanitation, ensuring access to affordable and clean energy, enhancing industry, innovation and infrastructure and combating climate change<sup>36</sup>. Corporations can foster Sustainable Development at the economic, environmental and social levels.

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<sup>30</sup> Naciti. V et al., 'Corporate Governance and Sustainability: A Review of the Existing Literature.' Op Cit

<sup>31</sup> Boeva. B et al., 'Corporate Governance and the Sustainable Development.' *European Journal of Economics and Business Studies*, Volume 7, No. 1 of 2017

<sup>32</sup> Ibid

<sup>33</sup> Ibid

<sup>34</sup> Bansal, T., 'Business Sustainability.' Available at <https://journals.sagepub.com/doi/full/10.1177/1476127013520265> (Accessed on 14/07/2023)

<sup>35</sup> Ibid

<sup>36</sup> United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit



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Corporations can foster economic development through investments in areas such as energy, infrastructure, industry and the distribution of income through payment of fair wages<sup>37</sup>. They can further promote Sustainable development in the field of environment through waste reduction, pollution reduction, energy efficiency, reduction of air emissions, reduction of the consumption of hazardous and toxic materials and mitigating the frequency of environmental accidents among other measures aimed at promoting the right to a clean and healthy environment and enhancing climate change mitigation and adaption<sup>38</sup>. Social sustainability can be attained by corporations by creating employment opportunities, provide equal opportunities for all persons, fostering diversity, encouraging social contacts within and outside the corporation and promoting quality life for their employees<sup>39</sup>.

Corporations have embraced various corporate governance initiatives to promote sustainability and foster Sustainable Development including the concepts of Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG)<sup>40</sup>. CSR is the idea that a company should play a positive role in the community and consider the environmental and social impact of business decisions<sup>41</sup>. It is a form of self-regulation that reflects a business's accountability and commitment to contributing to the well-being of communities and society through various environmental and social measures<sup>42</sup>. CSR plays a vital role in a company's brand perception; attractiveness to customers, employees, and investors; talent retention; and overall business success<sup>43</sup>. Corporations often implement CSR efforts through

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<sup>37</sup> Achim. M., 'The Impact of the Quality of Corporate Governance On Sustainable Development: An Analysis Based On Development Level.' Available at <https://www.tandfonline.com/doi/epdf/10.1080/1331677X.2022.2080745?needAccess=true&role=buttn> (Accessed on 14/07/2023)

<sup>38</sup> Boeva. B et al., 'Corporate Governance and the Sustainable Development.' Op Cit

<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> BDC., 'What is Corporate Social Responsibility (CSR)?' Available at <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/corporate-social-responsibility> (Accessed on 14/07/2023)

<sup>42</sup> Reckmann. N., 'What Is Corporate Social Responsibility?' Available at <https://www.businessnewsdaily.com/4679-corporate-social-responsibility.html> (Accessed on 15/07/2023)

<sup>43</sup> Ibid

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measures such environmental initiatives, charity work, ethical labor practices and volunteer projects<sup>44</sup>. Through CSR which is a tool of corporate governance, a corporation can foster Sustainable Development by promoting environmental and social sustainability which are crucial components of the Sustainable Development agenda<sup>45</sup>.

Environmental, Social and Governance (ESG) on the other hand is a concept that seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance concerns in corporate decision making<sup>46</sup>. It entails a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company's carbon footprint and ensuring there are systems in place to ensure accountability<sup>47</sup>. ESG involves monitoring and reporting environmental concerns such as carbon emissions, water consumption and waste generation; social concerns such as employee, product and customer related data and governance concerns such as political lobbying, anticorruption initiatives and board diversity<sup>48</sup>. The concept of ESG is pertinent since Environmental, Social and Governance concerns have become a societal focal point in light of the Sustainable Development agenda<sup>49</sup>. ESG can aid in achieving Sustainable Development by integrating Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities<sup>50</sup>.

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<sup>44</sup> Ibid

<sup>45</sup> Moon. J., 'The Contribution of Corporate Social Responsibility to Sustainable Development.' Available at <https://pdfs.semanticscholar.org/8d7c/f655828a4004d2caaeedb64d9fb1335446b.pdf> (Accessed on 15/07/2023)

<sup>46</sup> 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.

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' *Business Strategy and the Environment*, No. 26 of 2017

<sup>50</sup> Li. T.T et al., 'ESG: Research Progress and Future Prospects.' *Sustainability*, No. 13 of 2021.

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Corporations have thus embraced various corporate governance tools towards achieving corporate sustainability and fostering Sustainable Development including CSR and ESG. However, despite this progress, certain bad corporate governance decisions have affected the attainment of Sustainable Development. Some corporations have been accused of accounting scandals including the use of fraudulent accounting practices to inflate corporate revenues and hide debts<sup>51</sup>. Such practices have often resulted in the collapse of certain corporations when the financial scandals were exposed<sup>52</sup>. This affects the attainment of Sustainable Development at the economic and social levels due to concerns such as loss of revenue and employment opportunities<sup>53</sup>.

Further, some corporations have been blamed of failing to adhere to the principles of sustainability reporting and the disclosure of ethical, social, and environmental risk in their business activities<sup>54</sup>. Such corporations fail to adhere to the principle of transparency in corporate governance by avoiding to comply with CSR reporting and ESG disclosures<sup>55</sup>. Where corporations fail to comply with transparency and disclosure requirements which are fundamental principles of corporate governance, they may ultimately perpetrate concerns such as environmental pollution and human rights violation thus hindering the achievement of Sustainable Development<sup>56</sup>.

Indeed, some multinational corporations have been accused of perpetrating human rights concerns such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices, land injustices against neighbouring communities and displacement of people while undertaking

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<sup>51</sup> Petra. S & Spieler. A., 'Accounting Scandals: Enron, Worldcom, and Global Crossing.' Available at <https://www.emerald.com/insight/content/doi/10.1108/978-1-78973-417-120201022/full/html> (Accessed on 15/07/2023)

<sup>52</sup> Ibid

<sup>53</sup> Achim. M., 'The Impact of the Quality of Corporate Governance On Sustainable Development: An Analysis Based On Development Level.' Op Cit

<sup>54</sup> Adams, C., 'Understanding integrated reporting: The concise guide to integrated thinking and the future of corporate reporting.' Available at <https://doi.org/10.4324/9781351275002> (Accessed on 15/07/2023)

<sup>55</sup> Ibid

<sup>56</sup> Achim. M., 'The Impact of the Quality of Corporate Governance On Sustainable Development: An Analysis Based On Development Level.' Op Cit

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investment activities<sup>57</sup>. 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 populations<sup>58</sup>. Such activities hinder the attainment of Sustainable Development and are often as a result of corporate failure to abide by good corporate governance practices such as ESG and CSR requirements<sup>59</sup>.

Finally, it has been pointed out that corporations have in certain instances failed to consider sustainable governance and corporate integrity in particular<sup>60</sup>. Sustainable Governance represents part of the ESG equation and should be understood as a prerequisite for achieving the entire spectrum of ESG goals<sup>61</sup>. Behind each breach of a company's environmental or social commitments lies ineffective corporate governance, be it inadequate anti-corruption practices, perverse incentive structures, contradictory lobbying activity, ineffective board oversight or ill-equipped leadership<sup>62</sup>. It is thus vital for companies to foster corporate integrity by embedding governance concerns and corruption risks into ESG investing frameworks in order to promote Sustainable Development<sup>63</sup>.

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<sup>57</sup> 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-rightsviolations.html> (Accessed on 15/07/2023)

<sup>58</sup> 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

<sup>59</sup> Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' Op Cit

<sup>60</sup> Onweazu. O., 'Multinational Oil Corporations Corporate Integrity Ethics and Sustainable Development in Niger Delta, Nigeria.' *Journal of Sustainable Development*; Vol. 5, No. 10; 2012

<sup>61</sup> World Economic Forum., 'Why Sustainable Governance and Corporate Integrity are Crucial for ESG' Available <https://www.weforum.org/agenda/2022/07/the-g-in-esg-3-ways-to-not-miss>

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<sup>62</sup> Ibid

<sup>63</sup> Ibid

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The foregoing discussion has demonstrated that good corporate governance practices such as corporate sustainability, CSR and ESG can foster the realization of Sustainable Development<sup>64</sup>. However, bad corporate governance practices such as poor accounting practices, failure to adhere to sustainability reporting, failure to enhance ESG and CSR requirements and negligence of sustainable governance and corporate integrity can hinder the attainment of Sustainable Development<sup>65</sup>. There is need to reconceptualize corporate governance in order to advance Sustainable Development.

### **3.0 Way Forward**

There is need to embrace sound corporate governance practices in order to achieve Sustainable Development. One way through which this can be achieved is through corporate disclosure requirements such as sustainability reporting<sup>66</sup>. Through sustainability reporting, a corporation is able to use corporate governance as tool to monitor and disclose corporate progress on aspects such as the achievement of the Sustainable Development Goals<sup>67</sup>. Various models have been adopted towards promoting sustainability reporting as a tool of corporate governance. The United Nations Global Compact (UNGC) has developed sustainability principles focusing on human rights, labour, the environment and anti-corruption and encourages participants to self-assess, prepare, and submit a progress report to the UNGC on their performance around these four topical areas<sup>68</sup>. 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 report<sup>69</sup>. Corporations can thus develop an annual ESG report discussing organisational performance around these topics in order to fulfil the requirements of the annual Communication on Progress report

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<sup>64</sup> Boeva. B et al., 'Corporate Governance and the Sustainable Development.' Op Cit

<sup>65</sup> World Economic Forum., 'Why Sustainable Governance and Corporate Integrity Are Crucial for ESG' Op Cit

<sup>66</sup> Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' *European Journal of Sustainable Development* (2022), 11, 3, 326-339

<sup>67</sup> Ibid

<sup>68</sup> United Nations Global Compact: available at <https://www.unglobalcompact.org/engagelocally/africa/kenya> (Accessed on 15/07/2023)

<sup>69</sup> Ibid

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submissions to the UNGC and ascertain their role in fostering Sustainable Development<sup>70</sup>. In addition, corporations can comply with the Carbon Disclosure Project (CDP) which allows signatory companies to provide performance data on climate change, water security and deforestation on a self-disclosure basis<sup>71</sup>. This self-reported data is then used by investors and other stakeholders to make informed data driven decisions with regards a company's environmental impacts<sup>72</sup>. Investors are thus able to select entities that demonstrate climate resilience by evidenced implementation of strategies that future proof their organisations against climate related policies and regulations<sup>73</sup>. ESG reporting can be used to collect and report data to the CDP<sup>74</sup>. Corporations can thus embrace sustainability and ESG reporting as a tool of corporate governance in order to foster Sustainable Development. However, there is need to ensure transparency and full disclosure in such reporting in order to capture the true image in relation to a corporation's role in fostering Sustainable Development<sup>75</sup>.

In addition, there is need for corporations to embrace good corporate governance practices when it comes to the Board of Directors in order to foster Sustainable Development<sup>76</sup>. It has been asserted that the size of the Board of Directors is one element of corporate governance that has influenced companies in implementing and reporting all aspects of sustainable initiatives by companies<sup>77</sup>. Thus, having a larger board might increase the monitoring

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<sup>70</sup> Ibid

<sup>71</sup> Carbon Disclosure Project, available at <https://www.cdp.net/en> (Accessed on 15/07/2023)

<sup>72</sup> Matisoff, D et al., 'Convergence in environmental reporting: assessing the Carbon Disclosure Project.' *Business Strategy and the Environment* 22.5 (2013): 285-305.'

<sup>73</sup> Ibid

<sup>74</sup> 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 15/07/2023)

<sup>75</sup> Buniamin, S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

<sup>76</sup> Ibid

<sup>77</sup> Cuadrado-Ballesteros, B et al., 'Board Structure to Enhance Social Responsibility Development: A Qualitative Comparative Analysis of US Companies.' *Corporate Social Responsibility and Environmental Management*, Volume 24 No. 6 of 2017, 524-542.

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capability, as members can offer more expertise and, thus, contribute to good board discussion<sup>78</sup>. The size of the board has a connection with corporate involvement in Sustainable Development Goals since more judicial decisions can be made due to the knowledge provided by a larger number of board members<sup>79</sup>. Further, Board Independence is an essential tool of corporate governance that can enhance effective monitoring of a corporation's activities towards fostering Sustainable Development<sup>80</sup>. Thus, more independent board members can guarantee effective monitoring process that can reduce potential opportunistic behaviour by the management of a corporation<sup>81</sup>. In addition, gender diversity in the Board of Directors is a crucial influencer of corporate policy that can enhance sustainability particularly in social and environmental issues<sup>82</sup>. It has been asserted that men and women have different cultural and social preferences and a corporation may be induced to assume greater social responsibility and promote environmental strategies such as using environmentally friendly manufacturing process that reduces the release of toxic waste and recycle activities if it had a reasonable proportion of women in the Board of Directors<sup>83</sup>. Corporations should thus embrace good corporate governance practices in respect of the Board of Directors including ensuring an appropriate size of the board, promoting board independence and promoting gender diversity in the board in order to enhance Sustainable Development.

Finally, there is need for corporations to adhere to the tenets of Sustainable Development in their business activities. Some corporations especially in the investment sphere have been accused of failing to adhere to the principles of Sustainable Development as evidenced by cases of environmental degradation

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<sup>78</sup> Ibid

<sup>79</sup> Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

<sup>80</sup> Said, R et al., 'The Relationship Between Corporate Social Responsibility Disclosure and Corporate Governance Characteristics in Malaysian Public Listed companies.' *Social Responsibility Journal*, Volume 5 No.2 of 2009, 212-226C

<sup>81</sup> Ibid

<sup>82</sup> Martinez., M. et al 'Women on Corporate Boards and Sustainable Development'. In D. C. Poff & A. C. Michalos (Eds.), *Encyclopedia of Business and Professional Ethics*. Springer 2020

<sup>83</sup> Ibid

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and human rights violation<sup>84</sup>. Therefore, it is imperative for corporations to comply with the requirements of Sustainable Development and in particular the need for environmental protection and respect for human rights<sup>85</sup>. This will enhance corporate sustainability and profitability while also fast tracking the attainment of the Sustainable Development goals<sup>86</sup>.

#### **4.0 Conclusion**

Corporate governance plays an integral role in the realization of the Sustainable Development agenda. Sound corporate governance practices such as corporate sustainability, CSR and ESG can foster the realization of Sustainable Development<sup>87</sup>. However, bad corporate governance practices such as poor accounting practices, failure to adhere to sustainability reporting, failure to enhance ESG and CSR requirements and negligence of sustainable governance and corporate integrity can hinder the attainment of Sustainable Development<sup>88</sup>. There is need to rethink corporate governance in order to realize Sustainable Development. This can be achieved through embracing sustainability and ESG reporting, adopting good corporate governance practices in respect of the Board of Directors and adhering to the tenets of Sustainable Development<sup>89</sup>. Reconceptualizing corporate governance for Sustainable Development is a cardinal idea that needs to be embraced across the globe.

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<sup>84</sup> Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' Op Cit

<sup>85</sup> Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Op Cit

<sup>86</sup> Boeva. B et al., 'Corporate Governance and the Sustainable Development.' Op Cit

<sup>87</sup> Ibid

<sup>88</sup> World Economic Forum., 'Why Sustainable Governance and Corporate Integrity are Crucial for ESG' Op Cit

<sup>89</sup> Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit



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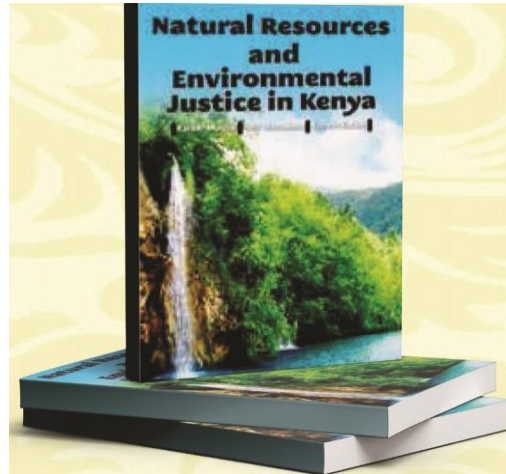
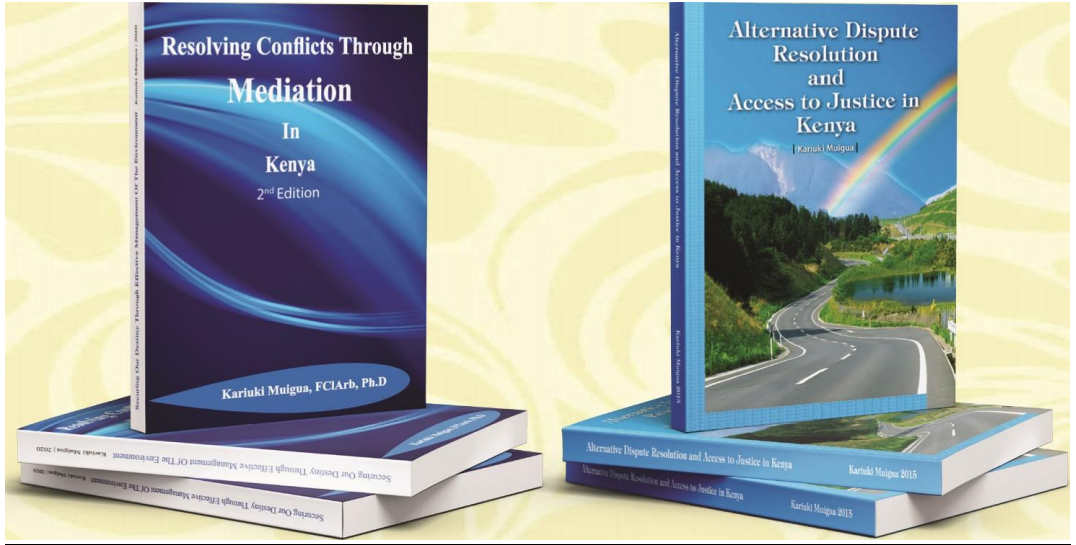
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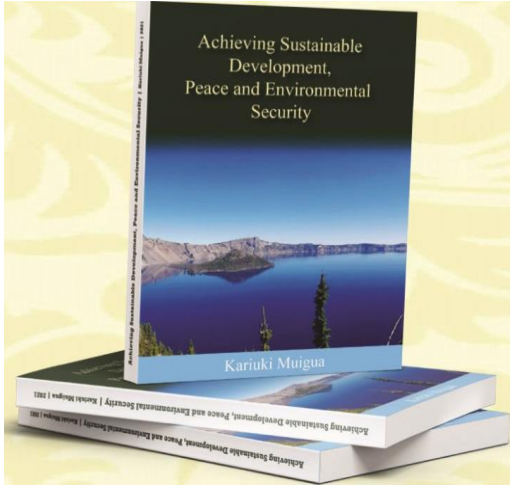
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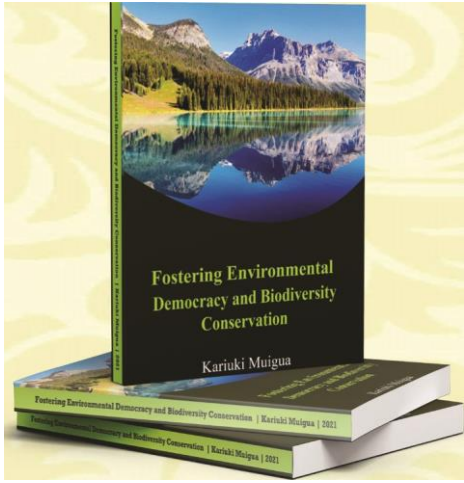
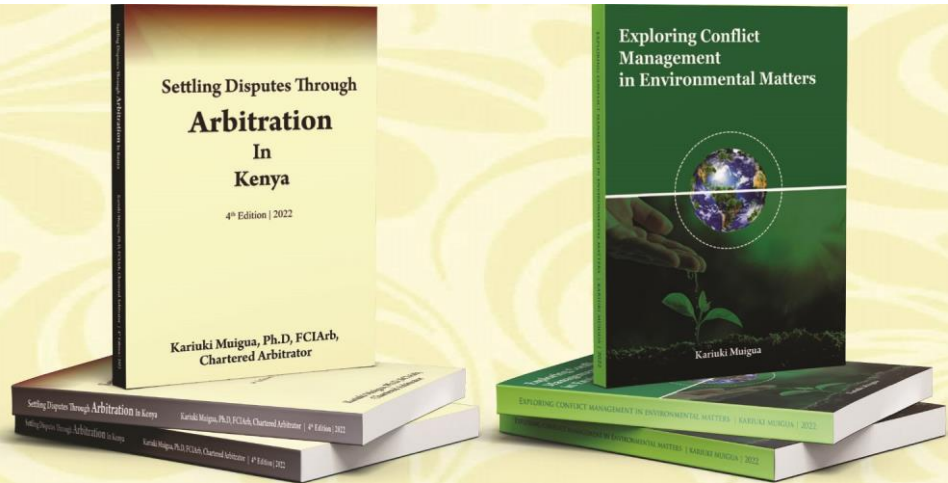
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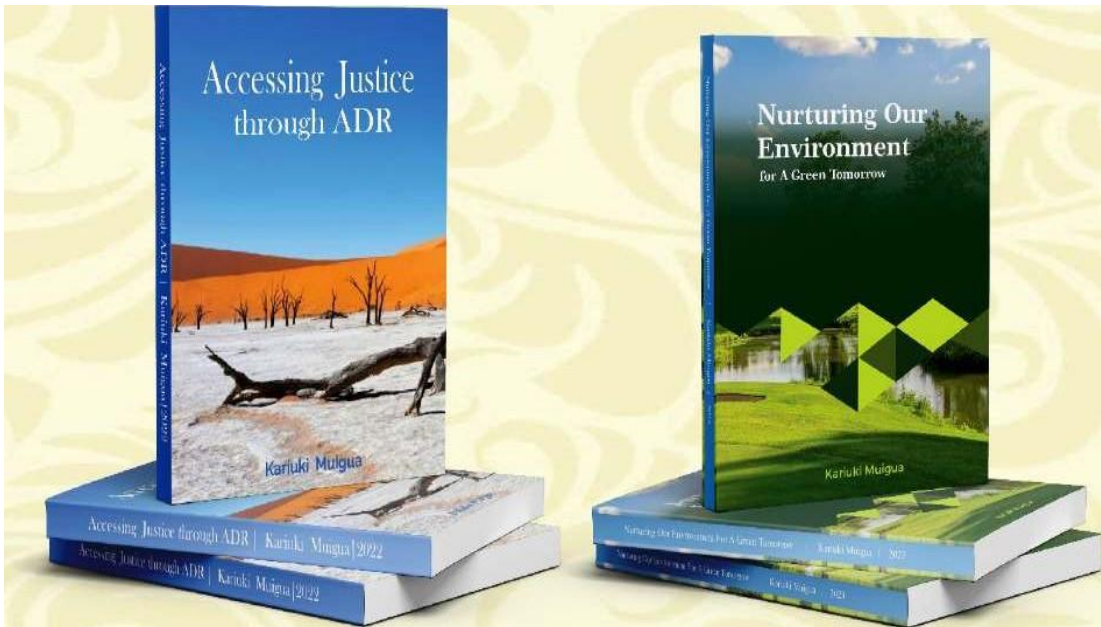
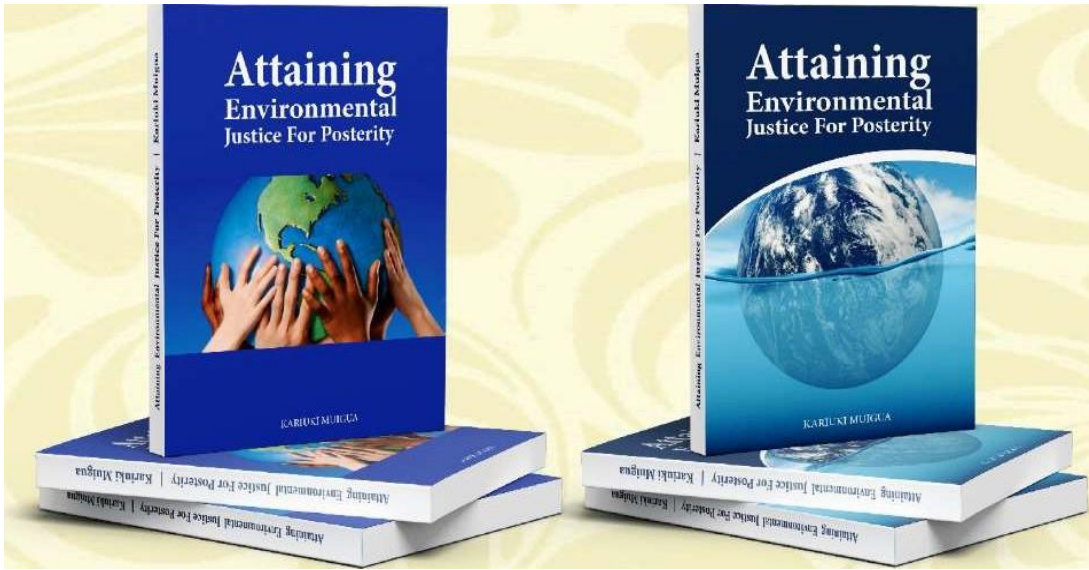
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**Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development** is a book that contains papers which have been published in peer reviewed journals and books. Their compilation in one volume makes it easier for the reader to access the content related to the theme of Embracing ESG tenets for Sustainable Development.

The discourse also covers ESG disputes and how best they can be handled. These include disputes involving Climate Change, compensation for environmental damage, human rights, benefit sharing, labour rights, transparency, accountability, reporting and disclosure.

The main theme that cuts across this book is Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development.

#### Author's Bio-data

Hon. 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 (CASFLAP). He also teaches at the Wangari Maathai Institute for Peace and Environmental Studies.

He is a Member of the Permanent Court of Arbitration (PCA) nominated by the Republic of Kenya and a Member of the National Environment Tribunal. 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 awarded the Outstanding Mentor Award by his mentees in recognition of his guidance, care and support. 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.

Hon. 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 (I.CIA) 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 (I.CIA), 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.

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