

Strengthening Environmental Rule of Law for Sustainability

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Abstract

This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability

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1.0 Introduction

The rule of law has been defined as a phenomenon that comprises a number of principles of a formal and procedural character, addressing the way in which a society is governed¹. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society². The procedural principles on the other hand concern the processes by which these norms are administered, and the institutions like courts and an independent judiciary that their administration requires³. On some accounts, the rule of law also comprises certain substantive ideals like a presumption of liberty and respect for private property rights⁴. The hallmarks of respect for the rule of law in a society include separation of powers of the executive, legislature, and judiciary; regular, free, and fair elections; an independent and impartial judiciary; free and independent media institutions; and equality of the people before the law⁵.

The United Nations defines the rule of law as 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 standards⁶. According to the United Nations, the rule of law requires measures to ensure adherence to the principles of supremacy of the 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

¹ Waldron. J., 'The Rule of Law.' Available at <https://plato.stanford.edu/Entries/rule-of-law/> (Accessed on 12/09/2023)

² Ibid

³ Ibid

⁴ Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Available at <http://kmco.co.ke/wp-content/uploads/2023/09/Rule-of-Law-Approach-for-Inclusive-Participation-in-Environmental-Social-and-Governance-ESG-Accountability-Mechanisms-for-Climate-Resilient-Responses-1.pdf> (Accessed on 12/09/2023)

⁵ International Commission of Jurists., 'Democratic Governance & Rule of Law.' Available at <https://icj-kenya.org/what-we-do/democratic-governance-rule-of-law/> (Accessed on 12/09/2023)

⁶ United Nations., 'What is the Rule of Law.' Available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (Accessed on 12/09/2023)

procedural and legal transparency⁷. The rule of law therefore essentially means that the law and regulation matters and that legal rights will have the backing of the state⁸. In addition, the rule of law infers that the state itself is constrained by law and cannot act unfairly or arbitrarily in relation to its own citizens and businesses⁹.

The rule of law is foundational to resilient democratic societies¹⁰. It has further been asserted that the rule of law is an enabler of justice and development¹¹. According to the International Development Law Organization (IDLO), the rule of law is inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable¹². The IDLO further points out that the rule of law is crucial for the viability of communities and nations, and for the environment, that sustains them¹³. The importance of the rule of law is also recognized under the 2030 Agenda for Sustainable Development at its Sustainable Development Goals (SDGs)¹⁴. SDGs 16 and 16.3 seeks to promote the rule of law at the national and international levels and ensure equal access to justice for all¹⁵.

According to the United Nations Environment Programme (UNEP), the rule of law is essential in all sectors of governance including the environment¹⁶. Consequently, the idea

⁷ Ibid

⁸ Lee, P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Available at https://binghamcentre.biicl.org/documents/155_rule_of_law_and_investor_approaches_to_esg.pdf (Accessed on 12/09/2023)

⁹ Ibid

¹⁰ United States Agency for International Development., 'Democracy, Human Rights and Governance.' Available at <https://www.usaid.gov/democracy/rule-law> (Accessed on 12/09/2023)

¹¹ International Development Law Organization (IDLO)., 'Rule of Law.' Available at <https://www.idlo.int/what-we-do/rule-law> (Accessed on 12/09/2023)

¹² Ibid

¹³ Ibid

¹⁴ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 12/09/2023)

¹⁵ Ibid

¹⁶ United Nations Environment Programme., 'Promoting Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> (Accessed on 12/09/2023)

of environmental rule of law has emerged¹⁷. This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability.

2.0 Defining Environmental Rule of Law

Environmental law is a collective term encompassing all aspects of the law that provide protection to the environment¹⁸. It entails a set of regulatory regimes and environmental legal principles which focus on the management of specific natural resources, such as land, wildlife and biodiversity, forests, minerals, water, fisheries and coastal and marine resources¹⁹. It has been observed that if human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet²⁰. Environmental rule of law offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals²¹.

Environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically

¹⁷ Ibid

¹⁸ Conserve Energy Future., 'What is Environmental Law: Importance and Components.' Available at <https://www.conserve-energy-future.com/environmental-law-and-its-components.php#:~:text=The%20two%20basic%20factors%20that,preserve%20and%20protect%20the%20environment> (Accessed on 12/09/2023)

¹⁹ Ibid

²⁰ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Available at https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450 (Accessed on 12/09/2023)

²¹ Ibid

Sustainable Development in the rule of law²². This concept integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance²³. It highlights environmental sustainability by connecting it with fundamental rights and obligations²⁴. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations²⁵. Environmental rule of law therefore refers to an ideal where environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet²⁶.

According to the International Union for Conservation of Nature (IUCN), the concept of environmental rule of law is founded upon key elements of governance including development, enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment; measures to ensure effective compliance with laws, regulations, and policies, including adequate criminal, civil, and administrative enforcement, liability for environmental damage, and mechanisms for timely, impartial, and independent dispute resolution; effective rules on equal access to information, public participation in decision-making, and access to justice; environmental auditing and reporting, together with other effective accountability, transparency, ethics, integrity and anti-corruption mechanisms; and use

²² International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Available at <http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091064.pdf> (Accessed on 12/09/2023)

²³ United Nations Environment Programme., 'Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> 0#:~:text=Environmental%20rule%20of%20law%20is,with%20fundamental%20rights%20and%20obligations (Accessed on 12/09/2023)

²⁴ Ibid

²⁵ Ibid

²⁶ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

of best-available scientific knowledge²⁷. It has been observed that despite most countries having established, to varying degrees, environmental laws and institutions to foster environmental governance, there is a growing recognition that a considerable implementation gap exists in both developed and developing nations between the requirements of environmental laws and their implementation and enforcement²⁸. UNEP in its global assessment of environmental rule of law finds weak enforcement to be a global trend that is exacerbating environmental threats, despite prolific growth in environmental laws and agencies worldwide over the past few decades²⁹. The goal of environmental rule of law is to bridge this gap and foster the implementation and enforcement of environmental laws³⁰.

IUCN posits that without the environmental rule of law and the enforcement of legal rights and obligations, environmental governance, conservation, and protection may be arbitrary, subjective, and unpredictable³¹. Therefore, environmental rule of law and robust institutions are essential to respond to increasing environmental pressures that threaten the ecological integrity of the Earth, in a way that respects fundamental rights and principles of justice and fairness³². Environmental rule of law is therefore an essential tool of environmental governance³³.

Environmental rule of law is central to Sustainable Development³⁴. The concept of Sustainable Development seeks to foster development that meets the needs of the present

²⁷ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

²⁸ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

²⁹ United Nations Environment Programme., 'Dramatic Growth in Laws to Protect Environment, But Widespread Failure to Enforce, Finds Report.' Available at https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450 (Accessed on 12/09/2023)

³⁰ Ibid

³¹ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

³² Ibid

³³ Muigua. K., 'Revisiting the Role of Law in Environmental Governance in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/06/Revisiting-the-Role-of-Law-in-Environmental-Governance-in-Kenya-Kariuki-Muigua-June-2019.pdf> (Accessed on 12/09/2023)

³⁴ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

without compromising the ability of future generations to meet their own needs³⁵. It combines elements such as environmental protection, economic development and social concerns³⁶. Environmental rule of law provides an essential platform underpinning the four pillars of Sustainable Development – economic, social, environmental, and peace³⁷. It seeks to integrate the fundamental principles of environmental law in environmental governance in order to realize Sustainable Development³⁸. These principles include the principles of intergenerational and intragenerational equity, the polluter-pays principle, the precautionary principle, the principle of public participation and the principle of international cooperation in the management of shared environmental resources³⁹. Environmental rule of law is thus vital in the attainment of the Sustainable Development agenda and the SDGs. UNEP asserts that the rule of law in environmental matters is essential for equity in terms of the advancement of the SDGs, the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights⁴⁰.

It has been pointed out that without environmental rule of law, development cannot be sustainable⁴¹. However, the presence of environmental rule of law ensures that well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged public lead to a culture of compliance that embraces environmental and social values⁴². Strengthening environmental rule of law is thus vital in protecting the environmental, social, and cultural values and to achieving

³⁵ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

³⁶ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

³⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

³⁸ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

³⁹ Ibid

⁴⁰ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

⁴¹ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

⁴² Ibid

ecologically Sustainable Development⁴³. It is therefore imperative that environmental rule of law should serve as the legal foundation for promoting environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, regional, and global levels⁴⁴.

The United Nations observes that environmental law is a foundation for environmental sustainability and the full realisation of its objectives is ever more urgent in light of growing environmental pressures⁴⁵. The world is facing increasing environmental problems including climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, which contribute to poverty and to growing social inequalities⁴⁶. Conflicts over natural resources and environmental crimes are further intensifying these problems thus hindering sustainability⁴⁷. Environmental rule of law is vital in addressing these challenges by fostering sound environmental governance and realization of its principles including Environmental Justice and Environmental Democracy⁴⁸. Environmental Justice means the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making⁴⁹. It also refers to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and

⁴³ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

⁴⁴ Ibid

⁴⁵ United Nations., 'Environmental Law.' Available at <https://www.un.org/ruleoflaw/thematic-areas/land-property-environment/environmental-law/> (Accessed on 12/09/2023)

⁴⁶ Earth. Org., '15 Biggest Environmental Problems of 2023.' Available at <https://earth.org/the-biggest-environmental-problems-of-our-lifetime/#> (Accessed on 12/09/2023)

⁴⁷ Ibid

⁴⁸ Muigua. K, Wamukoya. D, & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

⁴⁹ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 12/09/2023)

policies⁵⁰. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment⁵¹. The concept of Environmental Democracy focuses on how decisions are made, with a particular emphasis on the need for citizens, interest groups, and communities generally, to participate and have their voices heard⁵². It enshrines principles such as inclusivity, representativity, accountability, efficiency, and effectiveness, as well as social equity, justice and good governance⁵³. Environmental rule of law seeks to foster these principles by enhancing access to information, public participation, and access to justice and effective remedies in environmental matters⁵⁴. Environmental rule of law is therefore pertinent in fostering sound environmental governance by ensuring that the environment and natural resources are managed sustainably, transparently, and on the basis of the rule of law towards Sustainable Development, peace and justice⁵⁵. It is therefore vital to strengthen environmental rule of law for sustainability.

⁵⁰ United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice> (Accessed on 12/09/2023)

⁵¹ Ibid

⁵² Muigua. K., 'Realising Environmental Democracy in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf> (Accessed on 12/09/2023)

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

3.0 Global Trends in Environmental Rule of Law: Prospects and Challenges

The importance of environmental rule of law received global recognition during the first world conference on the environment being the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden⁵⁶. Participants at the conference adopted a series of principles for sound management of the environment including the *Stockholm Declaration and Action Plan for the Human Environment* and several resolutions⁵⁷. The Stockholm Declaration provides that the protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world and it is the urgent desire of the people of the whole world and the duty of all Governments⁵⁸. The Declaration stipulates several principles that are vital in advancing environmental rule of law including the need to protect and improve the environment for present and future generations, careful planning and management of natural resources, halting and preventing environmental pollution, adoption of environmental laws and policies and adopt an integrated and the need to adopt a co-ordinated approach in development planning so as to ensure that development is compatible with the need to protect and improve environment⁵⁹. The Stockholm Declaration was an important milestone for the development of environmental rule of law across the globe since it was the first global document outlining the general principles for the management of natural resources and the environment⁶⁰.

Environmental rule of law was further enhanced following the United Nations Conference on Environment and Development also known as the 'Earth Summit', held

⁵⁶ United Nations., 'United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm.' Available at <https://www.un.org/en/conferences/environment/stockholm1972> (Accessed on 13/09/2023)

⁵⁷ Ibid

⁵⁸ United Nations Environment Programme., 'Stockholm Declaration.' Available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf> (Accessed on 13/09/2023)

⁵⁹ Ibid

⁶⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

in Rio de Janeiro, Brazil, from 3-14 June 1992⁶¹. The Earth Summit concluded that the concept of Sustainable Development was an attainable goal for all the people of the world, regardless of whether they were at the local, national, regional or international level⁶². It also recognized that integrating and balancing economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet and that such an integrated approach is possible⁶³. One of the major results of the Earth Summit was the adoption of *Agenda 21*⁶⁴ a daring program of action calling for new strategies to invest in the future to achieve overall sustainable development in the 21st century.

Agenda 21 affirms that integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future⁶⁵. It calls for international cooperation to accelerate Sustainable Development in developing countries and related domestic policies⁶⁶. Agenda 21 further acknowledges the importance of the rule of law in sustainability and provides that laws and regulations suited to country -specific conditions are among the most important instruments for transforming environment and development policies into action, not only through "command and control" methods, but also as a normative framework for economic planning and market instruments⁶⁷. It further stipulates that it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon

⁶¹ United Nations., 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.' Available at <https://www.un.org/en/conferences/environment/rio1992> (Accessed on 13/09/2023)

⁶² Ibid

⁶³ Ibid

⁶⁴ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992., 'Agenda 21.' Available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*9uipp7*_ga*MjA2NDk2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*MTY5NDU5NjE3MS41NS4xLjE2OTQ1OTgzODUuM C4wLjA. (Accessed on 13/09/2023)

⁶⁵ Ibid, Preamble

⁶⁶ Ibid, Chapter 2

⁶⁷ Ibid, Chapter 8.13

sound social, ecological, economic and scientific principles in order to enhance sustainability⁶⁸. It also recognizes the importance of judicial and administrative procedures in advancing environmental rule of law and calls upon Governments and legislators, with the support, where appropriate, of competent international organizations, to establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest⁶⁹. Agenda 21 is therefore vital in fostering environmental rule of law by calling upon countries to develop integrated strategies to maximize compliance with their laws and regulations relating to Sustainable Development. These strategies include enactment of enforceable, effective laws, regulations and standards that are based on sound economic, social and environmental principles and appropriate risk assessment, incorporating sanctions designed to punish violations, obtain redress and deter future violations; establishing mechanisms for promoting compliance; strengthening institutional capacity for collecting compliance data, regularly reviewing compliance, detecting violations, establishing enforcement priorities, undertaking effective enforcement, and conducting periodic evaluations of the effectiveness of compliance and enforcement programmes; fostering mechanisms for appropriate involvement of individuals and groups in the development and enforcement of laws and regulations on environment and development and national monitoring of legal follow-up to international instruments⁷⁰.

Another important legal instrument that was adopted during the Earth Summit which is vital in advancing environmental rule of law is the *Rio Declaration on Environment and Development*⁷¹. The Declaration sought to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of

⁶⁸ Ibid, Chapter 8.14

⁶⁹ Ibid, Chapter 8.18

⁷⁰ Ibid, Chapter 8.21

⁷¹ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

achieving Sustainable Development⁷². The Declaration stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a healthy and productive life in harmony with nature⁷³. It further states that in order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it⁷⁴. The Rio Declaration upholds key environmental principles that are vital in strengthening environmental rule of law including the principle of inter and intra generational equity, the principle of public participation, the precautionary principle and the principle of international cooperation⁷⁵. It also recognizes the role of women, youth and indigenous people and local communities in environmental management and development⁷⁶.

The Earth Summit was thus an important milestone in advancing environmental rule of law. It has been pointed out that following the 1992 Rio Earth Summit, countries made a concerted effort to enact environmental laws, build environment ministries and agencies, and enshrine environment-related rights and protections in their national constitutions⁷⁷. At the global level, the right to a clean, healthy and sustainable environment has been recognized by the United Nations General Assembly as a fundamental human right⁷⁸. The resolution by the United Nations General Assembly further affirms the importance of the right to a clean, healthy and sustainable environment for the enjoyment of all human rights⁷⁹. The declaration by the United Nations General Assembly demonstrates global acceptance of the right to a clean, healthy and sustainable environment as a human

⁷² Ibid, Principle 2

⁷³ Ibid, Principle 1

⁷⁴ Ibid, Principle 4

⁷⁵ Ibid

⁷⁶ Ibid, Principles 20, 21 and 22

⁷⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

⁷⁸ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.'

⁷⁹ Ibid

right and could stimulate global efforts towards attaining this right and strengthening environmental rule of law⁸⁰.

In addition, there has been progress towards fostering environmental rule of law at the global level through the adoption of treaties, conventions and other legal and regulatory instruments geared towards promoting environmental sustainability and Sustainable Development, in general⁸¹. Some of the key instruments include the *Ramsar Convention*⁸² whose purpose is to foster the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving Sustainable Development throughout the world⁸³; the *Convention on Biological Diversity*⁸⁴ whose objective is to promote the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources⁸⁵; the *United Nations Convention on the Law of the Sea*⁸⁶ that seeks to promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment; the *United Nations Framework Convention on Climate Change*⁸⁷ and the *Paris Agreement*⁸⁸ which are geared towards combating climate change. Ensuring compliance with these among other international instruments is vital in promoting international environmental law as a tool for addressing

⁸⁰ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Available at <http://kmco.co.ke/wp-content/uploads/2023/06/Realizing-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment.pdf> (Accessed on 13/09/2023)

⁸¹ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁸² Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972)

⁸³ Ibid

⁸⁴ 1992 Convention on Biological Diversity, (1993) ATS 32/ 1760 UNTS 79/ 31 ILM 818 (1992)

⁸⁵ Ibid, Article 1

⁸⁶ United Nations Convention on the Law of the Sea., Available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Accessed on 13/09/2023)

⁸⁷ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 13/09/2023)

⁸⁸ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 13/09/2023)

specific environmental threats and for integrating long-term environmental protection into the global economy⁸⁹.

The *2030 Agenda for Sustainable Development*⁹⁰ and its 17 SDGs is also vital in fostering environmental rule of law. It is a plan of action for people, planet and prosperity⁹¹. It envisages the realization of Sustainable Development through tackling global environmental problems including water scarcity, lack of access to affordable, reliable, sustainable and modern energy and climate change through a combination of measures including enhancing national laws, policies and planning⁹². Achieving the 2030 Agenda for Sustainable Development is therefore vital in enhancing sustainability through environmental rule of law among other measures.

Further, the International Court of Justice (ICJ) has also played a vital role in enhancing environmental rule of law at the global level by providing an avenue for realizing the right of access to justice and legal remedies in environmental matters⁹³. In the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*⁹⁴, ICJ emphasized the need for the two countries to continue their cooperation and devise the necessary means to promote the equitable utilization of the river, while protecting its environment. The Court also recently rendered its first decision on environmental damage and compensation in the case *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*⁹⁵. Such decisions are pertinent in strengthening environmental rule of law at the global level.

⁸⁹ Hunter. D., 'International Treaties and Principles Protect the Environment and Guard against Climate Change.' *Insights on Law and Society*., Volume 19, Issue 1 (2021)

⁹⁰ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Op Cit

⁹¹ Ibid

⁹² Ibid

⁹³ The ICJ and Environmental Case Law., Available at <https://www.uio.no/studier/emner/jus/jus/IUS5520/h15/undervisningsmateriale/icj-and-international-environmental-law.pdf> (Accessed on 13/06/2023)

⁹⁴ International Court of Justice., 'Pulp Mills on the River Uruguay (Argentina v. Uruguay).' Available at <https://www.icj-cij.org/case/135> (Accessed on 13/09/2023)

⁹⁵ International Court of Justice., 'Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua).' Available at <https://www.icj-cij.org/case/150> (Accessed on 13/09/2023)

Environmental rule of law has also been fostered in Africa through regional environmental agreements. It has been argued that a regional approach to environmental governance through regional environmental agreements has an advantage over global agreements since there is greater similarity of interests, norms, perceptions and values at the regional level which enhances international cooperation⁹⁶. In Africa, these instruments include the *African Convention on the Conservation of Nature and Natural Resources*⁹⁷ which seeks to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable policies and programmes⁹⁸. Further instruments include the *Bamako Convention*⁹⁹ that is aimed at preventing environmental pollution by hazardous wastes by prohibiting the import into Africa of any hazardous (including radioactive) waste and the *Treaty for the Establishment of the East African Community*¹⁰⁰ which provides for co-operation in environment and natural resources and calls upon partner states to take joint efforts to cooperate in the efficient management of natural resources with key priorities to sectors such as climate change adaptation and mitigation, natural resource management and biodiversity conservation, disaster reduction and management, and pollution control and waste management¹⁰¹.

The African Court of Justice and Human Rights and the African Commission on Human and Peoples' Rights which are judicial bodies established pursuant to the African Charter on Human and People's Rights have also played a pivotal role in fostering environmental

⁹⁶ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁹⁷ Africa Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001, UNTS 3.

⁹⁸ Ibid, Article 1

⁹⁹ Africa Union., 'Bamako Convention On The Ban Of The Import Into Africa And The Control Of TransBoundary Movement And Management Of Hazardous Wastes Within Africa, 1991.' Available at <https://www.informea.org/en/treaties/bamako-convention/text> (Accessed on 13/09/2023)

¹⁰⁰ East African Community, *The Treaty for the Establishment of the East African Community*, Available at https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf (Accessed on 13/09/2023)

¹⁰¹ Ibid

rule of law in Africa through some of their decisions¹⁰². In the Endorois Case, the African Commission on Human and People's Rights upheld the right of indigenous communities to utilize natural resources including ancestral land¹⁰³. This decision is integral in enhancing environmental rule of law by recognizing the rights of indigenous people to property, to culture, to the free disposition of natural resources, and to development¹⁰⁴.

At the national level, the Constitution of Kenya recognizes the right to a clean and healthy environment as a fundamental human right¹⁰⁵. The Constitution further stipulates several obligations by the state in respect of the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits, the need to encourage public participation in the management, protection and conservation of the environment, the obligation to protect genetic resources and biological diversity and the obligation to eliminate processes and activities that are likely to endanger the environment¹⁰⁶. Constitutional recognition of environmental related rights is one the key ways of fostering environmental rule of law.¹⁰⁷ In addition, the *Environmental Management and Co-ordination Act*¹⁰⁸ establishes the legal and institutional framework for the management of the environment in Kenya. The Act upholds the right of every Kenyan to a clean and healthy environment and sets out various measures towards upholding this right including environmental planning, protection and conservation of the environment, Environmental Impact Assessment, Environmental Audit and Monitoring, environmental restoration and conservation orders and enforcement of environmental

¹⁰² Muigua. K., 'African Court of Justice and Human Rights: Emerging Jurisprudence.' Available at <http://kmco.co.ke/wp-content/uploads/2020/06/African-Court-on-Human-and-Peoples-Rights-Emerging-Jurisprudence-Kariuki-Muigua-June-2020.pdf> (Accessed on 14/09/2023)

¹⁰³ Claridge. L., 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois.' Available at <https://www.refworld.org/pdfid/4ca571e42.pdf> (Accessed on 14/09/2023)

¹⁰⁴ Ibid

¹⁰⁵ Constitution of Kenya, 2010., Article 42., Government Printer, Nairobi

¹⁰⁶ Ibid, Article 69

¹⁰⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁰⁸ Environmental Management and Co-ordination Act., No. 8 of 1999, Government Printer, Nairobi

rights through courts and tribunals¹⁰⁹. The Act further establishes the National Environment Management Authority which has the mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment¹¹⁰.

Courts and tribunals are also integral enhancing environmental rule of law and fostering environmental justice in Kenya¹¹¹. The Constitution of Kenya also recognizes the role of litigation in enforcement of environmental rights¹¹². It allows a person alleging the denial, infringement or violation or of the right to a clean and healthy environment to apply to a court for redress in addition to any other legal remedies that are available¹¹³. The Environmental Management and Co-ordination Act further sets out the role of the Environment and Land Court and the National Environment Tribunal in fostering the right to a clean and healthy environment in Kenya¹¹⁴. Litigation has fostered environmental rule of law in Kenya through decisions that have emanated from the Environment and Land Court, the National Environment Tribunal and other courts and judicial bodies¹¹⁵. Through such decisions, judicial bodies have pronounced themselves on several environmental matters including Sustainable Development, public participation, access to information, climate change, pollution and compensation¹¹⁶.

¹⁰⁹ Ibid

¹¹⁰ Ibid, S 7 & 9.

¹¹¹ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-inSafeguardingEnvironmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-> (Accessed on 14/09/2023)

¹¹² Constitution of Kenya, 2010., Article 70

¹¹³ Ibid

¹¹⁴ Ibid, S 3 & S 125

¹¹⁵ See for example the cases of Peter K. Waweru -vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR; Friends of Lake Turkana Trust vs Attorney General & 2 others., ELC Suit No. 825 of 2012, (2014) eKLR; KM & 9 others v Attorney General & 7 others, Petition No. 1 of 2016 (2020) eKLR; National Environment Management Authority -vs- Kelvin Musyoka & Others⁵⁹, Mombasa Civil Appeal No. E004 of 2020; Mohamed Ali Baadi and others -vs- Attorney General & 11 Others, Petition No. 22 of 2012 (2018) eKLR

¹¹⁶ Ibid

From the foregoing, it emerges that there have been attempts towards promoting environmental rule of law at the global, regional and national level. However, it has been observed that while environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective¹¹⁷. In addition, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates)¹¹⁸. As a result, it has been argued that there is no culture of environmental compliance in most societies¹¹⁹. This often hinders sound environmental governance and sustainability¹²⁰. There is need to address these challenges and foster a culture of compliance and enforcement of environmental laws in order to strengthen environmental rule of law for sustainability.

4.0 Way Forward: Strengthening Environmental Rule of Law for Sustainability

It is imperative to strengthen the rule of law in general in order to enhance environment sustainability and social justice¹²¹. It has been argued that the rule of law is an element not only for economic growth, but also for environment sustainability and social justice¹²². One of the key ways of strengthening environmental rule of law is by enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment¹²³.

¹¹⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

¹²¹ Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355016 (Accessed on 14/09/2023)

¹²² Ibid

¹²³ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

In addition, it is vital to embrace civic engagement in order to strengthen environmental rule of law. It has been rightly pointed out that environmental rule of law requires an approach that involves everyone including the civil society¹²⁴. The effective engagement of civil society results in more informed decision making by government, more responsible environmental actions by companies, more assistance in environmental management by the public, and more effective environmental law¹²⁵. Civic engagement can be fostered through public participation and access to information¹²⁶. Public participation is believed to be important in bridging the gap between the government, civil society, private sector and the general public, building a common understanding about the local situation, priorities and programmes as it encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making¹²⁷. Further, public participation can improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions¹²⁸. In addition, public participation can also improve policy implementation by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict¹²⁹. Citizen involvement in environmental decision making has been associated with several benefits which include: information and ideas on public issues; public support for planning decisions; avoidance of protracted conflicts and costly delays; reservoir of good will which can carry over to future decisions; and spirit of cooperation and trust between decision makers and the public¹³⁰. The Importance of public participation in

¹²⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDSMEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf> (Accessed on 14/09/2023)

¹²⁸ Cerezo. L, & Garcia. G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at <https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF> (Accessed on 14/09/2023)

¹²⁹ Ibid

¹³⁰ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Op Cit

environmental decision making is upheld under Principe 10 of the *Rio Declaration on Environment and Development* which stipulates that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (emphasis added)¹³¹.

It is thus pertinent to foster effective public participation and access to information in order to strengthen environmental rule of law. It is also vital to uphold the rights and foster the participation of indigenous people and communities who play an important role in managing the environment and natural resources through traditional ecological knowledge¹³². Local communities possess unique and valuable contextual knowledge of natural resources and have a vested interest in ensuring the sustainable use of land and resources¹³³. It is therefore desirable to uphold indigenous peoples' full participation in environmental governance in order to strengthen environmental rule of law.

In addition, environmental rule of law can be strengthened by embracing a rights-based approach to environmental governance¹³⁴. A rights-based approach to environmental protection is one that is normatively based on rights and directed toward protecting those

¹³¹ Rio Declaration on Environment and Development, Principle 10

¹³² United Nations., 'Indigenous People and the Environment.' Available at <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html#:~:text=The%20rights%20to%20lands%2C%20territories,of%20their%20traditional%20knowledge%20systems> (Accessed on 14/09/2023)

¹³³ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Available at https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_paper_-_climate_action_-_final.pdf (Accessed on 14/09/2023)

¹³⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

rights¹³⁵. This approach differs from regulatory approaches where environmental statutes set forth certain requirements and prohibitions relating to the environment¹³⁶. It has been argued that taking a rights-based approach to improving environmental rule of law provides a strong impetus and means for implementing and enforcing environmental protections¹³⁷. There has been progress towards realizing this goal through the recognition of the right to a clean, healthy and sustainable environment as a human right¹³⁸. This approach provides an impetus for realizing the right to a clean, healthy and sustainable environment and other human rights towards attainment of the Sustainable Development agenda¹³⁹.

There is also need to enhance access to justice in order to strengthen environmental rule of law. Courts and tribunals play a pivotal role in enhancing environmental rule of law and fostering environmental justice¹⁴⁰. It has been observed that countries have reinforced and publicized the linkages between human rights and the environment, which has elevated the normative importance of environmental law and empowered courts and enforcement agencies to enforce environmental requirements¹⁴¹. It is thus vital to enhance access to justice by addressing barriers such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow which hinder effective access to justice¹⁴². It is also crucial to enhance practices such as public interest litigation in order to enhance access to justice in environmental matters¹⁴³.

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Op Cit

¹³⁹ Ibid

¹⁴⁰ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

¹⁴¹ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁴² 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

¹⁴³ United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at

Capacity building is also vital in strengthening environmental rule of law. It is therefore critical to create strong environmental agencies and continuously strengthen their capacity in order to enhance their effectiveness in environmental governance¹⁴⁴. It is also vital to adequately build capacity for judges, staff and ADR practitioners in environmental law in order to ensure that justice institutions, both formal and informal have the capacity to foster sound environmental governance¹⁴⁵. Further, it is essential to foster public awareness and education on environmental laws and regulations in order to promote compliance and enforcement of such laws¹⁴⁶.

Finally, there is need to move beyond the law in order to enhance sound environmental governance. One of the ways through which these can be achieved is by embracing the concept of community-based natural resource management through organized community legal action or through Alternative Dispute Resolution and traditional justice systems¹⁴⁷. Further, the concept of Environmental, Social and Governance (ESG) plays a fundamental role in environmental governance by incorporating Environmental, Social and Governance matters in corporate decision making in order to foster sustainability¹⁴⁸. It is thus vital for organizations to embrace ESG in order to achieve sustainable, responsible and ethical investments towards sustainability¹⁴⁹. Environmental ethics and morals should also be embraced in environmental governance¹⁵⁰. These ideas recognize the intrinsic value of nature and the responsibility of humans to act in accordance with

https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf
(Accessed on 14/09/2023)

¹⁴⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁴⁵ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit

¹⁴⁶ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁴⁷ Muigua. K, Wamukoya. D, & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

¹⁴⁸ 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.

¹⁴⁹ Ibid

¹⁵⁰ Minter. B., 'Environmental Ethics.' Available at

<https://www.nature.com/scitable/knowledge/environmental-ethics-96467512/#:~:text=Environmental%20ethics%20is%20a%20branch,sustain%20biodiversity%20and%20ecological%20systems>. (Accessed on 14/09/2023)

ethical and moral principles towards environmental protection¹⁵¹. They envisage the moral and ethical obligations of human beings to protect and preserve the environment¹⁵². It is also ideal to embrace science and technology which play an important role in environmental governance in areas such sustainable waste management, climate change mitigation, sustainable agricultural practices and adoption of green and clean technologies¹⁵³.

Through the measures discussed above among others, environmental rule of law will be strengthened towards sustainability.

5.0 Conclusion

Environmental rule of law plays an important role in environmental governance. It offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals¹⁵⁴. There has been global progress towards promoting environmental rule of law through the enactment of environmental laws, establishment of environment ministries and agencies, and enshrining environment-related rights and protections in national constitutions¹⁵⁵. However, progress towards realizing environmental rule of law has often been thwarted by challenges of implementation and enforcement of environmental laws¹⁵⁶. This often hinders sound environmental governance and sustainability¹⁵⁷. It is thus imperative to strengthen environmental rule of law in order to foster sustainability. This can be achieved through the enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies, embracing civic engagement through public

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Muigua. K., 'Utilising Science and Technology for Environmental Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf> (Accessed on 14/09/2023)

¹⁵⁴ United Nations Environment Programme., 'Environmental Rule of Law.'

¹⁵⁵ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁵⁶ Ibid

¹⁵⁷ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

participation and access to information in environmental governance, upholding a rights-based approach to environmental governance, enhancing access to justice in environmental matters, capacity building and moving beyond the law for sound environmental governance¹⁵⁸. Strengthening environmental rule of law for sustainability is a noble endeavour which must be realized.

¹⁵⁸ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit; See also Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Op Cit

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