Natural Resources and Environmental Justice in Kenya

Kariuki Muigua, Didi Wamukoya, Francis Kariuki,

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Dedication

Dedicated to the ideal
That natural resources
Should not be a source
Of woe and misery
But should benefit humankind fully
And to the realisation of the cherished dream
Of Environmental Justice for all

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Authors' Note

The book examines Kenya's policy, legal and institutional frameworks relating to the management of natural resources under the Constitution of Kenya 2010. This is done in light of the national values and principles of governance which include amongst others: patriotism, 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. It thus identifies the natural resources that exist in Kenya, their importance to the social and economic development of the country and assesses the paradigm shift that is expected in their management under the new dispensation to ensure consistency with these values and principles.

Principles of governance, including: environmental justice, environmental democracy, sustainable development, access to information, access to justice and climate change, amongst other, are part of the running themes in this work. Across the chapters, the book looks at the environmental injustices perpetuated on communities through law and policy in the pre-2010 era and discusses the way forward in natural resources management and environmental justice in Kenya.

The book also locates the role of the new governance structures under the Constitution including the judiciary, executive, parliament and devolution structures and their ramification in natural resource management in Kenya.

Similarly, it examines the implications of globalization and the increased investment by foreign multinationals on the natural resources in the country. In that regard, it looks into issues of natural resources exploitation, legal and policy regimes for natural resource extraction, benefit sharing; granting of rights and concessions for exploitation of natural resources, impact of resource extraction, natural resource contracts and dispute settlement, amongst others. The authors reiterate the need for public participation; transparency and accountability in the management of the revenue or benefits accruing from natural resources exploitation to foster environmental justice for all.

It is hoped, that this book will be useful to students, researchers, lecturers and the general reader who has an interest in Natural Resources and Environmental Justice in Kenya.

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List of Abbreviations

ACHPR-African Commission on Human and Peoples' Rights
ADR-Alternative Dispute Resolution
AfDB- African Development Bank

AFIPEK-Kenya Fish Processors & Exporters Association
AFLEG-Africa Forest Law Enforcement and Governance
AFP- African Mining Partnership
ASALs- Arid and Semi-Arid Lands
BMUs-Beach Management Units
CAACs-Catchment Areas Advisory Committees
CBD-Convention on Biological Diversity
CBFM-Community Based Forest Management
CBNRM-Community Based Natural Resources Management
CBOs-Community Based Organizations
CDA- Coast Development Authority
CITES-Convention on International Trade in Endangered Species of Wild Flora and Fauna
CLCS-Commission on Limits of the Continental Shelf
DOALOS-Division for Ocean Affairs and the Law of the Sea
DWFN-Distant Waters Fishing Nations
EAA-Ecosystem Approach to Aquaculture
EACJ-East Africa Court of Justice
ECJ- European Court of Justice
EEZs-Exclusive Economic Zones
EIA-Environmental Impact Assessment
EI-TAF-Extractive Industries Technical Advisory Facility
EITI-Extractive Industries Transparency Initiative
EMCA- Environmental Management and Coordination Act, 1999
ERC-Energy Regulatory Commission
ESBM-Ecosystem-Based Management
FAO- Food and Agriculture Organization of the United Nations
FCC-Forest Conservation Committee
FPA-Fishing Partnership Agreements
FSC-Forest Stewardship Council
FTFs-Foundations, Trusts and Funds
GDC-Geothermal Development Company
ICIPE- International Centre of Insect Physiology and Ecology
ICJ-International Court of Justice
ICZM-Integrated Coastal Zone Management
IPOA-International Plan of Action
IPPs-Independent Power Producers
ISA- International Seabed Authority
ITLOS-International Tribunal on the Law of the Sea
IUCN-World Conservation Union

IUU-Illegal, Unreported and Unregulated
IWC-International Whaling Commission
IWRM-Integrated Water Resources Management
JFM-Joint Forest Management
KFS- Kenya Forestry Service
KMFRI-Kenya Marine and Fisheries Research Institute
KWRA-Kenya Wildlife Regulatory Authority
KWS-Kenya Wildlife Service
LAPSSET- Lamu Port Southern Sudan-Ethiopia Transport
LPG- Liquefied Petroleum Gas
LVFO-Lake Victoria Fisheries Organization
MCAs-Marine Conservation Areas
MCS- Monitoring, Control and Surveillance
MDGs-Millennium Development Goals
MEAs- Multilateral Environmental Agreements
MUM-Multiple Use Management
MWI-Ministry of Water and Irrigation
MWRMD-Water Resources Management and Development
NAFFAC-National Fossil Fuels Advisory Committee
NCCRS-National Climate Change Response Strategy
NCST-National Council of Science and Technology
NEAP-National Environment Action Plan Committee
NEMA-National Environmental Management Authority
NERA-National Electrification and Renewable Energy Authority
NET-National Environment Tribunal
NLP-National Land Policy
NMK- National Museums of Kenya
NNPC-Nigerian National Petroleum Company
NOO-National Ocean Office
NRC-Non Residential Cultivation
NRM-Natural Resource Management
NWP-National Water Policy
OECD-Organisation for Economic Co-operation and Development
PA-Protected Area
PCIJ- Permanent Court of International Justice
PFM-Participatory Forest Management
PSC-Production Sharing Contract
REDD-Reducing Emissions from Deforestation and Forest Degradation
RERAC-Renewable Energy Resources Advisory Committee
R-PP-Readiness Preparation Proposal

RSC- REDD+ Steering Committee
SADC-South African Development Community
SDGs-Sustainable Development Goals
SEA- Strategic impact assessment
SIOFA-Southern Indian Ocean Fisheries Agreement
SNP- Serengeti National Park
SPDC-Shell Petroleum Development Corporation
SWAp-Sector Wide Approach
SWIO-South West Indian Ocean
TRIPs-Agreement on Trade-Related Aspects of intellectual Property Rights
UNCED-United Nations Conference on Environment and Development
UNCLOS- United Nations Convention on the Law of the Sea
UNDP- United Nations Development Programme
UNEP- United Nations Environment Programme
UNESCO- United Nations Educational, Scientific and Cultural Organisation
UNFCC-United Nations Framework Convention on Climate Change
USA-United States of America
WARMA-Water Resources Management Authority
WASREB-Water Services Regulatory Board
WCED-World Commission on Environment and Development
WCGs-Water Consumer Groups
WCMA-Wildlife Conservation and Management Act
WIO-Western Indian Ocean
WRMA-Water Resources Management Authority
WRM-Water Resources Management
WRUAs-Water Resource User Associations
WSBs-Water Services Boards
WSIs-Water Sector Institutions
WSS-Water Supply and Sanitation

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Chapter One

Introduction

1.1 Introduction

Natural resources are essential for survival and livelihood. Increase in human population has added pressure on natural resources, sometimes leading to their degradation and depletion. Two centuries ago, the world's population was less than 1 Billion.[1] Today the world has a population of slightly over 7 Billion people, with a population growth rate of 1.1% per annum.[2] Consequently, the rising demand for food, space, water, energy and other natural resources cannot be gainsaid. Besides exploitation, natural resources are also in danger of destruction through environmental pollution. For instance, pollution reduces the quality of scarce resources such as water.

With increased demand for the scarce natural resources, the world must of necessity step in and use the law and other legal instruments to ensure that the existing resources are equitably distributed and sustainably utilized. To answer this call, numerous international instruments have been crafted to deal with conservation, use and management of natural resources. In Kenya, the Constitution 2010, besides recognizing these instruments, also requires natural resources to be conserved and managed in a sustainable and equitable manner.

In this Chapter, the authors seek to explain the meaning and classification of natural resources; give a background on natural resources management in Kenya; highlight the salient features of the legal, policy and institutional frameworks relating to the management of natural resources; assess the implications of the provisions of the Constitution on natural resources management and examine the role of law in natural resources management.

1.2 Defining Natural Resources

Natural resources include all aspects of the environment which are not man-made and are of value to man such as forests, minerals, oceans, freshwater, soil and air.[3] The Constitution defines natural resources to mean the physical non-human factors and components, whether renewable or non-renewable including sunlight; surface and groundwater; forests, biodiversity and genetic resources; rocks, minerals, fossil fuels and

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[1] FAO, "*Natural Resources and the Human Environment for Food and Agriculture*," (FAO, 1980), p.1.
[2] Worldometers, 'World Population (Worldometers: Real Time World Statistics 2013), available at *http://www.worldometers.info/world-population/*>[Accessed 25/06/2013].
[3] Devlin, R. & Grafton R, *Economic Rights and Environmental Wrongs: Property Rights for the Common Good*, (Edward Elgar Publishing, 1998).

other sources of energy.[4] Under the Environmental Management and Coordination Act, natural resources include resources of the air, land, water, animals, and plants including their aesthetic qualities.[5]

Natural resources play very important roles in the life of man which roles may be classified as economic, social or cultural. Economically, natural resources are not only a source of food and raw materials but are also a source of income for individuals and the State.[6] Socially, natural resources like water bodies play recreational role amongst others, they also contribute to the improvement of the quality of life of individuals. Culturally, different Kenyan communities attach importance to some natural resources that may be revered as shrines, dwelling places for ancestors and sacred sites where rites of passage and other cultural celebrations take place.

1.1.1 Classification of Natural Resources

Natural resources can be classified in various ways. One mode of classification is based on the ability of the resource to be replenished. Under this typology, natural resources are classified as either renewable or non-renewable. *Renewable resources* are those that can be replenished at about the same rate as they are used. Such resources include forests, water, sun and wind. However, renewable resources can be depleted if not properly managed or conserved, especially if they are exploited at a faster rate than they can regenerate. On the other hand, *non-renewable resources* are those that are depleted faster than they can regenerate. They include fossil fuels like oil and natural gas that take thousands of years to form and which get depleted once mined and used.

Another typology of classification is the geographical location of the natural resources. Geographical location determines who has the authority to manage or exploit the resources. There are natural resources falling exclusively within the boundaries of a state while others are transboundary. Resources within the exclusive territory of a state are subject to the principle of permanent sovereignty. Those resources are under the jurisdiction of the respective states where they are located. However, international water courses and cross-state boundaries are subject to conventional regimes or to general principles such as 'equitable and reasonable use' or those dealing with transboundary pollution.[7] No single state can exercise exclusive jurisdiction over transboundary natural resources.

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[4] Art. 260 of the Constitution of Kenya, 2010.
[5] S. 2, Act No. 8 of 1999.
[6] Costanza R., 'The ecological, economic, and social importance of the oceans,' *Ecological Economics*, Vol. 31 (2), November 1999, pp. 199–213.
[7] Blanco, E. & Razzaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives*, (Edward Elgar Publishing Limited, 2011).

There are also some natural resources that do not fall exclusively under the territory of a single State such as international watercourses, migratory species, forests, enclosed and semi-enclosed seas and regional air masses, and are referred to as *shared natural resources*.[8] Examples of shared natural resources in Kenya include Lake Victoria, Mt. Elgon, Lake Turkana and wildebeests in Maasai Mara and Serengeti, amongst others. Shared natural resources have also been defined as *an element of the natural environment used by man, constituting a bio-geophysical unity, and located within the territory of two or more States*.[9] The main challenge in managing shared resources is how to strike a balance between the interests of all the parties concerned.

Common areas are those resources that are situated beyond the territorial jurisdiction of any State. They are the global commons subject to the 'no harm rule.'[10] They include the high seas and their fisheries, the Antarctica and the ozone layer.

Common heritage of mankind refers to resources lying beyond the jurisdiction of any State. They are not open to all to enjoy but are subject to a special regime due to the special factors affecting them such as the deep seabed and the moon. Given the dangers of the tragedy of the commons and varying levels of technological resources among states, some countries may not have access to these resources. As a result, developing countries have tried to push for a regime of equitable exploitation but the developed countries have proposed one based on open access. Since developing countries objected to the idea that resources under their permanent sovereignty such as biodiversity be subject to developed countries property rights, the concept of common concern was coined.[11]

Common concern arose out of the failure of the concepts of common areas and common heritage to regulate and manage natural resources which are not geographically bound and yet are of interest to the whole of humanity. Climate change and biodiversity conservation have been said to be the common concern of humanity as all States derive benefits from protective action taken either unilaterally or collectively.[12] Examples of successful common concern regimes include those relating to the protection of the ozone layer[13] and of areas of world cultural and natural heritage.[14] However, irrespective of their physical location, natural resources have a global dimension since pollution in one state has impacts on other states.

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[8] *Ibid.*
[9] UNEP/IG/12/2 (1978), para.16.
[10] Blanco, E. & Razzaque, J, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives, op cit.*
[11] *Ibid.*
[12] Cullet, P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law,* (Aldershot: Ashgate, 2003), p. 3-5.
[13] See the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.
[14] Regulated by the UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November, 1972.

1.2 Background on Natural Resources Management in Kenya

Kenya has a wealth of natural resources most of which are the basis of its economy. For example, agriculture, tourism, manufacturing and the energy sectors are some of the largest earners of foreign exchange yet heavily dependent on the exploitation of natural resources.[15] The economic development of this nation and anticipated developments under the Vision 2030 development blue print are expected to result in increased pollution, production of more solid waste and effluents that will negatively impact on natural resources. With rising urbanization, it is expected that by 2030, 60% of Kenyans will be living in urban areas.[16] Such economic and social developments will have adverse impacts on environmental resources. Natural resources are also under threat due to population increase, poverty, climate change, desertification, unsustainable exploitation and environmental degradation. There is thus a need for sound policy, legal and institutional frameworks that will ensure productive, equitable, sustainable and efficient management of natural resources. The Constitution provides a good threshold for establishing these frameworks.[17]

While natural resources and the various components of the environment are inextricably interrelated, natural resources management in Kenya remains sectoral. A sectoral approach ignores the fact that all aspects of the environment are interrelated and interdependent. Consequently, there is a necessity of addressing natural resources functions and services in an integrated/ holistic way.[18]Currently, there exists a plethora of laws dealing with different aspects of natural resources including land, irrigation, forestry, fisheries, water, minerals, energy, and wildlife among others. The *Environmental Management and Coordination Act*[19] was intended to be the overarching environmental framework law in Kenya. Its main objective was to coordinate the management of various aspects of the environment, which it has not successfully achieved. Although EMCA was enacted in 1999, most of the laws and regulations dealing with the environment have not been aligned with its provisions. Indeed, some laws enacted after EMCA such as the Water Act, 2002 have provisions that glaringly conflict with EMCA. With the enactment of the Constitution 2010, all environmental laws and policies including EMCA must be harmonized with the Constitution.

The need for multi-sectoral coordination and cooperation in natural resources management has been recognized in various government policies. Vision 2030, highlights

[15] Vision 2030, *Government of Kenya*, 2007.
[16] *Ibid.*
[17] Chapter Five, Constitution of Kenya, 2010.
[18] *Project Report on National Integrated Natural Resources Assessment* (Government of Kenya, 2007), p. 13.
[19] Act No. 8 of 1999.

four strategic thrusts in this regard, to wit: conservation of natural resources, pollution and waste management, Arid and Semi-Arid Lands (ASALs) and high-risk disaster zones management and environmental planning and governance.[20] Likewise, the National Land Policy recognizes that natural resources pose formidable management challenges due to conflicting land uses, varied governance frameworks, unsustainable exploitation and inadequate enforcement of laws and regulations.[21]To deal with the problem of competing land uses, the National Land Policy proposes the development of a comprehensive and integrated land use policy. In relation to the problem of conflicting laws, the Policy was designed along some important guiding principles that are meant to introduce uniformity in all legislation on management of land as part of the natural resources to ensure equitable access and use. It also provides for participatory management of natural resources in partnership with public, private and community stakeholders. Among the guiding values of the National Land Policy are consultation, participation, interaction, inclusion and consensus-based management all of which are important in the facilitation of participatory management of natural resources.[22] These values as formulated are in line with Article 60 of the Constitution of Kenya, 2010 which provides for principles of land policy. These principles are meant to ensure the productive, efficient, equitable and sustainable management of land as a natural resource.[23]

1.3 Issues in Natural Resources Management

Natural resources management presents numerous challenges to both policy makers and implementers. There are legal, political, socio-cultural, economic, scientific and ecological concerns that arise in natural resource management. For example, agriculture, tourism, manufacturing and energy sectors that are relied on to sustain the economy are heavily dependent on the exploitation of natural resources. This requires a balance to be struck between the need for economic development and environmental conservation. Moreover, industrialization leads to higher levels of pollution which adversely affects natural resources. This brings about the question of pollution control with its far reaching ramifications on the economic, ecological, scientific and social sectors. The Constitution of Kenya, 2010 and most of the laws enacted thereunder attempt to address this problem by imposing obligations on the State, corporations and individuals with respect to the environment. Amongst these obligations is the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural

[20] Vision 2030, *op cit.*
[21] Sessional Paper No. 3 of 2009 on National Land Policy (Government Printer, Nairobi, 2009), para. 133; See also the Forest Policy, Sessional No.9 of 2005 (Government of Kenya, Nairobi, 2005).
[22] *Ibid*, para. 8.
[23] See also S. 4, Land Act, 2012.

resources.[24] Under the Environmental Management and Coordination Act, there are sustainable development principles that are to guide courts in environmental matters including the polluter pays principle, precautionary and prevention principle.[25] The *Environment and Land Court Act*, 2011 provides that in exercise of its jurisdiction under the Act, the Court should be guided by the principles of sustainable development, including the polluter-pays principle.[26] This, if duplicated through harmonization of all laws will help in tackling the resultant problem of pollution in the use and management of natural resources in Kenya.

1.4 Role of Law in Natural Resources Management in Kenya

The law governing natural resources can be found in the Constitution, Statutes, international instruments and customary laws. Law creates rights, duties, powers etc., 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.[27]

The Constitution, being the supreme law, outlines the framework for governance on all matters including on natural resources. The national values and principles of governance in Article 10 of the Constitution are meant to guide everyone managing natural resources. The Constitution also contains a robust Bill of Rights that includes economic and social rights and environmental rights. For instance, it provides for the right to a clean and healthy environment and dedicates a whole chapter to intricate principles and issues on land and environment.[28] This is a clear indication that management of natural resources is fundamental in the realization of human rights, and for survival and livelihood. Regional and International environmental instruments also apply in Kenya by virtue of Article 2 (5) and (6) of the Constitution. International legal instruments on the protection and conservation of various natural resources play a major role in directing countries on creation of policy and legislation touching on natural resources management. It has been observed that International environmental agreements, assume that nation-states have the capacity, internal legitimacy, and the will to manage resources within their territorial boundaries.[29] National frameworks on natural resources must then be aligned to conform to international environmental agreements.

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[24] Art.69 (1), Constitution of Kenya, 2010.
[25] See generally S. 3(5), Act No. 8 of 1999.
[26] S. 18.
[27] Moore, P., *et al*, *Natural Resource Governance Trainers' Manual*, (IUCN, RECOFTC, SNV, Bangkok, Thailand, 2011), p. 119.
[28] Chapter Five.
[29] Peluso, N.L, "Coercing conservation?: The politics of state resource control," *Global Environmental Change*, Vol. 3 (2), (1993), pp. 199-217.

In Kenya, we have various sectoral laws governing natural resources. These are mostly legislated along the provisions of regional and international legal instruments and the Constitution. The statutory frameworks in place establish institutions that manage respective resources under their domain while also specifying processes for which those institutions are responsible. These institutions include the National Environmental Management Authority, the Kenya Wildlife Service, the Kenya Forest Service and the Water Resources Management Authority, amongst others. Sectoral laws include the *Forest Act,*[30] which provides for the sustainable management, conservation and rational utilization of forest resources in Kenya,[31] the *Wildlife Conservation and Management Act,*[32] which provides for the protection, conservation, sustainable use and management of wildlife in Kenya, the *Water Act* 2002,[33] which provides for the management, abstraction and use of water resources, Fisheries laws[34] which provide for sustainable fishing for the benefit of all Kenyans, Coastal and Marine resources laws[35] for conservation of marine resources and several other laws. Sectoral laws grant and restrict rights of access and use of natural resources and provide for sharing of benefits accruing therefrom.[36]

Tribal laws of the different ethnic communities in Kenya, developed over time and passed from one generation to another, also play a significant role in natural resource management. Such laws provide the rights of access to and use of natural resources; decision-making institutions; implementing organs and penalties for destruction of natural resources.[37] For instance, pasture land and public places among the Gikuyu community were used for the benefit of all community members. Public opinion entered strongly in the management of such lands, for although in reality such lands were owned by different individual families, in actual uses they were treated as common lands. If a natural resource like salt licks for cows was discovered at a place, management of such piece of land would shift from an individual to the community.[38]

The law also provides for both substantive and procedural rights that are necessary in the management of natural resources. A rights-based approach to natural resources includes, *inter alia*, the right to access, use, explore, exploit and conserve natural resources. Substantive resource rights also empower people to assert their rights over

[30] *Forest Act*, 2005.
[31] Preamble to the Act, *Forest Act*, 2005.
[32] No. 47 of 2013.
[33] *Water Act* (No 8 of 2002); *Kenya Water Institute Act*, No. 11 of 2001.
[34] *Fisheries Act*, Cap 378; *Agriculture, Fisheries and Food Authority Act*, (No. 13 of 2013).
[35] Environmental Management and Conservation Act, No. 8 of 1999(EMCA); Marine Protected Areas (MPAs); Integrated Coastal Zone Management (ICZM) programmes.
[36] *Ibid.*
[37] *Ibid.*
[38] Kenyatta, J., *Facing Mount Kenya* (Heinemann Educational Books, Nairobi, 1938), p. 20.

natural resources. The substantive resource rights are complemented by the procedural rights to information, participation and justice.[39] Within the context of natural resources management, a right-based approach provides a better compliance, monitoring and dispute settlement mechanism and creates priority over other approaches.[40]

The Constitution of Kenya, 2010 provides for both the state and personal obligations in respect of the environment.[41] 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.[42] In a nutshell therefore, the role of law in NRM can be said to be distributive, conservatory and proscriptive as discussed hereunder.

1.4.1 Distributive Role of Law

The role of law can be distributive, by determining who is to have ownership or access to the resources.[43] Throughout history, mankind has sought to exploit the wealth that natural resources bring and the law has primarily been concerned with the problems of allocation of rights over such resources. Under international law, the principle of permanent sovereignty over natural resources is an example of law playing a distributive role as it is directed at the question of ownership of resources and the right of states to dispose of the resources according to their national development policies without external coercion.[44]

Often times, the distributive role of law ends up creating fragmented and uncoordinated sectoral legal regimes so as to facilitate efficient resource allocation and deal with environmentally adverse effects of resource exploitation.[45] In Kenya, for instance, it is possible to find a law dealing with land, wildlife, forests and water, applying simultaneously in a given area to various resources found therein. Consequently, several public institutions all acting within their legal mandates come in to issue conflicting directives that eventually lead to the degradation of all the resources.

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[39] Blanco, E. & Razzaque, J, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar Publishing Limited, 2011), pp.131-150.
[40] Shelton, D., "Human Rights and the Environment: Problems and Possibilities," *Environmental Policy and Law, Vol. 38*, p. 41.
[41] Art. 69.
[42] Art. 69(1) (d).
[43] Birnie, P., *et al*, *International Law and the Environment*, (Oxford University Press, 3rd ed., 2009), p. 593.
[44] Okidi, C.O., 'Concept, Structure and Function of Environmental Law' in C.O. Okidi, *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (East Africa Educational Publishers, 2008) 3, p.24.
[45] UNEP, "*Training Manual on International Environmental Law*," (UNEP, 2006), p. 16.

As an illustration, Mount Kenya is a very important natural resource in Kenya. It is gazetted as a national park under the *Wildlife (Conservation and Management) Act* and managed by the Kenya Wildlife Service. It is also gazetted as a Forest Reserve under the *Forest Act*[46] and managed by the Kenya Forestry Service. National Environmental Management Authority under the legislative backing of Environmental Management Coordination Act is mandated to develop and issue regulations on the conservation of mountaintops.[47] Mount Kenya is further classified as a water catchment area over which the Water Resources Management Authority has authority to issue a catchment management strategy.[48] It is also a water tower under the management of the newly created Kenya Water Towers Agency under the State Corporations Act.[49] This Agency is mandated to coordinate and oversee the protection, rehabilitation, conservation and sustainable management of water towers. Mount Kenya was also included as a World Heritage Site by UNESCO in 1997.[50] This puts it under the jurisdiction of National Museums of Kenya (NMK) which is mandated to identify, conserve, protect and transmit the cultural and natural heritage of Kenya.[51]

Another challenge with the distributive role of law is to determine an appropriate balance between individual entitlements and more general societal concerns. The law is expected to provide an objective approach to balancing the need to conserve the environment and ensure the needs of a community are being met.[52] The law maker thus needs to understand the ecological, economic and socio-cultural needs of the relevant community.[53] This is where the distributive role of law interacts with the conservatory role of law discussed below.

The Constitution of Kenya, 2010 on land provisions, has attempted to strike a balance by providing for various categories of land from private land to be enjoyed by individuals; community land for communal use; and public land to be held by the state on behalf of all Kenyans.[54] It also provides for equitable sharing of benefits accruing from natural resources,[55] recognition and protection of ownership of indigenous seeds and plant varieties and their use by the communities of Kenya.[56]

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[46] Forests Act, 2005.
[47] S. 44.
[48] Water Act, S.15.
[49]The *Kenya Water Towers Agency Order*, Legal Notice No. 27 of 2012.
[50] Kenya Wildlife Service, 'Mt. Kenya National Park: Namesake of a Nation' *(www.kws.go.ke 2013).<http://www.kws.org/parks/parks_reserves/MKNP.html>*[Accessed 10/04/2013].
[51]S.4(c), *National Museums and Heritage Act*, No. 6 of 2006.
[52] UNEP, "*Judicial Training Modules on Environmental Law*," (UNEP, 2007), p. 52.
[53] *Ibid.*
[54] Art.64, 63 and 62 respectively.
[55] Art.69 (1)(a).
[56]Art.11 (3) (b).

Continuing changes in natural resource use, rights and ownership, call for the need for succinct laws clearly defining use and ownership rights to avoid conflict. One of the key aspects of law in playing a distributive role is the provision of clear conflict resolution mechanisms as most conflicts on natural resources management touch primarily on access and distribution. Because natural resources are the bedrock of many economies, the quest for access and competition for resources on a regional and international level can be a source of great tension, sometimes leading to conflict.[57] Kenya has gone a step further and constitutionalised the provision for a special court to settle disputes relating to environment and land matters.[58] The *Environment and Land Court Act*[59] was enacted pursuant to this provision. It is interesting to note that in Section 13(2) of the Act, the disputes which the court is given power to hear and determine are almost all related to land. Further, the *Land Disputes Tribunal Act*[60] is repealed under this Act and yet provisions relating to the National Environment Tribunal under EMCA[61] are not repealed. The Act is, therefore, biased towards land matters as opposed to general environmental matters as was envisaged by the Constitution.

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.[62] 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 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.

These provisions are instrumental in achieving environmental justice in the use, access and management of natural resources in Kenya. The challenge lies in the full implementation of the foregoing provisions.

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[57] UNEP, "*Judicial Training Modules on Environmental Law," op cit,* p. 10.
[58] Art.162(2)(b)
[59] No. 19 of 2011.
[60] No. 18 of 1990.
[61] S. 125.
[62] Art.67 (2) (f).

1.4.2 Conservatory Role of Law

Law also plays a conservatory role, preserving natural resources or at least doing so at levels that can sustain exploitation.[63] In NRM, the law prescribes the threshold of sustainability. Thus, the core function of law is to ensure intra and inter-generational equity.[64] The international law principle of sustainable utilization and intergenerational equity is now at the foundation of all environmental legislation.[65] This principle states that all natural resources management strategies should be aimed at meeting the development objectives of the present generation without jeopardising the interests of the future generations to enjoy the same.[66] It has been expressed in the Stockholm Declaration,[67] the World Charter for Nature[68] and the Rio Declaration.[69] This principle is also now entrenched in the Constitution [70] and is well grounded in Kenyan laws.[71]

Another international law principle that highlights the conservatory role of law is the precautionary principle. This principle provides that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[72] This principle is clearly articulated in the Rio Declaration.[73] EMCA restates this principle[74] and provides further that in exercising its jurisdiction, the court should be guided by the precautionary principle.[75] The *Environment and Land Court Act*, 2011 also provides that the precautionary principle is one of the principles that shall guide the Environment and Land Court (ELC) in exercising its jurisdiction.[76]

One interesting aspect of the law is that, when it plays a conservatory role in natural resources management, it sometimes contradicts the well-founded principle that law should not be retroactive in nature. Law that prevents harm to natural resources may need to apply to pre-existing activities and operations if it is to be effective.[77] This is because

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[63] Bernie, P., *et al*., "*International Law and The Environment," op cit,* p. 594.
[64] Okidi, C.O., 'Concept, Structure and Function of Environmental Law,' *op cit,* p.6.
[65] *Ibid,* p. 28.
[66] S. 2 of EMCA.
[67] Principles 1 and 2.
[68] Para. 4.
[69] Principle 3.
[70] Art.42 (a).
[71] See EMCA S. 3(5) (d); Forests Act, S. 2; ELCA, S. 18(a) (iv).
[72] Mumma, A., 'The Continuing Role of Common Law in Sustainable Development' in C.O. Okidi, *et al* (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008) 90, p.101.
[73] Principle 15.
[74] S. 2.
[75] S. 3(5) (f).
[76] S. 18(a)(vi).
[77] UNEP, "*Judicial Training Modules on Environmental Law," op cit,* p. 50.

some environmental offenses, especially pollution offenses, are continuous in nature. An example is the provisions of EMCA which makes it an offense for any person to dispose of waste in a manner that pollutes the environment.[78] This section does not provide that it shall only apply to persons who commit the offense after the commencement of the Act. It can be contrasted with Section 72(1) which provides that any person who upon coming into force of the Act discharges pollutants into the aquatic environment shall be guilty of an offense.

The Constitution of Kenya has specific provisions that highlight the conservatory role of law in natural resources management. It provides that the state shall ensure sustainable exploitation, utilisation and management of the environment and natural resources[79] and that it shall encourage public participation in the management, protection and conservation of the environment.[80] EMCA and almost all the sectoral laws on natural resources management in Kenya play a conservatory role. They provide in their preambles that they are Acts of parliament to provide for, *inter alia*, the conservation of the specific sectoral resource that is being legislated on.

1.4.3 Proscriptive Role of Law

Law plays a proscriptive role, prohibiting for conservatory, ethical or moral reasons, the exploitation of resources or particular forms and methods of exploitation.[81] The proscriptive role of law comes in often to manage uncertainty and deal with risk.[82] This role is what leads to a command and control approach to natural resources management. The proscriptive role of law entails providing for regulatory limits backed by penalties.[83]

An international law principle that reflects a proscriptive role of law is the polluter pays principle. This principle provides that whoever is responsible for environmental degradation should be responsible for its reparation covering both civil liability and criminal responsibility.[84] The Rio Declaration is explicit that states are required to develop national laws regarding liability and compensation to victims of pollution.[85] This principle is entrenched in our national legislation under EMCA[86] and Environment and Land Court Act.[87]

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[78] S. 87(5), EMCA, 1999.
[79] Art.69 (1) (a).
[80] Art.69 (1) (d).
[81] Birnie, P., *et al., International Law and The Environment, op cit,* p. 594.
[82] UNEP, "*Judicial Training Modules on Environmental Law," op cit,* p.50.
[83] *Ibid.*
[84] Okidi, C.O., 'Concept, Structure and Function of Environmental Law,' *op cit,* p. 31.
[85] Principle 13.
[86] S. 3(f) (e).
[87] S. 18(a) (v).

One of the main tools for actualizing the proscriptive role of law is the creation of state agencies with regulatory functions. Thus, in Kenya, regulatory institutions such as National Environmental Management Authority (NEMA), Kenya Wildlife Service (KWS), Kenya Forest Service (KFS) and Water Resources Management Authority (WARMA), among others, are created through legislation. The law always goes further to appoint special officers, as enforcers of the law, such as environmental inspectors under NEMA, rangers and wardens under KWS and forest officers under KFS. These officers are given diverse powers including issuance and cancellation of permits and licenses, investigation and prosecution, arrest, search and entry and even powers to use firearms for law enforcement purposes.

The law, in its proscriptive role, also uses criminal law to enforce social control by discouraging behaviour that is deemed harmful to the environment.[88] Criminal law and punishments are designed to serve as deterrents and help in restraining behaviour.[89] Criminal enforcement is necessary to protect the integrity of regulatory systems and prevent harm to the environment.[90] In Kenya, EMCA as well as most of the sectoral environmental laws such as forests, water and wildlife have penal sanctions to enforce compliance.[91] In Kenya, there are no special courts that deal with environmental offenders and they are taken to lower courts like all other criminal cases. The unfortunate part is that environmental crimes are treated as petty crimes in the categorization of crimes by the police. This downplays the proscriptive role of natural resources management laws by lowering the profile of environmental offenders.

It is clear that the law is 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 key in interweaving environmental interests into the scheme of economic development. In Kenya, there are intricate and detailed frameworks and sectoral laws in place to ensure proper conservation and protection of natural resources.

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

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[88] P. Mbote, 'The Use of Criminal Law in Enforcing Environmental Law' in Okidi, C.O., *et a*l.(eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (East Africa Educational Publishers, 2008), p. 110-111.
[89] *Ibid.*
[90] *Ibid,* p. 113.
[91] *Ibid,* p.119.

agencies and communities living with the resources. What is required is a strengthened framework law that gives proper attention to all sectors of natural resources management.

1.4.4 State Regulation of Natural Resources in Kenya

The Constitution of Kenya, 2010 places immense responsibility on the State in the regulation, use, management and access to natural resources. Article 69 spells out the obligations of the State in respect of the environment. These obligations are to be fulfilled through the various sectoral laws enacted to regulate use, access and management of the various resources in the country. Under these laws, there are established institutions that oversee the implementation of the available policies and legislative objectives.

1.4.5 Community-Based Natural Resources Management

The Constitution of Kenya, 2010 recognises the important role that can be played by communities in attaining sustainable utilisation and management of natural resources. Article 63 defines community land to consist of, *inter alia*, land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines. The obligation to manage such land falls on the concerned community though they do so with assistance from the Government. Article 69(1) (d) obligates the State to encourage public participation in the management, protection and conservation of the environment.

One of the major complaints by the communities regarding natural resource management is that they do not benefit from natural resources which are geographically located in their areas. This is especially so in wildlife conservation areas where benefit sharing arrangements from wildlife revenues obtained through ecotourism activities are minimal. It has been contended that from a development perspective, ecotourism ventures should only be considered successful if local communities have some measure of control over them and if they share equitably in the benefits.[92] The *Forest Act*, 2005 provides for involvement of local communities living around any forest in the management of those forests.[93] It provides for Community Forest Associations where local communities come together and form an association through which they can manage forest resources around them and benefit from the sustainable utilization of forest produce.

1.5 Challenges with the Policy, Legal and Institutional Frameworks on Natural Resource Management

The legal and institutional frameworks for natural resource management in Kenya are faced with several challenges that hamper their efficiency and effectiveness. These

[92] Scheyvens, R., 'Case study: Ecotourism and the empowerment of local communities,' *Tourism Management*, Vol. 20, 1999, pp. 245-249.
[93] Part IV, Ss. 45-48.

challenges range from overlaps and conflicts in natural resources management regimes; weak enforcement mechanisms; inadequate sectoral laws and lack of political will to promote natural resource management. Most of these laws were drafted before the advent of the Constitution of Kenya, 2010, and most of them are yet to be reviewed to incorporate principles of good governance, sustainable development, environmental justice and climate change adaptation as provided for in the Constitution.

As it will be seen in the next section, the Constitution has done a lot in an attempt to achieve environmental justice and integrate the principles of sustainable development in natural resources governance. However, as indicated above most of the sectoral laws are under review so as to align them with the Constitution. The Environmental Management and Coordination Act, is under review and so are several other sectoral laws including the Wildlife (Conservation and Management) Act and the Forest Act. The idea is, for these laws to reflect the letter and the spirit of the Constitution of Kenya.

1.6 Implications of Constitution 2010 on Natural Resources Management

The Constitution of Kenya, 2010, has dedicated a whole chapter on land and environment, spelling out the general obligations of the State and individual persons towards the management of natural resources.[94] Under Article 10 sustainable development is one of the national values and principles of governance which binds all state organs, state officers, public officers and all persons whenever any one of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. By extension, these values and principles apply in equal measure to natural resource management. Sustainable development can only be achieved through sustainable utilisation of the available natural resources.

To achieve the foregoing, the Constitution of Kenya in Article 69(1) (a) enjoins the State to ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. It further obligates the State to encourage public participation in the management, protection and conservation of the environment.[95] This provision, therefore, enhances and encourages Community Based Natural Resources Management (CBNRM) as one of the approaches to natural resource management in the country.

Article 69(1) (h) obligates the State to utilise the environment and natural resources for the benefit of the people of Kenya. Article 69(2) of the Constitution provides that every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Article 60 outlines the principles to guide the appropriation, utilization

[94] Chapter Five, Constitution of Kenya, 2010.
[95] *Ibid,* Art.69 (1) (d).

and management of land to ensure equitability, efficiency, productivity and sustainability. These principles include encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution. The Constitution, further attempts to protect natural resources in the country against misuse and corrupt dealings by requiring certain transactions to be ratified by Parliament if: it involves the grant of a right or concession by or on behalf of any person, including the national government to another person for the exploitation of any natural resource of Kenya; and entered into on or after the effective date.[96]

1.7 Conclusion

The law plays a major role in the management of natural resources. This is important to ensure that natural resources are managed productively, efficiently, sustainably and equitably. The Constitution of Kenya, 2010 has many provisions on natural resource management that seek to promote the principles of environmental justice, democracy, accountability, sustainable development and conflict resolution while dealing with natural resources. Much still needs to be done in the amendment of the various sectoral laws to ensure that they reflect this constitutional position. This calls for all stakeholders to play their respective roles in harmonization and implementation of these laws. To achieve environmental justice, there is need to effectively adopt ADR Mechanisms as provided for under the Constitution and other laws in settling natural resources-related conflicts.

[96] *Ibid,* Art.71 (1).

Chapter Two

Principles of Natural Resources Management in Kenya

2.0 Introduction

This chapter examines the principles of natural resource management and their application in Kenya. Some of these principles are recognized in the Constitution of Kenya, 2010 and in various international environmental instruments. Understanding these principles at the outset will enable one to appreciate existing legal regimes on natural resources in Kenya vis-à-vis the international regimes and their meeting points. The Constitution and sectoral laws on natural resources have translated these principles into legally binding norms.

At the international level, these principles include the principle on transboundary environmental damage, sustainable development, sustainable use, prevention principle, precautionary principle, polluter pays principle, reasonable use and equitable utilization, international cooperation in management of natural resources and common but differentiated responsibilities. These principles are now applicable to Kenya by virtue of Articles 2 (5) and (6) of the Constitution which domesticates the general rules of international law and any treaty or convention ratified by Kenya.[1]

In addition, to the international principles, the national values and principles of governance outlined in Article 10 of the Constitution are relevant in natural resource management.[2] These include devolution of power, democracy and participation of the people, equity, social justice, protection of the marginalized, good governance, transparency and accountability and sustainable development.[3] Further, traditional ecological knowledge of communities in Kenya on the management of natural resources also applies.[4] Such traditional and cultural principles include traditional dispute resolution mechanisms.[5]

[1] Ratification of Treaties; See also the *Treaty Making and Ratification Act*, 2012, Laws of Kenya.
[2] Art.10 (2), Constitution of Kenya.
[3] *Ibid.*
[4] S. 3 (5) (b) of EMCA, Act No. 8 of 1999.
[5] See Art.159 (2) (c) and 67 (2) (f), Constitution of Kenya.

2.1 Sustainable Development

The concept of sustainable development predates the 1972 Stockholm Conference and can be traced back to traditional communities and ancient civilizations.[6] It seeks to limit environmental damage arising from anthropogenic activities and to lessen the depletion of non-renewable resources and pollution of the environment.[7] The *Brundtland Commission*[8] defined sustainable development as, *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*[9]Under section 2 of EMCA, sustainable development is defined as 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. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among present generations, and *inter-generational equity*, that is equity between generations.[10]

Sustainable development is also linked to the right to development, human rights and good governance, when it is described as sustainable human development. Sustainable human development focuses on material factors such as meeting basic needs and non-material factors such as rights and participation. It also seeks to achieve a number of goals to wit, poverty reduction, promotion of human rights, promotion of equitable opportunities, environmental conservation and assessment of the impacts of development activities.[11] Vision 2030 adopts sustainable human development as it seeks to address the economic, social and political pillars. It thus fosters both material factors and non-material

[6] Per Judge Christopher Weeramantry *in Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

[7] Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003), pp.8 -9.

[8] The Brundtland Commission was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its mission was to unite countries to pursue sustainable development together. The Commission was named after its chairperson, Gro Harlem Brundtland, a former Prime Minister of Norway. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the term Sustainable Development.

[9] World Commission on Environment and Development, *Our Common Future*, GAOR, 42nd Sess, Supp. No. 25, UN Doc, A/42/25 (1987), p.27; See also the Rio Declaration of 1992, UN Doc. A/CONF.151/26 (Vol. I).

[10] Weiss, E.B., "In Fairness to Future Generations and Sustainable *Development*," *American University International Law Review*, Vol.8, 1992.

[11] See generally Amartya S., *Development as Freedom* (Anchor Books, New York, 1999), pp.35-53; See also UNDP, *Human Development Report 2011, The Real Wealth of Nations: Pathways to Human Development*, (Palgrave Macmillan Houndmills, Basingtoke, Hampshire, 2011), p. (i)-12. This report defines sustainable human development as *the expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations*.

factors.[12] Sustainable human development is, therefore, inextricably linked to people's livelihoods, and is thus requisite in moving towards environmental justice.

In the *Case Concerning the Gabcikovo-Nagymoros Project,*[13] Judge Weeremantry[14] rightly opined that sustainable development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other. He considered sustainable development to be a '*principle with 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 *human right to development* and the *human right to protection of the environment*. Sustainable development reconciles these rights by ensuring that the right to development tolerates the '*reasonable demands of environmental protection.'*[15]

In Kenya, the debate on sustainable development has put a lot of emphasis on environmental protection to meet man's needs (an anthropogenic approach) and ignored the need to protect the environment for its intrinsic value (an ecological approach). Such is the case in the mining industry where great emphasis is placed on the need to regulate the mining industry for extraction purposes to fulfill human needs without giving due attention to ecological issues.[16] Although the ecological approach has been incorporated in the legal framework[17] its implementation is bound to face great challenges as exemplified by the conservation of the Mau ecosystem.[18]

Courts in Kenya have applied this principle. One example is in the case of *Peter K. Waweru Republic,*[19] where the court stated that intragenerational equity involves equality within the present generation, such that each member has an equal right to access the earth's natural and cultural resources. Towards sustainable development, courts are key

[12] Kenya Vision 2030, Government of Kenya, 2007.
[13] The Gabčíkovo–Nagymaros Project relates to a large damming project on the Danube River. This river is classified as an international waterway as it passes through or touches the borders of ten European countries before emptying into the Black Sea. The Project was specific to the part of the river passing through Hungary and Slovakia. It was initiated by the Budapest Treaty of 1977 between Slovakia and Hungary and aimed at preventing floods, improving river navigability and producing clean electricity for the two countries. Only a part of the project was completed in Slovakia, under the name Gabčíkovo Dam. Hungary suspended the Project in its territory and then later tried to terminate it citing environmental and economic concerns. Slovakia then proceeded with an alternative solution, called "Variant C", which involved diverting the river. These developments caused an international dispute between the two countries and they turned to the International Court of Justice for redress.
[14] Judge of the International Court of Justice (ICJ).
[15] *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).
[16] Munyiri, S.K., "Policy Position on the Proposed Amendments of the Mining and Minerals Bill 2009," Kenya Chamber of Mines, 2010.
[17] Art.10 (2) (d), 42, 69 and 70, Constitution of Kenya.
[18] There has also been massive destruction of mangrove forests in the LAPSSET project in Lamu.
[19] [2006] eKLR.

actors in terms of developing environmental jurisprudence that protects environmental resources not only for the benefit of human beings but also for conservation purposes.[20] Similarly, the role of the public in decision-making processes is necessary in the sustainable management, protection and conservation of the environment.[21]

2.2 Sustainable Use

Sustainable use refers to the need to reduce and eliminate unsustainable patterns of production and consumption.[22] It is described as use that in any way and rate does not lead to long-term decline of biological diversity, thereby maintaining its potential to meet the needs of present and future generations.[23] It requires that present use of the environment and natural resources does not compromise the ability of future generations to use these resources or degrade the carrying capacity of supporting ecosystems.[24] It is a principle that is applied to determine the permissibility of natural resource exploitation[25] and is central to the principle of sustainable development.

Sustainable use of natural resources is recognized in Article 69 of the Constitution where the State is obliged to ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources.[26] Sustainable use requires governments and public authorities to ensure *strong sustainability* as opposed to *weak sustainability*. According to Beder, strong sustainability views the environment as offering more than just economic potential. She opines that the environment offers services and goods that cannot be replaced by human-made wealth and that future generations should not inherit a degraded environment, no matter how many extra sources of wealth are available to them.[27] Strong sustainability is preferable to weak sustainability

[20] See generally, Stone C., "Should Trees Have Standing?" *South California Law Review*, Vol. 45, 1972, p. 450. Stone posits that '*until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of us.*' We have to value our natural resources by granting them rights as suggested by Stone so that they can benefit the present and future generations.
[21] Art.10 (2) (a) and 69 (1) (d) of the Constitution.
[22] Principle 8 of the Rio Declaration.
[23] Art.2, Convention on Biological Diversity.
[24] S. 2 of Act, No. 8 of 1999.
[25] See Birnie, P., *et al*, 'International Law and the Environment,' (3rd ed., Oxford 2009).
[26] Ar. 69 (1) (a).
[27] Beder, S., "Costing the Earth: Equity, Sustainable Development and Environmental Economics," *New Zealand Journal of Environmental Law*, Vol.4, 2000, pp.227-243.

for reasons such as 'non-substitutability,'[28] 'uncertainty'[29] and 'irreversibility.'[30] Weak sustainability makes a wrong assumption that future generations will be adequately compensated for any loss of environmental amenity by having alternative sources of wealth creation.[31]

Sustainable use, therefore, puts fetters in the utilization of natural resources. For example, not all forms of resource use will be permissible since certain forms of exploitation may lead to destruction of environmental resources with no substitutes, thus limiting the enjoyment of these resources by future generations. Moreover, uncertainty about the role of certain components of the environment and consequences of depletion and irreversible losses of species may militate against unsustainable use of natural resources in the Kenyan context. It is yet to be seen how this principle will be implemented in relation to resources such as forests where there are strong ancestral claims by local communities and the need to conserve catchment areas by the state.

2.3 Polluter Pays Principle

The polluter pays principle provides that the costs of pollution should be borne by the person responsible for causing the pollution.[32] It is one of the principles that is to guide courts in enforcing the right to a clean and healthy environment in section 3 (5) (e) of EMCA. It is an important tool in natural resources management as it aims at preventing harm to the environment using a liability mechanism. It is defined in section 2 of EMCA as the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law.[33]

It is evident that the polluter of the environment must pay the cost of pollution abatement, the costs of environmental restoration and costs of compensating victims of

[28] *Ibid.* The argument is that there are many environmental assets for which there are no substitutes, such as the ozone layer, tropical forests, wetlands, etc.

[29] *Ibid.* It has been said that scientific knowledge about the functions of natural systems and the possible consequences of depleting and degrading them is uncertain.

[30] *Ibid.* The depletion of natural capital can lead to irreversible losses such as species and habitats, which cannot be recreated using man-made resources.

[31] *Ibid.*

[32] Moutondo, E., "The Polluter Pays Principle," in *Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice* (UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, 1997), p.43.

[33] S. 2 EMCA.

pollution, if any.[34] The polluter pays principle promotes the right to a clean and healthy environment and gives appropriate remedies to victims of pollution.[35] In this way, the polluter pays principle is key in enhancing access to environmental justice.

It also acts as an economic policy tool by internalizing the costs of pollution as required by Principle 16 of the Rio Declaration. Principle 16 states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the application that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.[36]

However, the application of the polluter pays principle in natural resource management is limited by the fact that not all forms of environmental damage can be remedied by means of the liability mechanism. For a liability mechanism to be effective, the polluter must be identified, damage must have occurred, and must be quantifiable and a causal link must be established between the damage and the polluter. The issue of causation and the difficulty of identifying the polluter to establish liability for environmental damage was noted in *Natal Fresh Produce Growers Association v. Agroserve (Pty) Ltd,*[37] where a South African court held that the manufacturer of herbicides was not liable since the use of hormonal herbicides anywhere in South Africa could not result in damage to fresh produce in Tala Valley. The effectiveness of the polluter pays principle is also reliant on the ability of the polluter to pay the costs of pollution.[38] This may limit its efficacy in natural resources management.

In Kenya, there are efforts aimed at preventing environmental pollution and environmental damage through the internalization of externalities. Section 108 of EMCA provides for environmental restoration orders which can be issued by NEMA to deal with pollution. Such an order may require the person to whom it is issued to restore the environment, prevent any action that would or is reasonably likely to cause harm to the environment, require payment of compensation and levy a charge for abatement costs. Likewise, a court can issue an environmental restoration order to address pollution with similar effects.[39] Section 25 (1) establishes the National Environment Restoration Fund consisting of fees or deposit bonds as determined by NEMA, and donations or levies from

[34] *Ibid.*
[35] Moutondo, E., "The Polluter Pays Principle," in "*Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice*," *op. cit*, p. 43.
[36] Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I).
[37] [1990] (4) SA 749.
[38] Moutondo, E., "The Polluter Pays Principle," in "*Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice*,"*op cit.*
[39] S. 111 of Act No. 8 of 1999.

industries and other project proponents as contributions to the fund.[40] This fund acts as a supplementary insurance for the mitigation of environmental degradation, where the polluter is not identifiable or where exceptional circumstances require NEMA to intervene towards the control or mitigation of environmental degradation.[41]

It was one of the principles applied by the court in *Peter K. Waweru v Republic.*[42] In this case, the Applicants and the interested parties had been charged with the offences of discharging raw sewage into a public water source and the environment and failing to comply with the statutory notice from the public health authority. The Court observed that sustainable development has a cost element which must be met by the developers. The Court also held that the right to a clean and healthy environment was equivalent to the right to life which ought to be protected at whatever cost.

2.4 Public Participation

Public participation is a key aspect of natural resources management. It allows individuals to express their views on key governmental policies and laws concerning the environmental conditions in their communities.[43] The importance of public participation is the recognition that better decision-making flows from involving the public. According to Cedeño *et al*, it now generally agreed that environmental problems cannot be solved by solely relying on technocratic and bureaucratic monopoly of decision-making.[44]

Public participation is defined as the process by which public concerns, needs and values are incorporated into governmental and corporate decision-making with the overall goal of better decisions that are supported by the public.[45] Dietz and Stern give a broader definition by stating that, "*public participation includes organized processes adopted by elected officials, government agencies or other public or private sector organizations to engage the public in environmental assessment, planning, decision making, management, monitoring and evaluation.*"[46]

There are various definitions of public participation but the main aspects that come out clearly are that: public participation relates to administrative decisions and not decisions made by elected officials and judges. It involves an interaction between the

[40] *Ibid*, S. 25 (2).
[41] *Ibid*, S. 25 (4).
[42] High Court of Kenya at Nairobi, Misc Civ. Applic. 118 of 2004, 2 March, 2006.
[43] Marianela, C., *et al*, *Environmental Law in Developing Countries: Selected Issues*, Vol. II, IUCN, 2004, p. 7.
[44] *Ibid.*
[45] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement* (John Wiley & Sons, 2005), p.7.
[46] Dietz t. & Stern, P.C., (eds), *Public Participation in Environmental Assessment and Decision Making*, (National Academies Press, 2008), p.1.

agency and the people participating. In public participation, there is an organized process of involving the public so that they can have some level of impact or influence on the decisions being made. According to Creighton, the definition of public participation excludes some kinds of participation that are legitimate components of a democratic society such as the electoral process, litigation and extra-legal protests.[47]

Public participation may be provided for in law through at least three legal mechanisms; entrenchment in the Constitution as part of the Bill of Rights; in Environmental Impact Assessments; and through direct *locus standi* for the public in environmental matters.[48] One of the national values and principles of governance entrenched in the Constitution is participation of the people.[49] The Constitution provides that the state shall encourage public participation in the management, protection and conservation of the environment.[50] It goes a step further and imposes a duty on individuals to cooperate with the state organs and other persons in the protection and conservation of the environment.[51]

Principle 10 of the Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It further provides for access to information by the public. At the national level, each individual must have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available.[52] Effective access to judicial and administrative proceedings, including redress and remedy, must also be provided. Public participation is, therefore, an essential principle in natural resources management. However, public participation is hampered by factors such as financial cost of engaging the public, time constraints, fear that participants may not be truly representative and belief that citizens lack knowledge of complex technical issues.[53] In Kenya today, as the size and scope of government continues to grow, decisions that have previously been made by elected officials in a political process are

[47] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.8.
[48] Okidi, *op cit*, p.30.
[49] Art.10 (2) (a).
[50] Art.69 (1) (d).
[51] Art.69 (2).
[52] Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).
[53] Senach, S.L., 'The Trinity of Voice: The Role of Practical Theory in Planning and Evaluating the Effectiveness of Environmental Participatory Process,' in Depoe, S.D. *et al*, (eds), *Communication and Public Participation in Environmental Decision Making* (SUNY Press Ltd., 2004) 13, p.16.

now being delegated by statute to technical experts in state agencies and constitutional commissions. The rationale is, therefore, to incorporate public values into decisions, improve the substantive quality of decisions, resolve conflicts among competing interests and build trust in institutions and educate and inform the public.[54] This is necessary because technocrats in these institutions are not directly elected by the people.

2.4.1 Defining the 'public' in Public Participation

The 'public' in public participation refers to individuals acting both in their roles as citizens, as formal representatives of collective interest or affected parties that may experience benefit or harm or that otherwise choose to become informed or involved in the process.[55] The label 'public' is often used to refer to individual citizens or relatively unorganized groups of individuals but should be expanded to include the full range of interested and affected parties including corporations, civil society groups, technocrats and even the media.[56]

Four categories of the public must be considered when deciding whether or not the 'public' has been involved. These are: stakeholders who are organized groups that are or will be affected by or that have a strong interest in the outcome of the decision; the directly affected public who will experience positive or negative effects from the environmental decision; the observing public which includes the media and opinion leaders who may comment on the issue or influence public opinion; and the general public who are all individuals not directly affected by the environmental issue but may choose to be part of the decision making process.[57]

In *Hassan and 4 others v KWS*[58] the court described the public as "those entitled to the fruits of the earth on which the animals live" when stating that there was no express consent from the community allowing KWS to translocate the rare hirola antelope from their land. Further, in *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok,*[59] the court gave a much wider description of the public by stating that it is "the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised."

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[54] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement, op cit,* p.20.
[55] Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making, op cit*, p.15.
[56] *Ibid.*
[57] *Ibid,* p.15.
[58] [1996] 1KLR (E&L) 214, p.215.
[59] HC Judicial Review No. 122 of 2011, [2012] eKLR.

2.4.2 Dimensions of Public Participation

The dimensions of public participation are the boundaries within which the activity should fall for it to be properly termed as public participation.[60] It requires effective protection of the human right to hold and express opinions and seek, receive and impart ideas.[61] The Constitution protects the freedom of expression.[62] Public participation also requires the right of access to appropriate, comprehensible and timely information held by public institutions.[63] In *Meza Galana and 3 others v AG and 2 others,*[64] community representatives from Tana River District filed a suit against the defendants seeking, *inter alia*, a declaration that the legal notice declaring Tana Primate Reserve to be a national reserve to be quashed as it was not a valid notice. The court held that the legal notice was indeed not valid as the community had not been made aware of the decision to gazette the area as a national reserve and their views had not been sought before the decision was made.

2.5 Application of Public Participation in Kenya

EMCA is the overarching framework law on natural resource management and provides for specific application of public participation. Other sectoral statutes enacted after EMCA also have provisions for specific application of public participation. Most natural resources sectoral laws enacted prior to 1999 have no provisions relating to public participation. This part will take an in-depth look at public participation before 1999 and specific aspects of public participation provided for under EMCA and post-EMCA sectoral laws.

a. Judicial Review

The administrative system of government aids decision-making in natural resource management through the statutory functions of diverse administrative bodies.[65] Judicial review is a process through which a person aggrieved by a decision of an administrative body can seek redress in court. Judicial review is concerned with reviewing the decision-making process and not the merits of the decision itself. Some of the grounds upon which a person can bring a claim for judicial review are that the rules of natural justice were not

[60] Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making, op cit,* p.14.
[61] UNEP, *Training Manual on International Environmental Law, op cit,* p.193.
[62] Art. 33.
[63] UNEP, *Training Manual on International Environmental Law, op cit,* p.193.
[64] HCCC No. 341 of 1993, [2007] eKLR.
[65] R. Kibugi, 'Development and Balancing of Interests in Kenya,' in Michael Faure & Willemien du Plessis (eds.), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Press, 2011) 167, p.168.

followed during the process of decision-making. One important rule of natural justice, and which preceded the statutory requirements for public participation in natural resources management is the right to be heard. Before EMCA, most of the remedies sought against a public body which made a decision on natural resources without consulting the public were through judicial review. In *Nzioka and 2 others v Tiomin Kenya Ltd*,[66] the court stated that even if there was a distinct law on the environment, it was not exclusive and most environmental disputes were resolved by the application of principles of common law and administrative law.

Public consultation is an important aspect to be taken into account by agencies when making decisions that affect members of the public. In *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*,[67] the court issued an order of prohibition, stopping the respondent from charging the enhanced park entry fees because neither the applicant nor other stakeholders in the hotel industry had been consulted prior to revision of the said fees. Similarly, in *Hassan and 4 others v KWS*,[68] the court held that KWS would be acting outside its powers if it were to translocate animals away from their natural habitat without express consent of the community. In *Republic v Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others*,[69] the court quashed the gazettement of Lake Kanyaboli National Reserve on the grounds that the Minister in gazetting the same did not consult all the interested parties and should have obtained the consent of the county council before proceeding to gazette the area.

b. Environmental Impact Assessment

EIA is a tool that helps those involved in decision-making concerning development programs or projects to make their decisions based on the knowledge of the likely impacts that will be caused to the environment.[70] EIA is an important tool for public participation in natural resources management. Internationally, the CBD requires public participation in EIA procedures.[71] In Kenya, EIA gets its legislative backing from EMCA.

The procedure for EIA provided for under EMCA is designed to be quite comprehensive and to ensure public participation. The Act requires project proponents to submit a project report to NEMA. The project proponent is then required to carry out an

[66] [2001] 1KLR (E&L) 423.
[67] High Court Judicial Review No. 122 of 2011, [2012] eKLR.
[68] [1996] 1KLR (E&L) 214, p.215.
[69] HC Miscellaneous Application No. 55 of 2010, [2012] eKLR.
[70] Angwenyi, A.N., 'An Overview of the Environmental Management and Coordination Act,' in Okidi, C.O., *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008) p.167.
[71] Art. 14(1) (a).

EIA at his expense and submit an EIA study report to NEMA.[72] The Act then provides that the EIA study report shall be publicised for two successive weeks in the Kenya Gazette, a local newspaper and inviting members of the public to give their comments either orally or in writing on the proposed project within a period not exceeding sixty days.[73]

In *Bogonko v NEMA,*[74] the applicant sought an order to quash NEMA's decision to stop his project of putting up a petrol station. NEMA contended that it issued the order to stop the construction because the applicant had failed to publish the EIA study report for two successive weeks and hence the public was not given sufficient notice to comment on the report. The court held that the purpose of advertisement as provided for by the law is to ensure that the public see the proposed project and give their comments as to whether the project is viable or not. In the present case, the members of the public were denied such an opportunity. The court, therefore, declined to quash the order stopping the project because according to it, the public interest far outweighed the applicant's individual right to put up a petrol station.

Similarly, in *Kwanza Estates Ltd. v KWS,*[75] the plaintiff sought orders to have KWS restrained from constructing a public toilet at the beach front as the toilet when in use would cause adverse environmental effects and devalue the plaintiffs prime beach property. KWS did not conduct an EIA before putting up the toilet. The court held that public participation was what informed the requirement for an EIA being done before any project commenced. The requirement for publicizing the report is what gave members of the public, like the plaintiff in this case, a voice in issues that may bear negatively on their right to a clean and healthy environment. The court proceeded to grant an injunction restraining KWS from constructing the toilet in the absence of an EIA to show how the waste from the toilet would be treated to prevent pollution in the ocean.

c. Public Consultation

The Forest Act and the Water Act were both enacted after EMCA and both make similar provisions on public consultation. The only difference is that the provisions under the Water Act are in the main body of the statute[76] while in the Forest Act, they are in a schedule.[77] These statutes give the requirements for public consultation which are almost similar to those of EIAs. They provide that where the law requires public consultation,

[72] S. 58.
[73] S. 59.
[74] [2006] 1KLR (E&L) 772.
[75] HCCC No. 133 of 2012, [2013] eKLR.
[76] S.107.
[77] Third Schedule.

the relevant entity shall publish a notice in relation to the proposed action in the Kenya gazette, newspapers and local radio stations. The notice shall invite written comments or objections to the proposed action from the public within sixty days[78] of the publication of the notice. The said authority shall then publish through the same media a notice that copies of the decision and reasons therefore are available for public inspection. The last provision is critical because in public participation, the public agency retains the ultimate decision-making authority.[79]

In *Lake Naivasha Friends of the Environment v AG and 2 others*,[80] the question was whether the respondents complied with the law on public consultation in developing a Catchment Management Strategy. The respondents advertised the Catchment Management Strategy in the Kenya Gazette and in a local newspaper inviting the public to forward their comments. There were also meetings held with various stakeholders. The court found that the meetings and advertisements constituted sufficient consultations under the Water Act and that it was impractical for the respondents to contact and invite every interested individual personally to give their input. It also held that in implementing policy, it was impossible for the State to please each person or meet their individual interests. In some circumstances, the rights of the majority will be elevated over those of the individual.

2.6 Prevention Principle

The prevention principle aims at averting damage to the environment before it actually occurs. According to UNEP, experience and scientific expertise demonstrate that prevention of environmental harm should be the golden rule in environmental governance, for both ecological and economic reasons. This is because it is frequently impossible to remedy environmental injury.[81] There is an international obligation not to cause damage to the environment irrespective of whether or not there is transboundary impact or international responsibility.[82] This principle requires that activities that might cause risk or damage to the environment be reduced, limited or controlled.[83] It requires anticipatory investigation, planning and action before undertaking activities which can cause harm to the environment.[84]

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[78] The Water Act provides for 30 days.
[79] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.7.
[80] HC Petition No. 36 of 2011, [2012] eKLR.
[81] UNEP, *Training Manual on International Environmental Law*, *op cit*, p.32.
[82] *Ibid.*
[83] Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.
[84] Nanda, V. & Pring, G.R., *International Environmental Law and Policy for the 21st Century* (2nd Revised Edition Martinus Nijhoff Publishers, 2012), p.62.

Under this principle, States are under an obligation to prevent damage to the environment within their own jurisdictions.[85] The standard of care for prevention, is due diligence.[86] Due diligence in customary international law requires effective national legislation and administrative controls.[87] In Kenya, the Constitution contains provisions that reflect this principle. One of the obligations of the State in respect of the environment, as envisaged under Article 69(1) of the Constitution, is to eliminate processes and activities that are likely to endanger the environment. Further, Article 69(2) places a legal 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. Further, Article 70 of the Constitution gives courts the power to make orders or give directions that would be appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment. It is also noteworthy, that this would be done after an application by any person who may feel that the right to a clean and healthy environment as guaranteed under Article 42 is likely to be violated, denied, threatened or infringed. Such a person does not have to demonstrate *locus standi* to do so.[88]

Under national legislation, EMCA has provisions that reflect the principle of prevention of harm to the environment. Section 9 of EMCA outlines the objects and functions of the National Environment Management Authority. Amongst these is the responsibility to publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environment degradation. Section 38 of EMCA outlines the functions of the National Environment Action Plan which includes identifying and recommending policy and legislative approaches for preventing, controlling or mitigating specific as well as general adverse impacts on the environment. The foregoing provisions play a preventive role, thus preventing environmental harm.

2.7 International Cooperation in Management of Natural Resources

As countries embrace globalization and the resultant competition over natural resources, especially those that are transboundary to fast track economic growth, there has arisen a need for international cooperation in the management of natural resources. This is due to the fact that some environmental problems that arise out of mismanagement of natural resources like climate change are themselves transnational in nature hence requiring the effort and cooperation of every state to combat them. This cooperation

[85] Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.
[86] Nanda V. & Pring, G.R, *International Environmental Law and Policy for the 21st Century, op cit*, p. 62.
[87] *Ibid.*
[88] Art.70 (3), Constitution of Kenya, 2010.

principally includes both multilateral and bilateral, transboundary and private sector cooperation.[89]

The duty to cooperate is well established in international law. The first part of Principle 7 of the Rio Declaration provides that "*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem*." Principle 14 provides that States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health. In Kenya, this Principle has not been emphasized in natural resources legislation. However, EMCA recognizes this Principle as one of the principles of sustainable development in the management of environmental resources shared by one or more states.[90]

2.8 Common but Differentiated Responsibilities

The principle of 'common but differentiated responsibility' is said to have evolved from the notion of the 'common heritage of mankind' and is also a manifestation of general principles of equity in international law.[91] Principle 7 of the Rio Declaration requires States to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem. It goes on to state that, in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.

This principle is envisaged in a number of international legal instruments including, the Rio Declaration and the *United Nations Framework Convention on Climate Change* (UNFCCC) and its Kyoto Protocol. The UNFCCC provides that Parties should act to protect the climate system, "*on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities*."[92] Member States who have polluted most, have to take the biggest responsibilities in reducing the effects of that pollution. Differentiated responsibility is especially important in ensuring fairness to developing and Least Developed States that have contributed less to climate change and global warming. The responsibility of each State depends on the amount of emissions that result from them. For instance, large emerging economies would have a bigger

[89] Nkonya, E., *et al*., International cooperation for sustainable land and water management, *SOLAW Background Thematic Report* - TR16.
[90] No. 8 of 1999, S. 3 (5) (c).
[91] The Principle of Common But Differentiated Responsibilities: Origins and Scope, For the World Summit on Sustainable Development, 2002, Johannesburg, 26 August, *A Centre for International Sustainable Development Law (CISDL) Legal Brief*, p. 1.
[92] Art.3 of the UNFCCC.

responsibility towards environmental management and conservation when compared to a tiny developing State.

The principle of common but differentiated responsibility is a way to take into account the differing circumstances, particularly in each state's contribution to the creation of environmental problems and in its ability to prevent, reduce or control them.[93] The idea is to encourage universal participation and equity.[94]

2.9 Equitable Sharing of Benefits

With the accelerated efforts to foster economic growth and globalisation, the natural resources available for exploitation are quickly dwindling due to the competition for the same. This favours some countries while working against others because of the variance in technology and expertise to exploit the same. The United Nations and other international bodies therefore call for equitable sharing of the benefits that accrue from such shared resources. For instance, the fair and equitable sharing of the benefits derived from biodiversity is one of the central objectives of the Convention on Biological Diversity (CBD).[95] Article I thereof provides that the objectives of the Convention, are to be pursued in accordance with its relevant provisions. The sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.[96]

In the Kenyan context, the principle is explicit in a number of laws. Article 60(1) (a) of the Constitution of Kenya, 2010 enumerates equitable access to land as one of the guiding principles of the land policy in the country. All should have equitable access to land and public spaces including people with disabilities, the youth and marginalised communities. In addition, Article 69(1) (a) thereof, further provides that one of the obligations of the State with regard to the environment is to ensure equitable sharing of the accruing benefits. Article 42 guarantees every person the right to a clean and healthy environment, including the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, particularly those contemplated under Article 69.

To facilitate more equitable distribution of accruing benefits among locals, often amongst subsistence, and indigenous peoples, the environmental laws provide for

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[93] UNEP, *Training Manual on International Environmental Law, op cit*, p.29.
[94] *Ibid.*
[95] The Union for Ethical Bio-Trade, Available at *http://www.ethicalbiotrade.org/abs/*[Accessed on 28/06/2013].
[96] Art. I, Convention on Biological Diversity.

community based natural resource management. For instance, the Forests Act, 2005 provides for community participation in forests management under sections 45-48. Communities may register groups that get involved in management and use of forests resources in their area. Under the Water Act, 2002 provision is made for communities to establish Water Resources Users Associations and Catchment Areas Advisory Committees to among other things, ensure that water as a resource is used equitably and conflicts managed effectively at the local level. Section 43 of EMCA provides that the Minister (Cabinet Secretary) may, by notice in the Gazette, declare the traditional interests of local communities customarily resident within or around a lake shore, wetland, coastal zone or river bank or forest to be protected interests.

2.10 Reasonable Use and Equitable Utilization

The principle of reasonable use and equitable utilisation of resources comes into play mostly where there are transboundary resources being shared by more than one state. This principle has been incorporated in a number of international legal instruments on environmental conservation to which Kenya is a signatory. The principle has been codified in Article of the 1997 Convention on the Law of Non-Navigational Uses of International Water Courses,[97]which is considered a codification of customary principles. It requires that a State sharing an international watercourse with other States utilize the watercourse, in its territory, in a manner that is equitable and reasonable *vis-à-vis* the other States sharing it. In order to ensure that their utilization of an international watercourse is equitable and reasonable, States are to take into account all relevant factors and circumstances. Article 5 also sets forth, in paragraph 2, the principle of equitable participation. According to this principle, States are to "*participate in the use, development and protection of an international watercourse in an equitable and reasonable manner*." This principle is expected to have significant implications in Kenya, in light of recent discoveries of underground water aquifers traversing a number of countries in the East African Region.

2.11 Precautionary Principle

EMCA defines precautionary principle as the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[98] O'riordan, *et al*, identifies a number of core elements to the

[97] Convention on the Law of the Non-Navigational Uses of International Watercourses New York, 21 May 1997.
[98] S. 2, Act No. 8 of 1999.

precautionary principle, indicating that there are seven main themes, though each of them has a different intellectual and policy underpinning.[99] These elements are: Firstly, *pro-action*: this is the willingness to take action in advance of scientific proof, or in the face of fundamental ignorance of possible consequences, on the grounds that further delay or thoughtless action could ultimately prove far more costly than the 'sacrifice' of not carrying on right now; Secondly, cost-effectiveness of action in that proportionality of response should be designed to show that there should be a regular examination of identifiable social and environmental gains arising from a course of action that justifies the costs; Third, safeguarding ecological space as a fundamental notion underlying all interpretations of the precautionary principle in terms of how far natural systems and social organisations are resilient or vulnerable to further change or alteration; Fourth, legitimising the status of intrinsic value or bioethics in that vulnerable, or critical natural systems, namely those close to thresholds, or whose existence is vital for natural regeneration, should be protected as a matter of moral right; Fifth, shifting the onus of proof such that the burden of proof should shift onto the proto-developer to show *'no reasonable environmental harm'* to such sites or processes, before development of any kind is allowed to proceed; Sixth, is meso-scale planning. A meso-scale is the period, over which any major decision will have an influence; and seventh, precautionary principle requires paying for ecological debt which is a case for considering a burden-sharing responsibility for those not being cautious or caring in the past.[100]

The precautionary principle encourages policies that protect human health and the environment in the face of uncertain risks.[101] It is therefore at the heart of sustainable development agenda. Article 10 of the Constitution of Kenya, 2010 provides for sustainable development as one of the national values and principles of governance. This principle must therefore guide the law making organs while legislating on environmental management and conservation.[102] Section 11 of the *Land Act*, 2012 mandates the National Land Commission to take appropriate measures to conserve ecologically sensitive public land to prevent environmental degradation and climate change. The precautionary principle is one of the principles of sustainable development guiding the Environment and Land Court as provided for under section 18 of the *Environment and Land Act*, 2012.

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[99] O'riordan, T., *et al*, "The Precautionary Principle in Contemporary Environmental Politics," *Environmental Values*, Vol. 4, No. 3 (August 1995), pp. 191-212, p. 195.
[100] *Ibid.*
[101] Kriebel, D., *et al*, "The Precautionary Principle in Environmental Science," *Environmental Health Perspectives*, Vol. 109, No. 9, Sep., 2001, pp. 871-876.

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

2.12 Transboundary Environmental Damage

Transboundary environmental damage usually arises where the impact of environmental damage and degradation affects not only the country of origin but also another country. This is especially so in the case of water pollution. This is one of the principles that informed the making of the Treaty for the Establishment of the East African Community which was signed in Arusha on 30 November 1999 and entered into force on 7 July 2000.The regional organisation aims at achieving its goals and objectives through, *inter alia,* promoting a sustainable growth and equitable development of the region, including rational utilisation of the region's natural resources and protection of the environment. This places responsibilities on the member States to ensure realization of the goals and objectives of the Treaty.

Regulation 44 of the Legal Notice Number 101 provides that where a project is likely to have a transboundary impact, the proponent of the project must, in consultation with the Authority (NEMA), ensure that appropriate measures are taken to mitigate any adverse impacts, taking into account any existing treaties and agreements between Kenya and the other country. This places a huge responsibility on the State to prevent transboundary environmental damage.

2.13 Conclusion

This Chapter has examined some of the principles of natural resource management and their application in Kenya. Some of these principles are recognized in the Constitution 2010 and in various international instruments some of which have been mentioned herein. Principles play an important role in environmental law and are engines in the evolution of natural resources law.[103] They guide policy formulators and legislators when developing policy and law on natural resources. Understanding these principles will help in understanding the context within which natural resources management is required to take place in Kenya.

[103] UNEP, *Training Manual on International Environmental Law, op cit,* p.23.

Chapter Three

Approaches to Natural Resources Management in Kenya

3.1 Introduction

Natural resources law represents a major and perhaps one of the most important regulatory regimes in most countries.[1] One of the crucial issues addressed by natural resources law is how to avoid harm and serious damage to resources.[2] Therefore, policymakers have a variety of approaches available when legislating to enable holistic protection of the environment and natural resources.[3] These approaches include command and control, market-based approaches, incentives (taxation and subsidies) amongst others. Community based natural resource management (CBNRM) and traditional resource management institutions have also been used with some success in Kenya.[4] Ecosystem-based approaches such as integrated water resources management (IWRM) or River basin management, integrated coastal zone management (ICZM) and integrated management of land and other resources are other approaches to NRM.[5] This chapter discusses these approaches, assesses their role in sustainable development, and proposes reforms on how to improve natural resource management in light of the provisions of the Constitution.

These approaches are to be applied as complementary tools in natural resource management. They are not mutually exclusive as they overlap with one another in their application.[6] Command and control and market-based mechanisms can be used in a synergetic manner such that while broader environmental objectives are set by public authorities, the methods of achieving those objectives are determined by the business

[1] Hutter, B.M, 'Socio-Legal Perspectives on Environmental Law: An Overview' in Hutter B.M. (ed), *A Reader in Environmental Law,* (Oxford University Press, 1999) 3, p.4.
[2] Gunningham, N. & Sinclair, D., 'Designing Smart Regulation,' in Bridget M. Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999), p.305.
[3] *Ibid,* p.305.
[4] See generally, Measham, T.G. & Lumbasi, J., "Success factors for Community Based Natural Resource Management (CBNRM): lessons from Kenya and Australia." *Environmental Management*, Vol. 52 (3), 2013, pp. 649-659.
[5] See Feeney, C. & Gustafson, P., "Integrating Catchment and Coastal Management-A Survey of Local and International Best Practice," *Prepared by Organisation for Auckland Regional Council, Auckland Regional Council Technical Report 2009/092*, 2010.
[6] Blanco, E. & Razzaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives,* (Edward Elgar Publishing Limited, 2011), p. 106; See also Miller, B. W. & Morisette, J. T., "Integrating research tools to support the management of social-ecological systems under climate change," *Ecology and Society*, Vol. 19, No. 3, 2014, Art. 41.

fraternity.[7] Some argue that [8] while market-based mechanisms are seen to extend the freedom to the market players, in command and control mechanisms, the benefits are said to flow to the consumers due to government intervention. Further, the government will always play its role of granting rights, imposing responsibilities, and extend, restrict, or eliminate privileges, while the market conservatives argue that once there is efficient market then the free play of the market forces will allocate resources to their highest valued uses and governments should therefore stay away.[9]

3.2 Command and Control Approaches

This approach is based on standards or regulations. It is one of the most common approaches to environmental governance in many countries. This is true because natural resources management has direct consequences for human wellbeing, social justice and creates conflicting individual interests in democratic institutions.[10] Command and control approach has several different meanings. It means that natural resources protection systems rely on laws, regulations and penalties.[11] Regulation traditionally refers to the use of law to constrain and organize economic activity. It directs attention to state intervention through law, and typically involves regulation through public agencies charged with the implementation of the law.[12] In Kenya, the main agency charged with the implementation of natural resources laws is the National Environment Management Authority (NEMA). Sectoral laws create a multiplicity of agencies dealing with sector specific issues.[13]

The command and control mechanism therefore involves the 'command' of the law and the legal authority of the State. Typically, it entails regulatory law, backed by criminal sanctions.[14] It is based on potential coercion rather than voluntary goodwill and on penalties rather than positive incentives.[15] The command and control mechanism is what

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[7] Hanks, J.P., "Self-Regulation and Co-Regulation-Cost-effective Policy Options for Industrial Sustainable Development," in "*Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice,*" (UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa), pp.48-58.

[8] *Swaney,* J.A., "Market versus Command and Control Environmental Policies," *Journal of Economic Issues,* Vol. 26, No. 2, Jun., 1992, pp. 623-633, p. 624.

[9] *Ibid.*

[10] Blanco, E. & Razzaque, J, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives, op cit.*

[11] Davies J.C. & Mazurek, J., *Pollution Control in the United States: Evaluating the System* (Resources for the Future, 1998), p. 15.

[12] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit*, pp. 3 & 4.

[13] See for example, the Kenya Wildlife Service (Established under the Wildlife Conservation and Management Act, 2013, No. 47 of 2013); Kenya Forest Service (under Forests Act, 2005); and the various agencies under the Water Act, 2002.

[14] *Ibid,* pp.3 & 5.

[15] Davies J.C. & Mazurek, J., *Pollution Control in the United States: Evaluating the System, op. cit,* p.15.

has predominantly informed the development of Kenya's natural resources protection regime.[16]

In command and control, government agencies try to control exploitation and conservation of natural resources by issuing detailed regulations and permits.[17] This mechanism presupposes the government's ability to identify environmental problems and set rational priorities, develop regulations that provide technologically workable and politically viable solutions and enforce those regulations effectively. It is the state or international institution that establishes both the regulatory parameters and the conditions and instruments that are to be used.[18]

At its core is the centralization of authority for natural resource management in the public authorities with little delegation of responsibilities to other authorities or communities and limited participation of local communities.[19]

3.2.1 Effectiveness of Command and Control Mechanisms

One reason that makes command and control mechanisms effective is its criminalization aspect in regulation.[20] It creates a kind of social control over the use of natural resources. Through command and control mechanisms, new categories of criminal law and criminal behaviour have been created.[21] Entities which would have escaped with criminal behaviour are now put on their guard. An example is the culpability of corporations.[22] Under penal law in Kenya, when a body corporate commits an offence it is its managers who are held culpable[23] but under environmental law, culpability is assigned to the body corporate in its capacity as such, together with its managers.[24] This

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[16] 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.

[17] Babich, A., 'Understanding the New Era in Environmental Law' in Blumm, M.C. (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992), p. 364.

[18] *Ibid.*

[19] Ochieng, B.O, 'Institutional Arrangements for Environmental Management in Kenya,' *op. cit*, p.200; *cf.* Ribot, J.C., 'Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation,' *World Resources Institute*, 2002.

[20] 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.

[21] See Bethell, E., 'Environmental Regulation: Effective or Defective? Assessing Whether Criminal Sanctions Provide Adequate Protection of the Environment,' *Plymouth Law Review*, 2009, p.1.

[22] *Ibid.*

[23] S. 23, Penal Code (Cap 63), Laws of Kenya.

[24] S. 145(1), Act No. 8 of 1999.

is important in ensuring compliance of large industries which are often responsible for pollution which may negatively impact natural resources.

Under command and control approaches, criminal law is used as a preventative tool by use of punitive sanction.[25] This is because from an economic perspective, criminal sanctions when effectively enforced raise the cost of certain conduct and therefore encourages compliance with laws.[26] Where the criminal penalty is greater than the benefits that would have obtained from continuing with the pollution activity, the corporation will prefer to comply with the law. In addition to fines, EMCA proposes other penalties such as forfeiture of items used as well as cancellation of licenses and permits.[27] Corporations will fear shutting down due to cancelled permits and losing their assets as these will directly impact their profits.

Another reason that makes command and control effective is that, environmental laws are regarded as protective of public good.[28] Most environmental problems, pollution among them, must be solved by government action to avoid the tragedy of the commons.[29] Activities of relatively powerful groups are regulated in favour of a less powerful majority.[30] Indeed, it has been observed elsewhere that public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law.[31] This is so simply because without the imposition of governmental restraints, firms and individuals could pollute with utter contempt.[32]

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[25] 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.

[26] *Ibid*, p. 110.

[27] S.146, Act No. 8 of 1999.

[28] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op cit*, pp. 3 & 11.

[29] Krier, J.E. 'The Pollution Problem and Legal Institutions: A Conceptual Overview' in Michael C. Blumm (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992) 181, p.181; See also Hardin, G. 'The Tragedy of the Commons,' *Science*, New Series, Vol. 162, No. 3859 (Dec. 13, 1968), pp. 1243-1248, p. 1245.

[30] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit*, pp. 3 & 11.

[31] *Municipal Council, Ratlam v Shri Vardhichand & ors*, 29 July, 1980, Supreme Court of India, 1980 AIR 1622, 1981 SCR (1) 97, p. 12.

[32] Krier, J.E., *op cit*, p.181; See also generally Stewart, K. 'Avoiding the Tragedy of the Commons: Greening Governance through the Market or the Public Domain?'
Available at *http://www.yorku.ca/drache/talks/pdf/apd_stewartfin.pdf*, [Accessed on 19/07/2013].

3.2.2 Criticisms against the Command and Control Approach

Despite command and control being an effective tool, it has many critics. One recurring criticism is that regulatory agencies are under the threat of "regulatory capture" by the regulated population, if they identify too closely with their interests and hence may become lax in their enforcement of the law. Regulatory capture is also evident in the apparent imbalance between the capacities of the regulatory agencies and the regulated industries. This means that at times the business enterprises, may enjoy some advantages over the public regulator as they have more money, specialized staff, greater capacity to fight the regulator on both the technical and legal grounds and more information on the environmental problem, its extent and possible technological remedies.[33]

Command and control approaches also suffer from a lack of resource capacity in terms of staffing of the agencies, which leads to inability to carry out their mandates.[34] Lead agencies such as Kenya Wildlife Service and the National Environmental Management Authority lack enough officials to monitor and check on activities likely to harm the environment. Poor enforcement of standards on the part of national Environment Management Authority (NEMA) can partly be said to be the reason for increased pollution in the country. For example, lead agencies' inspectors have the discretion to decide what constitutes an offence and whether to refer a case for prosecution or not. Their interpretation of the law becomes quite important as it constitutes the bridge between the government's decision to intervene and protect the environment and the impact of the intervention upon both the environment and the regulated.[35] In such scenarios, incentive-based mechanisms become more useful.

Another challenge in relation to enforcement is the fact that command and control mechanisms employ a deterrent/sanction model. In this model, a penal style of enforcement accords prosecution an important role as its main objective is to prohibit certain activities. It is also accusatory and geared towards catching law breakers.[36] The penalties for violating standards tend to be too low and enforcement tends to be weak; that standards tend to be less cost-effective and the fact that to be effective, standards must

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[33] Hutter, B.M. "*A Reader in Environmental Law*", (Oxford University Press, 1999); See also Stallworthy, M, *Understanding: Environmental Law* (Sweet & Maxwell, 1st ed., 2008), pp. 79-81*;* See also Laura Tlaiye, L. & Biller, D, 'Successful Environmental Institutions: Lessons from Colombia and Curitiba, Brazil,' *LATEN Dissemination Note*, No.12, December, 1994, p. 5.

[34] See Amechi, E.P., "Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realisation of the Right to Environment," 5/2 *Law, Environment and Development Journal*, 2009, pp. 119-120.

[35] *Ibid.*

[36] Swaney, J.A., "Market versus Command and Control Environmental Policies," *Journal of Economic Issues*, Vol. 26, No. 2, Jun., 1992, pp. 623-633, p. 624.

be revised frequently which is not the case since in practice legislation tends not to keep up with the change.[37]

Command and control mechanism has further been criticized as being effective only in achieving short-term economic gains as against long-term benefits due to its oversimplified perception of problems and solutions for control of the same.[38] It is argued that the command and control approach, implicitly assumes that the particular problem in question is well-bounded, clearly defined, relatively simple, and generally linear with respect to cause and effect.[39] Where it is applied to complex real situations, it may not achieve the desired and predictable outcome thus risking severe ecological, social, and economic repercussions.[40] Instead of pursuing short-term benefit through command and control, there should be effective natural resource management that promotes long-term system viability based on an understanding of the key processes that structure and drive ecosystems, and on acceptance of both the natural ranges of ecosystem variation and the constraints of that variation for long-term success and sustainability.[41] Some economists and legal scholars have argued that command and control mechanisms are beset by excessive bureaucratic centralization and rigidity, which lead to delays and wastage of time. [42] A command and control approach relies on centralizing authority for environmental management in the hands of public institutions with little if any delegation of responsibilities to communities.[43] This leaves little room for participation of local communities.[44] In this way, a command and control approach may ignore local and other traditional knowledge relevant in natural resources management, which could be more cost effective and less time consuming.[45]

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[37] Sourced from *http://www.unescap.org/drpad/vc/orientation/M5_10.htm*,[Accessed on 19/07/2013]; See also Bethell, E. 'Environmental Regulation: Effective or Defective? Assessing Whether Criminal Sanctions Provide Adequate Protection of the Environment,' *op cit*.

[38] Holling C. S. & Meffe, G.K. "Command and Control and the Pathology of Natural Resource Management," *Conservation Biology*, Vol. 10, No. 2 (Apr., 1996), pp. 328-337, pg. 329.

[39] *Ibid*; See also generally Sposito, V.A & Faggian, R., 'Systemic Regional Development-A Systems Thinking Approach,' Informationen zur Raumentwicklung Heft, January, 2013. Available at http://www.researchgate.net/publication/268180957_Systemic_Regional_Development__A_Systems_Thinking_Approach [Accessed on 3/08/2013]

[40] *Ibid.*

[41] *Ibid*, p. 335; See also generally Simon A. Black, S. A., *et al*, "Using Better Management Thinking to Improve Conservation Effectiveness," *ISRN Biodiversity*, vol.2013, 2013.

[42] Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate' in Michael C. Blumm (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992) 343, p. 345.

[43] Ochieng', B.O., 'Institutional Arrangements for Environmental Management in Kenya,' *op. cit*, p. 200.

[44] *Ibid.*

[45] See generally, Berkes, F., 'Alternatives to Conventional Management: Lessons from Small-Scale Fisheries,' *Environments*, Vol. 31, No.1, 2003.

The use of criminal law and criminal sanctions to control regulatory behaviour also poses a challenge. Criminal law typically regulates situations and activities which are potentially harmful. In other words, actual harm need not have been caused for an offence to have been committed. Even when harm has been caused, the source of an offence may be difficult to detect because of the complex technical nature of the activities subject to control.[46] EMCA provides that the court may issue an environmental restoration order against any person who has harmed, is harming or is reasonably likely to harm the environment.[47] It, therefore, seeks to regulate a situation where harm has not yet actually occurred.

Further, evaluating environmental harm is difficult because of geographical and chronological factors.[48] To determine the need for regulation, the government agency assesses the risk of each activity, which procedure is slow and resource intensive.[49] Industry, also constantly adds new risks and pollutants to the thousands already existing.[50] EMCA, for example has legislated on standards for water quality among others.[51] It only identifies poisons, toxic substances[52] and effluent[53] as water pollutants. However, there are many sources of water pollution which NEMA is yet to identify and legislate upon. Once risks are assessed, regulators face the difficulty of setting an acceptable level of risk as this involves balancing environmental considerations against economic costs of risk reduction.[54]

Command and control mechanisms also have undesirable impacts where they seek to regulate activities that are crucial to the economic growth of a country.[55] For example, one of the flagship projects under Vision 2030 is the development and creation of at least five small and medium enterprise industrial parks.[56] This focus immediately raises

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[46] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit, pp.*3 & 6
[47] S. 111(1), Act No. 8 of 1999.
[48] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op cit, pp.*3 & 7; See also generally, Koomey, J. |& Krause, F., 'Introduction to Environmental Externality Costs,' available at *http://enduse.lbl.gov/Info/Externalities.pdf*[Accessed on 5/01/2015].
[49] Babich, A., 'Understanding the New Era in Environmental Law,' op cit p.367; See also, Eskeland, G. S. & Jimenez, E., "Policy Instruments for Pollution Control in Developing Countries," *The World Bank Research Observer*, vol. 7(2) (July 1992), pp. 145-169.
[50] *Ibid*, p. 367.
[51] S. 71, EMCA.
[52] S. 72(1).
[53] S. 73.
[54] Babich, A., 'Understanding the New Era in Environmental Law,' *op. cit*, p. 370.
[55] See generally, 'Regulation.' Available at *http://www.treasury.govt.nz/publications/briefings/1990/big90-11.pdf* [Accessed on 5/01/2015]; See also Coglianese, C., 'Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy,' *OECD Expert Paper No. 1*, August 2012.
Available at *http://www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf* [Accessed on 4/01/2015].
[56] Republic of Kenya, *Kenya Vision 2030 Popular Version*, (Government of Kenya, 2007) p.14.

important questions concerning the general effects and implications of natural resources conservation legislation. How useful will the law be as a regulatory tool, particularly when it is attempting to control activities which may be regarded as central to the economy?[57] It may fail in this quest depending on what government is seeking to achieve at any particular time.

Finally, one of the major weaknesses of command and control mechanisms is that they are not self-enforcing. The law fails to provide incentives for members of the regulated community to police themselves and one another.[58] Under the command and control system, the regulated community's sole responsibility is to comply with government edicts.[59] If a statute or regulation does not forbid a particular practice, people may engage in that practice with impunity. Thus, the risk that environmental hazards have escaped scientific scrutiny and regulatory control is borne by the public.[60]

3.2.3 Application of Command and Control in Kenya

For a long period of time, environmental governance in Kenya has been informed by the command and control approach. For instance, Part IX of the Environmental Management and Coordination Act[61] provides for environmental restoration orders, environmental conservation orders and environmental easements.[62] EMCA also criminalizes activities that contribute to the degradation of the environment and prescribes penalties for any non-compliance or violation of the laws. Such provisions either spell out orders or provide for disincentives under the law to discourage violation. However, very low penalties and lack of synchronization of penalties in sectoral laws with EMCA has led to a general failure of the command and control mechanism in protecting natural resources in Kenya. Further, EMCA provides for the appointment of environmental inspectors to assist in enforcement of the provisions of the Act.[63] Some sectoral laws in Kenya have gone as far as para-militarizing enforcement agencies in an attempt to

[57] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op cit*, pp. 3 & 6.
[58] Babich, A., 'Understanding the New Era in Environmental Law,' *op. cit*, p.375; See 'Chapter xv. Regulatory And Economic Instruments For Solid Waste Management,' UNEP Division of Technology, Industry and Economics (DTIE), Available at *http://www.unep.org/ietc/Portals/136/SWM-Vol1-Part4.pdf* [Accessed on 7/01/2015].
[59] *Ibid*; See also Aalders, M.V.C. & Ton Wilthagen, T., 'Moving beyond command-and-control: reflexivity in the regulation of occupational safety and health and the environment,' *UvA-DARE, the institutional repository of the University of Amsterdam (UvA)*, 1997. Available at *http://dare.uva.nl/document/2/27432* [Accessed on 6/01/2015].
[60] *Ibid; cf.* Wang, A., "The Role of Law in Environmental Protection in China: Recent Developments," Vermont *Journal of Environmental Law*, Vol.8, 2006, pp.195-223.
[61] No. 8 of 1999, Laws of Kenya.
[62] Ss. 108-115, No. 8 of 1999.
[63] *Ibid*, S. 117.

enhance command and control. Kenya Wildlife Service, for example, is established as a 'uniformed and disciplined' service under the *Wildlife Conservation and Management Act*, 2013[64] while Kenya Forest Service provides for 'uniformed and disciplined' enforcement officers. Both Services are authorized to use fire arms to ensure compliance with the conservation standards provided for under the law.

EMCA and the other sectoral laws, use tools such as licensing, registration and certificates to control access to and use of natural resources. Such licenses and certificates come with conditions which have to be met or there will be risk of withdrawal of the license among other penalties.

3.3 Market-Based Approaches

Market-based approaches employ market-based instruments, which are defined as regulations that encourage behavior through market signals rather than through explicit directives regarding environmental matters.[65] Lack of a price on environmental goods has been cited as a major reason for their overuse, depletion and unsustainable management.[66] Due to this reason, command and control approach to environmental management has at times been seen as the most appropriate tool for environmental management for its interventionist approach, to dictate what people should do with respect to environmental management.[67]

3.3.1 Application of Market-Based Approaches

The National Environment Action Plan under EMCA, attempts to incorporate the market-based approaches in environmental management by way of providing for appropriate legal and fiscal incentives that may be used to encourage the business community to incorporate environmental requirements into their planning and operational processes.[68]

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[64] No. 47 of 2013, Laws of Kenya.

[65] Stavins, R.N., 'Experience With Market-Based Environmental Policy Instruments.' *The Handbook of environmental Economics, 2001*, p 1. Available at *http://www.hks.harvard.edu/fs/rstavins/Papers/Handbook_Chapter_on_MBI.pdf*[Accessed on 8/01/2015].

[66] See 'Protecting the Environment and Economic Growth: Trade-Off Or Growth-Enhancing Structural Adjustment?' p.2.
Available at *http://ec.europa.eu/economy_finance/publications/publication7726_en.pdf*[Accessed on 6/01/2015]; See also Rosegrant, M.W., *et al,* 'Water policy for efficient agricultural diversification: market-based Approaches,' *Food Policy*, 1995, Vol. 20, No. 3, pp. 203-223.

[67] See 'Chapter 4: Regulatory and Non-Regulatory Approaches to Pollution Control,' *Guidelines for Preparing Economic Analyses*, December 2010, pp. 4.2-4.3.
Available at *http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-04.pdf/$file/EE-0568-04.pdf*[Accessed on 8/01/2015].

[68] S. 38(c), No. 8 of 1999.

3.4 Incentives

Proponents of market-based approaches seem to suggest that government should replace command and control mechanisms with a system that creates incentives to enhance protection of natural resources in a more efficient manner.[69]As such, natural resources laws should be modified to incorporate incentives.[70] The fundamental changes necessary to prevent wholesale destruction of the environment will occur only if people have powerful incentives to rethink and reform their behaviour towards the environment.[71]As an attempt to move away from command and control, there should be a shift from coercive to cooperative regulation, where persuasion instead of punishment and rewards (incentives) as against punishment, are preferred.[72] It is argued that practices of environmental responsibility by citizens and businesses may make good business sense by reducing harmful impacts of industry before the introduction of restrictive legislation.[73]EMCA provides for tax incentives, fiscal incentives, customs and excise waivers and tax rebates.[74]

Incentives are forms of rewards extended to the business players as a way of encouraging them to adopt measures that help in preserving the environment while discarding or avoiding those that contribute to the degradation of the environment. They may take several forms which range from tax/fiscal to exclusion from the effects of certain policy measures which would otherwise harm businesses.[75]

EMCA provides that taxes and other fiscal incentives, disincentives or fees may be proposed to government to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation.[76]

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[69] Babich, A., 'Understanding the New Era in Environmental Law,' *op cit,* p.375; See also Porto, M. & Lobato, F., 'Mechanisms of Water Management: Command & Control and Social Mechanisms,' Parte 1 de 2. Available at *http://socinfo.eclac.org/samtac/noticias/documentosdetrabajo/7/23397/InBr01605.pd*f [Accessed on 8/01/2015].

[70] Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate,' *op cit, p.* 345.

[71] Babich, A., 'Understanding the New Era in Environmental Law,' *op cit,* p. 361; See also Bhat, S., *Natural Resources Conservation Law* (SAGE, Publications India, 2010).

[72] Braithwaite, J., "Rewards and Regulation," *Journal of Law and Society,* Vol. 29, No. 1, New Directions in Regulatory Theory (Mar., 2002), pp. 12-26, p. 13.

[73] Forsyth, T., "Environmental Responsibility and Business Regulation: The Case of Sustainable Tourism," *The Geographical Journal,* Vol. 163(3), Nov., 1997, pp. 270-280, p. 271.

[74] S. 57.

[75] See 'The Cost Effectiveness and Environmental Effects of Incentive Systems: The U. S. Experience with Economic Incentives for Protecting the Environment,' 2001, available at *http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0216B-04.pdf/$file/EE-0216B-04.pdf*[Accessed on 6/01/2015].

[76] S. 57 (1) of EMCA.

Such taxes, 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.[77] They also include tax rebates to industries or establishments that install plants, equipment and machinery for pollution control, recycling of wastes, water harvesting and conservation, prevention of floods and for using alternative energy sources as substitutes for hydrocarbons.[78] Section 57 (1) also covers tax disincentives to deter bad environmental behavior that leads to depletion of environmental resources or that cause pollution.[79] Finally, it covers user fees aimed at ensuring that those using environmental resources pay proper value for the utilization of those resources.[80] It can thus be surmised that fiscal incentives can play a critical role in ensuring that natural resources are sustainably exploited, utilized, managed and conserved as required by the Constitution.[81]

3.4.1 Effectiveness of Incentive Based Mechanisms

Natural resources laws, like any social rules require a higher degree of voluntary compliance for their success.[82] Incentives achieve the same aggregate level of natural resources protection as command and control approaches but they allocate the burden of this protection more efficiently among industry.[83] EMCA provides that the National Environment Action Plan should recommend appropriate legal and fiscal incentives that may be used to encourage the business community to incorporate environmental requirements into their planning and operational process.[84] This will lay the burden of environmental protection on businesses as opposed to the Government. Voluntary compliance in the United States of America (USA) has reduced environmental harm below what it would otherwise be.[85]

Incentives have a number of advantages for the private sector. They encourage flexibility in pollution control technologies used and motivate industries to devise new products or production technologies to reduce environmental harm.[86] This drives

[77] *Ibid*, S. 57 (2) (a).
[78] *Ibid*, S. 57 (2) (b).
[79] *Ibid*, S. 57 (2) (c).
[80] *Ibid*, S. 57 (2) (d).
[81] Art. 69 (1) (a) of the Constitution.
[82] Clarence, D. J & Mazurek, J., *Pollution Control in the United States: Evaluating the System*, (Resources for the Future, 1998) p.15.
[83] André, F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *Ethical Boundaries of Capitalism: Corporate Social Responsibility Series* (Ashgate Publishing Ltd., 2005), p.209.
[84] S. 38(c).
[85] Clarence D. J & Mazurek, J., *Pollution Control in the United States: Evaluating the System, op cit*, p.15.
[86] Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate' in Michael C. Blumm (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992) p.343-346.

industries towards cost-effective solutions and also towards more research and development in search of cheaper and better damage abatement techniques.[87] People, therefore, have a choice either to opt out of burdensome regulation or to develop environmental control technology.[88] EMCA provides that NEMA should promote the use of renewable sources of energy by creating incentives for the promotion of renewable sources of energy.[89] This will drive industries to use cost-effective clean energy.

Government agencies also benefit since incentives can be used to provide the Government with new sources of revenue.[90] The cost of incentives is also much lower than command and control costs. For example, it has been estimated that abatement costs of sulphur dioxide (SO_2) emissions in USA through a tradable permits system has saved about USD 1 billion a year in compliance costs.[91] The fact that costs are borne by industry alleviates the financial burdens on government.[92] Law enforcement costs are significantly reduced as is the government wage bill because fewer law enforcement officers are required.

3.4.2 Critique of Incentive Based Mechanisms

One of the shortcomings of incentives, and a reason they are not widely used as an environmental protection method, is that they do not fit every problem.[93] For example, Kenya cannot have blanket incentives to protect water resources countrywide. The pollution problem and nature of pollutants for Nairobi River are very different from those in Lake Victoria. When concerns are with respect to local environmental problems, it is the level emitted by individual firms that must be controlled.[94] In this case, a conventional command and control approach such as uniform standards may be the preferred policy.[95]

Another shortcoming is that there may be bureaucratic obstacles to the successful use of incentives including the difficulties of the economic calculations involved.[96] For

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[87] André, F., 'Firms and the Environment: Ethics or Incentives?' *op cit,* p.209.
[88] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview' in Hutter, B.M., (ed), *A Reader in Environmental Law,* (Oxford University Press, 1999), p.3, p.22.
[89] S. 49(b).
[90] Mintz, J.A., 'Economic Reform of Environmental Protection: A Brief Commend on a Recent Debate' in Blumm, M.C., (ed), *Environmental Law* (Dartmouth Publishing Company Limited, 1992), p.343, p.346.
[91] André F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *op. cit,* p.210.
[92] Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview' in Hutter, B.M., (ed), *op. cit,* p. 23.
[93] André F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *op. cit,* p.210.
[94] *Ibid,* p.210.
[95] *Ibid,* p.210; See also 'Why Regulatory Governance Matters,' *CRC Policy Brief,* No. 2, 2004, p. 3.
[96] Hutter, B.M. 'Socio-Legal Perspectives on Environmental Law: An Overview,' in Hutter, B.M., (ed), *op cit,* p. 23.

example, there may be no precise measures for the emissions involved because there may be no reliable technology available to undertake the measurement.[97] EMCA tries to side-step this difficulty by making it the responsibility of the Minister responsible for finance to propose incentives.[98]

Another reason why incentives are not widely used is that environmentalists view the pollution problem more as a moral failing of corporate and political leaders, rather than a by-product of society that can be reduced in an efficient way by use of incentives.[99] Ethics comes to the forefront of the debate rather than incentives. They worry that increased flexibility in pollution control advocated by incentives would lower the level of environmental protection.[100]

3.5 Community-Based Natural Resource Management (CBNRM)

CBNRM is informed by the view that sustainable management of natural resources is most likely where local communities are able to manage and derive benefits from natural resources. They are characterized by a commitment to involve community members and local institutions in management of natural resources, devolution of power and authority to the grass roots, a desire to reconcile the objectives of socio-economic development and environmental conservation, the tendency to defend and legitimize local and indigenous property rights and a desire to include traditional values in modern management of natural resources.[101] It is a response to the challenges of a decentralized management system which occasions natural resources degradation. It is also a modern attempt to revive traditional mechanisms for the conservation of natural resources.[102] Giving local communities the rights to manage, use or own resources, creates incentives for them to collectively invest in natural resources management.[103]

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[97] *Ibid,* p.23.
[98] S. 57(1).
[99] André F., 'Firms and the Environment: Ethics or Incentives?' in Dăianu, D. & Vranceanu, R. (eds), *op cit p.*210; See also Stavins, R.N. & Whitehead, B.W., "The Greening of America's Taxes: Pollution Charges and Environmental Protection," CSIA Discussion Paper 92-03, (Kennedy School of Government, Harvard University, March, 1992).
[100] *Ibid,* p.210.
[101] Nelson F. & Agrawal, A., "Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa," *Journal of Development and Change,* vol. 39, No.4, 2008, pp.557-585; See also Kellert, S.R., *et al,* "Community Natural Resource Management: Promise, Rhetoric and Reality," *Society and Natural Resources: An International Journal*, Vol.13 (8), p.706.
[102] *Ibid.*
[103] *Ibid,* p.558.

3.5.1 Legal Framework on Community Based Natural Resources Management in Kenya

National values and principles of governance such as sharing and devolution of power; democracy and participation of the people and sustainable development provide a basis for CBNRM.[104] The Constitution provides that the State shall protect and enhance indigenous knowledge of biodiversity of the communities.[105] The State is also obliged to encourage public participation in the management, protection and conservation of the environment.[106] In settling land disputes, communities are encouraged to apply recognized local community initiatives consistent with the Constitution.[107] This will enhance community involvement in natural resource management. All these provisions encourage in one way or the other the participation of local communities in the management, use or ownership of natural resources.

Land is also classified as private, public or community. Community land is land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.[108] This classification is important as it will encourage land management by communities. It also defines community land as land that is ancestral land and one that is occupied by hunter and gatherer communities.[109] In this context, the Ogiek and the Endorois communities in Kenya are the main reference point. The reason for this is that they are forest dwellers and there has been an issue as to whether they should manage the forests in which they live in or it should be left to state institutions such as the Kenya Forestry Service. The Ogiek are a forest dwelling people who live in the Mau forest in Nakuru. The Endorois, on the other hand, live near the Lake Bogoria reserve. The claim of the two communities has been tenure rights within the forest and wildlife protected areas. The issue has been a subject of litigation at the African Commission on Human and Peoples Rights.[110] It can, therefore, be argued that the two communities have their rightful place in the forests according to the Constitution and since they manage the forests, they are part of the community-based organizations that manage natural resources.

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[104] Art.10 of Constitution.
[105] *Ibid,* Art. 69(1) (c).
[106] *Ibid,* Art. (1) (d).
[107] *Ibid,* Art.60 (1) (g) and Art.67 (2) (f).
[108] *Ibid,* Art.63(d).
[109] *Ibid.*
[110] 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya; Application No. 006/2012 – African Commission on Human and Peoples' Rights v. The Republic of Kenya* (The Ogiek case arose from Communication No. 381/09 – *Centre for Minority Rights Development – Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya,* which was before the African Commission on Human and Peoples' Rights (the Commission), and later referred to the Court.)

In that regard, the Constitution provides for community forests.[111] The protection of community land and by extension forests is guaranteed in the Constitution in the sense that all unregistered land should be held in trust by the county governments on behalf of the communities.[112] It is also provided that community land should not be disposed of or otherwise used in a manner that contravenes the rights of the members of that particular community.[113]

There is also a paradigm shift towards the use of incentives to encourage participation in wildlife management in Kenya.[114] If private land owners and communities are given incentives to keep wildlife on their land, then they will perceive wildlife as an economic good and protect the wildlife in the same manner they protect their private property. This is important because command and control approaches to wildlife management have failed to curb loss of wildlife. Economic incentives such as tax exemptions and waiver of stamp duties on land relating to wildlife will go a long way into encouraging Kenyans to conserve wildlife as an alternative land use method.

In forests management, the Forest Act creates the Forest Conservation Committee (FCC) as a key avenue in decision making and is comprised of community forest associations and local authorities.[115] The Act recognizes the need to strengthen community-based institutions where the public can be more involved in the conservation of forests. The key aspect in the Act and the Policy is the emphasis on the involvement of stakeholders through participatory mechanisms in the management and conservation of forests.[116] Forests laws seek to enhance environmental governance by incorporating participatory and collaborative management of forests through involvement of communities not only as interested groups but as key stakeholders.[117] This motivates communities to invest in sustainable forestry management. Participation of communities in forests management is informed by the fact that exclusion of local communities in

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

[112] Art.63(3) of the Constitution.

[113] *Ibid,* Art.63 (4).

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

[115] Kaptoyo, E. & Habiba A., *The Forest Act No 7 of 2005: Opportunities for Improved Forest Conservation to Forest Development,* available at *www.chr.up.ac.za* [Accessed on 28/03/2013].

[116] *Ibid.*

[117] Situma, F.D., Forestry Law and the Environment in Okidi, C. O, *et al*, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Education Publishers, Nairobi 2008), p.250; See also S. 46 of the Forest Act, 2005.

management and conservation of natural resources tends to escalate degradation rather than conservation.[118] The sense of ownership by communities facilitates gainful benefits to the local communities as well as encouraging community eco-governance.[119]

The Water Act establishes the Catchment Areas Advisory Committees (CAACs)[120] to encourage public participation in water resources management. They are to advise the Water Resources Management Authority (WRMA) on conservation of water resources, on use and apportionment of water resources and on the grant, adjustment, cancellation or variation of any permit to use water resources. The catchment management strategy is required to encourage and facilitate the establishment and operation of Water Resources Users Associations (WRUAs) as fora for conflict resolution and co-operative management of water resources in catchment areas.[121] The role of CAACs and WRUAs in involving water users in decision-making has been critiqued. It has been said that the role of CAACs is merely to advice WRMA, which is not obliged to take the advice. Doubts have also emerged as to how they are funded. In relation to WRUAs, it is said that in the absence of effective regulation of their relationship with WRMA, the latter may ignore the resolutions and decisions of the former.[122] The National Water Policy 1999 and the Water Act 2002, provided for a new institutional set-up for water resources management and water services provision at national and basin level. For participation of users/consumers and their empowerment, the Water Resources Users Associations (WRUAs) and Water Consumer Groups (WCGs) were established. In addition, Water Services Boards (WSBs) were established to promote asset development. Recently, there was put in place the National Water Policy of 2012 (NWP 2012) which builds on the achievements of the sector reforms commenced with the Water Act 2002 and based on the sector principles lined out in the National Water Policy, 1999.[123] It was designed to facilitate compliance and alignment of the National Water Policy with the Constitution of Kenya 2010 and the Vision 2030. This Policy aims to ensure that these institutions carry out their mandates in line with the Constitution of Kenya, 2010. Cultural and social

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[118] See Vyamana, V.G., *et al,* 'Participatory Forest Management in the Eastern Arc Mountain area of Tanzania: Who is benefiting?' Available at *http://iasc2008.glos.ac.uk/conference%20papers/papers/V/Vyamana_134501.pdf* [Accessed on 7/01/2015].

[119] 'Eco-social sustainability in the Murray-Darling Basin,' *Case study: regional sustainability efforts in the Murray-Darling Basin*, (Hawke Research Institute, University of South Australia, 2010).
Available at *http://w3.unisa.edu.au/hawkeinstitute/research/ecosocial/eco-case-study.asp#top* [Accessed on 7/01/2015].

[120] S. 16 (2) of the Water Act 2002.

[121] *Ibid*, S. 15 (5).

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

[123] National Water Policy of 1999 (NWP 1999) also referred to as Sessional Paper No. 1 on National Policy on Water Resources Management and Development, (Government Printer, Nairobi).

principles applied traditionally by communities are recognized under EMCA in so far as they are not inconsistent and repugnant to justice and morality or any other written law.[124]

3.6 Persuasion as an Approach to Natural Resources Management

Persuasion is used where the command and control and market-based approaches are not working well or there is inadequate political support in their application.[125] It aims at information production and dissemination. The rationale behind policies on persuasion is to change people's behaviour '*…by forcing them to think about the harm they are causing and by publicizing that harm*.'[126] Information-based instruments, as they are at times called, act as economic instruments. They include measures taken to enhance awareness on environmental issues such as naming and shaming of polluters, environmental awards, technical assistance programmes, eco-labelling, eco-auditing, advertising, performance reporting, group empowerment programmes and small business incentive schemes.[127] Some information-based instruments such as eco-labeling and eco-auditing are designed to capitalize on the perception that many consumers take into account environmental considerations when buying products and services.[128] The functions of NEMA include the carrying out of programmes intended to enhance environmental education and public awareness about the need for sound environmental management as well as enlisting public support and encouraging the efforts made by other entities in that regard.[129]

3.7 Ecosystem-Based approaches

An ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.[130] It is premised on appropriate scientific methodologies focused on levels of biological organization encompassing essential processed functions and interactions among organisms and their environment. It recognizes human beings and their cultural

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[124] S. 5(b) of the Environmental Management and Co-ordination Act, 1999.
[125] Hunter D, *et al, International Environmental Law and Policy* (Foundation Press, 4th Edition, 2011), pp.113-114.
[126] *Ibid*, p. 113.
[127] *Ibid*. See also Hutter, B.M. "*A Reader in Environmental Law*," *op.cit*.
[128] *Sustainable Cities for the Third Millenium: The Odyssey of Urban Excellence*, 'Chapter 2: For a New Balance among Nature, Humans and Artefacts in Cities. Mega, V.P. 2010. p. 33; See also generally Gerald J. & Dorothy R. F., 'Ecolabels And The Greening Of The Food Market,' in *Proceedings of a Conference Boston*, Massachusetts November 7-9, 2002, Lockeretz, W., (ed.), 2003. Available at *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3101478* [Accessed on 6/01/2015].
[129] S. 9 (2) (m) of EMCA.
[130] Convention on Biological Diversity, available at *www.cbd.int/ecosystem/*, [Accessed on 27/07/2013].

identities as integral components of ecosystems.[131] Integrated Water Resource Management (IWRM) and Integrated Coastal Zones Management (ICZM) are good examples of ecosystem-based approaches to natural resource management and are discussed hereunder.

3.7.1 Integrated Water Resources Management (IWRM)

IWRM is a cross-sectoral holistic approach to water management in response to the growing competing demands for finite freshwater supplies that aims at ensuring the coordinated development of water, land and related resources to optimise economic and social welfare without compromising the sustainability of environmental systems.[132] It is, therefore, a systematic process for the sustainable development, allocation and monitoring of water resource use in the context of social, economic and environmental objectives.[133] It highlights the interdependence of natural and social systems and provides a practical framework for such integration on a watershed basis.[134] It differs from the sectoral approach to natural resources management which leads to uncoordinated water resource development and management, resulting in conflict, waste and unsustainable systems.[135]

The concept of integrated water resources management, promotes the river basin as the logical geographical unit for its practical realization, because the river basin offers many advantages for strategic planning even at higher levels of government.[136] River basin management is also in line with the policy of decentralizing water resources management. This is informed by the fact that it is local organisations and communities who have better knowledge of the water resources and socio-economic situation and are the most affected by decisions taken on how to manage the resource. This is also because centralized government agencies may have difficulties in allocating and regulating water in a river basin as they are unaware of local interests and priorities of the people. However, the central government provides the rules and establishes the requisite framework for water management in a river basin.[137] River basin management, thus provides, the

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[131] *Ibid.*
[132] Global Water Partnership, "Integrated Water Resources Management", Global Water Partnership Technical Advisory Committee, Background Paper no.4, 2000.
[133] See generally, *The Training Manual on Integrated Water Resources Management for River Basin Organisations*, (Cap-Net & UNDP, 2008).
[134] Roy, D. *et al.*, "Ecosystem Approaches in Integrated Water Resources Management (IWRM): A Review of Transboundary River Basins," (International Institute for Sustainable Development (IISD), 2011), p.10.
[135] See generally *The Training Manual on Integrated Water Resources Management for River Basin Organisations*, *op.cit*.
[136] *Ibid.*
[137] *Ibid.*

platform for the involvement and participation of the marginalised groups, including women in the decision-making processes regarding water resources.[138]

IWRM has been applied in the management of Tana River Basin and Mara River Basins in a process where interventions such as policy, laws, regulations, programs, plans are put in place in order to attain the highest possible flow of benefits over time without causing environmental degradation.[139]

3.7.2 Integrated Coastal Zone Management

There are a myriad of challenges in the management of coastal zones. The Kenyan coastal zone is faced by problems of poor planning and uncoordinated coastal development as a result of a sectoral approach in planning and management; poor waste management; declining water quality; destruction and loss of coastal and marine habitats as a result of over-exploitation, poor land use practices, encroachment and unplanned and unregulated human settlements and urban development, amongst others.[140]

Consequently, section 55 (2) of EMCA empowers NEMA in consultation with the relevant lead agencies to conduct a survey of the coastal zone and prepare an integrated national coastal zone management plan based on the report of such survey. ICZM involves comprehensive assessment, setting of objectives, planning and management of coastal ecosystems and resources, while taking into account traditional, cultural and historical perspectives and conflicting interests and uses, all within the limits set by natural dynamics.[141] It is, thus, a continuous and evolutionary process for achieving sustainable development in the management of coastal and marine environment, covering the full cycle of information collection, planning, decision-making, management and monitoring of implementation.[142] It is a process by which interventions in form of policies, laws, regulations, programs and plans are devised and implemented to change the way people use and interact with coastal ecosystems and their resources in order to attain the highest

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[138] Earle, A. & Bazilli, S., "A gendered critique of transboundary water management," *Feminist Review*, Vol.103, 2013, pp. 99-119. p. 99; See also Chikozho, C., "Stakeholder Participatory Processes and Dialogue Platforms in the Mazowe River Catchment, Zimbabwe," *African Studies Quarterly*, Vol. 10, Issues 2 & 3, Fall 2008, pp. 27-44, p. 38.

[139] See Water Resources Management Authority, *Integrated Water Resources Management and Water Efficiency Plan For Kenya*, (Government Printer, Nairobi, 2009); See also Lake Victoria Basin Commission, *Mara River Basin-Wide Water Allocation Plan*, March, 2013.

[140] Integrated Coastal Zone Management Action Plan for Kenya 2011-2015, (NEMA), pp.8-9. Available at *http://www.nema.go.ke/index.php?option=com_phocadownload&view=category&download=315:iczm-national-plan-of-action&id=67:strategies&Itemid=567*, [Accessed on 27/07/2013].

[141] *Ibid*, p. 10.

[142] *Ibid.*

possible flow of benefits over time without preventing future generations from enjoying similar benefits.[143]

3.8 Conclusion

As indicated above, the various management mechanisms have relevance in the management of natural resources in the Kenyan context. If effectively applied, the result would be the realisation of environmental justice and sustainable use of resources. In addition, a hybrid approach which harnesses the positive attributes of each perspective, while minimizing the negative aspects of each, is also suggested as the most appropriate approach going forward.

[143] *Ibid.*

Chapter Four

Environmental Justice in Kenya

4.1 Introduction

The chapter discusses the concept of environmental justice as a tool for effective management of natural resources in the Kenyan context. Natural resources are vital for human survival. They are sources of livelihood for most communities in Africa. However, access to, control and use of natural resources in most of Africa has been limited, denied or undermined by laws and policies carried over from the colonial period. The chapter argues that current environmental injustices in Kenya have roots in colonial laws and policies. It also explores the provisions of the Constitution of Kenya 2010, and some sectoral laws enacted under it on environmental justice. The conceptual parameters of environmental justice adopted in the chapter assess whether the laws, policies and regulations under study distribute environmental burdens proportionately; whether they have adequate provisions for all to participate in environmental decision-making and whether they allow all to have access and enjoy a fair share of natural resources.

The discussion begins with an overview of the concept of environmental justice and its importance in natural resources management. It then highlights incidences of environmental injustices that have happened in Kenya and undertakes an analysis of the relevant legal frameworks, and offers proposals on what can be done to achieve environmental justice for all.

4.2 Environmental Justice

Broadly defined, environmental justice entails 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-making.[1] In the United States of America (USA), it is defined as 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 policies.[2] Environmental justice serves two purposes. First, it ensures no groups of persons bear disproportionate environmental burdens and second, that all have an opportunity to participate democratically in decision-

[1] Ako, R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in Botchway, F.N. (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.
[2] U.S. Environmental Justice Agency, 'What is Environmental Justice?' Available at *http://www.epa.gov/environmentaljustice/* [Accessed on 08/12/2014].

making processes.[3] In the United Kingdom (UK), environmental justice refers to fairness in the distribution of environmental 'goods' or 'bads' and fairness in providing information and opportunities necessary for people to participate in decisions about their environment.[4] Environmental justice also means a struggle to rein in and subject corporate and bureaucratic decision-making and relevant market processes to democratic scrutiny and accountability. In this regard, environmental justice requires that the exploitation of resources should be done with due regard to environmental and social exigencies. These exigencies act as important constraints in natural resources exploitation.[5]

In Africa, environmental justice mostly entails the right to have access to, use and control over natural resources by communities.[6] This view is exemplified by the *Endorois case,* [7] where the community was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of their development as a people. The African Commission on Human and Peoples' Rights (ACHPR) found Kenya to be in violation of the African Charter,[8] and urged Kenya to, *inter alia,* recognise the rights of ownership of the Endorois; restitute their ancestral land; ensure the Endorois have unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. The Government of Kenya, has however not yet implemented the decision of the Commission in the Endorois case. This demonstrates the Government's laxity in actualizing environmental rights in Kenya.[9]

4.2.1 Components of Environmental Justice

The 1992 Rio Declaration, succinctly captures the key components of environmental justice. It provides that environmental issues are best handled with

[3] Ako, R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in Botchway, F.N. (ed), *Natural Resource Investment and Africa's Development*, *op cit.*
[4] *Ibid.*
[5] Obiora, L., "Symbolic Episodes in the Quest for Environmental Justice," *Human Rights Quarterly,* Vol.21, No. 2, 1991, p. 477.
[6] *Ibid.*
[7] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, No.* 276 / 2003.
[8] Arts.1, 8, 14, 17, 21 and 22. The Kenyan government had violated their right to religious practice (Art. 8), right to property (Art. 14), right to freely take part in the cultural life of his/her community (Art. 17), right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and right to development (Art. 22).
[9] United Nations Human Rights Committee, 'Consideration of reports submitted by States parties under Art. 40 of the Covenant Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012. CCPR/C/KEN/CO/3, para. 24.

participation of all concerned citizens, at the relevant level. At the national level, each individual should have appropriate access to information concerning the environment held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. Further, it obligates States to facilitate and encourage public awareness and participation by making information widely available. In addition, states are to provide effective access to judicial and administrative proceedings, including redress and remedy.[10]

Essentially, the Declaration contains the critical components that are germane in promoting environmental justice. These are access to information, public participation and access to justice in environmental matters. The three components are interdependent and functionally interlinked. Access to environmental information is a prerequisite to public participation in decision-making and to monitoring governmental and private sector activities. Effective access to justice in environmental matters presumes that there is an informed public that can bring actions before informed institutions.[11]

4.2.1.1 Access to Environmental Information

Access to information refers to the availability of environmental information (including that on hazardous materials and activities in communities) and mechanisms by which public authorities provide environmental information.[12]Communities cannot be meaningfully engaged on matters relating to the environment and the exploitation of natural resources, without an understanding of what the ideals should be in a society where there is environmental justice. As such, the first step towards achieving environmental justice for the Kenyan people must be to afford them access to the relevant environmental information in forms that they would appreciate. This could be done in different ways including through newspapers, television, posters, release of reports, barazas, amongst other processes, provided in law where communities can get the relevant information in forms and languages that they can understand and appreciate.

4.2.1.2 Public Participation

Public participation means the availability of opportunities for individuals, groups and organizations to provide input in the making of decisions which have, or are likely to have, an impact on the environment including in the enactment of laws, the enforcement of national laws, policies, and guidelines and environmental impact assessment

[10] Principle 10, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. I).
[11] UNEP, *Training Manual on International Environmental Law* (UNEP, 2006), pp.80-81.
[12] *Ibid.*

procedures.[13] Public participation in environmental and natural resources governance should not be cosmetic but should be meaningful in order for the public to feel that their concerns are addressed and consequently for them to have trust and support government decisions relating to particular natural resources and environmental concerns. However, this cannot be achieved in a situation where the citizenry do not have an understanding of those problems, and where they have any knowledge be it traditional or any other, there must be a harmonization of the same with scientific knowledge. This can be achieved through educating the public on the available scientific knowledge in a comparative manner so as to make them appreciate the similarities or differences arising therein.

4.2.1.3 Access to Justice

Access to justice is not an easy concept to define. It is broadly described as a situation where people in need of help, find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.[14] It also refers to those judicial and administrative remedies and procedures, available to a person (natural or juristic) who is aggrieved or likely to be aggrieved by an issue. Further, it refers to a fair and equitable legal framework that protects human rights and ensures delivery of justice.[15] Access to justice also entails the opening up of formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.[16] Access to justice could also include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.[17]

In *Dry Associates Limited v Capital Markets Authority & anor*, access to justice was broadly described as including the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of

[13] *Ibid.*
[14] M.T. Ladan, "Access to Justice as a Human Right under the Ecowas Community Law," available at *http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-, [Accessed on* 19/04/2014].
[15] *Ibid.*
[16] Global Alliance against Traffic in Women (GAATW).Available at *http://www.gaatw.org/atj/,* [Accessed on 09/03/ 2014].
[17] See Muigua, K. & Kariuki F., "ADR, Access to Justice and Development in Kenya," *Strathmore Law Journal,* Vol. 1, No.1, June 2015, pp. 1-21.

physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.[18]

Access to justice is a basic and inviolable right guaranteed in international human rights instruments and national constitutions.[19] As a justifiable right, it has two important dimensions: procedural access (fair hearing before an impartial tribunal) and substantive access (fair and just remedy for a violation of one's rights).[20]The two dimensions are important in facilitating access to justice as observed by Krishna Iyer, J in *Municipal Council, Ratlamv Shri Vardhichand & Others,*[21] that '*it is procedural rules which infuse life into substantive rights, which activate them effective.*' Alternatively, procedural rights without any substantive content are meaningless if entirely cut from material considerations.[22] As such, access to justice is an instrumental right that gives the structural framework for the realisation of all substantive fundamental human rights.[23] However, both conceptions of access to justice must be accorded equal importance in legal frameworks if communities are to have any meaningful access to justice. The Bill of Rights, is thus not enough by itself to guarantee access to justice for all persons. There has to be corresponding legal and non-legal frameworks for the realisation and enforcement of those rights.

4.2.1.4 Environmental Justice as either Distributive or Procedural Justice

Just like access to justice, environmental justice is associated with two elements of justice namely: distributive and procedural justice. Distributive environmental justice recognizes that the human right to a dignified life is fundamental, and everyone has a right to a healthy and safe environment. On the other hand, procedural environmental justice requires that in order to uphold distributive justice, citizens need to be informed about and involved in decision-making, and enabled to identify and stop acts that breach environmental laws and cause environmental injustices. Procedural justice is concerned with how and by whom decisions are made, and encompasses participation and legitimacy

[18] [2012] eKLR [Petition No. 328 of 2011], para. 110.
[19] Art. 48 of the Constitution of Kenya 2010, guarantees the right of access to justice for all; See also Art. 159 (2) thereof.
[20] *Ibid.*
[21]1980 AIR 1622, 1981 SCR (1) 97.
Available at *http://indiankanoon.org/doc/440471/*[Accessed on 06/12/2014].
[22] Cullet, P., "Definition of an Environmental Right in a Human Rights Context,"13 *Netherlands Quarterly of Human Rights* (1995), pp. 25& 37.
[23] *Ibid.*

as common concepts. The institutional framework addressing environmental issues should be easily accessible to all, including the marginalized groups.[24]

Demands for the recognition of cultural identity and for full participatory democratic rights are integral demands for justice as well, and they cannot be separated from distributional issues.[25] One of the crucial components of environmental justice is that it seeks to tackle social injustices and environmental problems through an integrated framework of policies. An equitable distribution of the environmental costs and benefits of economic development, both globally and nationally, is required, based on the premise that everyone should have the right and be able to live in a healthy environment with access to enough environmental resources for a healthy life. It also recognizes that it is predominantly the poorest and least powerful people who are missing the above-stated conditions.[26]

Secondly, environmental justice examines issues of procedural equity and access to the processes of justice. The procedures and processes needed to tackle negative environmental impacts should therefore be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.[27] Thirdly, environmental justice is inextricably related to sustainable development and social justice. It is argued that it is possible to have a situation of perfect equality but which is destructive of the environment, and also a situation of perfect environmental sustainability which is inequitable.[28]

Environmental justice, is thus, seen as an alternative discourse to sustainable development, as it emphasizes commitment to the struggle of communities who suffer the most environmental damage by giving them a voice to access decision-making, which links with social justice to ensure sustainable and equitable development. Environmental justice, can therefore, address our concerns as to the use of our environmental resources and how to ensure equitable participation in environmental decision-making. This has

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[24] Friends of the Earth Scotland, 'Environmental Justice,' available at *http://www.foescotland.org.uk/environmentalrights* [Accessed on 08/12/2014]; see also Agyeman, J., & Evans, B., "Just sustainability': the emerging discourse of environmental justice in Britain?" *The Geographical Journal*, Vol. 170(2), June 2004, pp. 155–164, at p. 156.

[25] Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories,' *Environmental Politics*, Vol.13, No.3, Autumn 2004, pp.517 – 540, p. 537.

[26] Todd, H., & Zografos, C., "Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland," *Environmental Values*, Vol.14, No.4, November 2005, pp. 483-501, p. 484.

[27] *Ibid*, p. 484.

[28] *Ibid*, p. 484.

been framed in academic terms as distributive justice and procedural justice, a distinction which is useful in the environmental justice discourse.[29]

4.3 Background to Environmental Injustice in Kenya

The history of natural resources in Kenya depicts a struggle for environmental justice. A classic example is the Mau Mau revolt in the 1920s-1950s. One of the main reasons for the revolt, was to claim back land and land-based resources which had been divested from local communities and vested in Her Majesty. The colonialists were able to use law to exercise control over all the natural resources in the colony. In 1899,using the *Foreign Jurisdiction Act,*[30] the British were able to declare the land in the protectorate as waste and unoccupied, since a settled form of government did not exist and the land had not been appropriated by the local sovereign or individuals.[31]Several laws were therefore introduced in Kenya whose effect was to wrest control over natural resources from local communities. For example, under the *Crown Lands Ordinance of 1915,* all public land in the colony was vested in Her Majesty, leaving Africans as tenants at the will of the crown.[32] Under the Ordinance, all land within the protectorate was declared crown land whether or not it was occupied by the natives or reserved for native occupation.

The effect of the law was to appropriate all land and land-based resources from Africans and to vest them in the colonial masters.[33] In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers. This position was affirmed in a 1915 opinion delivered by the then Chief Justice to the effect that whatever rights the indigenous inhabitants may have had to the land had

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[29] Paavola, J. & Adger, W.N., 'Justice and Adaptation to Climate Change,' *Tyndall Centre Working Paper 23,* 2002.

[30] *Foreign Jurisdiction Act*, 1890. (53 & 54 Vie. c, 37.), s. 2 & 3.

[31] Njonjo Commission Report, p.23. Towett J. Kimaiyo has recorded that on 15th June, 1895, Kenya was declared a British Protectorate and the legal effect of this declaration was to confer on the British crown Political Jurisdiction over the area, whilst it remained a foreign jurisdiction. The declaration of Protectorate did not confer any rights over land in the territory. Any rights over the land, would have to be on the basis of conquest, agreement, treaty or sale with the indigenous people. In 1897, the Indian Land Act was extended to the territory, thus enabling the appropriation of lands in the main land beyond Mombasa for public use. This appropriation was however limited to land within one mile of either side of the railway line. To overcome the problem of title to land in the territory, in 1899 the law officers of the crown advised that the Foreign Jurisdiction Act, 1890 empowered the crown to control and dispose waste and unoccupied land in the protectorates with no settled forms of government and where land had been appropriated to the local sovereign individuals. In 1901, the East African (Lands) Ordinance-in- Council was enacted conferring on the Commissioner of the Protectorate (later named Governor) power to dispose of all public lands on such terms and conditions as he might think fit. [Kimaiyo, T.J., 'Chapter 6: Kenya Land Policy since 1900,' *Ogiek Land Cases and Historical Injustices*, 1902-2004, Vol. 1, 2004.]

[32] Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (*ACTS Press, Nairobi, 1991), p.54.

[33] *Ibid.*

been extinguished by the Ordinance leaving them as mere tenants at the will of the crown.[34] The colonial authorities were, therefore, able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives' reserves, there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.[35]

At the coastal region, the *Land Titles Act*[36] was enacted to remove doubts that had arisen in regard to titles to land there and to establish a Land Registration Court. The processes of land adjudication and registration under the Act deprived indigenous Coastal Communities of their land. This led to problems of landlessness among the indigenous Coastal people and absentee landowners.[37]Current land problems at the coast region have been traced back to the *Land Titles Act.*

The capitalist traders in British territory of Kenya agreed to employ their resources, through private Chartered Companies,[38] so long as they were guaranteed a monopoly of trade and allowed to exercise exclusive rights over taxation, minerals and land.[39]To protect these traders and safeguard their future claims, European Governments declared the territories they were occupying protectorates. Since the legality of protectorates was contested, they developed a system of treaties or agreements which were accepted as valid titles to the acquisition of African territories and the Africans were alleged to have "voluntarily ceded their sovereign rights." Such treaties were duly attested by a cross which purported to carry the assent of a King or Chief. The so-called assent was obtained by vague promises which were often unrecorded and all they were looking for, were grounds to justify the acquisition of African lands.[40]

The two Maasai agreements of 1904 and 1911, illustrate the effect of the treaties and agreements on the rights of the local people to their natural resources. In 1904, the then Commissioner of the Protectorate entered into an agreement with the Chief and

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[34] See generally the case of *Isaka Wainaina and Anor v Murito wa Indagara and others*, [1922-23] 9 E.A.L.R. 102.

[35] See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (*ACTS Press, Nairobi, 1991).

[36] Cap 282, Laws of Kenya.

[37] National Land Policy, 2009, p.43.

[38] A good example is the ten mile coastal strip which was owned by the Sultan of Zanzibar. This land had been leased to the Imperial British East African Company in 1888 by virtue of which all land in the Sultan's territory was ceded to the company except the private lands. Government of Kenya, *Report of the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002) p.21.

[39] Kiwanuka, S., *From Colonialism to Independence: A Reappraisal of Colonial Policies & African Reactions, 1870-1960*, (East African Literature Bureau, 1973), p. 19.

[40] *Ibid*; See generally, Watkins, O. F., "The Report of the Kenya Land Commission, September, 1933," *Journal of the Royal African Society*, Vol. 33(132), Jul., 1934, pp. 207-216.

certain representatives of the Maasai tribe by which, *inter alia*, it was arranged that certain sections of the tribe should move to a reserve at Laikipia. This removal took place and the tribe was consequently divided into two.[41] In 1911, the then Governor of the Protectorate entered into another agreement with the Chief, his regents, and certain representatives of that portion of the tribe living at Laikipia, by which it was arranged that the sections of the tribe which under the former agreement had moved to Laikipia should move south into one reserve with the remainder of the tribe.[42] Using the two Agreements, the British were able to forcibly move certain sections of the Maasai out of their favourite grazing grounds in the central Rift Valley (Naivasha-Nakuru) into two reserves in order to make way for white settlement.[43] Since then, attempts by the community to regain the land have not been successful. The Colonialists chose not to recognise customary property ownership regarding it as an invalid way of claiming any ownership or control over property or environment.[44]

The Maasai representatives have argued that land loss occasioned by the two agreements, is the single most important factor responsible for the ongoing cultural, economic, and social destitution of the Maasai people and has indeed, been responsible for the erosion of their sovereignty as a people.[45] They feel that they have been neglected by successive Governments of Kenya in redressing these historical injustices on land and related natural resources.[46]

The loss of control rights over natural resources also affected other resources including forests and water. For instance, in 1891 a law was enacted to protect the mangrove forests at Vanga in Coast region. Shortly thereafter in 1897, the *Ukamba Woods and Forests Regulations* established a strip marking two miles each side of Uganda railway and the same was placed under the management and control of the Divisional Forest Officer (DFO) and the railway administration. This changed forest management by

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[41] American Society of International Law, "Judgment of the High Court of the East Africa Protectorate in the Case Brought by the Maasai Tribe Against the Attorney-General of the Protectorate and Others," *The American Journal of International Law*, Vol. 8(2), Apr., 1914, pp. 380-389 at p. 381.

[42] *Ibid.*

[43] Hughes, Lotte, *Moving the Maasai: A Colonial Misadventure,* (Palgrave Macmillan, 2006), p. 8; Olson, P.A., 'The Struggle for the Land: Indigenous Insight and Industrial Empire in the Semiarid World,' (University of Nebraska Press, 1990). Available at *https://books.google.co.ke/books?id=OqwF27HZms8C&printsec=frontcover#v=onepage&q&f=false*[Accessed on 26/12/2014], p. 235.

[44] The provisions of the Land Titles Act demanded that for any local to claim land at the coast, they ought to possess papers showing ownership.

[45]Meitamei, O.D., "Maasai Autonomy and Sovereignty in Kenya and Tanzania," *Mining Indigenous Lands*, Vol. 25, No.1, Spring, 2001. Available at *http://www.culturalsurvival.org/ourpublications/csq/Art./maasai-autonomy-and-sovereignty-kenya-and-tanzania,* [Accessed on 26/12/2014].

[46] See generally, Kantai, P, "In the Grip of the Vampire State: Maasai Land Struggles in Kenyan Politics," *Journal of Eastern African Studies, Vol. 1, No. 1,* March, 2007, pp.107-122.

communities which was done through customary practices with the accruing benefits extending to all community members in a fair manner. In 1900, the 1891 and 1897 Regulations were extended to cover all the forests in the coastal region and all those along the railway line. To facilitate this state-centric approach to forests management, a post of conservator of forests was established in 1902 as the officer who would oversee the management of all the regulated forests at the national level. Within the same year, the East African Forests Regulations provided for the gazettement or degazettement of forests and control of forests exploitation through a system of licences and fines. The culmination of this was in 1932, when a declaration was issued over the remaining expansive forests in order to bring them under the control of the government, including the high potential areas.[47]

The focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.[48] Further, outside reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.[49]

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and protectionist legal frameworks, a move that was inherited by the independent governments of Kenya.[50] It was only in the 1990s that there emerged a paradigm shift towards community-based forests management, although this was done with minimal commitment from the stakeholders.[51] Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licences and permits in order to participate in the same. Similarly, in relation to water resources, legal frameworks were enacted chief among which, is the Water Ordinance of 1929, vesting water resources on the Crown. This denied local communities the universal water rights that they had enjoyed in the pre-colonial period. It is noteworthy, that the problem of environmental injustice in

[47] Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa,' *Issue 8 of Forest and social perspectives in conservation*, IUCN, 2001.p.74.
[48] Kigenyi, *et al*, 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa,' *Issue 10 of Forest and social perspectives in conservation*, (IUCN, 2002), p. 9.
[49] *Ibid.*
[50] For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took care of the forests. Following the ban, the communities were resettled outside the gazette forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.
[51] Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' *Evaluating Eden Series*, Discussion Paper No.4, p. 6.

Kenya has in fact continued into independent Kenya and often with ugly results, as has been documented in various Government reports.[52]

Environmental injustice continues to manifest itself in modern times. The recent conflicts such as those in Lamu County and in the pastoral counties are largely attributable to environmental injustices inflicted over the years. In some, there are feelings that land and other land-based resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.

4.4 Legal Framework for Environmental Justice in Kenya

4.4.1 Constitution of Kenya 2010

The history of environmental justice is important in the Kenyan context as it shows how laws and policies have imposed environmental burdens disproportionately on people; marginalized and excluded communities from natural resources; and hindered communities from enjoying a fair share of their natural resources. The current Constitution seeks to correct this situation by promoting and requiring environmental justice. The Constitution provides a foundation for environmental justice by emphasizing the need for public participation in matters of governance including in environmental matters and natural resources. The Constitution provides for the national values and principles of governance.[53]

The one common thread that runs through all these principles and values is their anthropocentric nature. They all recognise the important role of all human beings in natural resources governance. They call for meaningful involvement of all persons in governance. Meaningful involvement has been defined to mean that: potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; the public contribution can influence the regulatory agency's decision; the concerns of all participants involved

[52] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report, p. 59). The report found that some of the main causes of post-independence tribal clashes have been ambitions by some communities of recovering what they think they lost when the Europeans forcibly acquired their ancestral land; See also the *Kriegler and Waki Reports on 2007 Elections*, 2009, (Government Printer, Nairobi). The *Kriegler and Waki Reports* stated that the causes of the post-election clashes in the Rift Valley region covered by included conflict over land, cattle rustling, political differences and ecological reasons among others.

[53] Art. 10 (1).

will be considered in the decision making process; and the decision makers seek out and facilitate the involvement of those potentially affected.[54]

The Constitution guarantees the right of every person to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations, through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.[55] The guarantee does away with the requirement for showing standing in environmental matters.[56] To realise environmental rights the constitution guarantees the right to access to information[57] and access to justice.[58] Environmental justice as an offshoot of the right of access to justice also needs to be enhanced to facilitate people's enjoyment of the right to a clean and healthy environment as envisaged in the laws of Kenya. If people and communities in general are to have any meaningful access to justice, then both substantive and procedural rights must be accorded equal importance in the access to justice frameworks. The Bill of Rights is thus not enough to guarantee access to justice for all persons. There must be a corresponding effective legal framework for the enforcement of this Bill of Rights. It is within this framework that the right to environmental justice for all persons in Kenya would be realised.

For example, in land matters, the Constitution outlines the principles of landholding and management in Kenya to wit; sustainability, efficiency, equity and productivity. These principles are to be realised by ensuring equitable access to land; security of land rights; transparent and cost-effective administration of land; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.[59] If well implemented, the principles would make a positive step towards realising environmental justice for all in land matters in Kenya. The poor and women would have access to land for housing and farming to feed their families. The Constitution also requires the enactment of other laws on land namely: *Land Act*,[60] *Land Registration Act*[61] and *National Land Commission*

[54] The National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee, 'Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs,' November 2004, p. 5. Available at *http://www.epa.gov/environmentaljustice/resources/publications/nejac/ips-final-report.pdf*[Accessed on 26/12/2014].
[55] Art. 42.
[56] See the case of *Maathai v Kenya Times Media Trust Ltd*, Civil Case No 5403 of 1989.
[57] Art. 35
[58] Art. 48.
[59] Art. 60 (1).
[60] No. 6 of 2012, Laws of Kenya.
[61] No. 3 of 2012, Laws of Kenya.

Act.[62] These laws have tried to adopt the constitutional principles on land as the guiding principles in their implementation including dealing with historical land injustices.

4.4.2 Environmental Management and Coordination Act

With regard to sustainable development, the Act[63] provides that in exercising the jurisdiction conferred upon it under subsection (3),[64] the High Court shall be guided by the following principles of sustainable development, *inter alia*; the principle of public participation in the development of policies, plans and processes for the management of the environment; and 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.[65]

It is noteworthy, that EMCA, in a bid to facilitate public participation in environmental governance, dispenses with the requirement of proving *locus standi* in environmental litigation. Consequently, it states that a person alleging a violation of a right to clean and healthy environment shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action –is not frivolous or vexations; or is not an abuse of the court process.[66]

4.4.3 The Environment and Land Court Act

The Act[67] establishes an Environment and Land Court to hear matters touching on the environment and land. The establishment of the court is also out of the recognition of the need to enhance access to justice in environmental matters. Previously, environmental and land court matters used to be heard in the ordinary courts and could take years before justice was realised for the parties.

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[62] Act No. 5 of 2012, Laws of Kenya.
[63] *Environmental Management and Coordination Act* (EMCA) No. 8 of 1999, Laws of Kenya.
[64] Powers to enforce the right of every person in Kenya to a clean and healthy environment and the duty to safeguard and enhance the environment.
[65] S. 3(5).
[66] S. 3(4), EMCA; Art. 70 (1) of the Constitution also states 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. Clause (3) thereof is to the effect that for the purposes of this Art., an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
[67] *Environment and Land Court Act*, No. 19 of 2011, Laws of Kenya, (Government Printer, Nairobi).

4.4.4 Water Policy, 2012

In the past, the water sector in the country has been bedeviled by many problems, some of which can be traced back to the colonial times. For instance, the colonial masters made policies that favoured the use of all the water resources in the colony by the settlers at the expense of the locals. The local people lost control over water resources in the country as the colonial laws, such as the 1929 *Water Ordinance* divested ownership of all water bodies in the colony from local communities. The main use of water from the water bodies was farming by settlers. The settlers' main preoccupation was water exploitation without conservation of catchment areas. This led to such problems as soil erosion, siltation and disease outbreaks amongst the Africans who had been restricted to certain reserve areas. Indeed, the state-centric approach to water management in Kenya has been a problem that was also repeated in the *Water Act*[68]which vested the control of water resources in the State and the Minister responsible for water resources. Although past policies have contemplated participatory approach to water management in the country, the same has not achieved much positive results.

To correct this, the current Constitution provides for principles of natural resources management which include public participation and devolution, to empower the locals and give them a voice in water management. The water sector does not have a current and clear sector-specific policy and legal framework to operationalize devolution as envisaged by the current Constitution of Kenya.[69] As such, the *Water Policy* 2012, seeks to address this alongside other challenges that were identified as, *inter alia:* climate change, disaster management and environmental degradation; water availability and water service provision; absence of reliable information in the rural Water Supply and Sanitation (WSS) sub-sector; mixed and inconsistent performance of sector institutions mainly due to insufficient governance and autonomy of institutions; lack of good governance practices in some sector institutions; insufficient effluent treatment threatening the country's public health and economic growth; incomplete devolution of functions to the basin level in Water Resources Management (WRM)and conflict of interest in regulation and implementation.[70]

For effective water resources management, environmental justice concepts such as public participation, information sharing, community-based natural resource

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[68] Act No. 8 of 2002.

[69] Heymans, C., *et al*, *Devolution in Kenya: opportunities and challenges for the water sector - supporting poor-inclusive WSS sector reform*, Water and sanitation program, policy note, World Bank Group, 2013. Available at *http://documents.worldbank.org/curated/en/2013/09/19122948/devolution-kenya-opportunities-challenges-water-sector-supporting-poor-inclusive-wss-sector-reform*, [Accessed on 26/12/2014].

[70] National Water Policy, 2012.

management, amongst others, should feature prominently if the sector is to reflect the spirit of the current Constitution. This can be achieved through the policy guiding principles which include, *inter alia*: right to water with a pro-poor orientation; Integrated Water Resource Management (IWRM) approach; Sector Wide Approach (SWAp) for enhanced development; devolution of functions to the lowest appropriate level; gender provisions in the management of Water Sector Institutions (WSIs) and safeguarding of water; socially responsive commercialization for service delivery; good governance practices on all levels; participatory approach; public Private Partnership (PPP); and "User pays and polluter pays" principles. If fully implemented through the relevant sectoral regulations, these principles can go a long way in actualizing environmental justice in the water sector.[71]

4.4.5 National Land Policy, 2009

The Policy[72] identifies the problems facing the land sector in Kenya as including: severe land pressure and fragmentation of land holdings into uneconomic units; deterioration in land quality due to poor land use practices; unproductive and speculative land hoarding; under-utilization and abandonment of agricultural land; severe tenure insecurity due to overlapping rights; disinheritance of women and vulnerable members of society, and biased decisions by land management and dispute resolution institutions; landlessness and the squatter phenomenon; uncontrolled development, urban squalor and environmental pollution; wanton destruction of forests, catchment areas and areas of unique biodiversity; desertification in the arid and semi-arid lands; and growth of extra-legal land administration processes.[73]

In order to tackle these challenges, it proposed that the process of acquisition, use and disposal of land rights should be guided by: equal recognition and enforcement of land rights arising under all tenure systems; non-discrimination in ownership of, and access to land under all tenure systems; protection and promotion of the multiple values of land; and development of fiscal incentives to encourage the efficient utilization of land.[74] These values and principles have been reflected in the constitutional provisions dealing with land and have also been recognised albeit in broader terms in the various land laws enacted under the Constitution.

[71] *Ibid*, para. 1.5.
[72] *Sessional Paper No. 3 of 2009 on National Land Policy*, August, 2009.
[73] *Ibid*, Para. 2.3.
[74] *Ibid*, para. 3.3.2.

4.5 Gender Discrimination and Environmental Justice

Kenya's quest for environmental justice for all persons cannot be fully realised without tackling the problem of gender discrimination in relation to access to natural resources in Kenya. Gender discrimination in law and policy particularly in access to natural resources and property ownership is an instance of environmental injustice.[75] In the past, women have been discriminated against especially when it comes to access to land and associated resources. Indeed, it has been observed that much of Kenya's history was in fact marked by growing inequality and division, where women and sexual and gender minorities were oppressed by traditional social and religious attitudes to gender which translated into discriminatory laws. Discrimination by both the state and private actors, denied them equal participation in civil, political, economic, social and cultural life.[76] It is documented that only 3% of women have title deeds in Kenya.[77] This has led to instances where women have not only been discriminated against in practice but also in law.

It is against this background that the current Constitution of Kenya, has incorporated elaborate provisions to correct the situation. It provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.[78] Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[79] The constitution also prohibits the State or any person from discriminating directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[80] These provisions are important in ensuring that all persons including women have access to, control and use of natural resources. If women are denied opportunities to access, use and manage natural resources they can also exploit the provisions allowing any person whose right to a clean and healthy environment is being

[75] It is noteworthy that this is not a Kenyan problem only but has also persisted in other jurisdictions around the world. See generally, UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under Art. 40 of the Covenant: International Covenant on Civil and Political Rights: 4th periodic report: United States of America*, 22 May 2012, CCPR/C/USA/4 [Accessed 27/12/2014].

[76] The Equal Rights Trust (ERT), "In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya," *ERT Country Report Series*: 1, London, February 2012, p. 1.
Available at *http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf*[Accessed on 20/12/2014].

[77] UNDP-Kenya, *Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch Towards 2015*, UNDP-Kenya, Nairobi, 2010, p.33.

[78] Art. 27(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

[79] Art. 27(3).

[80] Art. 27(4) (5).

or is likely to be, denied, violated, infringed or threatened, to apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter.[81]

Among the principles of land policy as envisaged under Article 60(1) are, *inter alia*: equitable access to land; security of land rights; and elimination of gender discrimination in law, customs and practices related to land and property ownership. These principles envisage the removal of gender discrimination in access, use, management and ownership of property, as this is one of the best ways of achieving environmental justice for all, including women.

Women bear a disproportionate burden in environmental matters and are affected more by climate change, pollution and depletion of natural resources. Since they are particularly vulnerable to the earth's sustainability, their involvement in environmental problems is crucial.[82] The Constitution of Kenya has provisions that not only encourage but also make it an obligation on the State to ensure that there is meaningful participation by women especially in matters of governance since they form part of the previously marginalised groups in society. It obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups,[83] *inter alia*: participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.[84] These provisions can facilitate the creation of a society where women not only participate in decision making in matters touching on the environment but are also given an opportunity to own and enjoy the natural resources related to the environment.

4.6 Environmental Justice and Livelihood

Access to justice regarding natural resources is a pre-requisite for improving people's livelihoods. In addition, environmental justice is inextricably linked to people's livelihood thus necessitating greater protection in law and policy. To this extent,

[81] Art. 71, Constitution of Kenya.
[82] United Nations Development Programme, 'Women's Empowerment to Environmental Justice'. Available at *http://www.ks.undp.org/content/kosovo/en/home/presscenter/Art.s/2013/05/30/women-s-empowerment-to-environmental-justice-dg-environment-women-empowerment-*/ [Accessed on 19/12/2014].
[83] See Art. 260 on interpretation which provides that "affirmative action" includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom; and "marginalised group" means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Art. 27(4). Arguably, this definition would include women, based on discrimination on ground of sex.
[84] Art. 56, Constitution of Kenya.

environmental justice also dictates that victims of environmental injustice have a right to receive full compensation and reparations for damage as well as quality health care.[85]

The close relationship between environmental justice and livelihood sustenance was demonstrated in the case of *Kemai & Others v Attorney General & 3 others,*[86] where members of the Ogiek ethnic community, sought a declaration that their eviction from Tinet Forest by the government contravened their right to life, the protection of the law and the right not to be discriminated against. This was based on the claim that they had been living in Tinet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming. Their argument was that they would be left landless if evicted from the forest. They also claimed that their culture was concerned with the preservation of nature so as to sustain their livelihood and that they had never been a threat to the natural environment. The Court, in declining to issue favourable orders, held that the real threat to the right to life and to livelihood is not the government eviction orders in themselves but the negative environmental effect of ecological mismanagement, neglect and raping of natural resources. Hence, the importance of the issue of preserving the rain water catchment area. The Ogiek community has since moved on to the African Commission on Human and Peoples' Rights (ACHPR) for determination although it is yet to be finalized.

While managing resources sustainably, states must have an environmental policy that takes account of those who depend on the resources for their livelihoods, such as the Ogiek. Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.[87] Legal and policy constraints that deny the poor access to water for livelihood such as growing food crops for their families including small-scale agriculture should be removed.

The Kenyan economy is largely based on agriculture which relies mostly on the exploitation of natural resources.[88] Essentially, environmental justice gives people greater opportunities for protecting their fundamental human rights. Some of the basic rights guaranteed in the Constitution of Kenya 2010, include the economic and social rights of

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[85] Agyeman, J., &Evans, T., "Toward Just Sustainability in Urban Communities: Building Equity Rights With Sustainable Solutions," *Annals of the American Academy of Political and Social Science,* Vol. 590, Rethinking Sustainable Development (Nov., 2003), pp. 35-53 at p. 50.

[86] [2006] 1 KLR (E&L) 326, Civil Case 238 of 1999; *Ogiek People v District Commissioner, Case No. 238/1999 (2000.03.23)* (Indigenous Rights to Tinet Forest).

[87] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21; See also chapter 3, para. 2.

[88] Office of the Prime Minister Ministry of state for Planning, National Development and Vision 2030, *Sessional paper No. 10 of 2012 on Kenya Vision 2030,* Government Printer, Nairobi. p. 44; Government of Kenya, Integrated Water Resources Management and Water Efficiency Plan for Kenya, [Government Printer, Nairobi, 2009].

every person. These rights include, the right to the highest attainable standard of health, which includes the right to health care services, including reproductive healthcare; 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; to social security; and to education.[89] These rights touch on the livelihoods of persons and they cannot therefore be ignored.

4.7 Environmental Justice and Conflict Management

It is worth mentioning that natural resources are perceived as an integral part of society the world all over, as sources of income, industry, and identity. Owing to this central role of natural resources to the general wellbeing of communities, conflicts related to the exploitation of natural resources are inevitable. Natural resource-based conflicts have been defined as disagreements or disputes that arise with regard to the use, access and management of natural resources.[90] They have also been defined as situations where the allocation, management, or use of natural resources results in: violence; human rights abuses; or denial of access to natural resources to an extent that significantly diminishes human welfare.[91]

Environmental justice is related to conflict management. This is because in the environmental context procedural rights are the vehicle through which substantive rights are articulated by the courts and the other conflict management processes. The procedures and processes needed to tackle negative environmental impacts should therefore, be accessible on an equal basis to different social groups since many environmental injustices may be caused or exacerbated by procedural injustices in the processes of policy design, land-use planning, science and law. Therefore, the necessary policy, legal and institutional framework in place is crucial in ensuring environmental justice at the global, regional and national levels.

Access to courts is an important pillar in promoting environmental justice in Kenya. Courts have, however, been faced by a number of challenges that hinder people particularly local communities from vindicating their environmental rights. Although the Constitution of Kenya guarantees the right of every person to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied,

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[89] Art. 43.

[90] FAO, 'Conflict and Natural Resource Management,' p. 1, Available at *http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf* [Accessed on 09/12/2014].

[91] United States Agency for International Development (USAID), 'Conflict Over Natural Resources At The Community Level in Nepal Including Its Relation to Armed Conflict,' May 2006, p.1. Available at *pdf.usaid.gov/pdf_docs/PNADF990.pdf* [Accessed on 09/12/2014].

violated or infringed, or is threatened with no need to prove *locus standi* to institute the suit, there still lies other challenges hindering access to courts such as the geographical location, complexity of rules and procedure and the use of legalese.[92]

Environmental justice can be enhanced if the conflict management mechanisms allow parties to enjoy autonomy over the process and outcome; they are expeditious, cost-effective, flexible and employ non-complex procedures. Compared to courts, ADR processes are affordable, flexible, less complex, foster relationships and give communities greater opportunities to participate in the management of natural resources.[93]ADR and TDRM processes provide additional avenues for people in accessing environmental justice. These processes have the potential to enhance environmental justice for the Kenyan people. To enhance environmental justice, there is need to move beyond the law by adopting approaches that give communities greater avenues for protecting their rights and benefiting from the use of natural resources.

4.8 Enhancing Access to Environmental Justice in Kenya

Any steps towards realising environmental justice for the Kenyan people should arguably ensure that the local people's perception of what entails environmental justice is effectively incorporated in any government measures aimed at achieving the same. With this incorporation, it would be possible for the communities to support the government efforts in relation to achieving environmental justice. This can be achieved through ensuring that the elements discussed below are effectively incorporated in the laws on environmental governance.

4.8.1 Environmental Justice and Access to Information

As already pointed out, in order to contribute to the protection of the right of every person to live in an environment adequate to his or her health and well-being, there is need to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.[94] The Constitution guarantees the right of access to information held by the State, any other person and required for the exercise or

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[92] *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp. 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012. Available at *http://www.chuitech.com/kmco/attachments/Art./101/Avoiding.pdf*

[93] See generally Muigua K,"ADR: The Road to Justice in Kenya," *Chartered Institute of Arbitrators (Kenya Branch) ADR Journal*, Vol. 2 (1), 2014, pp.28-94.

[94] Art.1 of the *1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43.Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998, UN Doc. ECE/CEP/43.

protection of any right or fundamental freedom.[95] It also obligates the State to publish and publicise any important information affecting the nation.[96] Guaranteeing access to relevant information, is imperative in facilitating access to environmental justice and enabling the communities to give prior, informed consent in relation to exploitation of natural resources. With regard to informed consent, 'informed' has been defined to mean that all information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples.[97] Relevant information includes: the nature, size, pace, duration, reversibility and scope of any proposed project; the reason(s) or purpose of the project; the location of areas that will be affected; a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits; personnel likely to be involved in the implementation of the project; and procedures that the project may entail.[98]This informed consent cannot therefore be given without first ensuring that the concerned communities have access to relevant information. In *Friends of Lake Turkana Trust v Attorney General & 2 others,*[99] the court was of the view that access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment.

The Court, in *Friends of Lake Turkana Trust* case, also observed that Article 69(1) (d) of the Constitution of Kenya 2010, placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. Public participation would only be possible where the public had access to information and was facilitated in terms of their reception of different views. Such community-based forums and Barazas can effectively facilitate this. For example, Rule 5 of the Third Schedule to the *Forest Act,*[100] states that where rules made under the Act so require, the responsible authority shall cause a public meeting to be held in relation to a proposal before the responsible authority makes its decision on the proposal. Such public meetings should, as a matter of practice, be conducted in a manner that would ensure full and meaningful participation of all the concerned communities. Well conducted, these are viable forums through which access to environmental information can be realized and consequently enhance access to environmental justice.

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[95] Art. 35(1).
[96] Art. 35(2).
[97] FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition,' *Governance of Tenure Technical Guide* No. 3, Rome, 2014, p.5.
[98] *Ibid.*
[99] ELC Suit No 825 of 2012.
[100] 2005, Laws of Kenya.

4.8.2 Environmental Justice and Public Participation

Meaningful involvement of people in environmental matters, requires effective access to decision makers for all, and the ability in all communities to make informed decisions and take positive actions to produce environmental justice for themselves.[101] The *Vienna Declaration and Programme of Action*[102]states that all peoples have the right of self-determination.[103] By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development. This calls for free prior and informed consent from the affected communities in relation to exploitation of natural resources in their areas.

Free, prior and informed consent is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.[104]It is, thus, not a stand-alone right but an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms and which needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and territories.[105] The Guidelines call for consultation and participation which entails engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.[106]

The Constitution of Kenya provides that the objects of devolved government are, *inter alia*, to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of

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[101] US Office of Legacy Management, 'Environmental Justice' *What Is Environmental Justice?* Available at *http://energy.gov/lm/services/environmental-justice/what-environmental-justice*[Accessed on 08/12/2014].
[102] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.
[103] Proclamation 1.2.
[104] FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, *op cit*, p.4.
[105] *Ibid.*
[106] *Ibid*, p. 4.

minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.[107]

The Constitution provides for participation of persons with disabilities,[108] youth,[109] minorities and marginalized groups,[110] and older members of society,[111] in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments Act,*[112] which are to the effect that citizen participation in county governments shall be based upon the principles of, *inter alia*, timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; reasonable access to the process of formulating and implementing policies, laws, and regulations; protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.[113]

These provisions have an implication on natural resources management. It means that the devolved governments must not purport to make unilateral decisions especially with regard to the management of natural resources. They must recognise the centrality of people in natural resources management, since these resources have an impact on the economic, social, cultural and even spiritual lives of the diverse communities in Kenya. As such, they must ensure their active participation in coming up with legislative and policy measures to govern their management and utilisation for the benefit of all. They must also be alive to the fact that any negative impact on the environment directly affects these communities.

The Constitution of Kenya requires Parliament to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and to

[107] Art. 174, Constitution of Kenya 2010.
[108] Art. 54.
[109] Art. 55
[110] Art. 56
[111] Art. 57.
[112] No. 17 of 2012, Laws of Kenya.
[113] *Ibid*, S. 87.

facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[114] The proposed law, *The Natural Resources (Benefit Sharing) Bill*, 2014, also seeks to have established by each affected local community a Local Benefit Sharing Forum comprising of five persons elected by the residents of the local community.[115] Every affected local community is also to enter into a local community benefit sharing agreement with the respective county benefit sharing committee.[116] Such local community benefit sharing agreement is to include non-monetary benefits that may accrue to the local community and the contribution of the affected organization in realizing the same.[117]

It is, therefore, imperative that such communities be involved in the whole process to enable them air their views on the same and where such negative effects are inevitable due to the nature of exploitation of the natural resources, their appreciation of such impact is the ultimate key to winning social acceptance of these projects.[118] Indeed, participation will bring the most benefit when the process is seen as fair, and processes are seen as more fair, if those who are affected have an opportunity to participate in a meaningful way and their opinions are taken seriously.[119] Indicators of procedural justice have been identified as: presence of local environmental groups, public participation or consultation on local developments and initiatives, access to information, and responsiveness by public bodies.[120]

Indeed, those affected by environmental problems must be included in the process of remedying those problems; that all citizens have a duty to engage in activism; and that in a democracy it is the people, not the government, that are ultimately responsible for fair use of the environment.[121] Active and meaningful public participation, therefore, through such means as suggested in the indicators of procedural justice are important in enhancing access to environmental justice for all.

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[114] Art. 118(1) (a).
[115] Clause31 (1).
[116] Clause32 (1).
[117] Clause 32(2).
[118] S. 115 of the *County Governments Act*, 2012, provides that Public participation in the county planning processes shall be mandatory and be facilitated through— mechanisms provided for in Part VIII of this Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—clear strategic environmental assessments; clear environmental impact assessment reports; expected development outcomes; and development options and their cost implications.
[119] Amerasinghe, M., *et al*, 'Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology, 2008, p.3.
Available at *http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf* [Accessed on 08/12/2014].
[120] Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, *op cit*, p. 495.
[121] Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy,' OUP USA, 2005. Available at *http://philpapers.org/rec/SHREJC* [Accessed on 10/12/2014].

4.8.3 Benefit Sharing Arrangements

Benefit-sharing is a way of integrating the economic, social and environmental considerations in the management of natural resources.[122] In order to protect community and individual interests over land-based resources, and facilitate benefit sharing, the *National Land Policy*, 2009, recommended that the Government should: establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources and incorporate procedures for access to and sustainable use of these resources by communities and private entities; devise and implement participatory mechanisms for compensation for- loss of land and damage occasioned by wild animals; put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable; make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity; and ensure the management and utilization of land-based natural resources involves all stakeholders.[123]

Perhaps as a response to the proposals by the *National Land Policy*, 2009, there is a proposed law, *Natural Resources (Benefit Sharing) Bill*, 2014, which seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; to establish the Natural Resources Benefits Sharing Authority; and for connected purposes. The Bill, if passed into law, is to apply with respect to the exploitation of petroleum, natural gas, minerals, forest resources, water resources, wildlife resources and fishery resources.[124]Notably, the Bill provides for the guiding principles in benefit sharing which include: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; and rule of law and respect for human rights of the people.[125]

The proposed law also proposes the establishment of a Benefit Sharing Authority,[126] with the mandate to, *inter alia*, coordinate the preparation of benefit sharing agreements between local communities and affected organizations; review, and, determine the royalties payable; identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties;

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[122] Government of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, p. 23, (Government Printer, Nairobi).
[123] *Ibid*, p. 23.
[124] Clause3.
[125] Clause4.
[126] Clause5.

oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement; monitor the implementation of any benefit sharing agreement entered into between a county and an affected organization; conduct research regarding the exploitation and development of natural resources and benefit sharing in Kenya; make recommendations to the national government and county governments on the better exploitation of natural resources in Kenya; determine appeals arising out of conflicts regarding the preparation and implementation of county benefit sharing agreements; and advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation.[127]

The Bill also seeks to establish in each county with natural resources, a County Benefit Sharing Committee.[128] Benefit sharing could effectively be used to promote environmental justice among communities and enhance the relationship between the government and communities, as well as among communities which in turn enhances peace in the country.

4.8.4 Demonstrations and Lobbying

The Constitution guarantees every person's right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.[129] These are important tools that local communities can use to agitate for environmental rights. For example, communities can, by staging demonstrations and protests, stop corporations that are causing environmental pollution in their localities.

Environmental lobbying is either direct or indirect. Direct lobbying takes place when lobbyists meet with politicians and provide them with information that is relevant to the legislation on the floor of the House. The main goal is influencing the politician to vote in a certain way on legislation that is consistent with the interests of the group. Indirect lobbying arises where grassroots' lobbyists recruit community members to promote the interests of their group by holding demonstrations or writing or calling politicians with the main objective of rallying the community around a certain issue and

[127] Clause6 (1).

[128] Clause28. The functions of the said Committees will include to: negotiate with an affected organization on behalf of the County Government prior to entering into a county benefit sharing agreement; monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement; determine the amount of money to be allocated to each local community from sums devolved under this Act; convene public forums to facilitate public participation with regard to proposed county benefit sharing agreements prior to execution by the county government; convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.(Clause 29).

[129] Art. 37.

to empower them to do something about it.[130]A good example is the Maasai land claims initiative whose overall goal is to redress historical injustices and wrongs arising from the appropriation of their ancestral land by the British colonial government following the Maasai Agreements of 1904 and 1911, and the failure by successive governments to address the said injustices and wrongs.[131]

In many instances, lobbyists, Non-Governmental Organisations (NGOs) usually facilitate the lobbying and activism and communities can join in. [132] With strong governmental and community support, the NGOs involved can play a vital role in offering environmental education especially where government bodies cannot reach, thus filling in the education lacuna that may exist. If carried out effectively demonstrations and lobbying can be powerful tools in addressing such concerns as climate change, benefits sharing, participation in decision-making, and addressing the issue of environmental hazards all of which have a direct impact on communities and their lives.

4.8.5 Judicial Activism

There is no clear definition of some of the rights guaranteed in the Constitution regarding the environment and thus it is up to the courts to give guidance in certain matters. There is, therefore, a need for judicial activism so that jurisprudence in this area can be improved. For instance, there is no explanation of what, for example, amounts to a 'clean and healthy environment.' As noted by one author,[133] it took the court's active role to delineate this right in *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd,*[134] where the court expanded the meaning of a clean and healthy environment as follows:

> *'I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-*

[130] Rolli, E., 'Environmental Lobbyist', available at *http://www.sage.wisc.edu/careers/profiles/pdf/Environmental%20Lobbyist.pdf*[Accessed on 22/12/2014]. p. 1.

[131] Koissaba, B.O., 'Maa Civil Society Forum: Issues Arising from Anglo - Maasai Treaties of 1904 and 1911,' p.4,
Available at http://equalinrights.pbworks.com/f/Write+up+on+Anglo+Maasai+Treaties.pdf[Accessed on 22/12/2014].

[132] See generally, Ndahinda, F.M., "Indigenousness in Africa: A Contested Legal Framework for Empowerment of 'Marginalized' Communities," *Springer Science & Business Media,* Apr 27, 2011. Available at *https://books.google.co.ke/books?id=ayiB1Ngvd4C&dq=two+Maasai+agreements+of+1904+and+1911&source=gbs_navlinks_s* [Accessed on 26/12/2014].

[133] Twinomugisha, B.K., *"*Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda*," 3/3 Law, Environment and Development Journal (2007),* p. 244, p. 249.

[134] Misc. Cause No. 181 of 2004 (High Court of Uganda).

> *being of human beings… a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model…'* (Emphasis added)

Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.[135] It is arguable that the section allows judges to engage in judicial activism to safeguard environmental rights by ensuring sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Courts may therefore act without necessarily waiting for filing of any cases on public interest litigation so as to promote environmental justice.

4.8.6 Role of Academia

The institutions of learning around the country can play an important role in promoting environmental justice. They can be useful channels through which relevant information on environmental matters and natural resources can reach the communities in means that such communities can appreciate. Such information would not only be useful in assisting the communities know how best the resources at their disposal can be utilised for betterment of their livelihoods but would also be useful in enabling the communities to understand the existing legal and institutional frameworks on natural resources management and thus be able to meaningfully engage the authorities during public participation opportunities. Coming up with study programmes that focus on the specific resources in the country and collaborating with funding organisations would be useful in ensuring that a reasonable number of members of the public in general and specific communities in particular are well versed with the exploitation and management of the various natural resources, thus enabling them help the larger community in appreciating the implications of natural resources management.

4.8.7 Advocacy

The role of civil society, Non-Governmental Organisations (NGOs) and other faith-based organisations has been prominent in agitating for effective and efficient natural resources management. It has been noted that Environmental justice activists call for policy-making procedures that encourage active community participation, institutionalise public participation, recognise community knowledge, and utilise cross-cultural formats and exchanges to enable the participation of as much diversity as exists in a community.[136]

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[135] S. 20.

[136] Schlosberg, D., 'Reconceiving Environmental Justice: Global Movements and Political Theories', *op cit* p. 522.

4.8.8 Public Interest Litigation

Public interest litigation is one viable way of enhancing environmental justice in Kenya. When people are given opportunities to move to judicial and other non-judicial forums, natural resource managers are most likely to manage resources more productively, efficiently, sustainably and effectively. The Constitution provides for the enforcement of environmental rights and states 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.[137]Further, constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22,[138] 23[139] and 48[140] thereof. These are important provisions that are aimed at promoting environmental justice for every person through use of public interest litigation.

For instance, in December 2010, the Africa Network for Animal Welfare (ANAW), a Kenya non-profit organization, filed a case in the East Africa Court of Justice (EACJ) challenging the Tanzanian government's decision to build a commercial highway across the Serengeti National Park. On June 20, 2014, the court ruled that the government of Tanzania could not build a paved (bitumen) road across the northern section of the Serengeti, as it had planned. It issued a permanent injunction restraining the Tanzanian government from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park. [141] Such decisions show the crucial role that courts can play in promoting environmental justice by stopping any government development plans that might negatively affect the environment or the livelihoods of communities.

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[137] Art. 70 (1).

[138] Art. 22(1) guarantee every person's 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. Such persons need not prove *locus standi* to institute the suit (Art. 22(2).

[139] Art. 23 confers the High Court with jurisdiction, in accordance with Art. 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

[140] Art. 48 obligates the State to ensure access to justice for all persons and, if any fee is required, it be reasonable and not impede access to justice.

[141] *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, Reference No. 9 of 2010.

In *Lereya & 800 others v AG & 2 others,*[142] the plaintiff and others being the affected residents of Marigat Division of Baringo District, sued the AG, Minister for Environment and Natural Resources and the National Environment Management Authority seeking the eradication of a weed plant on their land. They averred that the Food Agricultural Organization (FAO) introduced the weed, *Propis Juliflora* in Ng'ambo location in Marigat Division to curb desertification. The weed, which is invasive in nature, allegedly went out of control and caused harm to humans, livestock and the environment. The suit was objected to on grounds, *inter alia*, that the suit which was brought more than 20 years after the introduction of the plant was time barred, and secondly that the plaintiffs had no specific interest in the subject matter and therefore lacked *locus standi*. The Court held that the preliminary objection, on the ground of time limitation, was not tenable because the weed was invasive in nature and its effects in the environment were long-term or continuing. Secondly, on the basis of section 3(3) and (4) of EMCA, the preliminary objection on the ground of lack of *locus standi* had no merit.[143] However, the case was dismissed because the government had not been notified of the proceedings as required by law.

The foregoing case is a good example of a scenario where the concerted efforts by the affected community to petition the court to enforce the right to clean and healthy environment were thwarted by procedural technicalities. Such technicalities should be addressed so as to ensure that the locals are able to access justice. As already indicated, procedural justice is not limited to environmental justice, but cuts across the whole spectrum of justice.[144] The basis of redress is the obligation on the State to ensure access to justice for all persons at reasonable fees so as not to impede access to justice.[145] Further, the Constitution states that in exercising judicial authority, the courts and tribunals are to ensure, *inter alia*, that justice is done to all irrespective of status; justice is not delayed; and that justice is administered without undue regard to procedural technicalities.[146]

In the past, public interest litigation has successfully been used to safeguard environmental rights. In *Hassan & 4 others v KWS,*[147]the applicants sought orders to restrain the respondent from removing and or dislocating a rare and endangered animal called Hirola from its natural habitat in Arawale to the Tsavo National Park on the grounds

[142] Nairobi HCCC No.115 of 2006 KLR (E&L), p. 761.
[143] Previously, such rights as to petition court were unheard of and environmental rights cases were thrown out of the courts on technical grounds. Such infamous cases include, *inter alia*, *Wangari Maathai v Kenya Times Media Trust* (1989) 1KLR (E&L) which was dismissed for lack of standing.
[144] Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, *op cit*, p. 497.
[145] Art. 48.
[146] Art. 159 (2).
[147] Nairobi HCCC No 2959 of 1996 KLR (E&L), p. 214.

that it was a gift to the people of the area and should be left there. The respondent contended that the application was seeking to curtail the respondent from carrying out its express statutory mandate. The court in granting the temporary injunction held, *inter alia*, that although Section 3A (d), (e) and (f) of the *Wildlife (Conservation & Management) Act*, empowered the Respondent to conserve wild animals in their habitat, the respondent would be acting outside its powers if it were to move the animals away from their natural habitat without the express consent of those entitled to the fruits of the land which includes flora and fauna.

4.9 Conclusion

Environmental rights can best be realised through the advocacy of rights to access to information, to consultation in the decision-making process and to access to courts, revamped in an environmental setting. Environmental justice in Kenya is an ideal that can be achieved. Already there are laws, policies and institutions that can be used as platforms for enhancing access to justice. However, due to the many and divergent interests (including local communities, investors and national and county governments) and high stakes involved in natural resources governance, the road to environmental justice may not be easy. It will require the concerted efforts of all concerned parties to make environmental justice in Kenya a reality.

Chapter Five

Devolution and Natural Resource Management in Kenya

5.1 Introduction

This chapter discusses devolution as a form of decentralisation, within the context of the Constitution of Kenya 2010 and its implication on natural resource management (NRM) in Kenya. The Constitution creates a decentralized system of government with 47 political and administrative units.[1] The primary objective of decentralisation is to devolve power, functions, resources management and representation down to the local level.[2] Ideally, decentralisation, a process through which powers, responsibilities and resources are devolved by the central state to lower territorial entities and regionally/locally elected bodies, is supposed to increase efficiency, participation, equity, and environmental sustainability.[3]

Decentralisation, or decentralizing governance, is "*the restructuring or reorganization of authority so that there is a system of co-responsibility between institutions of governance at the central, regional and local levels according to the principle of subsidiarity, thus increasing the overall quality and effectiveness of the system of governance, while increasing the authority and capacities of sub-national levels*."[4] It contributes to good governance by increasing opportunities for public participation in economic, social and political decisions; developing people's capacities; and enhancing government responsiveness, transparency and accountability.[5]

In natural resources management, decentralisation is justified on several grounds. It enables local people to identify and prioritise their environmental problems accurately; ensure efficient resource allocation; promote greater respect for decisions made with local inputs such as rules for resource use; allow for easier monitoring of resource use and give marginalised groups greater influence on local policy.[6] This is especially so, where decentralisation adopts democratic forms rather than administrative ones. Democratic decentralisation requires representative and downwardly accountable local authorities,

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[1] Art. 6(1), Constitution of Kenya 2010.
[2] *Ibid*, Art. 174.
[3] Oyono, P.R., "One step forward, two steps back? Paradoxes of natural resources management decentralisation in Cameroon," *The Journal of Modern African Studies*, 2004, 42, pp. 91-111, at p. 91.
[4] United Nations Development Programme, 'Decentralization: A Sampling of Definitions.' *Working paper prepared in connection with the Joint UNDP-Government of Germany evaluation of the UNDP role in decentralization and local governance*, October, 1999, p. 2.
[5] *Ibid.*
[6] Larson, A.M., 'Decentralisation and Forest Management in Latin America: Towards a Working Model,' *op cit*, at pp. 211-212.

who hold a secure and autonomous domain of powers to make and implement meaningful decisions.[7]

Decentralisation takes several forms. It could be devolution, delegation, deconcentration and divestment or privatisation. Out of all these, devolution, which is the focus of this chapter, is the most common understanding of genuine decentralisation.[8] Devolution is the transfer or transition from one person to another of a right, liability, title, estate, or office.[9] It seeks to distribute power, duties and responsibilities from one centralized point. It is a system of decentralization that effectively (through the Constitution) locates political and economic power at sub-national levels and that is controlled democratically by the people and not the national/central government.[10] The objective of devolution is to improve the performance of government by making it more accountable and responsive to the needs and aspirations of the people and secondly, to facilitate the development and consolidation of participatory democracy.[11] It entails moving away from the costly state-centred control towards approaches in which the local people and authorities play a much more active role in managing the resources around them. Their involvement increases resource user participation in natural resource management decisions and the accruing benefits.[12]

Devolution is one of the creatures of the Constitution of Kenya, 2010, provided for in Chapter 11 thereof. The devolved aspects of devolution in Kenya include political devolution, administrative, fiscal, service delivery and the opportunity for the effective participation of the people.[13] The Constitution of Kenya requires every county government to decentralise its functions and the provision of services to the extent that is efficient and practicable to do so.[14] National state organs are also required to ensure reasonable access to their services in all parts of the Republic, so far as it is appropriate having regard to the nature of the service.[15]

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[7] *Ibid*, p. 212.
[8] *Ibid*, p.6.
[9] 'The Law Dictionary,' available athttp://thelawdictionary.org/devolution, [Accessed on 29/12/2014].
[10] Nyamwamu, C.O., 'From a Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics,' *op cit*, p.3.
[11] Oloo, O.M., 'Devolving Corruption? Kenya's Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya,' *Paper Presented at Workshop on Devolution and Local Development in Kenya*, June 26th 2014, Nairobi, p.5.
[12] Shackleton, S., *et al*, 'Devolution and community based natural resource management,' *Natural Resource perspectives (ODI)*, No. 76, March 2002, p. 1.
[13] *Ibid*, p. 3.
[14] *Ibid*, Art. 176(2).
[15] *Ibid*, Art. 6 (3).

The Fourth Schedule to the Constitution of Kenya, outlines the obligations of the central government and those of the county governments.[16] The obligations of the central government towards natural resource management include the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular, fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.[17]

The county government is obligated to implement specific national government policies on natural resources and environmental conservation including, soil and water conservation and forestry.[18] Further, the county governments are also supposed to ensure and coordinate the participation of communities and locations in governance at the local level and assist communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.[19] Within the devolved system, the Senate is expected to play an important role in fostering good governance in the management of natural resources in Kenya. County assemblies will also play a role in NRM and development of policies, amongst other roles.

5.2 Historical Overview of Devolution in Kenya

Kenya's 1963 Lancaster Constitution had provision for two houses of representatives: upper and lower houses, which included regional governments with legislative assemblies. [20] However, the then KANU Government was opposed to regionalism *(Majimbo)*[21] and sabotaged the regions by refusing to release funds for their operations. This saw increased centralization of powers and functions by the central government.[22] The *Majimbo* system was replaced by a unitary system of government in 1965 through constitutional amendments.[23]

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[16] Pursuant to Art. 185(2), 186(1) and 187(2) of the Constitution of Kenya. The Schedule provides for the distribution of functions between the national Government and the County Governments.
[17] *Ibid.*
[18] *Ibid,* Part 2.
[19] *Ibid.*
[20] Media Development Association & Konrad Adenauer Foundation, *History of Constitution Making in Kenya,* 2012. Available at *http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057* [Accessed 10/01/2015], pp.7-8.
[21] Plural form of *jimbo,* which in Kiswahili means administrative district or region.
[22] Chitere, P., *et al.* 'Kenya Constitutional Documents: A Comparative Analysis.' *CMI Reports*, 2006, p. 12. Available at *http://www.cmi.no/publications/file/2367-kenya-constitutional-documents.pdf*[Accessed 10/01/2015].
[23] Omari, A.O., *et al.,* 'Change Dilemma: A Case of Structural Adjustment through Devolution in Kenya.' *International Journal of Arts and Commerce*, Vol. 1(7), December 2012, pp. 491-499, at p. 491.

The *Draft Constitution of Kenya, 2004* (Bomas Draft),[24] sought to restore decentralisation in the form of devolution in the country's governance structure. However, these efforts were thwarted. The Bomas draft had introduced a devolved system with four levels, namely: the national level, the regional level, the district level and the locational level.[25] The governments at each level were to be distinct, inter-dependent, consultative and negotiative.[26]

During the Bomas Conference discussions, devolution was one of the contentious issues. It was opposed on the grounds that a devolved government would be too expensive and complex. Similar reasons had been advanced to oppose regionalism after independence.[27] The Government of the day rejected the draft and came up with what is commonly known as the Wako draft, which was offered to, but rejected by the people, in a referendum in 2005. The Wako draft omitted altogether the concept of "devolution," reverting to "local government." It proposed only one sub-national unit, the district. Districts would have law making powers but the national government could override district laws even on a subject under the district list.[28]

Devolution was included in the current Constitution along the lines of the proposals in the Bomas draft, though with a single lower level of governance so as to make the system less complex.[29]A major characteristic of the old systems of local government and provincial administration was that local government was not protected by the Constitution. The provincial administration was operating under the direct control of the office of the President (through the Provincial Commissioner at the top and the chief at the bottom), with little or no participation by the people. The need for the devolved system was therefore largely informed by the citizens' calls for opportunity to participate in governance matters including those touching on natural resources.[30]

5.3 Natural Resources Management in Kenya

Natural resource management in Kenya has mainly been a state affair, with little or no involvement of the local communities and the public in general. Any efforts towards facilitating community participation or inclusion in such management had been peripheral. The State acted as the custodian of natural resources with the public being

[24] Constitution of Kenya Review Commission, adopted by the National Constitution Conference on 15 March 2004], See Chapter Fourteen thereof.
[25] *Ibid*, S. 6(1).
[26] *Ibid*, S. 6(2).
[27] Hornsby, C., *Kenya: A History since Independence* (I.B.Tauris, 2013), p. 722.
[28] Ghai, Y. 'History and Objectives of Devolution,' *The Star*, Saturday, April 20, 2013, available at *http://www.the-star.co.ke/news/article-117538/history-and-objectives-devolution*[Accessed on 10/01/2015].
[29] *Ibid.*
[30] *Ibid.*

expected to receive only accruing benefits if any, without participation in crucial decision-making. Inequitable benefit sharing, exclusion of the poor and the marginalised in decision making system, and indiscriminate environmental degradation are some of the features that characterized natural resources management system in the past.[31] State-centric natural resource management was a result of the colonial legacy. Under this legacy, the colonial masters had mastered the art of grabbing the natives' lands and appropriating all the land related resources such as water, wildlife, forests and mineral resources for their own benefit.[32]

In October 1982, former President Daniel Arap Moi announced that Kenya would henceforth allocate its resources for rural development on a decentralised basis, so as to be more responsive to the 'needs and aspirations of wananchi.'[33] Over the years, there has been a paradigm shift in conservation and natural resource management from the central government to Community-Based Natural Resource Management (CBNRM) approaches. CBNRM as a form of decentralisation, is expected to be more effective and efficient in attaining sustainable utilization of natural resources and promoting environmental justice when compared to state-centric approaches.[34]

The main difference between the CBNRM and devolution is that, while in CBNRM the communities are involved in conservation activities with the advantage of sharing accruing benefits, devolution entails not just administrative but also political decentralization that involves the sharing of power with the central government as defined by legal or constitutional provisions.[35] Under devolution, communities have more control and right of participation in decision-making as well as governance matters.

CBNRM has not always been effective in achieving equitable and sustainable natural resource management. This is because there are other factors, relating to its implementation and especially the reconciliation of social and environmental goals, which

[31] National Water Policy, 2012, Government Printer, Nairobi; National Land Policy, 2009; See generally, Yatich T, *et al*, 'Policy and institutional context for NRM in Kenya: Challenges and opportunities for Landcare.' *ICRAF Working paper-no.43*, (World Agroforestry Centre, 2007, Nairobi). Available at *http://www.worldagroforestry.org/downloads/publications/PDFs/wp15330.pdf*[Accessed on 29/12/2014].
[32] See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, *op cit*
[33] Barkan, J.D. & Chege, M. 'Decentralising the State: District Focus and the Politics of Reallocation in Kenya.' *The Journal of Modern African Studies*, September, Vol. 27(3), 1989, pp. 431-453.
[34] Misati, J., *et al.* 'Towards a Policy Framework for Community Based Natural Resources Management in Fresh Water Eco - Systems: A case Study of Lake Naivasha Basin, Kenya.' In: Proceedings of the 2012 JKUAT Scientific, Technological and Industrialization Conference, pp.541–552. p. 543; See also generally Mulatu, D.W., *et. al*, 'Farm households' preferences for collective and individual actions to improve water-related ecosystem services: The Lake Naivasha basin, Kenya.' *Ecosystem Services*, Vol. 7, 2014, pp.22–33.
[35] Oloo, O.M., 'Devolving Corruption? Kenya's Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya,' *op. cit*, p.5.

are to be considered.[36] These factors include equity, empowerment, conflict resolution, knowledge and awareness, biodiversity protection, and sustainable resource utilization.[37]

The success of CBNRM can also greatly benefit from tenure security, clear ownership, congruence between biophysical and socioeconomic boundaries of the resources, effective enforcement of rules and regulations, monitoring, sanctioning, strong leadership with capable local organization, expectation of benefits, common interests among community members, and local authority.[38] As such, these factors should be adequately addressed if there is to be any tangible positive change in the way natural resources are managed within the devolution framework.

Under the constitutional provisions on conflicts of laws between the two levels of government, national legislation is to prevail on matters of environment protection in cases where the county governments have unreasonably or prejudicially acted in relation to environmental protection.[39] The role of the Senate concerning natural resource management is a legislative function where the Senate represents the county government interests and functions.[40] It is not enough that the legal framework on devolution contains provisions addressing these factors, but the same must be seen to inform the procedure for its implementation.

The effect of devolution on natural resources management is, therefore, not mutually exclusive but largely depends on other laws and practice on tenure security, ownership, effective enforcement of rules and regulations, monitoring, sanctioning, strong leadership with capable local organization, expectation of benefits, common interests among community members, and local authority.[41]

The various sectoral laws have demonstrated the state's attempts to adopt CBNRM although with little success due to lack of goodwill and as discussed above, limitation due to other factors. Their implementation demonstrates state-centric tendencies with much of the control powers remaining with the government authorities. For instance, the *Forest Act*, 2005,[42]makes provision for Participatory Forest Management (PFM) and how forest

[36] Kellert, S.R., *et al*, "Community Natural Resource Management: Promise, Rhetoric, and Reality," *Society & Natural Resources*, 2000, Vol. 13(8); See also Oyono, P.R., "Profiling Local-Level Outcomes of Environmental Decentralizations: The Case of Cameroon's Forests in the Congo Basin," *The Journal of Environment Development*, September 2005, Vol. 14, No.3, pp.317-337.
[37] *Ibid.*
[38] Pagdee, A., *et al, "*What Makes Community Forest Management Successful: A Meta-Study from Community Forests throughout the World," *Society & Natural Resources: An International Journal*, Vol. 19, No.1, 2006.
[39] Art. 191.
[40] *Ibid*, Art. 96.
[41] Pagdee, A., *et al., "What* Makes Community Forest Management Successful: A Meta-Study from Community Forests throughout the World," *op cit.*
[42] Act No. 7 of 2005, Laws of Kenya.

communities may be involved in the co-management of forests and benefit sharing. Community participation in forests management is encouraged through the formation of community forests associations, which must be registered under the *Societies Act*.[43] However, under the Act, the issues of decision-making, management responsibilities and benefit-sharing are left to subsidiary legislation.[44]

5.4 State-centric approach to Natural Resource Management

The challenges that have bedeviled the unitary system of governance have been identified as, *inter alia*: misuse of power and bad governance under a powerful presidency; systemic marginalization and exclusion of peoples along ethnic and regional lines; skewed distribution and non-sharing of resources by the centralized government; poverty, lack of participation, infantilization of citizens and disempowerment of citizens.[45] The legal and institutional framework concentrated much of the powers in natural resource management on the state, completely suppressing the voice of the local communities in NRM. This approach led to a number of challenges.

A state-centric approach encourages internal natural resource-based conflicts.[46] This is especially so where local communities located within certain localities feel that the government is disproportionately exploiting resources and appropriating the accruing benefits for the 'good' of the country often to their detriment, especially where locals have to bear with environmental hazards resulting from the exploitation.

Moreover, it concentrates on political factors and institutional weaknesses,[47] and as such in order to provide populations with basic services and maintain the rule of law, resource-rich States have to develop well-designed institutions that promote efficiency, equality among citizens, economic growth and stability. When the capacity of these institutions or the will of political leaders is diminished, political opportunities are created

[43] *Ibid*, SS. 45-46.

[44] Kariuki F., *Securing Land Rights in Community Forests: Assessment of Article 63(2) (d) of the Constitution*, A Thesis Submitted in Partial Fulfillment of the Requirements for the Award of the Degree of Master of Laws (LL.M), of the University of Nairobi, November 2013, p. 20.

[45] Nyamwamu, C.O., 'From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics,' *Paper Presented At the FES Conference on State of Implementation of the Constitution since 2010*, p.2, available at *http://www.feskenya.org/media/publications/From%20A%20Centralized%20System%20To%20A%20Devolved%20System%20Of%20Governments%20-%20Cyprian%20Orina-Nyamwamu.pdf*, [Accessed on 9/01/2015].

[46] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report); the *Kriegler and Waki Reports on 2007 Elections*, 2009. [Government Printer, Nairobi].

[47] Charles, P. D. & Gagne, J.F., "Natural Resources: A Source of Conflict?" *International Journal*, Vol. 62, No. 1, Natural Resources and Conflict (Winter, 2006/2007), pp. 5-17, at p. 6.

for local groups to challenge the government's legitimacy and authority.[48] Because natural resources are important for livelihood and generation of income, there is need for even greater opportunities for increasing equity, alleviating poverty and providing development opportunities through the redistribution of control, decentralisation of services and infrastructure.[49] However, this also means that natural resource decentralisation is at greater risk of local elite capture and they are more likely to be resisted by those in a position to lose control over resources in the re-distribution of powers engendered by decentralisation.[50] In Mali for instance, since the colonial times the central government had sought control, access and use of forestlands and declared them public land, resulting in a very harsh reaction between the foresters and the local people.[51]This presents the challenge that the central government faces when it tries to manage the resources without the involvement of the local people.

Devolved governments will heavily rely on the environmental resources in order to promote development in the counties. Also important is the constitutional provision that one of the principles of devolved government is that County governments must have reliable sources of revenue to enable them to govern and deliver services effectively.[52] This is to be achieved through exploitation of the natural resources within their boundaries. However, as it was noted in the *1999 Sessional Paper on Environment and Development*, [53] environmental protection, management, and development should consider broad issues that bind together people, resources, development, and environment.[54] Indeed, one of the recommendations of the Policy paper was that the Government should encourage the participation of local communities in biodiversity conservation and management; and create incentives for effective conservation of biodiversity by local communities. This was however not effectively implemented through the existing legal framework. If anything, the same was undermined by the often complex and bureaucratic requirements on licences and permits. The framework concentrated on giving communities user rights and not control over the resources thus denying them any voice on how the same should be managed.

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[48] *Ibid*, p. 12.
[49] Larson, A.M., "Decentralisation and Forest Management in Latin America: Towards a Working Model," *Public Admin. Dev.,* Vol. 23, 2003, pp. 211–226, p. 213.
[50] *Ibid.*
[51] Local governance institutions for sustainable natural resource management in Mali, Burkina Faso and Niger.
[52] Art. 175.
[53] *Sessional Paper on environment and development, No. 6 of 1999*, (Government Printer, Nairobi, 1999).
[54] See also *Republic v Lake Victoria South Water Services Board & another* [2013] eKLR, Miscellaneous Civil Application 47 of 2012, para. 28.

The Constitution states that the governments at the national and county levels are distinct and inter-dependent and they must conduct their mutual relations based on consultation and cooperation.[55] Therefore, the national government and the county governments should join hands in promoting sustainable and equitable utilisation and management of natural resources for the benefit of the Kenyan citizenry and the ultimate economic development of the country as a whole.

5.5 Natural Resource Management under the Constitution of Kenya 2010 and Existing Legal Frameworks

Participation by local communities in the governance affairs of a country has been hailed as an indication of good and democratic governance as well as the respect and promotion of the rights of citizens.[56] One of the most outstanding features of the current Constitution of Kenya, 2010 is the principle of public participation in the governance affairs of the country.[57] The Constitution calls for respect of the environment, being the people's heritage.[58] It also lays out the obligations of the State in respect of the environment. Amongst these is the obligation to encourage public participation in the management, protection and conservation of the environment.[59] Further, it 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.[60] This brings about a paradigm shift, in that participation in natural resources, is not only a right but also a duty of every citizen. The implication is that all the existing laws on natural resource management must reflect this position.

5.6 The Implication of Devolution on Natural Resource Management

Devolution has been associated with several advantages, which include: making it difficult for individuals or groups of official actors to collude and engage in corrupt practices due to the distributed authority over public goods and revenues; fostering effective cooperation within the devolved units; enabling local communities to mobilize social pressure against rent seeking and corruption; multiplying the opportunities for political participation and therefore promoting a democratic culture; empowering communities to manage their own resources more effectively; effectively promoting

[55] *Ibid*, Art. 6(2).
[56] Gaventa, J., 'Towards Participatory Local Governance: Assessing the Transformative Possibilities,' *Applied Knowledge Sciences*, 2004, Available at *www.gsdrc.org/go/display/document/id/2682* [Accessed on 29/12/2014].
[57] Art. 10.
[58] Preamble to the Constitution.
[59] Art. 69 (1).
[60] Art. 69 (2).

productive efficiency in the provision and use of public services and the allocation of resources; and, in terms of poverty alleviation, devolution provides a more effective governance framework for advancing pro-poor policies since the sub-national institutions are likely to be more familiar with the local circumstances and cost conditions and so are better equipped to distribute resources more equitably.[61]

At the heart of the objectives of devolution, is the promotion of environmental justice in exploitation of natural resources. Devolution gives powers of self-governance to the people and enhances public participation in the exercise of the powers of the State and in making decisions affecting them; recognises the right of communities to manage their own affairs and to further their development; protects and promotes the interests and rights of minorities and marginalised communities; promotes social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensures equitable sharing of national and local resources throughout Kenya; and facilitates the decentralisation of State organs, their functions and services, from the capital of Kenya.[62] Devolution is thus expected to address the main challenges facing the struggle for environmental justice in Kenya especially in relation to natural resources management.

The involvement of the public in local governance enhances their understanding in environmental matters making them appreciate the necessity of conserving and sustainable use of the resources around them. State-controlled management of natural resources leads to institutions with conflicting and overlapping mandates. With devolution the roles, decision making, appropriation, monitoring and enforcement becomes more clear and precise. Devolution also enhances commitment of local community members in natural resources management.[63]

The objects and principles of devolved government are articulated in the Constitution. Devolution is to ensure the equitable sharing of national and local resources throughout Kenya.[64] One of the objects of devolved government is to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them.[65] It also recognizes the right of communities to manage their own affairs and to further their development. Devolution is

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[61] Institute of Economic Affairs, *et al*, 'A Guide for Understanding Decentralization in Kenya,' 2011, p.9.Available at *http://www.ncck.org/largedocs/Decentralization%20Manual%20-%20Revised%20Feb%202011.pdf [*Accessed on 9/01/2015].

[62] Art. 174.

[63] Gruber, J.S., 'Key principles of community-based natural resource management; a synthesis and interpretation of identified effective approaches for managing the commons,' 2008.
Available at *http://iasc2008.glos.ac.uk/conference%20papers/papers/G/Gruber_132301.pdf* [Accessed on 29/12/2014].

[64] Constitution of Kenya, Art. 174.

[65] *Ibid*, Art.174(c).

also expected to give powers of self-governance to the people and enhance their participation in the exercise of the power of the state and in making decisions affecting them. The powers of the state and obligations are provided under Article 69.

The county governments are expected to establish the policy, legal and social framework and conditions needed for local management to succeed, they have to facilitate and regulate private activity, helping the local organizations enforce locally designed and monitored regulations and sanctions, addressing local inequality and ensuring representation of marginalised groups so that downward accountability of organization receiving devolved authority is assured and helping communities defend their rights including protection against powerful external groups such as mining and timber companies and cartels.[66]

Natural resource management has become a key development strategy in recent times. Control of resources by the local people and communities improves local governance through participation and hence empowers the poor, centralized decision making, control and enforcement of natural resource management through government agencies has often proven ineffective and brought about resource degradation rather than sustainable use. [67] With the devolved government, they will become the primary implementers, though they still need the assistance of the central government especially on issues that affect not just the locals around but the nation at large. In fact, it has been observed that since natural resource management is multi-sectoral, encompassing many sectors, including environment, agriculture, irrigation, forestry, livestock, water supply and energy, amongst others, there is a necessity for multi-sectoral cooperation, particularly at the decentralised district levels, which are the focal points of service delivery and support to sustainable community management of natural resources.[68]

The *Transition to Devolved Government Act*[69] seeks to, *inter alia*, provide a legal and institutional framework for a coordinated transition to the devolved system of government while ensuring continued delivery of services to citizens; and provide for the mechanism for capacity building requirements of the national government and the county

[66] Shackleton, S., *op cit*, 'Devolution and community based natural resource management,'
[67] Serageldin, M., *et al*, 'Treating People and Communities as Assets: Local Government Actions to Reduce Poverty and Achieve the Millennium Development Goals,' *Global Urban Development Magazine*, Vol. 2(1), March 2006. Available at *http://www.globalurban.org/GUDMag06Vol2Iss1/Serageldin,%20Solloso,%20&%20Valenzuela.htm* [Accessed on 24/01/2015].
[68] DANIDA, 'Natural Resource Management,' available at *http://kenya.um.dk/en/danida-en/nrm/*[Accessed on 10/01/2015].
[69] Act No. 1 of 2012, Laws of Kenya is meant to provide a framework for the transition to devolved government pursuant to S. 15 of the Sixth Schedule to the Constitution, and for connected purposes.

governments and make proposals for the gaps to be addressed.[70] The Constitution also requires that the Government at either level should liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.[71]

It is within this legal framework, that the Transition Authority can assist the County governments to build capacity to effectively undertake the role of natural resources management on behalf of the local people. Under the devolved system, natural resource management seems to have adopted what is commonly referred to as the adaptive governance approach that calls for wide-ranging public involvement in a never-ending process of knowledge generation, decision-making, and implementation.[72] Under the approach, policies are required to legitimize the rights of all stakeholders, especially marginalized groups, to information, participation in decision-making and policy implementation processes, and access to justice through the courts.[73]

Although community participation, in a people-centred environmental project or programme, can mean many different things, the use of local knowledge is a valuable indicator of the type and level of participation and 'ownership' of a development process by the local residents, producers or users.[74] Notably, the range of local knowledge transcends empirical facts, since it includes information, attitudes, values, skills and practices concerning a high diversity of biological resources.[75] This is precisely what the devolved system of governance seeks to actualize as one of its main objectives under the Constitution and the *County Governments Act* 2012.[76]

The *County Governments Act*, 2012, contains elaborate provisions on public participation, public communication and access to information and civic education all of which have an implication on natural resources management at the county level. The Act provides the principles upon which citizen participation in counties should be based.[77] These include timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. This is in appreciation of the fact that, meaningful public participation of the citizens, requires access to the relevant

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[70] *Ibid*, S. 3.
[71] Art. 189 (1) (c).
[72] Akamani, K. &Wilson, P. I., "Toward the adaptive governance of transboundary water resources," *Conservation Letters*, Vol.4, No.6, 2011, pp. 409-416.
Available at *http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?Art.=1001&context=for_articles*[Accessed on 12/12/2014].
[73] *Ibid.*
[74] Atkinson, D., 'People-centred environmental management and municipal commonage in the Nama Karoo,' *Commons Southern Africa occasional paper*, 2005, No. 11, p. 7.
[75] *Ibid.*
[76] Act No. 17 of 2012.
[77] *Ibid*, S. 87.

information that is also useful in decision making by the citizenry in relation to the management of natural resources in their counties.[78]

Further, the Act calls for reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards. This is an important procedural aspect of the natural resources management that enables the public to appreciate the whole process and to be able to voice their concerns and proposals regarding the whole process.

The effect of this in the face of devolution is that the policies, laws and regulations that are put in place and any development projects that are undertaken in relation to exploitation of natural resources are more likely to be responsive to the real needs of the people at the county level and this facilitates effective natural resources management for the improvement of people's livelihoods. It is also important to note that without the relevant information, the affected communities may miss out on actual benefits accruing from localized natural resources management, as the whole process may be hijacked by other interested parties thus defeating the essence of devolution.[79]

The Act requires that to enhance the participation of marginalized groups and communities they should also have access to relevant information. This is important in actualizing Article 56 of the Constitution which obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups *inter alia*, participate and are represented in governance and other spheres of life. The other principle is that of legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities. This is an important provision and it is in line with section 3(5) of the *Environmental (Management and Coordination) Act 1999* and Article 70(3) of the Constitution both of which dispense with the requirement for *locus standi* in environmental litigation. The Act also calls for reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight.[80]

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[78] See generally, Muigua, K., "Towards Meaningful Public Participation in Natural Resource Management in Kenya," available at *http://kmco.co.ke/index.php/publications/126-towards-meaningful-public-participation-in-natural-resource-management-in-kenya*

[79] Oyono, P.R., "The social and organisational roots of ecological uncertainties in Cameroon's forest management decentralisation model," *The European Journal of Development Research*, 2004, Vol. 16, No.1.

[80] S. 87(e), *County Governments Act*, 2012.

This is an important principle that will go a long way in ensuring that County governments do not make unilateral decisions especially with regard to natural resources management at the county level but instead they bring on board all the affected stakeholders in a fruitful consultative forum. If well implemented through the county laws on natural resources management, these principles are bound to bring an overhaul of the way in which natural resources have been managed in the past through the state-centric management approaches.

Regional economic development is one of the major goals of devolution. Greater control over one's own livelihood is a key factor to development, empowerment and poverty alleviation.[81] Local democratic control over natural resources can improve local livelihood and have positive ecological effects as well.[82] Development comes with associated problems of soil degradation and waterways, altered landscape and destroyed biodiversity and habitat.[83] Consequently, environment and development issues should be considered as integral activities. Local people should be empowered in a collaborative manner to enable them deal with negative environmental effects. The county governments and the senate have the powers to create institutions and laws ensuring good practice in natural resource management.[84] County executives being the policy makers need to pay attention to political contexts in which stakeholders will vie for access and control over natural resources.[85]

Sustainable development should in the long term ameliorate the negative effects of poverty, provide basic needs, and meet people's aspirations for a better life. Sustainable development can be satisfactorily achieved through the meaningful involvement of the people in the counties in the natural resources exploitation. The devolved system of government holds a promise to deal with rampant poverty in many parts of the country.[86] There is bound to be a paradigm shift in the management of natural resources including on the way the government combats such challenges as climate change, deforestation, afforestation, soil and water conservation measures, pollution, amongst others.

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[81] Larson, A.M., 'Decentralisation and Forest Management in Latin America: Towards a Working Model'. *op cit*, at p. 212.
[82] *Ibid.*
[83] 'Policy, Legal and Institutional Framework Governing Environmental Management in Kenya,' p. 305, available at *http://www.tanariverdelta.org/tana/975DSY/version/default/part/AttachmentData/data/MUMIAS_Tana_EIA_part5.pdf* [Accessed on 29/12/2014].
[84] See Arts. 174 & 96 of the Constitution of Kenya.
[85] S. 36, *County Governments Act,* 2012.
[86] *Sessional paper on Environment and Development* [Government Printer, Nairobi, 1999].

Although the national government, has the role of protecting the environment and natural resources, [87] county governments have a role in pollution control [88] and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry.[89] Climate change is not listed in the Fourth Schedule of the Constitution as a function of either level of government, with the implication that by default, Article 186(3) of the Constitution applies so that climate change can be interpreted as a function of the national government.[90] Cooperation between the national government and county governments in the design and overall implementation of climate change response strategies is seen as imperative, as the counties are the likely implementers.

Indeed, with regard to climate change mitigation, the proposed *Climate Change Bill*, 2014[91] recognises that the county governments are to play a central role alongside the national government in the efforts towards mitigating the effects of climate change. The proposed law seeks to establish the Climate Change Council.[92] The Council, if set up will, *inter alia*, advise the national and county governments on legislative and other measures necessary for mitigating and adapting to the effects of climate change; and coordinate gender-responsive public education and awareness programmes on climate change and facilitate gender-balanced public participation in climate change programmes at the national and county governments.[93]

The principles of planning and development facilitation in a county should, *inter alia*, protect and develop natural resources in a manner that aligns national and county governments' policies. [94] For instance, the Constitution provides that one of the obligations of the State in relation to the environment is to work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya.[95] In line with this, the County Governments Act, 2012 provides that one of the objectives of county planning is to work towards the achievement and maintenance of a tree cover of at least ten per cent of the

[87] S. 22, Constitution of Kenya, 2010.
[88] *Ibid*, S. 3 of Part II.
[89] *Ibid*, S. 10.
[90] International Development Law Organization (IDLO), 'Enabling Legislative and Institutional Framework for Climate Change Response in Kenya,' 2012, p. 47.
[91] Kenya Gazette Supplement No. 3 (National Assembly Bills No. 1), (Government Printer, Nairobi). The Bill seeks to provide for the legal and institutional framework for the mitigation and adaption to the effects of climate change; to facilitate and enhance response to climate change; to provide for the guidance and measures to achieve low carbon climate resilient development and for connected purposes.
[92] *Ibid*, S. 4.
[93] *Ibid*, S. 5.
[94] *County Governments Act*, No. 17 of 2012. S. 101.
[95] Art. 69(1) (b).

land area of Kenya as provided in Article 69 of the Constitution.[96] It is, therefore, clear that county governments have an important role in climate change mitigation efforts, which effectively touches on the way natural resources are used, managed and conserved. To achieve this and ultimately sustainable development, county governments need to cooperate with the national Government.[97]

5.6.1 Land Management and Devolution

The *National Land Policy*,[98] perhaps in contemplation of devolution, provides that the institutional framework on land will be reformed to ensure devolution of power and authority, participation and representation, justice, equity and sustainability. It advocates for three institutions to be set up namely the National Land Commission, the District Land Boards and Community Land Boards. Indeed, some of these were captured in the Constitution of Kenya 2010 and the resulting sectoral laws on land. The National Land Commission was established by the Constitution of Kenya.[99] The proposed law, the *Community Land Bill*, 2014 envisaged under the Constitution also seeks to give effect to Article 63(5) of the Constitution; to provide for the recognition, protection, management and administration of community land; to establish and define the functions and powers of Community Land Boards and management committees; to provide for the powers of county governments in relation to unregistered community land; and for connected purposes. This Bill provides for holding of unregistered community land in trust by county governments.[100] The proposed law also seeks to establish a Community Land Board in respect of every sub-county.[101] The functions of the Board are to: oversee the management and administrative functions over community land by the committees; supervise and regulate the committees in all their dealings with community land; continuously monitor and evaluate compliance by the committees with the provisions of the Community Land Act and any other law; facilitate the committees in the discharge of their functions; and promote the participation of community members in the decision-making of the committees.[102]

According to the National Land Policy, land issues requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups are to be addressed. The

[96] *County Governments Act*, S. 103.
[97] *Ibid*, S. 106.
[98] *Sessional Paper No. 3 of 2009*, (Government Printer, Nairobi, 2009).
[99] Art. 67, Constitution of Kenya.
[100] Clause 2; clause 31.
[101] Clause 27.
[102] Clause 28.

rights of these groups are to be recognized and protected. It also provides that measures should be initiated to identify such groups and ensure their access to land and participation in decision making over land and land-based resources.[103]

Where community land is to be converted to public land by transfer, the proposed law states that such transfer is subject to the approval of the members of the community in a general meeting, and it is to be done in accordance with the Land Act.[104] Further, where community land is to be converted to private land by either transferor allocation by the Committee or a county government, such conversion of land requires approval of the County Assembly in the case of land held by the County Government; and members of a community in a general meeting in the case of land managed and administered by a Committee.[105] It is also important to note that where land is set aside by a community for public purposes, through consultation between the concerned communities with the Commission the involved county government, is to ensure that prompt and adequate compensation is made to the affected community.[106]

Thus, the proposed law recognises the important role of county governments facilitating sustainable, fair and equitable management of community land. If approved, this law will go a long way in promoting sustainable management of community land, in a way that stands to benefit the concerned communities. The law would also be useful in preventing a repeat of the historical injustices that had become synonymous with land matters in the country.

The *Land Act*[107] provides principles that will afford local communities greater opportunity to participate in land management.[108] Regarding the conversion of land from one category to another, the Act requires that any substantial transaction involving the conversion of public land to private land must be with the approval by the National Assembly or county assembly as the case may be.[109] This is important so as to ensure that illegal land allocation do not take place as to deny the locals their right to the use of such land.

The Act also has provisions on notification requirements applicable to allocation of public land, and the same is to be effected at least thirty days before, offering for

[103] Sessional Paper No. 3 of 2009, *op cit* p.x.
[104] Clause 40.
[105] Clause 41.
[106] Clause 44.
[107] Act No. 6 of 2012, Laws of Kenya.
[108] S. 4(2).These include: participation, accountability and democratic decision making within communities, the public and the Government; affording equal opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; and democracy, inclusiveness and participation of the people. S. 4(1).This provision echoes Art. 10 (1) of the Constitution.
[109] *Land Act*, S. 9(3).

allocation, a tract or tracts of public land.[110]Amongst the persons to receive the notice are, *inter alia,* the governor in whose county the public land proposed for allocation is located; and other known interested parties including, but not limited to, adjoining landowners, persons in actual occupation of the land including marginalised communities and groups living in the general vicinity of the public lands being proposed for allocation.[111]

Failure to provide notice of proposed allocations as required under this section may be grounds for the Commission to direct that the notification procedures be repeated; or void the allocation on grounds that the notification requirements were not properly conducted.[112] This procedure will allow the affected communities either by themselves or through their county governments to protest any unjust allocation of land.

The *National Land Commission Act*[113]was enacted to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration.[114] It mandates the National Land Commission with, *inter alia,* managing public land on behalf of the national and county governments and recommending a national land policy to the national government.[115] While carrying out their functions, the Commission is to be guided by the principles of land policy as provided for under Article 60 of the Constitution.[116]

5.6.2 Forests Management and Devolution

The *Forest Act*, 2005 [117] provides for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country.[118] It is noteworthy that this Act mainly concentrates on affording communities user rights as against actual control of forests resources. It is also a rather bureaucratic law, with such requirements as application by communities for any intended participation in the management of forests resources.[119]

The *National Forest Policy 2014,*[120] provides a revised policy framework for forest conservation and sustainable management and one of its main features is the enactment

[110] *Ibid,* S. 14(1).
[111] *Ibid,* S. 14(4) (5).
[112] S. 14(8).
[113] Act No. 5 of 2012.
[114] Preamble, *National Land Commission Act.*
[115] See also s.5, *The National Land Commission Act*, 2012.
[116] S. 3(a), *National Land Commission Act*, 2012; Art.67 (2) of the Constitution.
[117] Act No. 7 of 2005.
[118] Preamble, *Forests Act*, No. 7 of 2005, Laws of Kenya.
[119] *Ibid,* S. 46.
[120] [Government Printer, Nairobi].

of a revised forests law to implement the policy; the mainstreaming of forest conservation and management into national land use systems; clear division of responsibilities between public sector institutions and regulatory functions of the sector, thereby allowing Kenya Forest Service to focus on the management of forests on public land, and the role of the county governments in implementing national policies, county forest programmes including the delivery of forest extension services to communities, farmers and private land owners, and management of forests other than those under Kenya Forest Service; the devolution of community forest conservation and management, implementation of national forest policies and strategies, deepening of community participation in forest management by the strengthening of community forestry associations, and the introduction of benefit-sharing arrangements; the adoption of an ecosystem approach for the management of forests, and recognition of customary rights and user rights to support sustainable forest management and conservation; and the establishment of national programmes to support community forest management and afforestation/reforestation on community and private land.[121]

The Forest Policy recognises ineffective regulatory mechanisms and inadequate law enforcement, as some of the challenges facing the forestry sector in the country. Further, it observes that these challenges are compounded by dwindling public land, meaning that forestry development has to expand into private and community land, which need incentives and clear methods of engagement to encourage investments in commercial forestry.[122]

With regard to forestry governance, the Policy proposes that there is need to enact supporting legislation following the promulgation of the Constitution to minimize conflicts between industry, communities and governments at both national and county levels over resource management and benefit sharing. In addition, forest governance needs to take into account emerging issues and best practices at global, regional and national level.

The Policy also observes that the forest sector has had to contend with low productivity of tree crops, low conversion efficiency and weak value addition schemes. These arise from climate change, small genetic base of crops, emerging pests and diseases, low investments in technology development, and poor investment in forest based industry. The Policy thus recommends that there is need for research and development to refocus on basic forestry disciplines such as productivity, health, crop diversification, processing, value addition, intellectual property rights and indigenous knowledge. Further, the sector

[121] Forest Policy, 2014, p. ii.
[122] *Ibid.*

also faces challenges in building capacity for sustainable utilization and management.[123] With regard to the County governments, the Policy recommends that there is great need to build the capacity of county governments to undertake forestry development on community and private lands. Mechanisms for engaging county governments in forestry research and development should also be developed.[124] Further, livelihood enhancement will be one of the guiding principles with a focus on fighting poverty as a major consideration for all strategies and programmes in forest sector development.[125]

In order to promote public participation in forests management, the Policy recommends enhancement of participatory approaches as one of the guiding principles in forest conservation and management so as to ensure that the relevant government agencies, county governments, private sector, civil society and communities are involved in planning, implementation and decision making processes.[126] The Policy also advocates for commercialization of forestry activities where forestry operations are to be undertaken in a business manner focusing on result-based management. In this regard, the government will invite private sector to invest in tree growing, wood processing and value addition.[127]

The Forest Policy is intended to provide a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors to enable the sector contribute in meeting the country's growth and poverty alleviation goals within a sustainable environment.[128] In response to the Policy, there is a pending proposed law, *Forest Conservation and Management Bill*, 2014 that has been aligned with the current Constitution of Kenya and the devolved system of governance and therefore, has provisions addressing the issue of devolution. Implementation of the law is to be guided by such principles as: good governance and access to public information, and a participatory approach to forest conservation and management; devolution of forest resources management and conservation wherever possible and appropriate to those owners and managers of forest resources; adoption of an 'ecosystem approach' in the conservation and management of forests wherever possible; recognition of the rights and responsibilities of communities and private land owners to manage and utilize forest and forest resources; equitable sharing and enjoyment of the benefits accruing from forest conservation and management by the people of Kenya; and protection of indigenous knowledge and intellectual property rights embodied in forest

[123] National Forest Policy, 2014, para. 2.2.2.
[124] *Ibid*, para. 2.2.3.
[125] *Ibid.*
[126] *Ibid*, para.3.3 (e).
[127] *Ibid.*
[128] *Ibid.*

biodiversity and genetic resources.[129] These are some of the positive provisions under the proposed law that would go a long way in facilitating equitable and effective management of forest resources under the devolution system, if the law is approved.

5.6.3 Water Resources and Devolution

The *Water Act of 2002*[130] vests ownership and control of water resources, including their use, in the state and Cabinet Secretary respectively. Every water resource in the country is vested in the State, subject to any rights of user granted by or under the Act or any other written law.[131] Further, the Act allows the Cabinet Secretary to exercise control over every water resource in accordance with the Act.[132]The Ministry of Water and Irrigation (MWI) is vested with the responsibility for overall sector oversight including policy formulation, coordination and resource mobilisation.

The Act places a duty on the Cabinet Secretary to promote the investigation, conservation and proper use of water resources throughout Kenya and to ensure effective exercise and performance by any authorities or persons under the control of the Cabinet Secretary of their powers and duties in relation to water.[133] Communities are allowed to participate in water resources management through the formation of the Catchment Area Advisory Committees with membership drawn from representatives in the catchment area such as pastoralists, farmers, business community.[134] The committee is to advise the WRMA on water resources conservation, use and apportionment of water resources within a particular catchment area.[135] Water Resource Users Associations (WRUA) were established as a medium for cooperative management of water resources and conflict resolution at sub-catchment level.[136]

The Act specifically provides for public consultation in the development of national strategies such as the National Water Resources Management Strategy, the National Water Services Strategy and Catchment Management Strategy.[137] The Act also provides for representation of water users in boards of all water sector institutions including the Water Services Regulatory Board (WASREB), Catchment Area Advisory Committees (CAAC), Water Services Boards (WSBs), and the Water Resources Management Authority (WRMA).

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[129] *Forest Conservation and Management Bill, 2014,* s. 4.
[130] No. 8 of 2002.
[131] *Ibid,* S. 3.
[132] *Ibid,* SS. 4(1), 5.
[133] *Ibid,* SS. 4(2).
[134] *Ibid,* S. 16(3).
[135] *Ibid,* S.16 (2).
[136] S. 15(5).
[137] S. 15(1).

Under the *Water Act of 2002*, the Water Resources Management Authority (WRMA) is the lead agency in Water Resources management in the country.[138] Its mandates revolve around the following: regulation, use and control of water resources; (water allocation planning, water apportionment using permitting system, maintenance of the reserve, enforcement of conditions attached to water permits); protection of water resources from harmful impacts(pollution control and catchment management); gathering water resources information, analysis, storage and dissemination to stakeholders for decision making; involvement of stakeholders in corporate management of water resources and catchment management; promote and encourage water use efficiency-through water use charges; and catchment management and protection.[139]

Although the Act provides for public consultation in relation to water resources management, protection, use, development, conservation and control matters, [140] evidently, the Cabinet Secretary has been granted immense powers under the Act, without any meaningful provisions requiring them to be accountable to the communities around the area. Indeed, such communities are required to obtain licences and permits authorising them to engage in water use activities.[141] This is against the spirit of devolution, which places public participation and wide consultation by stakeholders, in a central position in all matters of governance especially in natural resources management. For instance, the courts have affirmed that the provision and management of water services is a shared function, distributed between the two levels of government.[142] This will be useful in addressing some of the challenges that have been experienced in relation to devolution of water services. An example is the conflict between Kwale County and Mombasa County; and Murang'a and Nairobi Counties. Kwale and Murang'a counties were under the impression that they can charge for the export of water from their counties to other counties.[143]

The water resources management functions that have been allocated to the national government are spelt out in the Fourth Schedule, Part I, and include: use of international waters and water resources; national public works-water resources development especially on permitting and ensuring compliance to permit conditions on water retaining infrastructure and works on water bodies; protection of the environment and natural resources with a view to establishing a durable and sustainable system of development,

[138] S. 8(1).
[139] S. 8(4); See also Water Resources Management Authority, *Water Resources Management Authority Brief*, p. 4. (Government Printer, Nairobi, 2013).
[140] *Ibid*, SS. 11, 15, 16, 107.
[141] *Ibid*, SS. 25, 36, 57.
[142] *Okiya Omtatah Okoiti & 3 others v Nairobi City County & 5 others* [2014] eKLR, para. 84.
[143] Musyoka, A., 'Kenya: MCAs Want Policy on Water Use,' *The Star Newspaper*, 12 July 2014, available at *http://allafrica.com/stories/201407140580.html [*Accessed on 17/01/2015].

including, in particular-water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; disaster management- water related disasters like flooding, drought and landslides; and capacity building and technical assistance to the counties.[144]

On the other hand, the water resources management functions that have been devolved to county governments are spelt out in the Fourth Schedule Part 2. These include, implementation of specific national government policies on natural resources and environmental conservation, including, soil and water conservation; county public works and services, including-storm water management systems in built-up areas; firefighting services and disaster management-especially on water related disasters.[145]

In order to actualise, the principles of natural resources management as envisaged in the current Constitution, in a framework that engages the county governments, WRMA intends to: provide information on water resources availability, use, allocation and viable options for water resources investments planning to meet any water deficit for the county's developmental needs; support the assessment of water resources to inform planning and decision making; work with the concerned county governments to domesticate the development and management plans as contained in the National Water Master Plan 2030 and jointly prepare an implementation matrix for each plan; apportion the water resources equitably among various users and uses, including maintaining the reserve; and work with the concerned County Governments to protect water resources from harmful impacts.[146] The implementation of these laws and policies calls for wide consultation and participation of all stakeholders, not only between the national government and the county governments but also with all the other relevant stakeholders, including the locals.

5.7 Lessons from other Jurisdictions

The rationale behind devolution is guided by different historical dispensations unique to every country.[147] Several countries have adopted a program referred to as community-based natural resource management. Though devolution has advantages, there have been different responses in different countries. In Uganda, decentralization reforms were found to be more effective where they take account of the differences

[144] Water Resources Management Authority, *Water Resources Management Authority Brief 2013, op cit,* p.10.
[145] *Ibid,* p. 11.
[146] *Ibid,* p. 5.
[147] Juma**,** T.O., *et al.* "Devolution and Governance Conflicts in Africa: Kenyan Scenario," *Public Policy and Administration Research*, Vol.4, No.6, 2014, p. 4.

between people and groups and where they introduce bargaining mechanisms to increase the power of marginal groups to negotiate.[148]

In Zambia, the decentralization process has been institutionalized in response to structural adjustment policies. While devolution has limited communication between the central government and the county government, at the local level institutions created there locally have been more successful.[149] In Tanzania, there is the Joint Forest Management (JFM), where village communities are entrusted with the protection and management of nearby forests. The areas concerned are usually degraded or even deforested areas. The communities are required to organize forest protection committees, village forest committees, village forest conservation and development societies, etc. Each of these bodies has an executive committee that manages its day-to-day affairs.[150]

In Zimbabwe, they have wildlife and eco-tourism programmes such as CAMPFIRE.[151] Such strategies and shift in thinking have usually been driven by broader decentralization/devolution and local government reform policies, which involve restructuring the power relations between central government and other governments. Bringing decision-making closer to the people increases public sector accountability and effectiveness. [152] Zimbabwean communities are legally defined through political administrative boundaries, and the interests of individual resource users combine in wards. By virtue of their residing in a geographic area, communities are defined as resource users, and are automatic holders of use and access rights over wildlife and forest resources within the administrative boundaries of their places of residence.[153]

Niger and Mali have adopted forest policies known as *strategie energie domestique,* the objective of the policies being to transfer forest management responsibilities to rural communities. Part of the accruing taxes and the revenue generated are used for community projects. These kinds of benefits that the community generates go a long way in making the locals appreciate the importance of conserving the resources around them sustainably.

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[148] Campbell, T., "Devolved natural resource management as a means of empowering the poor; Rhetoric or Reality," *Trocaire Review,* 2006, p. 122.

[149] See Mukwena, R.M., 'Situating Decentralisation in Zambia in a Political Context,' *African Training and Research Centre in Administration for Development*, available at *http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan017692.pdf*. [Accessed on 1/12/2013].

[150] Prasad, R., 'Forest management in India and the impact of state control over non-wood forest products,' *Unasylva,* Vol. 50, No. 3 (Non-Wood Forest Products and Income Generation), available at *http://www.fao.org/docrep/x2450e/x2450e0c.htm#TopOfPage,* [Accessed on 1/12/2013].

[151] CAMPFIRE means Communal Areas Management Programme for Indigenous Resources.

[152] Ribot, J.C., "Decentralization, Participation and Accountability in Sahelian Forestry: Legal Instruments of Political-Administrative Control," *Africa*, Vol.69 (1), 1999, pp.23–65.

[153] Mosimane, A.W. &Aribeb, K.M., "Exclusion through defined membership in people-centred natural resources management: Who defines?" *Commons Southern Africa occasional paper*, No. 14, p.7.

Customary and local governance institutions have played a very important role in natural resource management. Maintaining and strengthening local capacity for dialogue and negotiation is essential for the sustainability of resource use practice, local peace and rural livelihood.

5.8 Way Forward

The implementation of the current Constitution, especially devolution, has not been without challenges. Some of the challenges are: inadequate civic education for citizens which hinders their effective participation in national and county governance; delays in remission of funds to county governments, persistent disregard of the legislative process of Bills as well as failure to develop policies that would anchor the legislation; underfunding of commissions, delay in development of required regulations and inadequate legislative capacity in the county governments.[154]

It is noteworthy that the *Environmental Management Co-ordination (Amendment) Bill*, 2014 seeks to make provisions to align the Environmental Management and Coordination Act, with the Constitution of Kenya, 2010. The Bill takes into account the devolved system of government, rationalizing of state resources, sound environmental practices, structures for dispute resolution and principles such as transparency, accountability and participatory environment management.[155] Further, the Bill seeks to amend section 29 of the Act by disbanding Provincial and District Environmental Committees and constituting County Environmental Committees in accordance with Chapter 1l of the Constitution. Clause 18 empowers the Governor of every county to appoint the members of such committees. The functions of the County Environmental Committees will be to ensure the proper management of the environment for the respective counties. The Bill, under clause 28, also requires every County Environment Committee to prepare a county environment action plan for each county.

The proposed amendment law, although important in aligning EMCA 1999, with the Constitution of Kenya 2010 and especially the devolved system of governance, is not comprehensive on how the proposed public participation will be undertaken. The implication is that, just like the current Act, the proposed law risks promoting public participation through less meaningful ways. Much more needs to be done in order to promote meaningful and quality public participation within the devolution framework.

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[154] Commission for the Implementation of the Constitution, *2013-2014: Annual Report*, Available at *http://www.cickenya.org/index.php/reports/annual-reports/item/446-2013-2014-annual-report* [Accessed on 10/01/2015].

[155] Kenya Gazette Supplement No. 114 (National Assembly Bills No. 31), p. 2899.

Just like in Niger and Mali, where the accruing taxes and the revenue generated are used for community projects, there is need to ensure that the accruing benefits from natural resources management, reach the communities so as to enable the locals appreciate the importance of conserving the resources around them sustainably. Further, there should be efforts towards maintaining and strengthening local capacity for dialogue and negotiation which are essential for the sustainability of resource use local peace and rural livelihood, as demonstrated in Niger and Mali.

Kenya can also learn a lot from Zimbabwe in determining how to define the communities. Just like in Zimbabwe, where the Zimbabwean communities are legally defined through political administrative boundaries, and the interests of individual resource users combined in wards, Kenyan communities benefitting from natural resources may not necessarily be defined through certain fixed parameters such as tribe but should incorporate other unifying factors such as residential status in a county. By virtue of their residing in a geographic area, communities should be defined as resource users, and therefore automatic holders of use and access rights over wildlife and forest resources within the administrative boundaries of their places of residence.[156]

To ensure the success of the devolution of NRM, there is a need for management frameworks that encourage the engagement of multiple actors across the two levels of government and affected communities. The central Government still remains relevant in the natural resource management setup, as it is more effective in keeping the county governments in check in a system of counter-checks and balances amongst the 47 county governments and the national government. The active involvement of independent organizations and Non-Governmental Organisations (NGO's) will also go a long way in ensuring that the appropriate standards in natural resource management are maintained, educating the locals on the benefits that accrue and from sustainable utilization of the resources around them.[157]

If local communities are to benefit from the natural resources in the country, then there is a need to ensure maximum and quality participation by such communities in their management, through the devolved system of governance. Indeed, this will promote sustainable development which is one of the national values and principles of governance as envisaged under the Constitution. In *Olum & Another v Attorney General*,[158] it was held that although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect

[156] Mosimane, A.W. & Aribeb, K.M., "Exclusion through defined membership in people-centred natural resources management: Who defines?" *op. cit.*
[157] See generally, *Final Report of the Taskforce on Devolved Government*, Vol. I (Office of the Deputy Prime Minister and Ministry of Local Government, (Government Printer, Nairobi, 2011).
[158][1995-1998] 1 EA, 258.

wherever it was fairly possible to do so without violating the meaning of the words used. Further, in the context of Kenya, courts have observed that Article 10 of the Constitution does not purport to set out what exclusively amounts to national values and principles of governance. Respect and sustenance of the environment is one of the said values and principles, and since sustainable development is one of the express values and principles, the Court was enjoined to consider the same in arriving at its decision.[159] Devolution and CBNRM can effectively work in the wildlife, forestry, water, and fisheries sectors, amongst others.

5.9 Conclusion

Devolution must entail transfer of real powers and real resources from to local administration, otherwise their ability to operate will be hampered severely.[160] With Kenya and the devolution experiences in the new dispensation, a proper legal and institutional framework will be of great help in ensuring efficient natural resource management programmes are implemented.

The central government can still maintain a role in: protecting wider 'public goods' (watersheds, biodiversity, carbon sinks and other ecological services); establishing the policy, legal and social frameworks and conditions needed for local management to succeed; facilitating and regulating private activity; mediating conflict; helping local organisations enforce locally designed and monitored regulations and sanctions; providing legal recourse; providing technical assistance; addressing local inequality and ensuring representation of marginal groups so that downward accountability of organisations receiving devolved authority is assured; helping communities to defend their rights, including protection against powerful external groups such as mining and timber companies and organised traders; and supporting local capacity building.[161]

Devolution can indeed be used to facilitate effective natural resources management that is people-centred and one that benefits the people of Kenya. It is a good recipe for attainment of environmental justice in Kenya and eradication of poverty. Problems such as inequitable benefit sharing, exclusion of the poor and the marginalised in decision making system, and indiscriminate environmental degradation are some of the challenges that can be addressed through the devolved system of governance and management of natural resources.

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[159] *Republic v Kenya Forest Service Ex-parte Clement Kariuki & 2 others* [2013] eKLR (Judicial Review Case 285 of 2012).

[160] Campbell, T., 'Devolved natural resource management as a means of empowering the poor; Rhetoric or Reality,' *op cit*.

[161] Shackleton, S., *et al*. 'Devolution and community based natural resource management,' *op cit,* p. 2.

Devolution frameworks can go a long way in overcoming the challenges associated with state-centric approaches to natural resources management and effectively promote efficiency, equality among citizens, economic growth and stability in the counties. The overall effect would be growth and stability in the national economy.

Chapter Six

Land as a Natural Resource

6.1 Introduction

This Chapter discusses land as a natural resource and its management. Land includes the surface of the earth and the subsurface rock, any body of water on or under the surface, marine waters in the territorial sea and exclusive economic zone: natural resources completely contained on or under the surface: and the air space above the surface.[1] It is one of the single-most important natural resource that human beings rely on for survival. It is the basis upon which agriculture takes place. Its importance makes issues of land ownership, use and management to be very emotive in Kenya.

Despite its importance, land is a finite resource. Kenya is roughly 581,751 square kilometers (44.6 million hectares) in size and 97.8 % of land and 2.2% water surface. 20% of the land surface is medium to high potential and the rest is arid and semi-arid areas. Forests and woodlands occupy 7% while wildlife protected areas occupy 10% of the land surface.[2] In effect, a large portion of land in Kenya is not suitable for productive farming and there is thus a need for its sustainable management. Challenges have, however, been faced in land and natural resources management in Kenya, largely due to ineffective and inefficient land management and administration systems. The Constitution of Kenya 2010 seeks to remedy this state of affairs in its provisions on land.

6.2 Importance of Land

Land has been the centerpiece of Kenya's social, economic and political development discourse since independence.[3] It is a vital factor of production in the Kenyan economy since agriculture and tourism, which are the main foreign exchange earners, are done on land.[4] It also has aesthetic, religious, cultural and traditional values to Kenyan communities,[5] and is also a source of food through agriculture and pastoralism. Land is the repository of natural resources such as soil, forests, wetlands, minerals, wildlife, and inland water bodies such as rivers and lakes.

The importance of land means that land and land-based resources must be managed, utilized and exploited in a sustainable, efficient, productive and equitable manner.

[1] Art.260, the Constitution of Kenya, 2010.
[2] The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002), p. 15.
[3] National Land Policy, p.17.
[4] Vision 2030, Government of Kenya, (Government Printer, Nairobi).
[5] *Ibid.*

Currently, Kenya is experiencing high levels of natural resource degradation manifested by high rates of deforestation, soil erosion, declining soil fertility, pollution of water bodies, ineffective disposal of solid waste and violent conflicts over resources.[6]

6.2.1 Land: Meaning and Constitutional Foundations

"Land" is defined as the surface of the earth and the subsurface rock; any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface.[7] This definition is very broad in scope and does not cover the ordinary notions of land as comprising soil surface only, thus making it even a more serious issue in need of sound management. The same meaning is adopted by the *Land Act*.[8]

Land is considered as part of the natural resources on earth. Article 260 of the Constitution defines "natural resources" to mean the physical non-human factors and components, whether renewable or non-renewable, including, sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy. The two concepts are interrelated in that one flows from the other. Land is part of the natural resources. The two definitions as given above capture all that comprises the environment.[9]

One of the fundamental principles of the current Constitution of Kenya, as captured in the Preamble, is respect for environment with the aim of achieving sustainable development.[10] Further, the guiding national values and principles of governance under the Constitution include sustainable development.[11] Chapter Five of the Constitution is dedicated to land and environment, an indication of their importance in the country's development and heritage.[12] It, therefore, follows that land governance matters fall under the purview of the Constitutional national values and principles of governance, and the process must abide by these principles or risk being declared unconstitutional.

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[6] Makathimo, M., & Guthiga, P., '*Land Use Policies and Natural Resource Management in Kenya: The Case of Nairobi River Basin*,' FIG Congress 2010 Facing the Challenges–Building the Capacity Sydney, Australia, 11-16 April 2010, available at *http://www.fig.net/pub/fig2010/papers/ts01e%5Cts01e_makathimo_guthiga_4322.pdf* [Accessed on 10/12/2013].

[7] Art.260, Constitution of Kenya.

[8] S. 2, Land Act, No. 6 of 2012.

[9] Art. 42 guarantees every person's right to a clean and healthy environment and also to have it protected for the benefit of present and future generations.

[10] Preamble, Constitution of Kenya, 2010.

[11] Art.10(2) (d), Constitution of Kenya.

[12] Chapter 5(Art. 60-72).

6.2.2 Land as a Rights Issue

The right to property is widely recognized within international human rights instruments. The *Universal Declaration of Human Rights*[13] provides for the rights of everyone to own property either alone or in association with others, and that no one should be arbitrarily deprived of their property.[14] Land is a rights issue under the Constitution of Kenya and is protected as a form of property.[15] The right to own property, including land, is guaranteed in the Constitution.[16] The State can deprive an individual of their property under certain grounds subject to prompt payment in full, of just compensation to the person. The law also allows any person who has an interest in or right over, that property a right of access to a court of law.[17] Besides the foregoing provisions, the State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.[18]

It is not clear how these grounds would be shielded from manipulation and/or outright ill-will by government machinery. Such would arguably interfere with private ownership of land in the country. Indeed, the case of *Kuria Greens Limited v Registrar of Titles &another,* [19] presents one of the instances where the court has found that cancellation of an individual's title deed through the Kenya Gazette is unconstitutional, null and void. The Court stated that even assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the proprietor was not party to such fraud or misrepresentation. The petitioner lawfully purchased the suit land. As such, the court went on to indicate that whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisition of their property by the State through unlawful decisions taken by public officers. Another instance is the case of *Isaac*

[13] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
[14] Art. 17.The right to an adequate standard of living and security as guaranteed under Art. 25 thereof relies on the right to adequate shelter. Art. 11 of the *International Covenant on Economic, Social & Cultural Rights* also recognizes a universal right to housing and to continuous improvement of living conditions.
[15] Art. 260 defines "property" to include any vested or contingent right to, or interest in or arising from: land, or permanent fixtures on, or improvements to, land; goods or personal property; intellectual property; or money, chooses in action or negotiable instruments.
[16] Art. 40(1) of the Constitution provides that subject to Art. 65, every person has the right, either individually or in association with others, to acquire and own property: of any description; and in any part of Kenya. Further, clause (2) thereof prohibits the State/Parliament from enacting a law that permits the State or any person: to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Art. 27(4).
[17] Art.40(3).
[18] Art.66(1).
[19] [2011] eKLR, Petition No. 107 of 2010.

Gathungu Wanjohi & another v A.G &others,[20]where the Court declared a gazette notice that had nullified the petitioner's title as null and void. It found that the respondent's decision to nullify the applicants' title was made without jurisdiction and could not be allowed to stand.

It is also noteworthy that all human rights apply equally to women and men and as such, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),[21] states that women and men and both spouses, in a marriage setting, are to have equal rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.[22] The national values and principles of governance in the Constitution of Kenya include non-discrimination and protection of the marginalized.[23] As such, the Constitution calls for elimination of gender discrimination in law, customs and practices related to land and property in land.

Indeed, as a human rights issue, the rights of indigenous communities to land is also guaranteed in national and international human rights instruments. In *Centre for Minority Rights Development (Kenya) v Kenya*,[24] the African Commission on Human and People's Rights found that the government in evicting the Endorois community from the Mochogoi forest had disenfranchised the community and the government was under a duty to restitute the community to their ancestral land. Secure land tenure and property rights are also fundamental to shelter and livelihoods, and are an important foundation for the realization of other human rights and for poverty reduction. Secure land rights are particularly important in helping to reverse three types of phenomena: gender discrimination; social exclusion of vulnerable groups; and wider social and economic inequalities linked to inequitable and insecure land rights.[25]

6.3 Pre-Colonial Landholding

In the pre-colonial epoch, land was held communally. Members of the particular community could exercise rights over land in varying degrees of equality depending on the subsisting traditions of the particular community. These rights were determined by virtue of membership in the community or a unit of the community. By dint of

[20] [2012] eKLR.
[21] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, Vol. 1249, p. 13.
[22] *Ibid*, Art.15 and 16.
[23] Art. 10(2) (b) and Art. 60.
[24] Communication 276/2003.
[25] United Nations Human Settlements Programme (UN-HABITAT), 'Secure Land Rights for All', 2008, p. 3. Available at *http://www.gltn.net/jdownloads/GLTN%20Documents/secure_land_rights_for_alleng2008.pdf*[Accessed on 10/12/2013].

membership into a community or unit, one was required to perform certain obligations which in turn defined the rights of access to and use of land.[26] In essence, the land tenure inherent among traditional African communities ensured that a specific unit in the community exercised the power of allocation and it was possible to exclude non-members from use. Land tenure was thus defined in terms of use rather than ownership as is evident under individual landholding.[27]

Among the pastoralist communities, land was owned communally with no individual person having absolute rights. The agricultural communities, on the other hand, laid claim on the land on a 'first to clear and cultivate' basis. Community leaders ensured that there was access to the resources by all members and that the land and resources were preserved for future generations. Colonialism brought about land alienation, imposition of English property laws and transformed customary land holding and tenure systems. In relation to landholding, colonialism was an agent of disruption, as it interfered with the development of traditional tenure systems and forced them to conform to English property laws.[28] In spite of the disruptions on customary land tenure arrangements, they still do occupy a central place in the use and management of land in Kenya.

6.4 Colonial Foundations of Land Tenure Forms in Kenya

Colonialism introduced western notions of landholding alien to Kenyan communities. English property law systems greatly influenced and disrupted the customary land systems that previously existed in Kenya. When Kenya was declared a British Protectorate in 1895, it became necessary to make the colony economically viable by granting the incoming settlers secure land rights. Different approaches were used to acquire land from local communities such as conquests, agreements, treaties or sale.[29] Using the Foreign Jurisdiction Act, the land in the protectorate was declared as waste and unoccupied in 1899, as there was neither settled form of government nor had it been appropriated by the local sovereign or individuals.[30] The colonialists never appreciated that the local communities owned the land they occupied nor did they appreciate the African customary laws that governed their lives. Consequently, through the 1901 and 1902 East African Ordinances, all land in the protectorate was declared crown land and could be allocated to the settler community either in fee simple (freehold) or leasehold

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[26] Ojienda,T., *Customary Land Rights and the Adjudication Process: Reviewing the Procedure for Ascertaining and Recording Land Rights in the Light of Customary Claims, op cit,* pp.5-7.
[27] *Ibid.*
[28] Wanjala, SC, 'Land Ownership and Use in Kenya: Past, Present and Future,' in Wanjala, SC, (ed), *Essays on Land Law: The Reform Debate in Kenya,* (Faculty of Law, University of Nairobi, 2000), pp. 25-44.
[29] *Ibid.*
[30] *Ibid,* p.23.

tenure by the Commissioner of the protectorate. Earlier on in 1904 and 1911, the Maasai had been displaced from their lands through Agreements which were unconscionable and unfair to the community.

In 1908, the *Land Titles Ordinance* was introduced to deal with land registration at the coast. The ten mile coastal strip was owned by the Sultan of Zanzibar. However, in 1888 the land was leased to the Imperial British East African Company as a result of which all land in the Sultan's territory was ceded to the company except private lands.[31] The *Land Titles Ordinance*, therefore, required any private claimant (those with certificate of ownership issued by the Sultan) to register their interests within six (6) calendar months. Those who registered their claims were issued with certificates of ownership, certificates of mortgage or certificates of leasehold, depending on the interest established. Any unregistered lands within the stipulated period were declared Crown lands.[32]

The complexity of the land problems in the Coast region is largely attributable to the processes of land adjudication and registration under the *Land Titles Act,*[33] which deprived many members of the indigenous Coastal Communities of their land. This also led to the area having the largest single concentration of landless indigenous people living as squatters. It also gave rise to the problem of absentee land owners.[34] The 1915 *Crown Land Ordinance*, declared all land within the protectorate to be Crown Land whether or not such land was occupied by the natives or reserved for native occupation. The effect of this was to appropriate all land to the colonial masters.[35] Consequently, colonial authorities had the powers to appropriate the land held by the indigenous people and allocate it to the settlers.[36] The end result was the restriction of natives within 'native' reserves. The African communal form of land ownership was seen as a major hindrance to agricultural development, as it caused uncertainty in decision making and individual control. This also led to landlessness of majority of the population in central and other parts of Kenya leading to political restlessness among the populace. In response, the colonial government decided to invest more in agriculture to increase land productivity.

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[31] The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002), p.21.
[32] Ojienda,T., *Conveyancing Laws Principles and Practice* (Law Africa, 2008), p.22.
[33] (Cap. 282), Previously known as *Land Titles Ordinance*.
[34] Sessional Paper no.3 of 1999, p. 43.
[35] Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya* (ACTS Press, Nairobi, 1991), p.54.
[36] See generally the case of *Isaka Wainaina and Anor v Murito wa Indagara and others* [1922-23] 9 E.A.L.R., 102, which affirmed in 1915 through an opinion delivered by the then Chief Justice to the effect, *inter alia*, that whatever rights the indigenous inhabitants may have had to the land had been extinguished by the colonial legislation leaving them as mere tenants at the will of the crown, of the land actually occupied.

One of the ways that this was implemented, was through the giving of credit to some African farmers.[37]

The modernization of peasant agriculture was necessary, not only to boost the colonial economy, but also to solve the problems of food insecurity and political instability at the time. The Swynnerton Plan of 1955, offered a solution by providing for land adjudication and consolidation which eventually led to the registration of land.[38] Despite offering a solution to the lenders, the plan brought with it new challenges. One of these was increased landlessness[39] since land could be registered in the name of a few individuals on behalf of the rest of the community; leaving the later at the mercy of the registered owners in as far as occupation of land was concerned.

Essentially, the introduction of colonial laws saw the birth of a duality of tenure systems in Kenya, where there were systems of land tenure based on principles of English property law on one hand; and a largely neglected regime of customary property law on the other.[40] Even with the enactment of the new land laws under the Constitution of Kenya, this duality is still manifesting itself as the law dealing with community land is yet to be passed years after the laws dealing with private and public land were passed. This is largely because we have embraced European attitudes and values such as individualism necessitating stronger protection of private property compared to communal land ownership systems.

6.4.1 Effects of Colonialism on Natural Resources

The impacts of colonialism on natural resources are diverse. The restriction of the natives into the native reserves led to population pressure occasioning overstocking, soil degradation and pressure on the natural resources available in the native reserves. The Maasai whose lands had been taken following the 1904 and 1911 Agreements faced various challenges including rapid spread of livestock diseases due to overstocking, lack of pasture and water. It is pretty clear that the imposition of foreign laws in Kenya constituted the imposition of land use systems based on values that were not in harmony with those of the majority of rural Africa where resources such as timber, grazing areas, wildlife and water were considered common and free resources. This led to overexploitation and overconsumption of these resources without regards to

[37] The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002), p. 67.
[38] Swynnerton, R.J.M, "*A Plan to Intensify the Development of African Agriculture in Kenya*," 1955. This Plan introduced individual tenure in the African Reserves so as to intensify African agriculture.
[39] The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002).
[40] National Land Policy, Sessional Paper No.3 of 2009, p.8.

sustainability. In relation to wildlife conservation, the confinement of wildlife resources within parks, where they were not available for use represented a social cost to the communities which was not paid for.[41] Ironically, it has turned out that most of the wildlife does not live in the protected areas but in non-protected areas. The creation of boundaries by the colonial masters, also had great impacts especially in relation to managing wildlife resources such as the wildebeests in Mara and Serengeti. For instance, due to national boundaries it has been difficult for the Kenyan government to manage the wildebeests since once they move to Tanzania they rarely come back to Kenya.

6.5 Historical analysis of Land Management Challenges in Kenya

Land management in Kenya has been coupled with a lot of challenges evident even in the post-colonial Kenya. The struggle for independence in the country saw land become a focal point. The struggle focused mainly on access to and control over land. These challenges mainly arose from the introduction of formal land administration mechanisms in the country which resulted in the subjugation of customary forms of ownership that were in existence.[42]

Further, the colonial period saw the dispossession of many Kenyans of their land as the colonial government viewed land that was occupied by communities as *terra nullius* and as such the land was declared to be crown land. This was effected by the declaration by Commissioner Hardinge, that all land on the mainland beyond Mombasa and situated within one mile on either side of the line of the Uganda Railway, was to be treated as ownerless.[43] In this regard, Africans were only deemed to have occupancy rights and not property rights on the land in these areas. This position was buttressed by the holding of Chief Justice Barth in interpreting the provisions of the 1915 Crown Lands Ordinance in the case of *Isaka Wainaina &another v Murito wa Indagara & others,* where he stated that Africans were mere tenants at the will of the Crown and had nothing but occupancy rights on the land which they were in occupation.[44] The case of *Mulwa Gwanombi v Alidina Visram,*[45]involved an Arab who claimed to have acquired land through purchase from an African. The court found that there was no transaction as the African could not transfer title which he did not have, clearly showing the extent of dispossession visited upon Africans.

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[41] Mbote, P.K., *Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife, op cit,* pp. 97-100.
[42] Mbote, P.K., 'The Land Question in Kenya: Legal and Ethical Dimensions,' In *Governanc*e: *Institutions and the Human Condition,* Strathmore University and Law Africa (2009), pp.219-246.
[43] Proclamation No. 6 of 9th May, 1897.
[44] [1922-23] 9 E.A.L.R., Vol. 9, 102.
[45] [1913] 5 KLR 141, p. 148.

Okoth-Ogendo argues that duality in the legal regime governing land in the country was characterized by parallel systems of highly bureaucratized laws and institutions,[46] resulting in disparities in land distribution and Africans formed the group that was largely affected by this. Under the Swynnerton Plan,[47] there was massive dispossession of native lands because Africans were unaware of the process through which land rights were to be granted. Under the Plan, land rights were granted through the process of adjudication, consolidation and registration. This was done without taking into consideration the nature of land-holding that was common among Africans, that is communal holdings, and further without taking consideration of the fact that most of the Africans were uneducated and not well conversant with the processes introduced under the Plan.

The post-colonial period saw the continued application of the policies that had been introduced by the colonial government. In order to address the massive needs for land by the Africans, the post-independence government introduced the One Million Acre Settlement Programme which entailed purchasing land that was previously settled on by the colonialists and resettling Africans on it.[48] This programme was coupled with challenges as the resettling of certain communities, especially the Kikuyu, on the lands in Rift Valley, resulted to them being perceived as "outsiders" by the indigenous communities in Rift Valley Province. Failure to address these grievances resulted to the land clashes witnessed in 1992 in parts of Rift Valley.

Failure by the post-colonial government to craft a cohesive national polity further aggravated the challenges that were faced in the land regime in the country.[49] Land became a divisive issue in politics and subsequent governments used land as a tool to reward their supporters and to consolidate patronage networks at the expense of those who did not support them. Further, most of the land allocated to these groups consisted of community forests and grazing lands resulting to major conflicts among pastoral communities.[50]

Pastoral communities were thus left with small portions of land which they were to use to cater for their grazing needs. The increase in the pressure exerted on these lands resulted to the deterioration of the land in these areas. Further, the administrative

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[46] H.W.O Okoth-Ogendo, 'Formalizing "Informal" Property Systems: The Problem of land rights reform in Africa,' (University of Nairobi, 2008), p.8.

[47] See Swynnerton, R.J.M., *The Swynnerton Report: A Plan to Intensify the Development of African Agriculture in Kenya* (Government Printer, 1955).

[48] Kanyinga, K., 'Beyond the Colonial Legacy: The Land Question, Politics, and Constitutionalism in Kenya,' in Wanjala SC (ed), *Essays on Land Law: The Reform Debate in Kenya,* (Faculty of Law, University of Nairobi, 2000).

[49] Mbote, P.K., *et al, Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013), p. 41.

[50] *Ibid,* p. 45.

boundaries established in the pastoralist areas resulted to an increase in competition for the scarce resources available.[51] The authorities tasked with the administration of land to be used by the pastoralists further dispossessed these groups and this was done through the individualization of lands without taking consideration of the existing land rights of the communities.

Marginalization of certain groups from ownership of land is another challenge that has coupled the land management regime in the country. The paternalistic laws adopted by the government have seen the exclusion of women and the youth in the governance process and this includes land governance. The exclusion of these groups has resulted to their exploitation by politicians who have taken advantage of their precarious situation and used them to propagate violence during elections as witnessed during the 1993/94 ethnic clashes.[52]

As noted in the previous section, the post-independence government inherited its land law regime from the colonial government. There were diverse sets of laws that were adopted to govern land in the country. The transposition of these laws into the country without taking into consideration the unique needs in the country marked the genesis of most of the challenges faced in the land sector in the country.

Judicial decisions fanned the duality by passing judgments that were largely opposed to customary notions of ownership. For example, in *Obiero v. Opiyo,*[53] the court observed that the legislature did not intend to recognize customary law rights. It went on to opine that, "had the legislature intended that the rights of the registered proprietor were subject to the rights of any person under customary law, nothing could have been easier than for it to say so." Further, in *Mukangu v. Mbui,*[54] it was opined that customary land rights over land were extinguishable upon registration of land. The importance attached to statutory law by the colonial government essentially meant that the property rights of certain groups who previously had adequate protection under customary law was in peril.

The multiplicity of laws and institutions tasked with land administration also resulted in the breakdown of land management and administration systems. For example, in the case of land use planning, majority of Kenyans do not see the importance of the various statutes guiding land use planning. This has, *inter alia*, resulted in the emergence of informal settlements in many parts of the country and the degradation of the environment. Consequently, there have emerged informal land rights delivery systems to

[51] Leach, A., 'Land Reform and Socio-Economic Change in Kenya' in Smokin Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya,* (Faculty of Law, University of Nairobi 2000), p.202.
[52] *Ibid,* p.208.
[53] E.A 227 [1972].
[54] Civil Appeal No. 281 of 2000.

cater for the land rights of the poor especially in urban informal settlements who are not served by the formal systems.

From the foregoing, it is evident that land management challenges being faced in the country have also contributed to the underperformance of land markets. In addition, lack of political goodwill has also resulted to further exacerbation of the challenges faced in the land regime. It, therefore, became imperative for the land regime in the country to be overhauled and for new laws and institutions created to deal with land issues. The following section examines some of the steps that have been taken towards reforming the land regime in Kenya following the enactment of the Constitution of Kenya, 2010.

6.6 Constitutional Reforms and the New Land Laws

Prior to the enactment of the Constitution of Kenya 2010, there had been a realization that the land regime in the country needed to be reformed. This saw the adoption of the National Land Policy (NLP) in 2009. The NLP sought "*to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity."*[55] The policy took cognizance of the importance of putting land to wise use in order to ensure sustainability and avert conflicts. In this regard, the policy sought to resolve issues relating to land administration, access to land, land use planning, restitution of historical injustices and reforming the outdated legal and institutional frameworks on land. Therefore, the Constitution of 2010 is a critical step towards reforming the land sector in the country.

6.7 Principles Undergirding Land Management

Land is so important in Kenya, that the Constitution in Article 60 has outlined principles on how it should be managed. Article 60 of the Constitution stipulates that land should be held, used and managed in a manner that is equitable, efficient, productive and sustainable.[56] These principles are to be implemented through a National Land Policy developed and reviewed regularly by the national government and through legislation.[57] Attempts have thus been made towards the implementation of these principles through

[55] *Sessional Paper No. 3 of 2009 on National Land Policy*, August 2009, (Government of Kenya, Government Printer, Nairobi), p. 4.

[56] See Art. 60: Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles- a) equitable access to land b) security of land rights c) sustainable and productive management of land resources d) transparent and cost-effective administration of land e) sound conservation and protection of ecologically sensitive areas f) elimination of gender discrimination in law, customs and practices related to land and property in land; and g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution. See also Sessional Paper No. 3 of 2009.

[57] Art.60(2).

legislation. For instance, the Land Act, a crucial law on land management in the country, echoes these principles. At section 4 thereof, the Act sets out the guiding values and principles of land management and administration that are binding on all State organs, State officers, public officers and all persons whenever any of them: enacts, applies or interprets any provisions of the Act; and makes or implements public policy decisions.[58] These principles form the foundation upon which land reforms and environmental management in the country is to take place. It is correct, therefore, to posit that the effective implementation of land reforms in the post-2010 Constitution will largely depend on strict observance and operationalization of these principles and values in landholding and administration.

6.7.1 Equitable Land Management

The Constitution requires that land be held, used and managed in a way that ensures equitable access to land by all persons. Article 60 (1) (a) requires that there must be equitable access to land. In this regard, the Constitution envisions the elimination of subjugation of certain groups when it comes to landholding and the need to ensure that land is a resource that is accessible to all. This provision has been informed by the realization that historical injustices have largely been faced in the land regime and the result of this has been the marginalization of certain communities and vulnerable groups like women. The Constitution thus protects the legitimate expectations of such groups to hold land in any part of the country.

All land dealings must also guarantee security of land rights. Indeed, property rights protection was deemed imperative for the conclusion of the independence talks held in Lancaster House from 1960 to 1962.[59] This is affirmed by the Constitutional guarantee of the right to property.[60] Pursuant to Article 2(5) and (6) of the Constitution, which provides that general rules of international law and treaties shall form part of the law of Kenya, scope of protection that has been accorded to marginalized groups has been broadened. One example of such protection has been accorded under Article 6(1) (h) of the *Convention on the Elimination of All Forms of Discrimination Against Women* which provides that the state parties are "*to ensure on the basis of equality the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration."*

[58] S. 4(2), No. 6 of 2012.
[59] Sessional Paper No. 3 of 2009, p. 24.
[60] Art. 40.

In order to further ensure non-discrimination in the management and administration of land, the Constitution has provided that every person is entitled to equal protection in law.[61] Law must apply in a manner that fosters equality of the parties in all sectors of life. Consequently, customary practices that are discriminatory in land ownership must be avoided. [62] In order to ensure maximum protection of matrimonial property, the Matrimonial Property Act, 2013 was enacted to accord spouses protection to matrimonial property and ensure spousal consent is sought before matrimonial property is alienated.[63]

Gender considerations have also been taken into account in the principles of land policy. In this regard, it is envisioned that the land ownership regime in the country is to be rid of incidences of discrimination based on gender. Some cultural practices have been applied in a discriminatory manner against limiting ownership and access rights of women. Although the law has recognized women land rights, such recognition is not enough. There is need to ensure that such rights are also socially recognized.

The various land laws enacted after the promulgation of the Constitution have tried to cater for the land rights of women. The Land Act No. 6 of 2012 seeks, *inter alia*, to eliminate the culturally biased practices that hinder the participation of women in land management. The Land Registration Act, 2012 on the other hand, provides for procedural aspects involved in the land adjudication process. The Act in section 93 has taken cognizance of the fact that spouses can co-own land and as such shall have equal rights to land.

The *Land Act*, 2012, recognizes the following forms of land tenure-freehold; leasehold; such forms of partial interest as may be defined under law, including but not limited to easements; and customary land rights, where consistent with the Constitution.[64] In order to protect the holders of interests under any of these forms, the Act provides that there is equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.[65] This is an important provision that seeks to correct the colonial and independent governments' position where some forms of tenure appeared to have more recognition under statutory law than others.

In a bid to promote equality in land matters, the *Land Act* provides discrimination as one of the grounds that may prompt the power of the court to re-open certain charges and revise terms. A charge cannot discriminate against chargors on account of their gender or refuse to grant them charges. However, a chargee implementing any programme,

[61] Art. 27.
[62] See *Vivian Cherono v Maria Chelangat Kerich,* Civil Case No.84 of [2012]eKLR.
[63] S. 12(1).
[64] *Land Act* 2012, s. 5(1).
[65] *Ibid,* s.5 (2).

approved or assisted by the national or county governments, and designed to assist women to improve their economic and social position by providing them with advances secured by a charge of land shall not be taken to be acting in a discriminatory manner, if the advances under that programme are made only to women.[66]

It is clear that several of the land law reforms are aimed at enhancing gender equality through the promotion of women's land and property rights. The courts have also been on the forefront in seeking to ensure that all persons in the country are guaranteed their right to property. Judicial decisions emanating after the enactment of the Constitution of Kenya 2010, show this paradigm shift in embracing women's property rights.[67]

6.7.2 Security of Land Rights

The Constitution guarantees security of land rights.[68] It takes cognizance of the precarious position which most landholders find themselves when their land rights are violated or infringed or are insecure. Under the registration of deeds and documents systems prevalent in the colonial and pre-colonial epochs, the government did not guarantee the accuracy of the register with the effect that any person suffering loss as a result of any inaccuracy therein was not entitled to state indemnity.[69]

Private and communal lands have been the categories mostly faced with land insecurity challenges. Private land faces this challenge because of the weaknesses in the administrative regime, which is as a result of the existence of a multiplicity of land registers. The problem arising from this is the lack of a systemized mechanism of register harmonization.[70] This means that it is possible for two or more persons to have title deeds over the same piece of land. Insecurity of land rights was common with group-holding tenure arrangements under the *Land (Group Representatives) Act*, because the officials in these groups could dispossess the other members by registering these units under their individual names. It was, therefore, suggested that it was imperative for the public policy and law governing customary property ownerships to be reformed in order to ensure that this form of ownership is not neglected thus increasing security of indigenous property

[66] *Ibid*, s. (1) (c) (ii).
[67] For example, in *Kisumu H.C C.C No. 267 of 2012*, the Plaintiff, a woman, was held to have indirectly contributed towards the purchase of land which the husband sought to sell.
[68] Art. 60(1)(b)
[69] Wanjala, SC, 'Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and their Possible Solutions,' in Wanjala, SC (ed), *Essays on Land Law: The Reform Debate in Kenya* (Faculty of Law, University of Nairobi, 2000).
[70] *Ibid*, p.85.

systems.[71] Similar challenges arose with respect to trust lands, as the local authorities who were holding those lands on behalf of communities, oftentimes mismanaged, alienated and allocated trust lands without following the law. In this regard, the reforms envisioned are meant to ensure that the various laws dealing with these forms of ownership reflect the reality on the ground. It is upon this background that there has been a push for the enactment of a community land law by various stakeholders.

Regarding public land, there have been cases of mismanagement of public land prompting the Government to attempt and address the problem through the setting up of Commissions of inquiry. One such commission was the Njonjo Commission.[72] The Commission looked into the land issue in the country with a view to, *inter alia*, recommending guidelines for a basic land law and complementary legislation and associated subsidiary legislation which would address such issues as: the systems of land tenure appropriate for the country, the system of land ownership and control, and the system of land use planning, management and development. The other Commission was the Ndung'u Commission.[73] The Commission was charged with the mandate of, *inter alia*, inquiring into the allocation to private individuals or corporations, of public lands or lands dedicated or reserved for a public purpose. Its recommendations touched on, *inter alia*, the legal and administrative measures for the restoration of such lands to their proper title or purpose, having due regard to the rights of any private person having any *bona fide* entitlement to or claim of right over the lands concerned, and legal and administrative measures for the prevention of unlawful or irregular allocations of such land in the future.[74]

6.7.3 Efficient Land Management

The use, holding and management of land must ensure transparent and cost-effective administration of land resources. This will be beneficial to the poor because the process of formalizing their land rights has been expensive due to numerous administrative bureaucracies which exist in the process. This, coupled with the low levels of information among the poor, makes it difficult for this group to be able to handle the enormous documentations that come with the formal systems. Moreover, in the spirit of

[71] Ogendo, H.W.O., 'Land Rights in Africa, Interrogating the tenure security discourse' paper for the IFAD/MLHUD/UNOPS workshop on Land Tenure Security in Eastern and Southern Africa, Kampala, Uganda.
[72] Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration, 2002, (Government Printer, Nairobi, 2002).
[73] Commission of Inquiry into the Illegal and Irregular Allocation of Public Land, (Government Printer, Nairobi, June, 2004).
[74] *Ibid*, p. xviiii.

promoting access to justice,[75] the Constitution provides for encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution. There are also fiscal and tax incentives that are envisaged in law to ensure that land is used efficiently. Tax requirements would for instance, tax idle land thus forcing the owners to put it to efficient use.

6.7.4 Productive Land Management

Because of the importance of land, it must be put to productive use. African governments need to take appropriate measures to ensure that land plays its primary role in the development process and more particularly in social reconstruction, poverty reduction, enhancing economic opportunities for women, strengthening governance, managing the environment, promoting conflict resolution and driving agricultural modernization.[76] Mechanisms must thus be put in place to ensure land is not left idle by speculators or absentee land owners. Doctrines such as, adverse possession or prescription where applicable can be applied to ensure land is available to those who will productively utilize it.

6.7.5 Sustainable Land Management

In the spirit of environmental sustenance for the benefit of present and future generations,[77] the Constitution requires sound conservation and protection of ecologically sensitive areas.[78] The *Land Act* 2012,[79] tasks the National Land Commission to take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas.[80] Moreover, the Commission is to identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change. This is to be done in consultation with the existing institutions dealing with conservation.[81]

The Land Act also obligates the Commission to make rules and regulations for the sustainable conservation of land-based natural resources.[82] With regard to this, such rules

[75] Art. 48; 159.
[76] AUC-ECA-AfDB Consortium, 'Framework and Guidelines on Land Policy in Africa'. *Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*, September, 2010, p. 13.
[77] Constitution of Kenya, Preamble.
[78] *Ibid*, s. 60 (1) (e).
[79] Act No. 6 of 2012.
[80] *Ibid*, s.11 (1).
[81] *Ibid*, s.11 (3).
[82] *Ibid*, s.19 (1).

and regulations may contain: measures to protect critical ecosystems and habitats; incentives for communities and individuals to invest in income generating natural resource conservation programmes; measures to facilitate access, use and co-management of forests, water and other resources by communities who have customary rights to these recourses; procedures for the registration of natural resources in an appropriate register; procedures on the involvement of stakeholders in the management and utilization of land-based natural resources; and measures to ensure benefit sharing to the affected communities.[83]

As a way of promoting sustainable land management, one of the conditions implied on leases on part of the lessee include using any land in a sustainable manner and in accordance with any conditions imposed on the use of that land by the lease, or any written law or any provisions in a grant of a public land out of which that lease has been created and, in particular, not to cut down, injure or destroy any living tree on the land unless the purpose for which the land has been leased cannot be carried out without so doing.[84] Further, one of the implied covenants by the chargor in the case of a charge of land used for agricultural purposes, is to use the land in a sustainable manner in accordance with the principles and any conditions subject to which the land or lease under which the land is held, and in compliance with all written laws and lawful orders applicable to that use of the land.[85]

The Constitution calls for a sound and sustainable management of land resources. This provision is critical in light of the discovery of vast deposits of coal and mineral oil in various parts of the country and these deposits have mainly been seen to lie within communal lands.[86] In this regard, the Constitution seeks to ensure that the exploitation of these resources is done in a manner that takes into consideration the needs of future generations.

6.8 Land Tenure

Land tenure refers to the terms and conditions under which rights to land and land-based resources are acquired, retained, used, disposed of, or transmitted.[87] It is a search for the tenure system operative in a particular area attempting to answer the tripartite

[83] *Ibid*, s.19 (2).
[84] *Ibid*, s.66 (1) (b).
[85] *Ibid*, s.88 (1) (e).
[86] Daily Nation, 'Kenya's Trillions of buried wealth,' 3/01/2012. Available at *http://www.nation.co.ke/Features/DN2/Kenyas+trillions+of+buried+wealth+/-/957860/1299662/-/egm18i/-/index.html*[Accessed on 24/02/2015].
[87] National Land Policy, Sessional Paper No.3 of 2009, p.15.

question as to who holds what interest in what land.[88] In this regard, a look of land tenure examines three variables; people, time and space. It is important in the management of natural resources, as it defines the range of persons, who control and manage resources found on land. It determines who participates in resource extraction and to what degree. Because virtually all the other natural resources are based on land, the landowner has a role to play in the management of natural resources.[89]

Land tenure categories can be classified into public, community and private. It can also be categorized in terms of the quantum of rights a proprietor has over land either as freehold, leasehold or commonhold. The *National Land Policy*, observes that prior to the current Constitution of Kenya, 2010, the existing policies and laws on land did not provide equal protection to all categories of land rights. This problem was attributable to colonial and post-colonial land administration which undermined traditional resource management institutions, thereby creating uncertainty in access, exploitation and control of land and land-based resources. The successive governments in Kenya were poor stewards of government land and trust land resulting in the irregular and illegal allocation of essential public land, and destruction of critical natural resources such as forests and water catchment areas.[90]

As such, the Constitution and the post-Constitution land regimes aim at correcting this position. They spell out the general principles that must inform land use, holding and management in Kenya. For all forms of tenure, two major components have been identified: reasonable duration of rights appropriate for using the land to meet the social needs of the land user; and effective legal protection against eviction or arbitrary curtailment of land rights, with enforceable guarantees and legal/social remedies against the loss of these rights.[91] Other important aspects of tenure security include users' freedom to bequeath land to heirs, and to lease, lend or grant land to others on a temporary or long-term basis, with reasonable guarantees of being able to recover the land.[92]Where the rights of land users and owners are clear, tenure security can be achieved through clear, long-term rental contracts, or formal recognition of customary rights and informal settlements, with accessible and effective dispute resolution mechanisms.[93] Enhanced tenure security, generates individual, household and community benefits by encouraging savings and

[88] Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya* (ACTS Press, Nairobi, 1991).
[89] *Ibid.*
[90] *Ibid*, p.36.
[91] UN-HABITAT, 2008, *op cit*, p.7.
[92] *Ibid.*
[93] *Ibid.*

investments in the improvement of land, homes and neighborhoods, which in turn improves livelihoods and living standards.[94]

In a bid to clarify land tenure and ownership with regard to private land, the *Land Registration Act,* 2012,[95] creates a single system of title registration for private land in Kenya.[96] For efficiency and transparency purposes, the *Land Registration Act* requires the registration of all private land transfers, long term leases and formal charges.[97] It is noteworthy that registration under the Act vests absolute ownership in the registered proprietor, and leasehold interest in the registered lessee.[98] However, all registered land is subject to the leases, charges, encumbrances and the conditions and restrictions, if any, noted on the register; and the liabilities, rights and interests that affect the same and are declared by section 28[99] not to require noting on the register.

Although the foregoing provision, on overriding interests, is meant to protect the interests of the concerned parties, it may be at the expense of an innocent party who acquires interest in land. The makes the assumption that every proprietor, at the time of acquiring any land, lease or charge, is deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition.[100] However, this may not always reveal some of the overriding interests considering that it is not compulsory for all the interests to be entered in the register. As such, this still leaves room for illegal land dealings at the expense of innocent buyers or lessees where such overriding interests are not verifiable beforehand.

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[94] *Ibid.*
[95] Act No. 3 of 2012, Laws of Kenya.
[96] *Ibid,* s.109.
[97] *Ibid,* Part III (ss.36-53); Part IV (ss.54-55); and Part V (ss. 56-59) respectively.
[98] *Ibid,* s.24.
[99] See s. 28:Unless the contrary is expressed in the register, all registered land to be subject to the following overriding interests: spousal rights over matrimonial property; trusts including customary trusts ; rights of way, rights of water and profits subsisting at the time of first registration under this Act; natural rights of light, air, water and support; rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies; charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and any other rights provided under any written law.
[100] *Ibid,* s.29.

6.8.1 Categories of land

The Constitution of Kenya[101] provides for three modes of landholding in Kenya. These are public, private and community landholding.[102] *Private land* consists of registered land held by any person under any freehold tenure; land held by any person under leasehold tenure; and any other land declared private land under any Act of Parliament.[103] The institution of private rights denotes that the entitlement conferred on an owner defining his rights, privileges and limitations for use of a resource, should ideally be immune from government interference. However, since land is a natural resource, that is finite and of importance to man, control by the government is necessary for its sustainable management.[104] The attributes of private property include clarity, exclusivity, transferability and enforceability.[105]

Public Land is land held by the government either directly or through other administrative arms. Article 62 of the Constitution provides that public land includes unalienated government land; land held by any state organ; land transferred to the state by sale or surrender; land which no individual ownership can be established, land where no heir can be identified, all minerals and mineral oils; government forests; game reserves; water catchment areas, national parks; government animal sanctuaries and specifically protected areas; all roads and thoroughfares; all rivers, lakes, and other water bodies; territorial sea, the exclusive economic zone and the seabed; the continental shelf; land between high and low water marks and any land not classified as private or community land.[106] Including in the classification of public land, land that is not classified as private or community land,[107] may go towards preventing and/or curbing incidences of grabbing of land seen as 'unclaimed'. Such public land is to vest and be held by: either a county government in trust for the people resident in the county, and administered on their behalf by the National Land Commission; or the national government in trust for the people of Kenya and it is to be administered on their behalf by the National Land Commission.[108]

Community land refers to land vested in and held by communities identified on the basis of ethnicity, culture or similar community of interest.[109] Community land is classified by the Constitution as consisting of land lawfully registered in the name of a

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[101] Art. 61.
[102] *Ibid,* Art.61(2).
[103] Art.64 of the Constitution.
[104] National Land Policy, Sessional Paper No.3 of 2009.
[105] 'Attributes of Private Property Rights,' available at *http://www.law.berkeley.edu/journals/clr/outlines/uprop-dwyer-00.doc* [Accessed on 10/12/2013].
[106] Art.62 (1), Constitution of Kenya, 2010.
[107] *Ibid,* Art. 62(1) (m).
[108] *Ibid,* Art. 62(2) (3).
[109] *Ibid.* Art. 63(1).

group representative; land transferred to a specific community by any process of law; land held by a specific community as community forest, grazing areas or shrines; ancestral land and land that is traditionally occupied by a hunter-gatherer community or lawfully held as trust land by the county government.[110] However, non-registration does not defeat the right of such communities to enjoy the benefits accruing from the community land in question. Article 63(3) is to the effect that any unregistered community land is to be held in trust by county governments on behalf of the communities for which it is held.

Community landholding as envisaged in the Constitution is based on the principle of common property /community property, where property is not controlled by a single entity and access to which is limited to an identifiable community which has a set of rules on the way those resources are to be managed and can exclude others from accessing that resource.[111] Article 63(1) of the Constitution provides that community land is to vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Recognition of community land is an acknowledgement of the fact that communal tenure systems are still very much part of the social and economic fabric of ethnic communities in Kenya, explaining its resiliency in spite of neglect by formal laws. Community tenure is central to pastoralism as a form of land use due to the role of cultural norms and practices in land holding among pastoral communities.

6.9 Proprietorship

As indicated above, tenure regimes can also be classified in terms of the quantum of rights held, i.e., whether it is a freehold, leasehold or common-hold.

6.9.1 Estate in Fee Simple/Freehold/Absolute tenure

These three terms connote the largest quantity of land rights which the State can grant to an individual. The *Land Act* recognizes the freehold tenure in Section 5. An estate in fee simple is a perpetual grant of proprietary rights over land so that the said grant can never come to an end. It is a term in land without end,[112] an estate without duration which is capable of transfer with little limitations. A new owner acquires a similar estate. There has been great confusion in Kenya with respect to the existence of the freehold and the absolute proprietorship. Different statutes defined it using different terms. It was referred to as a fee simple in the Government Land Act, freehold in the Registration of Titles Act

[110] Art.63 (2) of the Constitution.

[111] Ojienda, T., 'Customary Land Rights and the Adjudication Process: Reviewing the Procedure for Ascertaining and Recording Land Rights in the Light of Customary Claims,' in *Land Law Reform in Kenya*, Vol. 2, (The Law Society of Kenya, 2003).

[112] The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002).

and absolute title in the Registered Land Act. The National Land Policy proposes that there is no need to continue to have these separate classifications of essentially the same quantity of land rights.[113]

In Kenya, the limits placed on fee simple or freehold tenure is in respect of development control, zoning laws and environmental laws. Before any development, an owner of such an estate must adhere to the zoning laws of the particular municipality, that the property is situate. Any development is also required to adhere to the environmental laws in place. However, when an owner of an estate in fee simple wishes to transfer, charge, let or sublet the property, they do not have to obtain consent from the government or any party. No rent is payable to the government in respect of such an estate. Hence, it is said that such a proprietor, is free to deal with the property as they deem fit. The National Land Policy seeks to regulate the powers of the primary rights holder to dispose of land in order to ensure that such disposal takes into account legitimate interests such as family rights.[114] This is affirmed in the Constitution of Kenya, 2010 which, under Article 68 (c) (iii), places an obligation on Parliament to enact a legislation to regulate the recognition and protection of matrimonial property, and in particular, the matrimonial home during and on the termination of marriage. This is an important measure in protecting the rights of spouses and others who have interests in the property.

6.9.2 Leasehold Tenure

Leasehold tenure is the right to use land for a defined period of time in exchange for the performance of certain obligations, such as the payment of rent. Leasehold rights provide a flexible mechanism for transacting rights in land and for land use control.[115] In leasehold tenure, there is a separation between the ownership of land and the use. While landlord is the true owner, the tenant is only entitled to the exclusive use for the period of the lease. The titles issued under leasehold tenure are mostly in commercial areas and the government is presumed to be the landlord in such instances. Some leases are granted for long periods, which may amount to actual ownership. The settlers in the white highlands, upon colonization, were granted leases for a term of 999 years and they continue to enjoy those interests to date. However, the Constitution in Article 65 has reduced such land holding by non-citizens to 99 years from the date of passing of the Constitution.

[113] National Land Policy, Sessional Paper No.3 of 2009, p.20.
[114] *Ibid.*
[115] *Ibid.*

6.9.3 Common-hold Tenure

This mode of land tenure classification is defined in Section 91 of the *Land Registration Act* 2012,[116] to mean the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common. The law provides that if two or more persons, not forming an association of persons under the *Land Registration Act* or any other way which specifies the nature and content of the rights of the persons forming that association, wish to own land together under the Act, they may be either *joint tenants* or *tenants in common*.[117]

Under joint tenancy, two or more persons are treated as one owner and as between them they have separate rights. It is distinguished from a tenancy-in-common by the right of ownership under the doctrine of *jus accrescendi,* i.e. the right of survivorship. Under the doctrine of *jus accrescendi,* when one joint tenant dies the survivor becomes the sole owner of the whole interest or right in land. The rules of intestacy do not apply to the joint tenancy and the joint tenant cannot dispose of his interest under a will.[118] This incidence of common ownership is provided in Section 91 (4) of the *Land Registration Act*.

On the other hand, under a tenancy in common, a tenant-in-common can alienate his share which is fixed but not divided. The principle of *jus accrescendi* does not apply. However, the rules of intestacy and dispositions by will apply. Shares of tenants-in-common may be equal or unequal.[119] This incidence of common ownership is provided for in Section 91 (5) and (6) of the *Land Registration Act*.

6.10 Land Rights of Marginalized Communities as Defined in Article 260.

Article 260 of the Constitution defines marginalized community to mean: a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities, whether they are, nomadic; or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

Land and related resources, such as water and biodiversity are vital amongst marginalized communities, since they offer diversified livelihood opportunities and

[116] Act No. 3 of 2012.
[117] S. 91 (2) of the Land Registration Act, Act No. 3 of 2012.
[118] Onalo, P.L., *Land Law and Conveyancing in Kenya* (Law Africa, 2010), pp.20-21.
[119] *Ibid.*

alternatives. Land is also believed to provide a sense of security in contexts where formal employment opportunities and access to resources are limited.[120] Access to and availability of land resources are believed to be critical in ensuring real and long-lasting improvement in social, economic and political well-being, especially among vulnerable societies that are prone to instability and conflicts.[121]

6.11 Land Management in Kenya

The National Land Commission as established under Article 67 of the Constitution of Kenya, 2010 is mandated with, *inter alia*, the management of public land on behalf of the national and county governments; to recommend a national land policy to the national government; to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning throughout the country.[122]The Commission is, therefore, tasked with overseeing the general management of public land in the country. The *National Land Commission Act*[123] makes further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; and on the objects and principles of devolved government in land management and administration.[124]Although the Commission is generally tasked with the management of public land, it is mandate includes facilitating development of a national land Policy, which policy will regulate the use and/or management of all forms of land tenure. The State is to carry out its constitutional mandate and obligations on land through the Commission, amongst others.

As already noted elsewhere in this Chapter, one of the guiding principles of land policy is security of land rights. Article 40(1) guarantees the right of every person to acquire and own property, either individually, or in association with others. Clause (2) thereof prohibits Parliament from enacting any law that permits the State or any person to

[120] Urmilla B., "Land-related conflicts in Sub-Saharan Africa," *African Journal on Conflict Resolution,* Vol. 10(2), (2010).
[121] *Ibid.*
[122] Art.67(2); See also S. 5, *The National Land Commission Act*, No. 5 of 2012.
[123] Act No. 5 of 2012.
[124] *Ibid*, Preamble.

arbitrarily deprive a person of property of any description or of any interest in, or over, any property of any description.

However, the Constitution as well as the other land laws, provide for instances when the State may reign in on management and use of any land, including private land. Article 66 gives the State the powers to regulate the use of any land and/or property in the interest of defence, public safety, public order, public morality, public health, or land use planning. Further, Article 40 (3) outlines instances when the State may deprive a person of property of any description, or of any interest in, or right over, property of any description. Such exceptions include: acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or acquisition for public purpose or in the public interest. A person deprived of land or property interest must be compensated promptly for such loss or be allowed to access court to challenge the decision. However, these rights are not available for holders of property that has been found to have been unlawfully acquired. The exercise of eminent domain /compulsory acquisition powers is one way in which the State lifts the cloak of private property in the public interest.

6.11.1 Management of Public Land

Article 62 of the Constitution provides for public land and defines what constitutes such land. The management of such land is vested in the National Land Commission on behalf of both the national and county governments.[125] In addition to the functions set out in section 5(1) of the *National Land Commission Act*, the Commission is, with the consent of the national and county governments, alienate public land; monitor the registration of all rights and interests in land; ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations; develop and maintain an effective land information management system at national and county levels; and manage and administer all unregistered trust land and unregistered community land on behalf of the county government.[126]

6.11.2 Doctrine of Public Trust

The Government is deemed to hold public land on the basis of public trust. The doctrine of public trust stipulates that some common resources are incapable of being allotted any individual and must therefore, be held in trust by the government of the day for the benefit of all.[127] The doctrine of public trust is believed to have originated from

[125] Art.67, Constitution; s. 5, *National Land Commission Act.*
[126] S. 5(2), *National Land Commission Act*, No. 5 of 2012.
[127] Art.62(2) (3), Constitution of Kenya, 2010.

the Roman law concept of common property. Such common property comprising the air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public.[128]

Although land law regime in Kenya recognizes private or communal ownership of land, there are categories or instances where interests in such land shifts from the individual or community to the government. Article 62(1) (f) provides that all minerals and mineral oils as defined by law constitutes public land and vests in government. The effect of this is that in case of discovery of any minerals or mineral oils in private land, the ownership of such land shifts from the individual to the government for purposes of management of such minerals. The *Land Act*, 2012, provides that in the management of such land, the National Land Commission is to: identify public land and keep a geo-referenced and authenticated data base; evaluate all parcels of public land based on land capability classification, land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning; and share data with public and relevant institutions.

Importantly, the Commission may require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or other instrument. This may be justified under Article 66 of the Constitution which gives the State the power to regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.[129] Since land and other natural resources, are a heritage of mankind that should be available for present and future generations, they are only held by the State in trust for future generations and that the citizens should, while utilizing them, take into consideration the interest of future generations. Therefore, since land is entrusted in the hands of the State on behalf of all future generations, it is held by the present generation under the same constraints, and the State is entitled to administer this trust by enacting laws and regulations.[130] Because land is a finite and important resource, its tenure and distribution needs to be controlled for the benefit of the whole society.[131] Under feudal landholding, the State held radical title to all land in the territory

[128] California State Lands Commission, *The Public Trust Doctrine*, p. 1, available at *http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf* [Accessed on 12/12/2013].
[129] Art.66 (1), Constitution.
[130] Sifuna, N., 'Public Regulation of the Use of Private Land: Opportunities and Challenges in Kenya,' *Law, Environment and Development Journal*, Vol.5, No.1, 2009, pp. 40-57, at p. 45.
[131] *Ibid*, p.45.

as the sovereign, and acquisition of land was seen as mere repossession by the State of that which is its own.[132]

6.11.3 Management of Private Land

Article 64 of the Constitution defines what constitutes private land. The administration and management of private land is provided for under the *Land Act,* 2012 in Part V (ss.38-54) thereof. Section 38 of the Land Act provides for regaining possession of land after concluding a contract of sale of land. No suit may be brought upon a contract for the disposition of an interest in land, unless the contract upon which the suit is founded is in writing and is signed by all the parties thereto.

Section 39 thereof is to the effect that if, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the purchaser by: resuming possession of the land peaceably; or obtaining an order for possession of the land from the court in accordance with the provisions of section 41.[133] For land ownership to be a viable institution, it should be possible for it to be expropriated in the public interest, lest it becomes a curse upon society.[134]Although the state's power over natural resources within its territory cannot be ousted, there must be clear guidelines on how such powers of eminent domain are to be exercised so as to prevent abuse. In the *Njonjo Report* (2002), the Commission recommended principles that should guide the exercise of the powers of compulsory acquisition as follows:

a) That the power of compulsory acquisition should vest in the State only;
b) There should be clear definition by law, of the conditions necessary and sufficient for the exercise of that power in respect of all categories of land or interest therein. Further, there ought to be provision for consultation with local community or land owners including cities and municipalities (or counties);
c) Preparation of an Environmental Impact Assessment Report as part of feasibility study before any compulsory acquisition or setting apart;
d) Establishment of a single mode for the exercise of that power irrespective of the tenure category in respect of which land is held;

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[132] *Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration*," (Njonjo Report, November, 2002), p. 40.
[133] S. 41 outlines the procedure for obtaining an order for possession.
[134] Sifuna, 'Public Regulation of the Use of Private Land: Opportunities and Challenges in Kenya,' *op cit*, p.44.

e) A uniform set of principles for the determination of compensation to be applied to all categories of land acquired irrespective of their tenure status;
f) Prohibition of taking of possession of any land or interest in land acquired, before full and fair compensation, either in cash, or in terms of land of equivalent value or size is made; and,
g) Where the public purpose or interest justifying the compulsory acquisition fails, the law should provide for the original owners, or their descendants, of the property or interest to be given first option of restitution on condition that the original compensation is refunded.

These recommendations were put forward so as to safeguard against abuse of the doctrine by rogue leaders for selfish interests. *The Evictions and Resettlement Procedures Bill*, 2013 seeks to provide for procedures applicable to all forms of evictions; to provide protection, prevention and redress against eviction for all occupiers of land, including unlawful occupiers; and for matters incidental and connected thereto.[135]This proposed law seeks to provide for the regulation of eviction of persons from either private or public land. This ensures that the manner of carrying out evictions is consistent with the Constitution. Clause 17 thereof provides that no order for eviction from public land is to be granted when it is clear to the Court that such an order would result in rendering a person affected by evictions homeless. Here, the Bill strives at striking a balance between enforcing land rights and protecting the constitutionally guaranteed right to housing as provided for under Article 43.

6.11.4 Management of Community Land

Article 63 of the Constitution provides for and defines what entails community land. The Constitution aims to safeguard community land from illegal acquisition by non-members of the particular communities. One of the principles of land policy is security of land rights and thus the Constitution vests management of community land in the particular communities or their representatives. However, any unregistered community land is to be held in trust by county governments on behalf of the concerned communities.[136] To the indigenous communities, land and property relationship is predicated on their customary practices and institutional arrangements (laws and customs) that, amongst other, safeguards members' inalienable rights to land resources.[137]

[135] Preamble, *The Evictions And Resettlement Procedures Bill*, 2013.
[136] Art.63(3).
[137] Godana, D.A., '*Fixation with the Past or Vision for the Future: Challenges of Land Tenure Reform in Kenya with special focus on Land Rights of the Maasai and Borana Pastoralists,'* Thesis, Master of Laws (LLM) Murdoch University, June 2009, p. 2.
Available at *http://researchrepository.murdoch.edu.au/3013/2/02Whole.pdf*[Accessed on 10/12/2013].

Management of community land, must therefore reflect, equity, equality, social justice, amongst other principles, as captured under Article 60 (1) of the Constitution. Article 60(1) (g) provides for utilization of recognized local initiatives in settlement of land disputes. This is a significant provision as it gives the particular communities a chance to use dispute settlement mechanisms that are most familiar to them, thus improving the chances of reaching a positive outcome.

There is a pending *Community Land Bill,* 2013, which seeks to give effect to Article 63 (5) of the Constitution, by providing for the recognition, protection and registration of community land rights; management and administration of community land; to establish and define the powers of community land boards and management committees; and to provide for the role of county governments in relation to unregistered community land.[138]Although the Bill is yet to become law, once enacted it will mark a big step forward in the struggle to have community land rights recognized. The objects and purposes of the proposed law are to establish a legal framework and procedures for: recognition, protection and registration of community land rights; documentation and mapping of the existing forms of communal land tenure; vesting of community land in the communities identified on the basis of ethnicity, culture or similar community of interests; management and administration of registered community land; procedures for conversion of community land to other categories of land; and holding of unregistered community land in trust by county governments.[139]

These objects and purposes are to give effect to the constitutional principles on land policy. Part VII (clauses 52-56) of the proposed land law provides for the management of natural resources, land use planning and investments in community land. Clause 52(1) thereof is to the effect that subject to any other law, natural resources found in community land are to be used and managed: sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits. Clause 52(2) further provides that every community is to, in consultation with the relevant State agencies, assess and document natural resources within the land and prepare a natural resource management plan. The Bill thus seeks to ensure that communities benefit to the maximum from resources located in their areas. If passed, this legislation is also likely to ensure that communities are involved and actually benefit in the exploitation of land-based natural resources in their areas.

[138] Preamble, *The Community Land Bill*, 2013, "Draft," 12/11/2013.
[139] *Ibid,* p.3.

6.12 Regulation of Land Use-Eminent Domain & Police Power

In the exercise of its eminent domain powers, the State may compulsorily acquire private land for public purposes. The Land Act 2012 provides that Land may be acquired compulsorily if the National Land Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfillment of the stated public purpose.[140] However, where, after land has been compulsorily acquired the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title pre-emptive rights to re-acquire the land, upon restitution to the acquiring authority the full amount paid as compensation.[141]

Stripping of ownership rights, for instance, individual resource ownership and security is believed to be a recipe for human grievance that can contribute to conflicts.[142] Real or perceived land ownership insecurity would, and often causes people to employ all means possible to ensure that this does not happen. Any land management must attempt to balance the interests of the various groups in society so as to avert such potential land related conflicts. For instance, in the case of *Joseph K. Nderitu & 23 others v Attorney General & 2 others,*[143] the petitioners who were property owners in Nakuru County had built palatial homes. They were shocked when the Respondent in the company of administration police and with no courtesy entered their land and started to erect beacons across their parcels of land. They contended that the Respondents intended to acquire the said parcels of land compulsorily. The petitioners argued that they were neither consulted nor given any notice before the process began hence infringing on their right to property and privacy. The Respondents on the other hand claimed that they were only carrying out a feasibility study with a view to identifying the properties before commencing a compulsory acquisition process.

The Court held that Article 40 of the Constitution guarantees every person the right to property. It protects a person from being arbitrarily deprived of his property by the State or any person. However, that right could be limited by compulsory acquisition. It stated that before commencing compulsory acquisition processes, the State had to demonstrate that the acquisition was for a public purpose or in the public interest and the process had to be done in accordance with Part VIII of the *Land Act*, 2012. The court was of the view that compulsory acquisition process commenced when the National or County

[140] Land Act 2012, s.110 (1).
[141] *Ibid*, s.110 (2).
[142] Azeez, I. O., & Onyema, M. C., "Conflicts of land tenure and tree tenure on land use and management among agro-based households in Nigeria," *International Journal of Advance Agricultural Research*, IJAAR Vol.1, 2013, p. 54.
[143] Constitutional Petition No.29 of 2012.

government made a request to compulsorily acquire the land and the same was approved by the Commissioner under section 107(3) of the Land Act, hence the conduct of the feasibility study could not be said not to be part of the compulsory acquisition of land.

In this regard, it was incumbent upon the Respondent to inform the petitioners both individually and generally of the intended feasibility study which could automatically affect them all or some of them. It is, noteworthy, that the current land laws have made an attempt to ensure that compulsory acquisition of land by the State is done in an efficient and transparent way. The *Land Act*, 2012, provides that whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110,[144] the respective Cabinet Secretary or the County Executive Committee Member, must submit a request for acquisition of public land to the Commission to acquire the land on its behalf.[145]

The Commission is obligated to prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.[146] However, the Commission is entitled to reject a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under subsection (2) and Article 40(3) of the Constitution.[147] This provision is meant to act as a safeguard against illegal acquisition of land by State organs. However, this safeguard is not water tight as the Act also provides that in the event that the Commission has not undertaken the acquisition in accordance with subsection (1), the acquiring authority may proceed and acquire the land.[148] This exception may be abused by the powers that be, since the Act fails in clearly stating the circumstances under which the Commission may fail to undertake the acquisition and whether there may be any justification for the same.

The powers of the State to regulate or take over any land as provided for under the Constitution and the other relevant land laws must be balanced with private property rights. Security of tenure in land and/or other land based resources is a necessary condition for any land-based investment.[149]

The current regime of land management in Kenya, ushered in by the current Constitution of Kenya, is guided by the principles of land policy including, *inter alia*, equitable access to land; security of land rights; sustainable and productive management

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[144] Land Act 2012, s. 110.
[145] S.107 (1).
[146] S.107 (2).
[147] S.107 (3).
[148] S.107 (4).
[149] United Nations Human Settlements Programme (UN-HABITAT), *Secure Land Rights for All*. Available at *https://www.responsibleagroinvestment.org/sites/responsibleagroinvestment.org/files/Secure%20land%20rights%20for%20all-UN%20HABITAT.pdf* [Accessed on 26/12/2013].

of land resources; and encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution. These principles are useful in addressing and/or avoiding land-related conflicts, if incorporated into land policies and laws. The challenge however, is the political goodwill to implement the same. The National Land Commission, in discharging their duty, must rise above the political pressures of the day. This is not to say that land issues are completely non-political, but they must not succumb to pressure in performing their functions.

Despite the enhanced participation of communities in decision making and management of community land, Clause 56(1) of the proposed law, *Community Land Bill*, 2013, provides that pursuant to Article 66 of the Constitution, the State has the power to regulate the use of any land, or interest in or right over land, in the interest of defence, public safety, public order, public morality, public health or land use planning. Further, sub clause (2) thereof provides that despite the provisions of this Part and pursuant to clause 22 of the Fourth Schedule to the Constitution, the management of community land is to be subject to national government laws and policies relating to: fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and safety of dams; forestry; environmental laws; and energy policy. These are important provisions as they ensure that such communities appreciate and are involved in the environmental conservation, climate change debate and sustainable development agenda without compromising on their ability to benefit from the community land based natural resources.

6.13 Place of Traditional Dispute Management Institutions

Before the arrival of colonialists in Africa, the traditional dispute settlement systems were tasked with the handling of community as well as individual disputes ranging from land related conflicts to general conflicts. However, the African institutions of governance were altered radically with the ensuing fundamental restructuring of African political entities and socio-economic systems.[150] Although the role of these institutions has changed with time, they still have an important role to play in management of disputes and/or conflicts especially the land-related ones. These roles have been broadly classified into three categories namely: first, advisory role to government, as well as their participatory role in the administration of regions and districts; second, developmental role, complementing government's efforts in mobilizing the population for

[150] Economic Commission for Africa, '*Relevance of African Traditional Institutions of Governance,*' 2007. Available at *http://www.uncsd2012.org/content/documents/relevance_africantradinstgov.pdf*, [Accessed on 3/01/ 2014].

the implementation of development projects, encouraging economic enterprises; and third, their role in conflict resolution.[151]

One of the principles of land policy as provided for under Article 60(1) (g) is the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution. This has elevated their position and they are therefore likely to be utilized more in resolution of land related conflicts. These institutions can be integrated into the judicial system so that the experts therein offer and/or actively participate in resolution of land related conflicts in community land and other forms of land ownership where their expertise is necessary.

Indeed, Part VIII (Clauses 57-60) dealing with settlement of disputes relating to community land recognizes the importance of these institutions and the mechanisms employed by such institutions. Clause 57(2) thereof provides that in resolving disputes related to community land, priority is to be given to: alternative dispute resolution mechanisms which include dispute resolution processes and mechanisms that fall outside the government judicial processes; and traditional dispute resolution mechanisms. Further, Clause 57 (3) is to the effect that the customary laws and practices of the locality are to apply in managing disputes related to community land to the extent that they are not inconsistent with the Constitution.

With regards to safeguarding the land rights of communities, Clause 62 thereof provides that pursuant to Article 67 (2) (e) of the Constitution, the National Land Commission is to investigate into present or historical community land injustices and recommend appropriate redress. Traditional dispute settlement institutions, therefore, have an active role to play in management of land related disputes under the current Constitution of Kenya, 2010.

6.14 Conclusion

Land plays an important role in the economic, social, cultural and spiritual aspects of a community, making it a very sensitive issue for the authorities. It has been a cause of many conflicts across the globe and especially in Africa. Thus, although there are laws in place now for the regulation of its use and management, political goodwill is still required to ensure that such laws are fully enforced and implemented. Since these laws have tried to incorporate the constitutional principles and values on landholding, their effective implementation is the remaining phase. There is need for goodwill and commitment from everyone to ensure a smooth implementation of the reforms. In this regard, participation of all stakeholders will continue to be sought and enhanced by encouraging regular

[151] *Ibid.*

consultations and dialogue.[152] Moreover, it is overly important that the community land law be passed urgently to avert illegal and irregular dealings in community land in the interim.

[152] National Land Policy, 2009, pp. vii-viii.

Chapter Seven

Forest Management in Kenya

7.1 Introduction

A forest can broadly be defined as an ecological system dominated by trees and other woody vegetation.[1] In Kenya, woody vegetation includes forests, woodlands, bush land and wooded grasslands.[2] A 'forest' refers to any land containing a vegetation association dominated by trees of any size (whether exploitable or not); capable of producing wood or other products; and with the potential to influence climate, soil, water, and provide habitat for wildlife, and includes woodlands.[3] Woodland means an open stand of trees less than ten (10) metres which has come about by natural regeneration.[4] As a consequence, forests play a vital role in the livelihood of people by providing invaluable forest related goods and services. They are important in the economic, social and cultural development and in providing environmental services.

This Chapter discusses forest management in Kenya, in light of constitutional provisions recognizing the need to conserve biodiversity and to increase the area under tree cover. The legal and institutional arrangements on forest management are discussed and their interaction with other natural resources sectors examined.

7.2 Importance of Forests

Forests play vital ecological, economic and social functions in the planet. They are biodiversity repositories, containing 60-90% of all terrestrial species on the planet. Their protection reduces desertification and land degradation and is essential for watershed protection. They also play a crucial role in global climate regulation and are some of the largest carbon sinks. They absorb carbon from the atmosphere through photosynthesis and release it when destroyed or degraded. Forest conservation and reforestation can, therefore, reduce atmospheric carbon concentrations by sequestering carbon in trees and soil. Economically, forests provide timber which is an important source of revenue and a major foreign exchange earner. Finally, forests serve as habitats and a source of livelihoods for indigenous peoples and forest dwellers.[5] The Africa Forest Law Enforcement and

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[1] Matiru,V., *Forest Cover and Forest Reserves in Kenya: Policy and Practice*, p. 2, December 1999. Available at *http://cmsdata.iucn.org/downloads/forestcover.pdf* [Accessed on 5/01/2014].
[2] *Ibid*.
[3] S. 2, Forests Act, 2005.
[4] *Ibid.*
[5] UNFF Memorandum, available at www.iucnael.org/en/.../doc.../849-unit-3-forest-game-*backgrounder.html*. [Accessed on 16/07/2013]; See also UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), pp.145-154.

Governance (AFLEG) Ministerial Declaration of 2003[6] recognized the role of forests in its preamble noting that Africa's forest eco-systems are essential for the livelihoods of the African people; especially the poor and that forests play important social, economic and environmental functions.[7]

Despite the global importance of forests, there is no legally binding international instrument in which the environmental, social and economic functions of forests are addressed. This is mainly due to lack of political goodwill among States.[8]For instance, negotiations over the creation of a treaty on forests in Rio in 1992, were sharply divided between developed and developing countries. Developing countries were opposed to the proposal by developed states, to protect forests as carbon sinks and reservoirs, thus urging that they be recognized as the home of forest communities.[9] As a result, UNCED only adopted a non-legally binding statement of principles on forests.[10] These principles apply to all forests[11] and require that they be protected for their ecological, subsistence and economic value to local communities.

7.3 State of Forests in Kenya

Kenya's main forests constitute five water towers, that is, Mt. Kenya, Aberdare Ranges, Mau Escarpment, Cherangani Hills and Mount Elgon, covering more than 1 million hectares and forming the upper catchments of all main rivers in the country.[12] These forests have undergone destruction over the past 20 years due to human activities. The major threats to forests ecosystems in Kenya are poverty; poor governance and management; inadequate technology, knowledge and incentives for alternative livelihoods and environmental awareness; population growth; limited coordination and landscape focus; overexploitation of forests on private land, ranches and trust lands; and increased wildlife population.[13]

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[6] Africa Forest Law Enforcement and Governance (AFLEG), Ministerial Conference 13-16 October, 2003; Ministerial Declaration, Yaoundé, Cameroon, October 16, 2003.
[7] Preamble, Forests Act, 2005.
[8] Ruis, B.M.G.S., *Global Conventions Related to Forests*, (FAO, 2001).
Available at *http://www.fao.org/docrep/003/y1237e/y1237e03.htm*.(Accessed on 16/07/2013).
[9] Hunter, D., *et al*, *International Environmental Law and Policy*, (Foundation Press, 4th Edition, 2011), 157.
[10] Annex III to the Rio Declaration, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, A/CONF.151/26 (Vol. III), 14th August 1992.
[11] *Ibid*, Preamble.
[12] *Vision 2030*, Government of Kenya, (2007), p. 104.
[13] Matiku, P., The Coastal Forests of Kenya: Forests data, threats, socio-economic issues, values, stakeholders, challenges, strategies, investment and enabling environment, A national synthesis report for the development of the WWF-EARPO Eastern Africa Coastal Forests Eco region Programme, p.7.
Available at *http://coastalforests.tfcg.org/pubs/National-Synthesis-Ken.pdf* [Accessed on 7/01/2014].

Poverty manifests itself in many forms including involvement in illegal activities; hunting and gathering of foods and other products; inappropriate agricultural practices hence low yields and need for more land, leading to illegal cutting of forests for poles and firewood; forest clearing for cultivation; and overexploitation of forest products. Poor governance and management manifests itself in ways such as : breakdown in management; inadequate operating funds; non-demarcation and survey of boundaries; inadequate land-use planning; poor extension services; inadequate protection; inadequate participation of local communities in management; inadequate data on allowable cut and forest regulation; insecure tenure; rampant corruption; inadequate monitoring; lack of impact assessment of policies; unplanned settlement and infrastructure and land grabbing resulting to, among others, encroachment on forests, rampant illegal activities, unsustainable cutting, deforestation and inadequate options for alternative livelihoods.[14]

7.3.1 Types of Forests in Kenya

There are various types of forests in Kenya categorized by their nature. Categorization may be based on physical characteristics, such as canopy cover, or on botanical characteristics, such as variety of tree species.[15] In Kenya, forest classification is mainly done by describing dominant species and environmental features of different forests giving rise to six main blocks: the volcanic mountains, the western plateau, the northern mountains, the coastal forests, the southern hills and the riverine forests.[16] It is also posited that since Kenyan forests are also influenced by the farming and herding practices of the local inhabitants, most forests are cultural rather than natural entities, although they still support a forest cover of solely or mainly indigenous species.[17]

a. Indigenous Forests

An indigenous forest is a forest which has come about by natural regeneration of trees primarily native to Kenya, and includes mangrove and bamboo forests.[18] Indigenous forests are mostly found in the mountainous regions. However, riverine forests which are found on the riverbanks of major rivers and streams are also a type of indigenous forests. All indigenous forests and woodlands are to be managed on a sustainable basis for purposes of water, soil and biodiversity conservation; riverine and shoreline protection;

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[14] *Ibid.*

[15] Lambrechts, C., *How much forest cover in Kenya? A surprisingly difficult question to answer*, a presentation by the United Nations Environment Programme, February 2012, p. 2.

[16] Peltorinne, P., 'The forest types of Kenya' in: Pellikka, P., J. Ylhäisi & B. Clark (eds.),*Taita Hills and Kenya, 2004 – seminar, reports and journal of a field excursion to Kenya*,(Expedition reports of the Department of Geography, University of Helsinki 40), pp.8-13.

[17] *Ibid.*

[18] S. 2, Forests Act, 2005.

cultural use and heritage; recreation and tourism; sustainable production of wood and non-wood products; carbon sequestration and other environmental services; education and research purposes; and as habitats for wildlife in terrestrial forests and fisheries in mangrove forests.[19] As a result, the law requires the Kenya Forest Service to consult with the forest conservation committee for the area where the indigenous forest is situated in preparing a forest management plan.[20] Further, the Forests Board may enter into a joint management agreement for the management of any state indigenous forest or part thereof with any person, institution, government agency or forest association. [21] Such arrangements are important in promoting environmental justice since communities get to participate in management of indigenous forests.

b. Coastal Forests

These are the forests of the coastal strip of East Africa, composed of mangrove forests of the salt-water coasts, the forests of the mountain systems and the lowland forest patches. They cover Lamu to the North, Malindi and Kilifi in the middle and Kwale in the south including Mombasa City.[22]There are several types of coastal forests in Kenya which include Woodland (0.1%); Coastal evergreen bushland (0.4%); and Coastal palm stands (<0.1%).[23] Kenya is said to have a total of 107 coastal forests, 49 of which are home to over 90 threatened species of plants and animals. Most coastal forests (80.3%) in Kenya are under some form of protection: 1 National Park (6km^2); 2 national Reserves (74 km^2); 21 national monuments (6 km^2); 14 forest reserves (469 km^2); 23 sacred sites (13 km^2), 35 forests (95 km^2) have no legal protection and fall within private land. National Parks (Shimba Hills) and a small part of Arabuko-Sokoke forest and National Reserves (including Tana River Forests) are officially managed by the Kenya Wildlife Service. National monuments are managed by the National Museums of Kenya not principally for their biodiversity importance, but for their historical importance. Forest Reserves, including Nature Reserves (e.g. Arabuko-Sokoke Forest) are managed by the Forest Department, but the level of protection is weak given very insufficient capacity to patrol and ensure protection. Sacred forests are managed by the local elders.[24] Different forests in Kenya are thus being managed by different government departments creating forum for

[19] *Ibid*, S. 40(1).
[20] *Ibid*, S. 40(2).
[21] *Ibid*, S. 40(3).
[22] Matiku, P., *The Coastal Forests of Kenya*: *Forests data, threats, socio-economic issues, values, stakeholders, challenges, strategies, investment and enabling environment*, A national synthesis report for the development of the WWF-EARPO Eastern Africa Coastal Forests Ecoregion Programme, *op cit*, p.1.
[23] *Ibid*, p. 2.
[24] *Ibid.*

overlapping and at times conflicting jurisdictions. This creates fodder for mismanagement and eventual destruction of forests.

Coastal forests in Kenya are useful in that they provide the basis for a number of economic activities by providing food for both national and international consumption. The main livelihood activities along the Kenyan coast comprise fishing within mangrove areas and creeks, carving, agriculture, tourism, harvesting of medicinal plants, salt production, harvesting of mangroves and wildlife harvesting.[25]

c. Traditionally Protected Kaya forests

Kayas are forests found along the Kenyan coast which are remnants of once extensive lowland forests. Initially, these forests sheltered small fortified villages called *Kayas*, which were established to shield the Mijikenda cultural heritage. The traditional elders regulated the use of the *kayas* as a source of selected forest products, burial sites and sites for ceremonial activities. The Kaya forests are important for both cultural and biodiversity importance.[26] The *Kayas*, created in the 16th century but abandoned by the 1940s, are now regarded as the abodes of ancestors and are revered as sacred sites and, as such, are maintained by a councils of elders.[27] These forests are recognized in law. Similarly, the activities of such communities in relation to forests are also recognised legally.

The *Forests Act* 2005 defines a "forest community" as a group of persons with a traditional association with a forest for purposes of livelihood, culture or religion or registered as an association or organization engaged in forest conservation.[28]A community forest association once approved by the Director of Kenya Forest Service can participate in the management or conservation of a forest or part of a forest and must, *inter alia*, formulate and implement forest programmes consistent with the traditional forest user rights of the community concerned in accordance with sustainable use criteria.[29]These provisions are meant to allow forest communities such as the Mijikenda to manage culturally useful forests as they have sufficient social, cultural and ancestral incentives to take good care of those forests. Community forest management is recognized at the international level. For instance, the *Convention on Biological Diversity*,[30] acknowledges

[25] *Ibid.*
[26] Mulenkei, L., *Sacred Sites*, Paper Presented During the Traditional Knowledge Conference, Vancouver, Canada February 23-26, 2000, p.3,
available at *http://www.ubcic.bc.ca/files/PDF/Mulenkei_Sites.pdf*[Accessed on 7/01/2014].
[27] UNESCO Advisory Body Evaluation, Sacred Mijikenda Kaya Forests.
Available at *http://whc.unesco.org/en/list/1231* [Accessed on 7/01/2014].
[28] S. 2, Forests Act, 2005.
[29] *Ibid*, s. 46(1).
[30] Art. 10, *Convention on Biological Diversity*, adopted at the 1992 Earth Summit in Rio de Janeiro.

the need to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.[31]

d. Farm Forestry and Private Plantations

Farm forestry is the management of trees within a farming context, usually on private land. Farm forestry usually takes the form of agroforestry which is basically the combining of agriculture and tree growing so as to produce both agricultural products and tree products on a commercial basis.[32] Section 2 of the *Forests Act* defines "farm forestry" as the practice of managing trees on farms whether singly, in rows, lines, boundaries, or in woodlots or private forests. If well practised, farm forestry can give multiple benefits to the farm, the environment and the community.[33] Section 25 of the Act provides for the management of private and farm forestry. Subsection (1) thereof gives the concerned Cabinet Secretary the power to declare any local authority forest or private forest, which in the opinion of the Board is mismanaged or neglected, to be a provisional forest. However, according to subsection (2) thereof, a declaration under subsection (1) of this section is only to be made where the forest: is an important catchment area or a source of water springs; is rich in biodiversity and contains rare, threatened or endangered species; is of cultural or scientific significance; or supports an important industry and is a source of livelihood for the surrounding forest communities.

To safeguard the principles of benefit sharing and equity, subsection (3) provides that a provisional forest shall be managed by the Service in collaboration with the owner thereof, and any profits accruing therefrom shall be paid to such owner less the expenses incurred by the Service in managing the forest concerned. Such provisional forest shall revert to the owner where the Board is satisfied that it has been adequately rehabilitated and the owner has given an undertaking to efficiently manage it.[34] These provisions ensure that even private forests are managed in an efficient and sustainable manner.

e. Shamba System

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[31] Githitho, A.N., *The Sacred Mijikenda Kaya Forests of Coastal Kenya and Biodiversity Conservation*, Session I: Presentations Of Case Studies From Africa And Latin America, p. 1.
Available at *http://www.sacredland.org/PDFs/Mijikenda_Kaya.pdf*[Accessed on 7/01/2014].
[32] *Farm Forestry / Agroforestry: What Is It*? January 2002. Available at *http://www.dpi.vic.gov.au/forestry/private-land-forestry/farm-forestry-agroforestry-what-is-it*[Accessed on 7/01/2014].
[33] *Ibid.*
[34] S. 26(1), No. 7 of 2007.

The Forests *Act*, 2005, makes provision for the reimplementation of the *Shamba* system by requiring plantation establishment through non-resident cultivation.[35] The *Shamba* system or Non-Residential Cultivation (NRC) involves farmers tending tree saplings on state-owned forest land in return for the grant of permission to intercrop perennial food crops until canopy closure.[36] The use of the *Shamba* system for establishing forest plantations in Kenya dates back to 1910.[37] It is believed to have played a significant role in conifer plantation development for many years and reducing the cost of establishing trees, while contributing to national food production.[38] From 1910 to 1975, forest cultivators were integrated into the Forest Department (FD) as resident workers. They were allocated forest plots, or "*Shambas*," and guaranteed work for nine months per year. The produce from the *Shambas* was considered part of workers´ emolument as they tended the young trees. The system worked well early on but was later mismanaged, failing to establish new plantations and, in extreme cases, causing the destruction of natural forests. In 1986, the *Shamba* system was banned. It was reinstated in 1994, as Non-Residential Cultivation (NRC) but again banned in 2003.[39]

The *Shamba* system in forest conservation has been challenged by various stakeholders.[40] The system was in the past used throughout all state-owned forest lands in Kenya, accounting for a large proportion of some 160,000 ha. The system aimed at being mutually beneficial to both local people and the government. However, the system has had a chequered past in Kenya due to widespread malpractice and associated environmental degradation. It was last banned in 2003 but in early 2008 field trials were initiated for its reintroduction.[41] Some argue that there was a strong desire amongst local people for the system's reintroduction, as it had previously provided significant food,

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[35] *Ibid*, S.46(2) (h).

[36] Witcomb, M. &Dorward, P., "*A*n assessment of the benefits and limitations of the Shamba agroforestry system in Kenya and of management and policy requirements for its successful and sustainable reintroduction," *Agroforestry Systems*, Vol.75 (3), 2009, pp. 261-274.

[37] Konuche, P. K. A. &Kimondo, J. M., 'Prospects of re-planting clear felled forest plantations without *Shamba* system,' *Technical Note - Kenya Forestry Research Institute,* 1990, pp. i + 16 pp.
Available at
http://www.cabdirect.org/abstracts/19910651752.html;jsessionid=5DBFA31B473C54E8EB2BBDC292D85345 [Accessed on 5/01/2014].

[38] *Ibid.*

[39] Kagombe, J.K., and Gitonga, J., 'Plantation Establishment in Kenya: The Shamba System Case Study,' *Kenya Forestry Research Institute,* May 2005, pp.6-8.

[40] Sinange. J.K., *An exploration of the Shamba system as a tool for forest development in Kenya: Case study of Kinale, Kamae and Bahati forest stations*, Available at
http://elearning.jkuat.ac.ke/journals/ojs/index.php/pgthesis_abs/article/view/193/164
[Accessed on 5/01/2014].

[41] Witcomb, M. & Dorward, P., '*A*n assessment of the benefits and limitations of the Shamba agroforestry system in Kenya and of management and policy requirements for its successful and sustainable reintroduction,' *op cit*.

income and employment.[42] Local perceptions of the failings of the system included mismanagement by government or forest authorities and abuse of the system by *Shamba* farmers and outsiders. The system requires greater accountability and transparency in administration and better rules with respect to plot allocation and stewardship.[43]

It is also argued that the framework for the *Shamba* system under the Act is weakened because insufficient power is likely to be devolved to local people, casting them merely as 'forest users' and the *Shamba* system as a 'forest user right'. In so doing, the system's potential to both facilitate and embody the participation of local people in forest management is limited and the long-term sustainability of the new system is questionable. Suggested instruments to address this include some degree of sharing of profits from forest timber, performance related guarantees for farmers to gain a new plot and use of joint committees consisting of local people and the forest authorities for long term management of forests.[44] When properly practiced, the system allows sustained, optimum production of food crops along with forestry species from the same land and thus meets most of the social and economic needs of the *Shamba* farmer.[45]

7.4 Policy, Legal and Institutional Frameworks

The first known legislation to protect forests in Kenya was the 1891 Order in Council published to protect mangrove forests at the coast.[46] Later in 1902, the East African Forest Regulations were enacted to provide for gazettement and de-gazettement of forest areas. This was the beginning of state regulation of forestry in Kenya.[47] Since the colonial days, there have been attempts by both the colonial and post-colonial governments to formulate policies and legislate on the management of forests in the country. The ineffectiveness of one law or policy has always led to the formulation of another. Their effectiveness has been and is always dependent on the social, economic and political forces of the particular era. In the colonial period, forests management was done to protect forests from destructive indigenous land use practices, to prevent European settlers from obtaining private ownership, and to generate revenue for the forest department through the sale of timber and minor forest products, while the Post-colonial objectives of forest management were catchment protection, industrial forestry

[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] Oduol, P.A., "The Shamba system: an indigenous system of food production from forest areas in Kenya," *Agroforestry Systems*, Vol. 4(4), (1986), pp. 365-373.
[46] Kojwang, H.O., 'National Report on the Forestry Policy of Kenya' in FAO (eds), *Forestry Policies of Selected Countries in Africa* (FAO, Rome, 1996), p.303.
[47] *Ibid.*

development, and protection from encroachment by local communities.[48] Apart from forest laws and policies, the policy, legal and institutional frameworks on land tenure and other natural resource management in Kenya impacts directly and indirectly on the management of forests.[49]

7.4.1 Forest Policy, 1957

This was Kenya's first forest policy and was formulated in 1957. It was enacted by the colonial government and did not make provision for community involvement in forest management. It was an exclusionist policy seeking to bar communities from accessing forests. Many communities were denied rights of access to forests to harvest forest products and as dwelling places. The policy concentrated on catchment protection and timber production (plantation forestry).[50] The Policy was later revised in 1968 by Sessional Paper No.1 of 1968.

7.4.2 Forest Policy- Sessional Paper No.1 of 1968

This policy continued the colonial policies as propounded by the 1957 policy. It sought to exclude forest communities from forest management. It had a number of objectives which included: reservation of forest areas for catchment protection in terms of soil and water conservation, and to provide timber and other forest produce; protection of forests by strict control of fire and grazing, and by exclusion of private rights in gazetted forests; management of the forest estate on a sustained yield basis as far as was consistent with the primary aims of forest reservation; development of forest industry; provision of employment, in particular under the '*Shamba*' system for re-afforestation and forest maintenance; designation of forest areas to be managed by county councils especially those under trust land; establishment of private forest including farm woodlots, for protection as well as production; promotion of recreation and the conservation of flora and fauna; promotion of research and education; and provision of adequate funds for the implementation of the forest policy.[51]That notwithstanding, the 1968 forest policy focused

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[48] Mwangi, E., 'Colonialism, Self-Governance And Forestry In Kenya: Policy, Practice And Outcomes', p. 2, *Research In Public Affairs*, V590, 6th May, 1998. Available at *http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5706/Colonialism%20self%20governance%20and%20forestry%20in%20Kenya.pdf?sequence=1* [Accessed on 5/01/2014].

[49] Matiru, V., *Forest Cover and Forest Reserves in Kenya: Policy and Practice*, *op cit.*, p. 4.

[50] Wandago, B., & Kanyanya, E., *National Study on Enabling Environment (Laws and Policies) For the WWFEARPO Eastern Africa Coastal Forest Ecoregion Programme*, February 2003, p. 6. Available at *http://coastalforests.tfcg.org/pubs/Policy-legal-Ken.pdf*[Accessed on 6/01/2014].

[51] Ludeki, J.V. *et al*., 'Environmental Management in Kenya: A Framework for Sustainable Forest Management in Kenya – Understanding the New Forest Policy and Forests Act, 2005',2006. Available at *empaform.org/Forests_Act_2005.pdf* [Accessed on 5/01/2014].

on catchment management and timber production, with strong government control of the sector. The communities could, therefore, not appreciate the benefits of sustainable forests management and could only resort to illegal logging and charcoal burning.

7.4.3 The Forest Act, Chapter 385

This law was enacted to provide for the establishment, control and regulation of central forests, and forest areas in the Nairobi area and any unalienated government land.[52] Forest areas under this Act means an area of land declared under section 4 to be a forest area. Section 4(1) empowered the Minister from time to time, by notice in the Gazette to: declare any unalienated Government land to be a forest area; declare the boundaries of a forest and from time to time after those boundaries; declare that a forest area shall cease to be a forest area. The Act was enacted and became operational on 1st March 1942. It was however amended in 1962, 1957 and revised in 1964.

In the 1980s, there was heavy commercial exploitation of Mount Kenya Forest due to improved transport and communications networks in central Kenya, accompanied by rising local utilization of forest resources from a rapidly growing human population, resulting in severe forest degradation. To curb this rapid loss of forest species and increasing encroachment, the Forests Act was revised in 1982 and 1992 and a series of bans and prohibitions against natural forest exploitation were introduced during the mid and late 1980s and implemented through heavy policing of forests and prosecution of offenders. There was a shift in forest management to an increasingly restrictive and exclusionary system of protection.[53] However, the law was not very successful and such encroachment and illegal trade in forest products persisted. The Act was finally repealed by the *Forests Act* 2005 which is the current law in force. This Act evidently lacked in the promotion of sustainable forests management through communities' participation in the process.

7.4.4 Sessional Paper No. 6 of 1999 on Environment and Development

This Sessional paper contained some useful provisions on forests management. It stated that development and forestry do conflict. This is because forest land is often required for agriculture, industry, human settlements, and development of infrastructure. Poverty causes excessive deforestation by communities for agriculture, human settlements, and also in search of wood fuel, poles, and other forestry products.[54] It thus

[52] Preamble, Cap.385, Laws of Kenya of 1942 (revised in 1982 and 1992).
[53] Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' *Community Conservation Research in Africa: Principles and Comparative Practice*, paper No. 6, (Institute for Development Policy and Management, University of Manchester, 1996), p.7.
[54] *Ibid.*

advocated for poverty reduction as a strategy for forest conservation and consequently achieving sustainable development. One of its objectives is to promote environmental conservation with regard to soil fertility, soil conservation, biodiversity, and to foster afforestation activities.

The policy recognises that the biggest threat to forest resources is poor management practices, including subsidized prices of products and services, poor accounting and auditing, availability of funds, delegation of authority and absence of environmental instruments to assess the impacts of change of use of gazetted forest lands.[55] It also recognized that one of the environmental challenges at the time was minimal participation by communities in the management and conservation of forests resources due to the prevailing attitude that forests belong to the State and that communities have no stake.

7.4.5 Environmental Management and Conservation Act, 1999

The *Environmental Management and Conservation Act* (EMCA) [56] is the overarching law in environmental matters in Kenya. It is a framework environmental law establishing legal and institutional mechanisms for the management of the environment. It provides for improved legal and administrative co-ordination of the diverse sectoral initiatives in order to improve the national capacity for the management of the environment. Section 44 of the Act, mandates the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of hill sides, hill tops, mountain areas and forests. It also requires the formulation of regulations, guidelines, procedures and measures aimed at controlling the harvesting of forests and any natural resources located in or on a hill side, hill top or mountain areas so as to protect water catchment areas, prevent soil erosion and regulate human settlement. Section 46(1) requires every District Environment Committee to specify the areas identified in accordance with section 45(1) as targets for afforestation or reforestation. A District Environment Committee is to take measures, through encouraging voluntary self-help activities in their respective local community, to plant trees or other vegetation in any areas specified under subsection (1) which are within the limits of its jurisdiction.[57]

It is noteworthy that such afforestation may be ordered to be carried out even in private land. Clause (3) thereof is to the effect that where the areas specified under subsection (1) are subject to leasehold or any other interest in land, including customary tenure, the holder of that interest shall implement measures required to be implemented

[55] *Ibid.*
[56] No. 8 of 1999, Laws of Kenya.
[57] S. 46(2), No. 8 of 1999.

by the District Environment Committee, including measures to plant trees and other vegetation in those areas.

Under section 48, the Director-General with the approval of the Director of Forestry, may enter into any contractual arrangement with a private owner of any land on such terms and conditions as may be mutually agreed for the purposes of registering such land as forest land. The powers of the Authority include the issuance of guidelines and prescribing measures for the sustainable use of hill tops, hill slides and mountainous areas.[58] To promote environmental justice, section 48 (2) prohibits the Director-General from taking any action, in respect of any forest or mountain area, which is prejudicial to the traditional interests of the indigenous communities customarily resident within or around such forest or mountain area.

The Second Schedule (S.58 (1), (4) to the Act provides for forestry related activities including: timber harvesting; clearance of forest areas; and reforestation and afforestation to undergo through an Environmental Impact Assessment. The Act thus promotes forestation by regulating activities that would cause deforestation in the country thus contributing towards efficient management of forest resources in the country.

7.4.6 Forest Policy 2005 and the Constitution of Kenya 2010

This policy[59] was formulated in 2005, and came into force in 2007 with the broad objective of providing continuous guidance to all Kenyans on the sustainable management of forests due to the inadequacies of Sessional Paper No. 1 of 1968 which did not provide for adequate harmonization between resource policies. The policy sought to harmonize other existing policies relating to land and land-use, tenure, agriculture, energy, environment, mining, wildlife and water.

The specific objectives of the revised Forest Policy were to: contribute to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees; contribute to sustainable land use through soil, water and biodiversity conservation; promote the participation of the private sector, communities and other stakeholders in forest management to conserve water catchment areas, create employment, reduce poverty and ensure the sustainability of the forest sector; promote farm forestry to produce timber, wood fuel and other forest products; promote dry land forestry to produce wood fuel and to supply wood and non-wood forest products; promote forest extension services to enable farmers and other forest

[58] S. 47(1), No. 8 of 1999.
[59] Sessional Paper No. 1 of 2007, on Forest Policy.

stakeholders to benefit from forest management approaches and technologies; and promote forest research, training and education to ensure a vibrant forest sector.

It also addresses indigenous forest management, farm forestry, industrial forest development, dry land forestry, forest health and protection, private sector involvement and participatory forest management. To facilitate efficient forest management, the policy empowers local communities to take an active role in forest management through community forest associations. It also seeks to encourage the private sector to invest in commercial forestry activities, through leasing, agreements and concessions. To achieve this, the Policy requires the promotion of sustainable management of forests for climate amelioration, soil, water and biodiversity conservation; the carrying out of inventories and valuation of forest resources and their utilization to generate accurate information for decision making; empowerment of local communities to manage forests through community forest associations; sustainable management of forest plantations to realize their maximum potential; forest management, which supports the preservation of religious and cultural sites, traditional medicinal sources, water catchments, and habitats for endemic and threatened species of flora and fauna; the formulation of criteria and indicators for sustainable forest management; and promotion of good governance in the forest sector. The policy also seeks to promote various types of forests namely: indigenous forests, farm forestry, forest plantations, dry land forestry, local authority forests,[60] and private forests. In essence, recognising ownership of forests by the State, Local Authority and private persons is in line with the National Land Policy which requires tenure to land based resources to be aligned to the different land categories namely public, community and private.[61] This would in turn promote sustainable use of forests and allow communities and individuals have access to forests and participate in their conservation and management.

It also seeks to promote an all-inclusive use of forest products and industries by facilitating efficient use of forests for both commercial and subsistence purposes. The Policy's promotion of forest user rights seems to discourage acquisition of tenure rights in forests and promotes the old notion that forests belong to the State and the State only extends user rights to communities without any real ownership of the same. This is explicit when one considers the definition of community forests under the Act.

A community forest is defined as a group of persons with a traditional association with a forest for purposes of livelihood, culture or religion; or are registered as an association or other organization engaged in forest conservation. The problem arises when a community has been living in a forest and then the State decides to deal with a forest in

[60] Created under S. 23 of the Forests Act, 2005.
[61] Para. 96 of the National Land Policy, 2009.

a way that compromises their traditional way of life. It is not clear what would happen if the State decided to involve other persons in the management of a certain forest through concession, under the guise of community participation. For instance, in the case of Republic *v Kenya Forest Service ex parte Clement Kariuki & 2 others*,[62] the Kenya Forest Service had advertised in the Kenya Daily Nation newspaper and called for individuals and interested institutions to apply for concessions in State forest plantations, for parcels of land between 1,000–12,000 hectares each. The issue was whether the Kenya Forest Service was in excess of its mandate by denying the Kenyan public a chance to participate in the decision whether or not to invite bidding concessions for public forest lands, and before advertising the forest lands in the daily newspaper. It was held that there ought to have been public participation. However, the question that arises is whether if the case involved a community forest, whether there would have been two levels of consultations involving the general public and/or the indigenous community. Would such a community be recognized as a marginalized community, thus calling for special attention?

7.4.7 The Forests Act, 2005

This Act provides for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country. It seeks to establish legal and institutional frameworks on forest management in Kenya. The Act applies to all forests and woodlands on state, local authority and private land.[63] It also establishes several institutions for the management of forests in the country. The Kenya Forest Service is established to, *inter alia*, manage all the state forests.[64] Under section 12(2), a Forest Conservation Committee is established in each forest conservancy area or part thereof to advice the Kenya Forest Service's Board on all matters relating to management and conservation of forests in that area. Section 17 thereof, establishes a Forest Management and Conservation Fund, to be used, *inter alia*, in the development of forests; the maintenance and conservation of indigenous forests; the promotion of commercial forest plantations; and the promotion of community-based forest projects.

Part III of the Act deals with the creation and management of forests. Section 20 thereof provides that all forests in Kenya other than private and local authority forests are vested in the State, subject to any rights of user in respect thereof, which by or under the Act or other written law, have been or are granted to any other person. The law also provides for community participation in forests management in Part IV (ss. 45-48).

[62] [2013] eKLR.
[63] S. 1.
[64] S. 3.

Section 45 provides for registration of community forest associations in order to participate in forest management. Part V (ss. 49-58) thereof deals with the enforcement of the provisions of this Act. The most outstanding aspect of this Act is the devolvement of the management of forests to the local level, incorporating even non-state actors such as NGOs and community-based organisations (CBOs). Decision making powers are also distributed amongst various bodies such as the committees as against monopoly powers of the Cabinet Secretaries as was the case before.

7.4.8 Vision 2030

Kenya's long-term strategic development is outlined in *Vision 2030*.[65] *Vision 2030* is based on three main pillars: economic, social, and political. Regarding the environment, the policy states that Kenya aims to be a nation that has a clean, secure and sustainable environment by 2030. It, thus, envisages the expansion of forest cover in the country from the current 3% to the internationally recommended 10%. Sustainable forests management is thus identified as part and parcel in the sustainable economic development of the country. Considering that agricultural productivity is significantly dependent on the health of forests and a healthy environment,[66] sustainable and efficient forestry management must be pursued.

7.4.9 The Forest Conservation and Management Bill, 2014

This Bill seeks to provide for the establishment, development and sustainable management of forest resources. The Act is meant to apply to all forests on public, community and private lands and it seeks to ensure that the management of forests is devolved to the counties. Clause 20 of the Bill provides for the establishment of forest conservation committees which are to consist of among others county chief officers in charge of forestry in the county. There are further established county forest conservation committees in every county which are to be tasked with the management of forests in their respective counties and particularly the management of community forests. The committee in each County is to be chaired by a person appointed by the County Governor and is required to be a person having at least five years' experience in forest conservation and management.[67] The activities of these committees are to be overseen by the County Executive Committees that have been established in various counties.

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[65] Republic of Kenya, (Government Printer, Nairobi, 2007).
[66] Nyong'o, P.A., 'Statement by the Minister for Planning and National Development,' June 2003, p. 29. Available at *http://www.statehousekenya.go.ke/government/pdf/erp.pdf* [Accessed on 7/01/2014].
[67] Forest Conservation and Management Bill, 2014, Clause21 (3) (a).

Under the Bill, it is the mandate of the County Government to manage county forests and the County Government may also, after consultation with the National Land Commission and with the approval of the Cabinet Secretary, declare an area to be a community forest.[68] The County Government is thus to ensure the sustainable management of these forests and also to ensure that measures are put in place to ensure that the local communities benefit from the forests.

The County Governments are to further ensure that there is encouragement of participation by members of the forest communities in the management of the forest areas. In this regard, the Bill provides that members of a forest community may register a community forest association which is to participate in the conservation and management of public or community forests[69] and the Bill has further recognized the need to respect the customary rights of communities over the use of forests.

7.4.10 The Nyayo Tea Zones Development Corporation

The Nyayo Tea Zones Development Corporation[70] was established as a State Corporation with the aim of promoting forest conservation by providing buffer zones of tea and assorted tree species to check against human encroachment into the forestland.[71] It was also a strategy to exclude local communities from active participation in forests management. The Corporation is mandated to protect gazetted forests from human encroachment by establishing continuous belts of tea bushes and assorted tree species which act as a buffer between forests and communities living adjacent to the forests.[72] Although this approach was originally used to exclude the local communities from forests management, with time it has proved to be a blessing in disguise as the Corporation has established 5,235 hectares of forest cover in form of assorted tree species, thus playing a leading role in the preservation of biological diversity of Kenya's highland forests. In addition, the tea zones have acted as 'live' fences against human intrusion. Further, in the areas where the Corporation is situated, illegal logging has been greatly reduced and encroachment stopped.[73]

7.4.11 Kenya Forest Service (KFS)

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[68] *Ibid*, Clause33.
[69] *Ibid*, Clause49.
[70] Established through Legal Gazette Notice No. 265 of 1986.
[71] Nyayo Tea Zones, available at <*http://www.teazones.co.ke/index.php/2013-08-08-12-01-17/background-history*> [Accessed on 7/01/2014].
[72] *Ibid.*
[73] Forest Conservation; See *http://www.teazones.co.ke/index.php/template/forest-conservation* [Accessed on 7/01/2014].

The Kenya forest service is established under section 3 of the Forests Act 2005 as a corporate body. Section 4 therein sets out the functions of the Service which include but not limited to, formulating for approval of the Board, policies and guidelines regarding the management, conservation and utilization of all types of forest areas in the country and managing all state forests.[74] Section 4(l) tasks KFS to collaborate with other organizations and communities in the management and conservation of forests and for utilization of biodiversity therein.

7.4.12 Kenya Wildlife Service (KWS)

The Kenya Wildlife Service (KWS) is tasked with the management of all indigenous forests falling within national parks, national reserves and game sanctuaries. KWS is to collaborate with KFS and other organisations for efficient management of the forests. The functions of the Service are not restricted to the conservation of animals (fauna) only but also vegetation (flora) considering that these vegetation/forests forms the habitat for the animals and must therefore be protected.

7.4.13 National Environment Management Authority (NEMA)

NEMA is established under section 7 of the *Environmental Management and Coordination Act* (EMCA),[75] as a corporate body. The Authority as established is 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 environment.[76]

In light of the foregoing, the Authority is to, *inter alia*: co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya; take stock of the natural resources in Kenya and their utilisation and conservation; establish and review in consultation with the relevant lead agencies, land-use guidelines; examine land use patterns to determine their impact on the quality and quantity of natural resources; and advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be.

[74] S. 4, *Forests Act*, 2005.
[75] Act No. 8 of 1999.
[76] S. 9(1), No. 8 of 1999.

NEMA is thus obligated by EMCA, to collaborate with the other institutions in the management of forests in the country. Although it is a good idea that all the foregoing institutions have been tasked by various laws to play a role in the management and/or conservation of the forests (either as part of the natural habitat or part of the environment), the flipside is that there is the risk of overlapping and conflicting mandates resulting in mismanagement of forests. It is for instance not clear, when guidelines on the management of some hills (which may be a forest) should be issued by NEMA and when KFS should do so. It would even become complicated if the said area is a habitat for wildlife, in which case KWS could claim that this falls within its mandate. Unless and until, such overlapping and conflicting mandates are clarified, it is unlikely that these institutions will coordinate in the promotion of forestation in Kenya.

7.5 Role of Forests in Poverty Alleviation

Sessional Paper No. 9 of 2005 states that forests can contribute to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees. However, forest conservation has also led to poverty among Kenyan communities. This is evident in the Mau Forest Complex, where communities have been evicted from their traditional homes in the interest of forest conservation. Effective Community-Based Forest Management (CBFM) can be a solution in areas where there are competing land uses. Community-based natural resource management can be designed to devolve rights over the management of natural resources to local communities to achieve the dual objectives of biodiversity conservation and poverty alleviation.[77] For instance, CBFM is able to provide prospects for reducing vulnerability through access to food and income to meet consumption needs, and spreading risks and building assets that would raise communities above the poverty line, without necessarily providing immediate cash.

Communities living next to forests in Kenya can, therefore, undertake income generating projects around the country to reduce poverty, create jobs and co-manage forests with the Kenya Forest Service (KFS) and the Kenya Wildlife Service (KWS), under Participatory Forest Management (PFM) frameworks.[78]

It is, however, worth noting that effective management of forest resources calls for the protection of the land rights of communities living in these areas. It has been noted with concern that customary rights of communities over forest resources, are usually

[77] Suich H., 'The Impacts on Poverty of Community Based Natural Resource Management,' (Australian National University, 2012), p. 1, available at *www.isee2012.org/anais/pdf/908.pdf* [Accessed on 5/01/2014].
[78] Sitole, D., Participatory forests management to reduce poverty in Kenya, *The African Confidential*, December 11, 2012. Available at African confidential.com/participatory-forests-management-to-reduce-pov... [Accessed on 5/01/2014].

under threat due to the subjugation of customary rights. Kenyan courts have also not done much to ensure protection of these rights. The case of *William Yatich Sitetalia and others v Baringo County Council and others,*[79]is a clear illustration of this. In this case, the Endorois community challenged the manner in which the joint trustees of the Lake Bogoria land managed trusteeship over the land. The community further challenged the decision to evict them from the game reserve and also denial of access to grazing sites and thus sought a declaration that the land around L. Baringo was their property held in trust by the joint trustees. Their claim was dismissed by the court on 19th April, 2002 and the court stated that the law did not allow individuals to benefit from such resources due to the simple fact that they happen to be born close to it.

The Endorois community subsequently resorted to the African Commission on Human and People's Rights in 2003. The Commission faulted the Trust Land regime in Kenya stating that this system did not provide adequate protection to the rights of communities, in this case the Endorois Community. The Commission, thus, stated that the community has rights over their traditionally held lands in the forest areas.[80] The need for the involvement of members of the community in the management of forest resources was seen in *Republic v Kenya Forest Service Ex parte Clement Kariuki & 2 others,*[81]discussed earlier.

It is, therefore, imperative that the rights of communities over forestlands in needs to be guaranteed to ensure that the communities effectively participate in the conservation of these areas. Further, mechanisms are to be adopted to ensure that there is sustainable co-existence between the communities in these areas and the resources in the forested areas in order to ensure that the communities do not engage in activities that are destructive to the forests.

7.6 International Best Practices in Forest Management.

At the international level, there are certain approaches that have been harnessed to promote effective management of natural resources including forests. States therefore urged to adopt them so as to promote sustainable natural resource use in the wake of sustainable development. These approaches include:

7.6.1 Sustainable Forest Management

Although there is no universally agreed-on definition for sustainable forest management (SFM), it refers to the management of both private and public forests to

[79] High Court Miscellaneous Civil Case No. 183 of 2000; (2002) [eKLR].
[80] Communication 276/2003, *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) v Kenya.*
[81] [2013] eKLR.

ensure that they continually provide, not only a sound supply of renewable forest products for present and future generations, but also maintain their environmental values and social services.[82]In essence, forest stewardship must be done in a sustainable manner ensuring that the products and environmental services they provide are available for present and future generations. This was the consideration that the court took in deciding the case of *Oposa, et al v Fulgencio S. Factoran, Jr., et al*[83] which was a class action seeking the cancellation and non-issuance of timber licence agreements. The Petitioners' position was that, in seeking to ensure the protection of the environment, they were acting on their behalf and that of future generations. International agreements and national policies demand that foresters demonstrate that their forestry practices meet independent criteria of sustainability.[84]

7.6.2 Community-Based Natural Resource Management (CBNRM)

Community participation in natural resource management is traceable to the Rio Declaration of 1992.[85] Principle 10 of the Rio Declaration states that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual is to have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States are to facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, are to be provided.

Community-Based Natural Resource Management (CBNRM) is an approach where local communities are afforded a chance to play a more active role in the management of natural resources in their locality. There has been a paradigm shift in conservation and natural resource management (NRM), from the costly state-centered approach towards approaches in which local people play a much more active role in NRM decision-making and benefits-sharing.[86] It is, however, important to note that such powers are not completely taken from the State to the locals. The State still retains its powers in: protecting the wider 'public goods' (watersheds, biodiversity, carbon sinks and other ecological services);establishing the policy, legal and social frameworks and conditions

[82] Available at *http://www.forestlearning.edu.au/forests-sustainability* [Accessed on 5/01/2014].
[83] G.R. No. 101083, July 30, 1993.
[84] *Sustainable forest management*, available at *http://www.forestry.gov.uk/forestry/infd-7m8gka*, [Accessed on 6/01/2014].
[85] A/CONF.151/26 (Vol. I).
[86] Shackleton, S., *et al*, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to Participate and Benefit?' p. 1, *Natural Resource perspectives*, No. 76, March, 2002, p.1.

needed for local management to succeed; facilitating and regulating private activity; mediating conflict; helping local organisations enforce locally designed and monitored regulations and sanctions; providing legal recourse; providing technical assistance; addressing local inequality and ensuring representation of marginal groups so that downward accountability of organisations receiving devolved authority is assured; helping communities to defend their rights, including protection against powerful external groups, such as mining and timber companies and organized traders; and supporting local capacity building.[87]

The above is captured under Article 69 of the current Constitution of Kenya 2010 on the obligations of the environment which include, but are not limited to ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.[88] However, 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.[89] There are different views regarding the effectiveness of CBNRM in promoting equity in benefit sharing. Some argue that it actually promotes poverty among the forest communities, while others argue that it alleviates poverty and results in positive outcomes. However, what really matters is the quality of community participation. If communities are made to participate in a beneficial way, then this can only result in lives' being uplifted.

7.6.3 Community-Based Forest Management (CBFM)

CBFM is informed by the ideals of community-based Natural Resource management. CFM is undergirded by the principles of equity and participation and buttressed by the concept and approaches based on integrated natural resource management.[90] The history of community-based forest management (CBFM) is traced back to early African agrarian development, starting from the traditional forms of forest management that were practiced by tribal communities for millennia, prior to colonial administration.[91] Natural resource governance among traditional societies was governed by community management systems in Africa. Traditional management systems had precise control instruments and mechanisms based on shared norms, values and

[87] *Ibid*, p.2; See also Art. 66 of the Constitution of Kenya 2010 which provides for State's regulation of land use and property.
[88] Art.69(1).
[89] Art.69(2).
[90] Odera J., 'A report prepared for the project: Lessons Learnt on Sustainable Forest Management in Africa Lessons Learnt on Community Forest Management in Africa,' *National Museums of Kenya*, July 2004, p. 8.
[91] *Ibid*, p. 9.

regulations that were based on community-specific customary laws, and these promoted sustainability and environmental conservation.[92] Unwritten, informal and systematic taboos, rituals and rules, regulated interactions between individuals and the natural environment. Decision-making institutions focused on utilizing and managing environmental resources, based on the knowledge of the community and enforced compliance through their ethics, norms and beliefs.[93] The community normally held the land with clearly defined spatial and temporal use-rights allocated to its members. Accordingly, indigenous tenure systems often provided high levels of tenure security.

The Stockholm Conference on the Human Environment of 1972, advocated for sustainable management of forests. The 8th World Forestry Congress in 1978 ("Forests for People") gave international recognition to the importance of developing forests in ways that directly benefit local communities. The 9th World Forestry Congress in 1985 emphasized restructuring national forest policies and incorporation of locals in forest development. The *African Convention on the Conservation of Nature and Natural Resources*, states under Article II, that as a fundamental principle, the contracting States must undertake to adopt the measures necessary to ensure conservation, utilization and development of soil, water, flora and fauna resources in accordance with scientific principles and with due regard to the best interests of the people. Such measures must be people-centered, if their interests are to be taken care of.

In essence then, CBFM provides democratic strategies that incorporate communities in the forest management planning. This enables them to factor their needs and aspirations in the forest management plans. It is already agreed that the principal objectives of CBFM, regardless of who promotes them, are: to arrest forest resource degradation; to enhance production of multiple products; to enable communities to have a secure access to, and ownership of, the resources and their benefits, through empowerment and building capacity for forest management; and to promote environmental protection through forest conservation and biodiversity management.[94]

In Kenya, decentralization and devolution will be useful in promoting the objectives of CBFM thus helping to secure access to forest resources, tenure rights, and provide holders with legal and statutory support against the industry and corporations encroachment.

[92] *Ibid.*
[93] *Ibid.*
[94] *Ibid,* p. 28.

7.6.4 Forest Stewardship Council

The Forest Stewardship Council (FSC) is an international not for-profit, multi-stakeholder organization established in 1993 to promote responsible management of the world's forests. It is concerned with standard setting, certification and labeling of forest products. The Forest Stewardship Council (FSC) seeks to promote business responsibility, by identifying and promoting more sustainable business practices. The goal of FSC is to promote environmentally responsible, socially beneficial and economically viable management of the world's forests, by establishing a worldwide standard of recognized and respected Principles of Forest Stewardship.[95]All ten principles and criteria must be applied in any forest management unit before it can receive FSC certification. The Principles & Criteria are applicable to all forest types and to all areas within the management unit and included in the scope of the certificate. The P&C are applicable worldwide and are relevant to forest areas and different ecosystems, as well as cultural, political and legal systems.[96]

The ten FSC Principles require the forest owner or manager to carry out activities by paying due regard to: compliance with laws and FSC Principles; tenure and use rights and responsibilities; indigenous peoples' rights by identifying and upholding indigenous peoples' rights of ownership and use of land and resources; community relations and worker's rights by maintaining or enhancing forest workers' and local communities' social and economic well-being; benefits from the forest by maintaining or enhancing long term economic, social and environmental benefits from the forest; environmental impact by maintaining or restoring the ecosystem, its biodiversity, resources and landscapes; management plan by having a management plan, implemented, monitored and documented; monitoring and assessment to demonstrate progress towards management objectives; maintenance of high conservation value forests, to maintain or enhance the attributes which define such forests; and, plantations, to plan and manage plantations in accordance with FSC Principles and Criteria.[97] These principles are useful in promoting sustainable management of forests resources.

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[95] FSC Principles and Criteria for Forest Stewardship, FSC-STD-01-001 (version 4-0) EN, Approved 1993, Amended 1996, 1999, 2002. Available at *https://ca.fsc.org/download.principles-criteria-v4.7.pdf* [Accessed on 6/01/2014].

[96] FSC Principles and Criteria International Guidelines to forest management. Available at https://ic.fsc.org/principles-and-criteria.34.htm[Accessed on 6/01/2014].

[97] The 10 Principles: Ten rules for responsible forest management, available at *https://ic.fsc.org/the-10-principles.103.htm*[Accessed on 6/01/2014].

7.6.5 REDD & REDD+ (Reducing Emissions from Deforestation and Forest Degradation)

REDD is an attempt to create a financial value for the carbon stored in forests, offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development. "REDD+" goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks.[98] The role of forests in climate change mitigation and adaptation is significant after the ratification of the United Nations Framework Convention on Climate Change (UNFCCC) in 1993 when Parties committed themselves to conserving available carbon reservoirs, including forests.[99]

Kenya's, Readiness Preparation Proposal (R-PP) outlines the process by which the Government of Kenya seeks to develop its national strategy for participating in an evolving international mechanism for reducing emissions from deforestation and forest degradation, conserving and enhancing stocks and sustainably managing forests (REDD+).[100]The Government of Kenya commits itself to implementing environmentally and socially sustainable land-use and forest policies. The aim is to design policies and measures to protect its remaining forest resources from deforestation and degradation and to enhance forest carbon stocks in ways that help improve local livelihoods and biodiversity.[101]

The Kenya Forest Service (KFS) is mandated with coordinating REDD+ readiness activities in Kenya and establishing a secretariat for the purpose, consisting of representatives from each of its core management programmes, that is, Natural Forest Conservation and Management, Industrial Forest Plantations, Farm Forestry and Extension and the Drylands Forestry Development Programme.[102] There is also a National REDD+ Steering Committee (RSC) charged with the role of: Policy guidance and implementation of REDD+ activities; national coordination of inter/intra-sectoral REDD+ activities; approval of REDD+ work plans and budgets; resource mobilization; assurance of timely delivery of a national REDD+ strategy, national reference emission level and an effective carbon monitoring system; monitoring and evaluation; quality control of REDD+ preparedness deliverables; and providing a mechanism for international

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[98] *About REDD+, available at http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx*[Accessed on 6/01/2014].

[99] REDD+ Policy Brief, available at *www.forestryandwildlife.go.ke/wp-content/uploads/.../Policy-Brief.pdf* [Accessed on 6/01/2014].

[100] Governments of Kenya, Revised REDD *Readiness Preparation Proposal*, Kenya, Submitted to The Forest Carbon Partnership Facility, (Government Printer Nairobi, October, 2010).

[101] *Ibid.*

[102] *Ibid.*

collaboration with other REDD+ processes.[103] Proper coordination of the activities of these bodies would facilitate Kenya's compliance with REDD+ through expansion of forest cover in the country.

7.7 Attaining a tree cover of 10% in Kenya

The United Nations requires that every State should ensure that its territorial land is covered by trees in at least 10% of the surface land area. This, therefore, lays an obligation on States to ensure that this is achieved. FAO's, Forest Resource Assessment of 1990, classifies Kenya among the countries with low forest cover of less than 2% of the total land area.[104] It is for this reason that the Constitution of Kenya 2010, under Article 69 (1) (b) provides that one of the obligations of the State in respect of the environment, is to work towards achieving and maintaining a tree cover of at least ten per cent of the land area of Kenya. There are useful provisions to encourage this in both the Forest Policy 2007 and the *Forests Act*, 2005.

The Forest Policy contains useful policy statements (outlined above) for the promotion of various types of forests in the country, which if implemented through legislation would see Kenya achieve the set standards. It states that the Government will put in place measures to significantly increase the area under forest cover, with the aim of attaining at least 10% within the next decade. To attain this level of forest cover, the Government will promote farm forestry, intensify dryland forest management, involve the private sector in the management of industrial plantations and also promote community participation in forest management and conservation.[105]

Forest cover is defined as an area more than 1 ha in extent and having tree canopy density of 10 percent and above. Tree cover on the other hand, is defined as an area covered by crown of trees that is too small to be delineated by digital interpretation of remote sensing data at 1:50, 000 scale used for forest cover assessment.[106] In this regard, tree cover is used to define an area that is too small to be considered to be a forest cover and hence not having a canopy density of more than 10 percent.

According to the Ministry of Environment, Water and Natural Resources, Kenya requires Kshs. 7.6 billion annually, to purchase 384 million seedlings in order to meet the United Nations requirement of a 10% forest cover by the year 2030.[107] This is not an easy

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[103] *bid.*
[104] Kenya Broadcasting Corporation, available at *http://www.kbc.co.ke/kenya-to-achieve-10pc-forest-cover-by-2030/* [Accessed on 6/01/2014].
[105] Forest Policy, 2007, p. i.
[106] See http://www.fsi.nic.in/sfr2003/forestcover.pdf [Accessed on 6/01/2014].
[107] Enchanted Landscapes Travelogue, 'Kenya needs Kshs. 7.6 billion to reach 10% forest cover by the Year 2030,' p. 1. Available at

task and requires the involvement of the government, communities and even the private sector to ensure that this is achieved. For instance, a tripartite collaboration between the private sector, Kenya Forest Service and the Green Belt Movement, where the private sector was providing funding to tree planting and the Green Belt Movement nurturing trees for a period of three years before handing them over to the Kenya Forest Service (KFS), has seen Kenya gradually start reversing deforestation in Kenya's five water towers; namely Mt. Kenya, the Aberdare Ranges, the Mau Complex, Mt. Elgon and the Cherangani Hills.[108]

The Green Belt Movement is also working with rural communities, particularly women, to help them address their needs for essential basic services such as water, fertile soil, and a healthy ecosystem by planting trees on critical watersheds.[109] With such collaboration, it is indeed possible to achieve the 10% tree cover in the country. The government must start to give incentives to farmers to plant more trees on their farms,[110] because it is agroforestry and commercial tree farming together with the protection of government-controlled forests that can help the country reach its target of 10% tree cover.[111]

Further, the government can put in place measures to ensure that the vast ASALs in the country are put to productive use through the planting of trees in these areas. This is in recognition of the fact that a large percentage of forested areas in the country exist in areas which are agriculturally productive and which receive adequate rainfall. This is despite the fact that ASALs in the country cover 80% of the total land mass in the country.[112] These areas are largely unproductive and covered with sparse vegetation. The need to ensure that forests are also planted in ASALs in the country comes against the realisation that the practice has the potential effect of strengthening the economic base of the inhabitants of the areas and in effect strengthening the economy of the country.[113]

ASALs areas also offer a great potential for the country to attain the 10% tree cover and hence the importance of ensuring effective management of forest resources in the

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http://www.kenyaforestservice.org/index.php?view=article&catid=223%3Ahict&id=254%3Akenya-needs-ksh-76-billion-to-reach-10-forest-cover-by-the-year-2030&format=pdf&option=com_content&Itemid=98.[Accessed on 6/01/2014].

[108] Kenya Broadcasting Corporation, 'Kenya to achieve 10 percent forest cover by 2030,*' available at http://m.news24.com/kenya/National/News/Kenya-to-achieve-10-percent-forest-cover-by-2030-20130415* [Accessed on 6/01/2014].

[109] *Ibid.*

[110] Ouya, D., 'Agroforestry key to reaching 10% tree cover in Kenya,' November 12, 2012. Available at *http://www.worldagroforestry.org/newsroom/media_coverage/agroforestry-key-reaching-10-tree-cover-kenya[Accessed on 6/01/2014]*.

[111] *Ibid.*

[112] Republic of Kenya, *REDD Readiness Preparation Proposal Kenya* (Government Printer, Nairobi, 2012].

[113] Republic of Kenya, *Forest Policy, 2014*, s. 4.3.

ASALs. It is important to note that most of the ASALs are usually located in pastoral areas where land is largely held by communities. In seeking to ensure that these areas are put to effective use, it is important to clearly delineate the property rights in the land in order to ensure that the clearly identified rights holder(s) is able to put the land to effective use and is able to get enough incentives to plant trees on the land.

The Forest Policy requires the government to undertake measures driven at ensuring the encouragement of planting of trees in ASALs and ensuring that the genetic resources in these forests are conserved. This is of necessity in seeking to encourage local communities to participate in conservation initiatives, as consumptive uses of forests will be allowed in return of the conservation by the communities who gain from the resources in the forests. Apart from increasing the forest cover in the country, the development of forests in ASALs, has the effect of improving the livelihoods of the communities who live in these areas as it can provide some income for them.

Various initiatives have thus been undertaken to drive the country towards attainment of the 10% forest cover. The first step has been through a review of the legislative and policy framework on Forests. The Forest Policy has been adopted and it seeks to among others ensure that the legislation governing forest resources in the country is in line with the Constitution. The *Forest Conservation and Management Bill 2014* has further provided for incentives that are to be pursued for increasing forest and tree cover in the country. Among these is the need to encourage communities to participate in the management of forests and also the provision of tax incentives meant to increase investments in forest land use and also to prevent the degradation of forests.[114]

Farm forestry is a viable alternative for small- and large-scale farmers worldwide as it has the potential of improving forest/tree cover across the globe.[115] Section 2 of the *Forests Act 2005* defines "farm forestry" to mean the practice of managing trees on farms whether singly, in rows, lines, boundaries, or in woodlots or private forests. In addition, Participatory Forest Management (PFM) offers a viable option in the achievement of the ten percent tree cover.[116] Since this is provided for in the provisions of the Forests *Act* 2005, it is therefore a matter of political goodwill that is required to ensure its success.[117] There is also need for involving all stakeholders including the State, private sector and donors to ensure that they all play their relevant roles in the process. Communities should be involved more by distributing tree seedlings to them to encourage agroforestry. Where

[114] SS. 54-56.
[115] Oeba, V.O., *et al*, "Modeling Determinants of Tree Planting and Retention on Farm for Improvement of Forest Cover in Central Kenya," *ISRN Forestry*, Vol. 2012 (2012), Article ID 867249, p. 14.
[116] See generally Koech C.K., *et al*, 'Community Forest Associations in Kenya: challenges and opportunities,' (Kenya Forestry Research Institute, 2009).
[117] Part IV (SS. 45-48), No. 7 of 2005.

there are no reliable sources of water, the government should strive to ensure that such people in the areas access water for both home use and irrigation so as to act as an incentive. Agroforestry carries with it a huge potential to ensure successful forestation of the country. Donors can facilitate the funding for the production and distribution of trees' seedlings to the communities. Private sector can participate in the process through corporate social responsibility and help in the production and planting of trees.

7.8 Conclusion

Efforts to tackle climate change cannot bear any meaningful fruits without the world's forests since the transition to sustainable, resource-efficient and low-carbon economies will depend on forest resources.[118] One of the national values and principles of governance is sustainable development, and if this is to be achieved, then due attention has to be paid to the efficient management of forests in the country. Efficient and sustainable management of forests in the country, however, requires the participation of all the concerned stakeholders, as well as the citizenry.

[118] FAO, 'Developing effective forest policy: A guide', *FAO Forestry Paper*, Rome 2010, p. v. Available at *http://www.fao.org/docrep/013/i1679e/i1679e00.pdf*[Accessed on 6/01/2014].

Chapter Eight

Water and Wetlands

8.1 Introduction

Water is essential for the sustenance of human life. It is also vital for survival of living things and for the health of virtually all ecosystems. Water is necessary in the socio-economic development of a country. Domestically, water is used for cooking, bathing, feeding livestock, farming amongst other uses. Commercially, it is used in large and small-scale agriculture, in generating electricity and in factories. Despite its importance in sustaining life and in economic development, water shortages continue to be experienced in both the rural and urban areas of Kenya, and the world at large. It is estimated that over 2.6 billion people are living without access to improved sanitation facilities, and nearly 900 million people are not receiving their drinking-water from improved and safe water sources.[1] Kenya is classified as a water scarce country, and there is therefore a need to manage the scarce water resources sustainably to ensure adequate supply of clean water to all Kenyans. The recognition of a human right to water and sanitation in international law[2] and in municipal laws, now imposes obligations on States to undertake a raft of measures and steps in conserving and protecting water resources and in ensuring that all have access to water and sanitation services.

Wetlands are equally important natural resources and play important functions in the ecosystem.[3] They are, however, threatened ecosystems as they are considered to be of no much use and are thus often converted into agricultural lands. This Chapter discusses how these important resources can be sustainably managed to benefit all Kenyans. It also reviews existing policy, legal and institutional frameworks to assess their efficacy in water and wetlands governance.

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[1] World Health Organisation, UN-*Water Global Annual Assessment of Drinking Water and Sanitation - Targeting Resources for Better Results*, May 2010, available at *http://www.who.int/water_sanitation_health/publications/UN-Water_GLAAS_2010_Report.pdf*[Accessed on 1/03/2014].

[2] On July 28, 2010, the United Nations declared access to clean, safe drinking water to be a basic human right everywhere in the world.

[3] Barbier, E.B., "Economic valuation of wetlands: A guide for policy makers and planners," *Ramsar Convention Bureau*, Switzerland, 1997, pp. 2-3.

8.2 Kenya's Water Resources

Kenya is vested with vast water resources which are distributed in various parts of the country. Despite this, the country has not been able to meet its water demands. Although there is no actual physical global shortage of water, the resource is unevenly distributed over the surface of the earth and making access difficult to many people.[4]

In Kenya, adequate water is available only in 20% of the landmass in the country and a large portion of the country constitutes arid and semi-arid lands (ASALs).[5]These resources have been the subject of numerous conservation initiatives as the performance of the economy and poverty reduction are hinged on the country's water resources.

Kenya is considered to be a water scarce country and the amount of renewable surface water in the country is estimated at 19 500 million m^3 or 650 m^3 per capita, which is expected to drop to 250 m^3 per capita in 2025 when the population is projected to rise to 60 million people.[6] This trend is evidently dangerous and it means that there is likely to be an increase in the number of ASALs due to the depletion of the resources and the degradation of the remaining few water resources in the country.

The continued depletion of water resources in the country comes against the backdrop of continued increase in demand for water resources which is attributed to the increases in population in the country.[7] It is estimated that in 1995, the daily demand for water in the country was 2,186,600 $m.^3$ This increased to 4,183,200 m^3 in 2010,[8] forming the backdrop of initiatives driven at ensuring that mitigation measures are put in place to ensure that there is sustainable water resource development.

Kenya's surface water resources are grouped into five basins namely; Lake Victoria, Athi, Tana and Ewaso Ng'iro basins.[9] These basins have different water yielding potentials. The surface water resources found in these areas are classified as either permanent or seasonal and they constitute of rivers, lakes, dams and ponds. The following table illustrates the major drainage basins in Kenya and their potentials.

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[4] Ludwik T. A. & Utton, Albert E, *International Groundwater Law,* (London Oceana Publications, 1981).

[5] Agwata, J., 'Water Resources Utilization, Conflicts and Interventions in the Tana Basin of Kenya' available at *https://www.uni-siegen.de/zew/publikationen/volume0305/agwata.pdf* [Accessed 26/02/2015].

[6] National Environmental Management Agency, NEMA, *State of the Environment Report, Kenya* (Government printer,2003), pp.53-60.

[7] Ashton, P.J., "Avoiding Conflicts over Africa's Water Resources," *AMBIO: A Journal of the Human Environment,* 31(3):236-242, 2002.

[8] Ministry of Water and Irrigation, quoted in UN Water, 'Kenya National Water Development Report' UN-WATER/WWAP/2006/12.

[9] Government of Kenya, *National Water Master Plan* (Government Printer, Nairobi 1992).

Basin Name	Area /km^2	Mean Annual Rainfall/mm	Annual Discharge/ BCM
Lake Victoria	46 229	1 370	13.80
Rift Valley	130 452	560	3.26
Athi	66 837	740	1.31
Tana	126 000	700	3.70
Ewaso Ng'iro	210 226	410	0.34

Fig. 1.0

*****Source NEMA, 2003[10]

In Kenya, five water towers have been identified to contribute to the water found within these drainage basins, these water towers are; Mt. Kenya, Aberdare Ranges, Cherangani/Tugen Hills, Mt. Elgon and the Mau Forest complex which is the largest and also considered to be the most important water catchment. Several rivers, both permanent and seasonal, arise from these catchment areas and drain into the water basins in various parts of the country.

Apart from the surface water resources, there also exist groundwater resources in various parts of the country which also contribute to the country's water resources. It has been established that the ground water resources constitute 14% of the total water resources in the country. It is estimated that it consists 619 million cubic meters of which, 69% is located in shallow aquifers and 31% in deep ones.[11] The distribution of the groundwater resources varies in quantity from basin to basin. Nonetheless, groundwater is useful in supplementing the surface water in various parts of the country and more importantly in ASALs.

Despite the fact that the country is endowed with several water resources, these resources are faced with numerous challenges which have greatly affected access to water in the country.[12] One such challenge is occasioned by the constantly growing populations which have resulted to increased demands of water, for domestic, agricultural and industrial uses notwithstanding the fact that supply continues to decline. The continued

[10] *State of the Environment Report, Kenya, op cit.*

[11] Agwata, J., 'Water Resources Utilization, Conflicts and Interventions in the Tana Basin of Kenya,' *op cit,* p.15.

[12] Government of Kenya, "Kenya National Water Development Report 2005," Prepared for the 2nd UN World Water Development Report 'Water: A shared responsibility,' 2006, UN-WATER/WWAP/2006/12, pp. 2-8.

increase in population has resulted in reduction of per capita water availability in the country.[13]

Climate change in the country is another phenomenon that has resulted to concerns both locally and globally. In this regard, there have been massive degradations of the catchment areas and which has led to the drying up of many rivers.[14] Erosion of the soil arising from massive flooding in various areas has led to the siltation of dams which are critical in the supply of water, thus negatively affecting the supply of water and resulting in deterioration of water quality.[15]

Groundwater, as an important substitute of surface water also faces depletion due to overexploitation and pollution.[16] In urban areas there is massive leachate from garbage dumps and infiltration of fertilizer and pesticides and pesticide residues from farms.[17]The effect is infiltration of high levels of organics, metals and other toxic substances into water meant for human and animal consumption. Groundwater resources in rural areas are also usually left neglected and are in dire need of rehabilitation.[18]

8.3 Developments in Water Governance in Kenya

In the past, Kenya has had to contend with ineffective water governance. Majority of the people have not had access to reasonable and adequate water services. Moreover, there has been increased destruction of important water catchment areas. This has largely been occasioned by existence of water laws and policies which were a carryover from the colonial era. The first legislation on water was the *Water Ordinance,*[19]enacted to make provision for the employment and conservation of waters and for the regulation of water

[13] See Waswa, J. & Mburu, J., Chapter 5, 'Potential of Dryland Farming in Kenya and Environmental Implications,' in Waswa F., S. Otor & D. Mugendi, eds., *Environment and Sustainable Development: A Guide for Tertiary Education in Kenya*, Vol. 1, School of Environmental Studies and Human Science, Kenyatta University, Downtown Printing Works Ltd, Nairobi, pp. 70-90.

[14] Urama, K.C. & Ozor, N., *Impacts of Climate Change On Water Resources in Africa: the Role of Adaptation* (African Technology Policy Studies Network, 2010), pp. 3-4.

[15] See Richter, B.D., *et al,* "Lost in development's shadow: The downstream human consequences of dams." *Water Alternatives*, Vol. 3(2), 2010.

[16] Roba, A.W. &Mwasi B.N., "Integrating Environmental Dimensions of Poverty Reduction into Local Development Planning and Governance in Kenya," *Report Prepared for the Community Development Trust Fund (CDTF)*, June 2006. p.13.

[17] See generally, Kipkorir, L.J. &Towett, J., "Towards Ensuring a Supply of Sufficient and Quality Water in the Lagam Escarpment and the Kerio Valley in Marakwet District, Kenya," *International Journal of Humanities and Social Science*, Vol. 3(13), July 2013.

[18] See Nicol, A., *et al* (eds.), "Water-smart agriculture in East Africa," In Colombo, Sri Lanka: International Water Management Institute (IWMI), CGIAR Research Program on Water, Land and Ecosystems (WLE), 2015, p.352, Available at *http://www.iwmi.cgiar.org/Publications/wle/corporate/water-smart_agriculture_in_east_africa.pdf* [Accessed on 4/06/2015].

[19] No. 35 of 1929.

supply, irrigation, and drainage.[20] The Ordinance vested ownership of all natural water bodies in the Crown, granted the Governor-in-Council the right of control, and provided for the establishment of a controlling body designated "The Water Board" for the purpose of granting water rights. The Ordinance also made detailed provision for the principles of the relationship between Government as the granter of water rights and the licensees as recipients and holders of water rights. The Ordinance further provided for penalties for offences against its provisions.

Several challenges, however coupled the management of water resources during the colonial times. One such challenge was the restrictions that had been put in place to regulate the manner in which people could have access to water. In this regard, the colonial government arbitrarily imposed sanctions on the usage of water resources during shortages and any initial rights of access to water resources that had been granted could be revoked.[21]

It is worth noting that prior to the introduction of formal water laws, customary water arrangements existed to ensure that individuals were able to access water resources. Through this system, the various African societies were able to sustain and ensure effective and efficient use of water resources. There also existed mechanisms that ensured the various rules that guided the manner in which individuals could access these resources were enforced. The introduction of the formal systems of access to water resources by the colonial administration eroded the African institutions that had been established.[22]

The customary arrangements that existed were largely geographical. In this regard, rules were made by the various communities to govern the manner in which members of the community could access water in the areas they occupied. Colonial rule disoriented the land ownership patterns in the country and as such communities were moved from the land which they initially occupied to other areas. This in effect distorted the arrangements that had been put in place governing access to water resources by members of the community.

The movement of Africans into colonial reserves further worsened the problems that were being faced in the water sector, as the reserves were overpopulated and faced

[20] Colonial Reports-Annual, *Colony and Protectorate of Kenya*, Report For 1929, No. 1510, London, 1930, p.79.

[21] Orindi, V & Huggins, C., 'The Dynamic Relationship between Property Rights, Water Resource Management and Poverty in the Lake Victoria Basin,' paper presented at International workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa,' 26-28 January 2005, Johannesburg, South Africa.

[22] Juuti, P., *et al*, 'Governance in Water Sector-Comparing development in Kenya, Nepal, South Africa and Finland,' ICES, 2007. Available at *http://dspace.cc.tut.fi/dpub/bitstream/handle/123456789/20557/juuti_governance_in_water_sector.pdf?sequence=1* [Accessed 25/02/2015].

numerous sanitation challenges. In order to address these challenges and to further integrate Africans in the formal market economy, the Swynnerton Plan was introduced. The Plan sought to intensify African agriculture and to ensure that Africans holding land could make maximum use of their land.[23]

The adoption of the various policies relating to the supply of water to Africans did not yield much due to the approach taken by the colonial government. The colonial government adopted these policies as a means to curb the growing political pressure from Africans. In this regard, the policies adopted by the government negatively affected the seemingly progressing water sector since the priorities of the administration shifted to containing political pressure rather than water development.[24]

The Water Ordinance was then repealed by the Water Act, Cap 372, which was published in May 1952, and revised in 1962, and in 1972 with minor changes.[25] Under this *Act*, the Ministry of Water Resources Management and Development (MWRMD), National Water Pipeline Conservation, Ministry of Agriculture (MoA), Ministry of Local Government (MoLG) and Ministry of Livestock and Fisheries (MoLF) were all responsible for policy formulation, regulation and service provision. This made several government organs the policy formulators, regulators and service providers, causing confusion and overlapping of roles.

Before 1974, the Ministry of Water and Irrigation was a department in the Ministry of Agriculture. The Ministry was later constituted and remained till 1992 when it was merged with other departments to form the Ministry of Land Reclamation and Regional Development. After 1998, the Ministry was named the Ministry of Water Resources. In 2001, during a major merger of government Ministries and departments, the Ministry of Water Resources was merged with the Ministry of Environment and Natural Resources. In January 2003, through the *Presidential Circular No. 1 / 2003*, the Department of Irrigation and Land Reclamation and the Department of Water were brought together to form the Ministry of Water Resources Development and Management. The creation of the Ministry consolidated the responsibility for the management and development of water resources, irrigation, drainage and land reclamation in one docket. In September 2004, through the *Presidential circular No. 1/2004*, the Ministry was renamed the Ministry of Water and Irrigation, giving recognition to the crucial role played by the

[23] See Thurston A.F., "Smallholder Agriculture in Colonial Kenya: The Official Mind and the Swynnerton Plan," *Cambridge African Monographs* 8, African Studies Centre, 1987.
[24] Juuti, P., *et al*, 'Governance in Water Sector-Comparing development in Kenya, Nepal, South Africa and Finland,' *op cit*, p.24.
[25] Institute of Economic Affairs (IEA), *A Rapid Assessment of Kenya's Water, Sanitation and Sewerage Framework*, June 2007, p.4.

irrigation sub-sector in national development.[26] Currently, the Ministry is called the Ministry of Environment, Water and Natural Resources.

8.3.1 Water Act, Cap. 372 of 1972[27]

This Act sought to make better provision for the conservation, control, apportionment and use of the water resources of Kenya, and for purposes incidental thereto and connected therewith.[28]It vested the water of every body of water under or upon any land in the Government, subject to any rights of user that had been or were granted, or recognized as being vested in any other person.[29] The Government was, therefore, charged with the governance of all the water bodies in the country. The Act did not distinguish between water bodies on private land and public land.

Further, the control of every body of water was to be exercised by the Minister in accordance with the Act.[30] Upon the commencement of the Act, no conveyance, lease or other instrument could convey, assure, demise, transfer or vest in any person any property or right or any interest or privilege in respect of any body of water, and no such property, right, interest or privilege could be acquired otherwise than under the Act.[31] Private persons or the general public could not play any part in the control of these water bodies. The effect of this was rampant misuse of the Ministerial powers resulting in illegal and irregular allocation of water use rights and access. In light of the current Constitution of Kenya, the exercise of such powers may be challenged under the national values and principles of public participation, inclusiveness, transparency and accountability.[32]

The Act established the Water Resources Authority, which was to exercise such powers and perform such duties as were conferred and imposed upon it by the Act.[33] The functions of the Authority could be delegated to any authority, board, committee, body or person. The functions of the Authority were, *inter alia*: to investigate the water resources of Kenya and to advise, and make recommendations to, the Minister on the improvement, preservation, conservation, utilization and apportionment of water resources.[34]

The Authority could also require any person to furnish information relating to any existing or proposed waterworks including particulars as to the use of, and demand for,

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[26] Government of Kenya, Ministry of Water and Irrigation (MoWI) Strategic Plan 2009-2012, (Government Printer, Nairobi, May 2012), p. 8.
[27] Revised Edition 1972 (1962).
[28] Preamble, Water Act, 1972.
[29] *Ibid*, S. 3.
[30] *Ibid*, S. 4.
[31] *Ibid*, S. 6.
[32] Art.10, Constitution of Kenya.
[33] S. 19 (1).
[34] S. 20(1).

water supplies.[35] Evidently missing was a provision requiring the Authority to supply similar information to the general public in relation to any decision that could affect them. The Authority had power to divide Kenya into catchment areas to be governed by a Catchment Board, appointed by the Minister, in consultation with the Water Resources Authority.[36] It is noteworthy from the Act that the regime did not provide for public participation as the Authority was not obligated to consult the public or the community living around the concerned water resources. All the decisions were unilaterally made and at times with adverse effects on the livelihoods of the people depending on such water resources.

The Act established for each province a Regional Water Committee appointed by the Minister, whose duties and responsibilities in respect of such province were, *inter alia*: to advise the Minister on water conservation, development and policy; and to submit to the Water Resources Authority recommendations on water development.[37]It also provided for the appointment by the Minister a Board, to be known as the Water Apportionment Board, which was to be subordinate to the Water Resources Authority.[38]

The Minister had immense powers which included the power to appoint any person or any number of persons to a Local Water Authority for the management and use of water or the drainage or reclamation of lands in any area under a permit granted to it in respect of a community project, and to exercise any powers, duties or obligations that could be delegated to the Local Water Authority by the Water Apportionment Board, and also, subject to the approval of the Minister, to investigate, construct, operate or maintain any community project or any other project for the provision of water within its area.[39]According to the provisions of the Act, the use of water was to be reasonable as well as beneficial in relation to others who would use the same sources of supply or bodies of water.[40] It is noteworthy that the foregoing powers were at times abused at the expense of depletion and degradation of water resources. This is because the powers were often exercised without the participation of the general public in water governance matters.

The Act was also sketchy on measures meant to address such issues as water pollution from urban and industrial waste, degradation of water quality, deforestation, desertification and soil erosion, amongst other issues affecting water quantity and quality. The law did not have much to do with the conservation of water resources. It lacked provisions dealing with water pollution and perhaps this is because it was not clear on

[35] S. 21(1).
[36] S. 22.
[37] S. 24(1).
[38] S. 25(I).
[39] S. 27.
[40] S. 30(1).

what activities could constitute pollution. Management of water resources became complex as it introduced several entities with the mandate of managing water resources. The overlaps in the institutional mandates caused confusion and this had negative impacts on water resource management.

This Act was evidently state-centred in water governance with no provisions on public participation. Decisions were unilateral and it did not adequately address the real issues surrounding water security for the people, since the water governing bodies established therein, were not in direct touch with the local people. There was also duplication of governing bodies with no clear mandate.[41] Most of them depended and operated under the shadow of the Water Resources Authority which delegated its functions to these bodies. Arguably, this did not proffer efficiency but instead promoted laxity due to the duplication of functions. The Act was finally repealed by the *Water Act*, No. 8 of 2002, discussed later.

8.3.2 The National Policy on Water Resources Management and Development (Sessional Paper No. 1 of 1999)

The adoption of this policy saw a shift in practice where the role of the government shifted from that of direct service provision to that of regulation of the water sector. In this regard, the provision of water services was left under the various municipalities, the private sector and communities. The broad objectives that were to be met by the policy are; water supply and sewerage provision, water resource management, legislative framework on water and, financing mechanisms.

According to the Policy, in order to meet these objectives certain measures were to be taken by the government. The government was mandated with ensuring that the available water resources are conserved and protected in order to ensure sustainable utilisation of water resources. In this regard, the Policy created an obligation vested on the government to ensure that legal, policy and institutional safeguards are established to ensure systematic development and management of the water resources.

From the foregoing, it can be seen that the Policy not only addressed the development of water resources but also water conservation in the country. Public participation was further taken into consideration by the Policy. The management of water resources was to take into consideration the views of local actors and also the private sector. Further, the Policy recommended the revision of the Water Act of 1972, resulting in the adoption of a new Water Act in 2002.

[41] See the abovementioned bodies established under the Act.

8.3.3 Water Act, No. 8 of 2002

This Water Act was passed to provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water; to provide for the regulation and management of water supply and sewerage services; to repeal the Water Act (Cap. 372) and certain provisions of the Local Government Act; and for related purposes.[42] It was expected that this law would improve the management, conservation, use and control of water resources in the country and facilitate better access and use of water resources by the general public.

The Act provides that every water resource as contemplated under the Act is vested in the State, subject to any rights of user granted by or under this Act or any other written law.[43] Further, section 4(1) of the Act grants the Minister the power to exercise control over every water resource in accordance with the Act. Under section 5, the right to the use of water from any water resource is vested in the Minister except to the extent that it is alienated by or under the Act or any other written law. These provisions illustrate more of a state-centric approach, rather than a people-centred approach to the control and governance of water resources in the country.

Regarding institutional frameworks on management of water resources, the Act establishes an authority to be known as the Water Resources Management Authority.[44] The Authority is tasked with, *inter alia:* developing principles, guidelines and procedures for the allocation of water resources; to monitor, and from time to time reassess, the national water resources management strategy; to receive and determine applications for permits for water use; to monitor and enforce conditions attached to permits for water use; to regulate and protect water resources quality from adverse impacts and; to manage and protect water catchments; in accordance with guidelines in the national water resources management strategy.[45]

The Minister is also granted the power, after public consultation, to formulate, and publish in the Gazette, a *national water resources management strategy* in accordance with which the water resources of Kenya are to be managed, protected, used, developed, conserved and controlled.[46]It is, however, not clear what amounts to public consultation here and on what elements the public is to be consulted on. The national water resources management strategy is to prescribe the principles, objectives, procedures and

[42] Preamble.
[43] S. 3.
[44] S. 7(1).
[45] S. 8(1).
[46] S. 11(1).

institutional arrangements for the management, protection, use, development, conservation and control of water resources.[47]

Following public consultation, the Authority is to formulate a *catchment management strategy* for the management, use, development conservation, protection and control of water resource within each catchment area. Under the Act, a catchment management strategy must among others: take into account the class of water resource and resource quality objectives for the water; be consistent with the national water resources strategy and; prescribe the principles, objectives, procedures and institutional arrangements of the Authority for the management, use, development, conservation and control of water resources within each catchment area.[48] Further, the catchment management strategy must encourage and facilitate the establishment and operation of water resources users associations as fora for conflict resolution and co-operative management of water resources in catchment areas.[49]

The Act also provides for appointment of a committee of not more than 15 members in respect of each catchment area. The catchment area advisory committees are to, in relation to the catchment area for which it is appointed, advise officers of the Authority at the appropriate regional office concerning, *inter alia*, water resources conservation, use and apportionment; and the grant, adjustment, cancellation or variation of any permit.[50]

The Act provides for the national water resources management strategy which shall provide for national monitoring and information systems on water resources.[51] The systems shall provide for: the collection and management of data and information regarding water resources and their management: and procedures for gathering data and the analysis and dissemination of information on water resources. The downside to this provision is that under subsection 6 thereof, any member of the public must pay a prescribed fee so as to have access to information contained in any national information system; and to be supplied with a copy of the Authority's annual report.

8.3.4 Ministry of Water and Irrigation (MoWI) Strategic Plan 2009-2012

This is a Ministerial Plan that developed with the broader aim of facilitating sustained availability and accessibility to water for all uses, including sanitation services through appropriate laws, regulations and policies. It was also meant to help the Ministry implement programmes to cover more land under irrigation as well as to reclaim more waste and degraded sections of land, with the aim of reducing poverty, and enhancing

[47] S. 3, No. 8 of 2002.
[48] S. 15(3).
[49] S. 15(5).
[50] S. 16(1) (2).
[51] S. 18.

food security.[52] It is one of the instruments aimed at moving the water sector towards achievement of the larger Vision 2030 and it is aligned to the Medium-Term Plan of 2008–2012, which is the first phase of Vision 2030. This is due to the recognition of the key role played by water in the agriculture, manufacturing, tourism, health, livestock, fisheries and housing sectors.

The Strategy highlights some of the major reforms in the Water sector under the legal and institutional framework provided by the Water Act 2002 to include: first, enhanced governance- Creating institutions to manage water resources and provide water services and limiting the Ministry's role to policy formulation; overseeing the implementation of the policies; and resource mobilization whereas regulation and service delivery have been left to the new institutions that have been established; second, introduction of a Sector Wide Approach to Planning (SWAP) aimed at improving coordination of the sector-operationalised through the National Water Resources Management Strategy and the National Water Services Strategy; and third, involvement of local communities in the management of water resources through formation of Water Resource Users Association (WRUAs)-the community participation believed to have resulted in reduced illegal abstractions, reduced catchments encroachment, rehabilitation of catchments areas and river bank protection.

The Strategy has taken cognizance of the fact that Kenya has made regional and global commitments to ensure sustainable access to safe drinking water and basic sanitation, and thus lists some of the regional and national challenges that the country is facing when it comes to the provision of water. Regionally, the country is faced with the challenge of ensuring that the water policy is aligned to meet the demands of the East African Community, in order to ensure that future conflicts are averted.[53] This is because within the East African region there are water resources that are shared. In this regard, the country may not have control over the manner at which other countries deal with the water resources that are shared with Kenya. The Ministry is required to ensure that the interests of the country are at all times safeguarded in relation to these shared water resources.

At the national level, the main challenge is usually occasioned by the high levels of poverty in the country. The high poverty rates in the country make it difficult for a majority of the population to be able to access water resources. Moreover, the government has failed to adequately invest in the provision of water to the poor. In addition, the Ministry has failed in catering for this section of the populace as it has failed to develop pro-poor models. The Ministry is, therefore, supposed to take into consideration that certain sections of the populace are not usually able to get adequate financial resources to

[52] Government of Kenya, MoWI Strategic Plan 2009-2012, (Government Printer, Nairobi, May 2012).
[53] *Ibid*, p.3.

access water services. This particularly relates to the inhabitants of ASALs and urban informal settlements.

The Strategic plan also notes that the continued degradation of water catchment areas continues to dampen the achievements that have been realised resulting to increased conflicts over water uses. Pollution of water resources has further meant that the cost of treating water has increased and the resulting financial burden is usually borne by the consumer. The government has further failed to invest in adequate storage facilities in order to avert the challenges occasioned by low precipitation and low supplies to the treatment facilities.

The Strategy also highlights some other challenges that the Ministry continues to face. Firstly, poor corporate governance in spite of the capacity building efforts; low infrastructural development and rehabilitation thereby limiting expansion of capacity for self-sustainability in many Water Services Board (WSB) and Water Services Providers (WSP); under-capacitated Water Services Providers; inadequate information base; reduced non-revenue water thus continuing to drain resources of affected institutions; and high poverty levels in the informal settlements and ASAL areas, which limit the Ministry's drive to extend commercialization of the water and sanitation services. Secondly, Water and Sanitation services coverage in the underserved parts of the country, informal settlements, rural and urban areas under the pro-poor targeting is still limited. This is due to dilapidated infrastructure, low financing and inadequate capacities of water sector institutions.

Thirdly, capacity for water storage in the country is very limited. Harvesting of roof water is still limited and there is a serious shortage of pans and dams in the areas where they are needed. Fourth, use of recycled water is still limited, leading to continued (uneconomical) use of treated water for activities that would be better served with used water. Fifth, there is a shortage of water quality staff and /or skills for the water quality surveillance in water service providers. Sixth, there is lack/inadequate of testing equipment in the central and provincial laboratories and other water supplies.

Seven, there is lack of appropriate investment plan for water resources, especially with respect to the assessment and exploitation of groundwater resources. According to the Strategy, there are challenges in irrigation, drainage and water storage. First, there is need to increase the size of land under irrigation to 540,000 ha of land with the available water resources base. Second, there are inadequate support services such as research and extension services as well as marketing infrastructure. Third, low budget allocations, fourth, high cost of investments, fifth, weak monitoring and evaluation, sixth, low efficiency in water distribution; and finally, low water storage capacity, that is, dams, aquifers and pans.

Further, under Land Reclamation, the Strategic Plan identifies the following challenges: coverage is still low compared to potential, as operations are in only 5 ASAL districts. All ASAL districts need the services since they face serious food insecurity, as well as inadequate water supply, and environmental degradation. There are serious staff capacity problems. There is also limited partnership and interaction with other stakeholders who are providing related services in ASAL. Water harvesting and storage capacity at farm and household level is still low. The required legal and policy framework is not yet in place. Management of rainwater in the production of food crops and fodder for livestock has not prioritized increased water retention and conservation. There is low investment in rehabilitation of the ASAL and degraded areas. Overexploitation of natural vegetation in the ASALs with overstocking, clearing fragile lands or for the production of charcoal has led to increasing degradation, waste lands and poor water retention and conservation. Finally, the concept of total water in resource management has not always been given sufficient emphasis.

The Strategy, therefore, sought to combat these challenges but there is yet to be any success as some of the problems such as bureaucracy especially in issuance of water permits remain a huge obstacle to access to water resources for many. This makes it hard to meet the right to water. Public participation remains at its lowest as the main legal instruments are more state-centric than people centred. The complex procedures and unavailability of quality information for consumers and general public in general remain a challenge. There is also little in the framework for conservation of the resources. The provisions on conservation appear vague as they empower the various bodies to either advise or take up measures for conservation without very clear guidelines on the same, and even more noticeably, lack provisions spelling out the duties of private users in regard to such conservation.

8.3.5 The National Water Policy of 2012

The National Water Policy of 2012 (NWP 2012) was informed by the gains made during the period of implementation of reforms in the water sector anchored on the National Water Policy of 1999 (NWP 1999) also referred to as Sessional Paper No. 1 on National Policy on Water Resources Management and Development, the Water Act 2002, existing related policy documents, and the globally recognized Integrated Water Resources Management (IWRM) approach.[54] The reforms are said to have culminated into the development of the WSSP 2010 – 2015, which is designed to institutionalize a

[54] Chapter 1, *The National Water Policy*, (Government of Kenya, 2012).

stakeholder and participatory approach to the management of water affairs in the country.[55]

The Policy identifies the gains and lessons learned from the Reform Agenda of 1999 as, *inter alia*: devolvement by the Ministry responsible for water affairs of Water Resources Management (WRM) aspects, Water Supply and Sanitation (WSS) and water regulation to the lowest appropriate level and autonomous Water Sector Institutions (WSIs); modernized sector that is more robust and more capable; attraction of more professionals into the sector thereby improving performance of Water Service Providers (WSPs); increased investments as the sector budget has grown more than 10 times over 7 years, also due to growing donor confidence; gradual improvement of WRM and WSS service provision and coverage after decades of decline; pro-poor financing mechanisms (i.e. the sector basket Water Services Trust Fund or simply WSTF) and other specialized financing thereby increasing access to water services for the rural and urban poor; increased contribution of the sector to GDP (e.g. a high of 9% in 2010/2011); improved accountability by the separation of policy, regulation and implementation/operations in WSS; greater user-participation (e.g. establishment of Water Resource User Association or WRUAs and Water Association Groups or WAGs); improved water-related data and information gathering and reporting to the public (e.g. the IMPACT report of the Water Services Regulatory Board); adoption of the Sector Wide Approach (SWA*p*) which has enhanced efficiency and effectiveness as well as equity (pro-poor focus) all in line with the sector fundamentals in the CoK, 2010; and improved alignment of stakeholders in the sector to sector policies.[56]

The Policy goes further to highlight the challenges and weaknesses with respect to existing policy, legislation, and practices. It outlines these problems as follows: climate change, disaster management and environmental degradation (e.g. erosion risks) not taken on board sufficiently in the policy framework and in implementation; water availability and water service provision does not develop with the pace of rapid growth in urbanization, industrial production, tourism and recreation services, agricultural and livestock production, among others; absence of reliable information in the rural WSS sub-sector; mixed and inconsistent performance of sector institutions mainly due to insufficient governance and autonomy of institutions; sub-optimal realization of benefits of separation of assets from operation.[57]

Further, it is noted that the sector is yet to attain a comprehensive investment and financing planning capturing the total demand in a pre-feasibility quality addressing the

[55] *Ibid.*
[56] *Ibid,* p. 2.
[57] *Ibid,* pp. 2-3.

quantitative policy goals which the donors can buy into, lack of key strategies for (1) wetlands, (2) rainwater harvesting and storage, and (3) land reclamation and rehabilitation as well as lack of a national master plan for water storage with special focus on safeguarding green water, subsidies for operation not linked to performance and sustainability, wasting funds and hampering progress in reforms; Prolonged survival of the unjustified non-viable urban WSPs e.g. insufficient economies of scale, lack of good governance practices in some sector institutions, insufficient effluent treatment threatening the country's public health and economic growth, incomplete devolution of functions to the basin level in WRM and conflict of interest in regulation and implementation, and lack of a shared cross-sectoral vision for safeguarding the deteriorating five major water catchment towers due to missing inter-ministerial coordination.[58]

The NWP 2012 is based on the following key guiding sector principles: right to water with a pro-poor orientation; separation of WRM and WSS; integrated Water Resource Management (IWRM) approach; Sector Wide Approach (SWAp) for enhanced development; separation of policy from regulation and operation/implementation; devolution of functions to the lowest appropriate level; gender provisions in the management of WSIs and safeguarding of water; socially responsive commercialization for service delivery; professionalizing the sector; autonomy of WSIs; good governance practices on all levels; ring fencing of income as long as universal access to rights are not achieved; participatory approach; Public-Private-Partnership (PPP); and "user pays and polluter pays" principles.[59]

Regarding water resources management, the Policy asserts that the NWP 1999 and the Water Act 2002 were a clear response to institutionalization of a new order in the sector through reforms based on the globally recognized IWRM approach that promotes the development and management of the resource in partnership with the people of Kenya. The Policy further observes that the basin management approach has reduced conflicts through user participation (*vide* WRUAs), regulated abstraction, and accountability in water use, promotion of equity in water sharing and reduced pollution of water, and that it remains an appropriate way forward to address challenges.[60]

The Policy identifies the key challenges in water resources management as including: the low per capita freshwater availability; ecological instability due to anthropogenic activities causing declining vegetation; diversity within the six strategic water catchments; inability to take full advantage of green water resources; deforestation

[58] *Ibid.*
[59] *Ibid,* p. 4.
[60] *Ibid,* p. 5.

of cover from 17% (in 1990) to current 1.2% of the land classified as forest against an international bench-mark of 10%; lack of comprehensive effluent treatment and recycling strategy; and uneven distribution of water resources leading to severe deficits in certain areas due to insufficient inter-basin water transfers. Furthermore, increasing pollution of water resources leads to disregard of public health risks and the water requirements of downstream population, inadequate flood and storm water management, insufficient recognition of climate change issues, weak regulation and enforcement, inadequate information sharing and reporting, inadequate financing of WRM and development and conflicting institutional mandates.[61]

The Policy's objective is to ensure a comprehensive framework for promoting optimal, sustainable, and equitable development and use of water resources for livelihoods of Kenyans.[62] Further, through policy statements, the Policy seeks to: ensure increased per capita water availability above the international benchmark of 1000 m^3 by 2030; ensure progressive restoration and protection of ecological systems and biodiversity in strategic water catchments; maximize use of trans-boundary water resources in coordination with other riparian countries; enhance storm water management and rainwater harvesting; enhance inter-basin water transfer in Kenya as a strategic intervention for optimized use of water resources; enhance pollution control; establish sound research and development in the water sector; enhanced enforcement of regulation and other IWRM actions; improve effluent waters treatment and recycle for use; ensure sustainable groundwater resources for present and future generations; sufficient funds for sustainable development and management of water resources; resolve conflicting mandates by better cross-sectoral coordination; and develop a water management system which contributes to the protection of the environment. These Policy statements are important in the achievement of environmentally sound water and wetlands management and governance for the benefit of the Kenyan people.

The Water Policy, if fully implemented, promotes the spirit of the Constitution of Kenya 2010 of promoting, *inter alia,* equity, participation, inclusion in the general use and management of water resources. It is noteworthy that the arising State duties and obligations ought to be performed in cooperation between the national and county governments, as contemplated under Articles 186,187,189, 190 and the Fourth Schedule to the Constitution. One of the functions of the national government under the Fourth Schedule is, *inter alia*: protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular

[61] *Ibid,* p. 5
[62] *Ibid,* p. 6

water protection, securing sufficient residual water, hydraulic engineering and the safety of dams.

On the other hand, the county government is mandated with ensuring that county public works and services are developed to facilitate the provision of water and sanitation services. The County governments are also to ensure implementation of specific national government policies on natural resources and environmental conservation, including: soil and water conservation; and forestry. Further, from the Constitution it seems that the major role of ensuring public participation in governance matters lies with the County governments. This is because the Constitution provides that one of the roles of County governments is ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.[63] It is, therefore, important that the two levels of government work synergistically in the provision of water and sanitation services. It is also important that they work together, viewing their functions as being complementary and not mutually exclusive.

8.4 Water Governance in Kenya: Current Arrangements

Good governance depends on the quality of leadership, the strength of the institutions and how efficiently, effectively, sustainably, and transparently the resources are managed by sector institutions and main stakeholders.[64] As a resource shared by many people, the governance and management of water, is supposed to be done taking into consideration the principles listed above. Water governance refers to the range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services, at different levels of society.[65] In order to ensure effective governance of water resources, there are various initiatives that are important, if adopted. The strategies include mechanisms for improving participation, efficiency, transparency and putting in place accountability mechanisms at individual, household, community, institutional and organizational levels.[66]

Water governance, therefore, calls for managing water resources in an efficient and effective manner through policies, strategies and legislation, while being accountable to

[63] Schedule 4, Part 4.
[64] Water Partnership Program (WPP) & African Development Bank, "Water Sector Governance in Africa," *Theory and Practice*, Vol. 1, 2008, p. vii.
[65] Rogers, P., & Hall, A., W., 'Effective Water Governance,' *Global Water Partnership* (GWP), p. 4. Available at *http://www.tnmckc.org/upload/document/bdp/2/2.7/GWP/TEC-7.pdf* [Accessed on 3/03/2014].
[66] Osinde, R., 'Improving water governance in Kenya through the human rights-based approach,' (UNDP, 2007).

the recipients of the services. Effective management and access to water resources is critical in achieving sustainable development and good governance.[67] This is because of the important role played by water, not only in the personal lives of the citizenry, but also in the economic development of the country. In this light, a people-centric governance approach is to be adopted to ensure that the citizens are involved in the decision-making processes on issues that affect the management of water resources and provision of water services.

Further, the human rights-based approach to water governance calls for ensuring that mechanisms are put in place to ensure that the un-served and marginalized groups are able to realise their right to water. In this regard, the various initiatives that have been undertaken are driven at ensuring the provision of water is also done at local levels to ensure that this section of the populace also reaps the benefits.

The Ministry of Environment, Water and Natural Resources is the key institution responsible for the water sector in Kenya. Its fundamental goal and purpose is conserving, managing and protecting water resources for socio-economic development. Its aim is to improve the living standards of people by ensuring proper access to available water resources. In relation to water governance, it is divided into five departments: Administration and Support Services, Water Services, Water Resources Management, Irrigation, Drainage and Water Storage, and Land Reclamation.[68]

Water supply is overseen by the Department for Water Services, whose functions include formulation of policy and strategies for water and sewerage services, sector co-ordination and monitoring of other water services institutions. It is also in charge of overall sector investments, planning and resource mobilization. Water Services Boards are mandated with the responsibility for water and sanitation service provision. The Boards in turn commission private water vendors to provide water services. In Kenya, this task is delegated to commercial public enterprises called Water Service Providers (WSPs). WSPs are regulated by Water Services Regulatory Board (WASREB), whose functions also comprise of issuing licenses, developing of tariff guidelines, setting standards, and developing guidelines for service provision.[69]

It is imperative to note that among the economic and social rights recognized under Article 43 of the Constitution, is the right to reasonable standards of sanitation; and to clean and safe water in adequate quantities. The right to water has been given prominence

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[67] Moraa, H., *et al*, 'Water governance in Kenya: Ensuring Accessibility, Service delivery and Citizen Participation', July 2012, p. 2, *iHub Research*.
Available at *research.ihub.co.ke/uploads/2012/july/1343052795__537.pdf* [Accessed on 3/032014].

[68] Republic of Kenya, The Ministry of Environment, Water and Natural Resources, available *http://www.water.go.ke/* [Accessed on 23/03 2014].

[69] *Ibid.*

in other international and regional legal instruments which Kenya is signatory to. The human right to water entitles everyone to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic use.[70]

The government realizes that it has obligations bestowed upon it by both the Constitution of Kenya and by international conventions ratified by Kenya. It, therefore, has to live up to these obligations. In this regard, the government is, among others, supposed to put in place mechanisms to operationalize the provisions of these municipal and international legal instruments.

Article 56 of the Constitution also obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalized groups have, *inter alia,* reasonable access to water, health services and infrastructure. The actualization of the foregoing constitutional provisions on human rights calls for sound water governance in the country. Indeed, it has been posited that water, sanitation and sustainable energy are at the core of sustainable development and the overarching goal of poverty eradication, and are closely linked to the achievement of internationally agreed development goals, including the Millennium Development Goals (MDGs).[71]

Article 69 of the Constitution provides that the State is to ensure that there is sustainable exploitation, utilization, management and conservation of the environment and natural resources. The management of the environment and other natural resources is also supposed to take public participation considerations into account. The State is further required to take measures to ensure that activities that are likely to endanger the environment are done away with. This also relates to ensuring that there is conservation of environmental resources to ensure water availability for exploitation.

8.5 International Instruments on Water Governance

Due to the great significance of water as a natural resource, several legal instruments have been adopted internationally, dedicated to the use and management of water resources around the world in an attempt to provide guidelines on the best water use and management standards for States.

Indeed, it has been posited that since water is a resource that is essential to life, to all forms of economic production, to many forms of social interaction and to many cultural

[70] The UN Committee on Economic, Cultural and Social Rights stated in its General Comment of November 2002.

[71] Concept Note, Thematic Debate of the General Assembly "Water, Sanitation and Sustainable Energy In the post 2015 development agenda" , 18-19 February 2014, New York. Available at *http://www.un.org/en/ga/president/68/pdf/sts/Concept_Note_on_Water_Sanitation_and_Sustainable_Energy.pdf* [Accessed on 3/03/2014]

activities thus making it so fundamental.[72] The global perspective on water and sanitation has shifted fundamentally in that access to both water and sanitation are now officially recognised as human rights under international law.[73]

Equally important are wetlands, which form indispensable part of the wider ecosystem. Like other water resources, there exist numerous legal instruments that seek to guide the manner in which wetlands are to be managed.

The UN General Assembly has noted that addressing the water and sanitation challenge requires improvements in among others: the way available fresh water resources in river basins are managed; how efficiently and effectively freshwater resources in agriculture, industry, and household use are used and managed; how water resources are disposed of after use (wastewater management and related pollution) and; how the investments required to improve water productivity are financed.[74]

8.5.1 United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21

Agenda 21 seeks to promote sustainable development. It reflects a global consensus and political commitment at the highest level on development and environment cooperation.[75] Sustainable development requires that the available water resources be utilized in a manner that does not compromise the ability of future generations to utilize the water resources. Chapter 3 thereof deals with combating poverty and partly observes that while managing resources sustainably, an environmental policy that focuses mainly on the conservation and protection of resources must take due account of those who depend on the resources for their livelihoods. In order to combat poverty, governments are required to undertake certain actions which have been outlined in this chapter, one such action is the provision of the poor with access to fresh water and sanitation.

Governments are to undertake measures meant to ensure that mechanisms are in place to ensure that water pollution is controlled in order to ensure the protection of the lives of persons.[76] This especially relates to water in urban areas. In this regard, governments are to undertake to ensure the provision of integrated environmental infrastructure including infrastructure on water and sanitation. Initiatives are especially to be adopted to facilitate the provision of these services to the urban poor.

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[72] Baillat, A., & Schmitz,T., 'Towards a Human Rights Based Water Governance: Challenges for the post 2015 Thematic Consultations on Water,' p. 1, *WaterLex,* Geneva, June 2013. Available at *www.waterlex.org/new/wp.../08/WaterLex-HRC-side-event-paper.pdf*[Accessed on 03/03/2014].
[73] *Ibid,* p. 2.
[74] *Ibid.*
[75] Agenda 21 - Chapter 1, Preamble.
[76] S. 6.41 (c).

Sustainable land use practices are also to be adopted to ensure the wise use of water resources. Measures are, therefore, to be adopted to ensure the protection of these water bodies and to also ensure the protection of transboundary water resources. Agenda 21 also takes cognizance of the fact that these resources are interconnected and hence the need to adopt integrated approaches to their conservation. It is, therefore, an important instrument in promoting sustainable use and management of water and wetlands resources.

8.5.2 The Dublin Statement on Water and Sustainable Development

The Statement[77] observed that scarcity and misuse of fresh water poses a serious and growing threat to sustainable development and protection of the environment. Further, it stated that 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.[78]

To encourage participation of all, the Conference participants called for fundamental new approaches to the assessment, development and management of freshwater resources, which they argued could only be brought about through political commitment and involvement from the highest levels of government to the smallest communities.[79] However, the participants observed that commitment would need to be backed by substantial and immediate investments, public awareness campaigns, legislative and institutional changes, technology development, and capacity building programmes. Underlying all these, must be a greater recognition of the interdependence of all peoples, and of their place in the natural world.[80]

The Statement recognises that fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment hence the importance of its effective management. There is, therefore, the need to ensure that a holistic approach to the management of these resources is undertaken.[81]

The Statement also made recognition of the fact that water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.[82] It elaborates that the participatory approach involves raising awareness of the importance of water among policy-makers and the general public. It

[77] Adopted January 31, 1992 in Dublin, Ireland, International Conference on Water and the Environment.
[78] Preamble.
[79] *Ibid.*
[80] *Ibid.*
[81] Principle No. 1.
[82] Principle No. 2.

means that decisions are taken at the lowest appropriate level, with full public consultation and involvement of users in the planning and implementation of water projects.[83]

Noteworthy is Principle No. 4, which makes an important assertion that water has an economic value in all its competing uses and should be recognized as an economic good. Further, it states that within this principle, 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. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.[84]

The Statement calls for water savings in agriculture, in industry and in domestic water supplies. It advocates for more efficient irrigation practices which will lead to substantial freshwater savings. Practices such as recycling of water are encouraged. The Statement observes that application of the 'polluter pays' principle and realistic water pricing will encourage conservation and reuse. On average, it is estimated that 36% of the water produced by urban water utilities in developing countries is 'unaccounted for'. Better management could reduce these costly losses.[85]

The Statement also calls for Sustainable urban development. It observes that future guaranteed supplies must be based on appropriate water charges and discharge controls. The Conference participants also observed that achieving food security is a high priority in many countries, and agriculture must not only provide food for rising populations, but also save water for other uses. They called for development and application of water-saving technology and management methods and the involvement of the community in adopting new approaches to sustainable water management.

Further, the participants called for integrated management of river basins which would provide the opportunity to safeguard aquatic ecosystems against pollution, and make their benefits available to society on a sustainable basis. Integrated approaches to management also ensure that transboundary water resources are effectively conserved by including all the stakeholders in the conservation process. The Statement also calls all countries to participate and, where necessary, be assisted to take part in the global monitoring, the study of the effects and the development of appropriate response strategies and also to ensure that members of the public are made aware of the programmes in place

[83] *Ibid.*
[84] Principle No.4.
[85] The Dublin Statement on Water and Sustainable Development, Adopted January 31, 1992 in Dublin, Ireland.

The proposals made by this important Statement have formed the general framework for sustainable management and governance of water resources. The adoption of the proposed measures within the Kenyan water laws will go a long way in achieving sustainable management and utilisation of water in the country.

8.5.3 The United Nations Convention on the Law of the Non-Navigational uses of International Watercourses (UN Watercourses Convention), 1997

The United Nations General Assembly adopted the UN Watercourses Convention[86] in 1997 to provide for the rights and obligations of countries sharing international watercourses.[87] The Convention requires watercourse States to ensure equitable and reasonable utilization and participation in the management of international water courses. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the Convention.[88]

In particular, an international watercourse is to be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse. These provisions are seen to be in line with Article 69 of the constitution of Kenya, which imposes a number of obligations on the State in the protection of the environment.

Watercourse States are obligated to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.[89] Article 20 provides for protection and preservation of ecosystems and it is to the effect that watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses. Further, Article 21.2 requires that States are to ensure a reduction and control of pollution to international watercourses and avoid measures likely to result to pollution. Parties are required to resort to amicable dispute resolution methods in cases of disputes relating to the interpretation of the Convention.[90] The dispute management may be through negotiation, mediation, conciliation, fact-finding or arbitration or the International Court of Justice.

The Convention provides a comprehensive mechanism for sound governance of international watercourses. However, it is noteworthy that Article 36.1 thereof reads that

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[86] Adopted by the UN General Assembly in resolution 51/229 of 21 May 1997, the General Assembly of the United Nations adopted at its 51 session.
[87] *Ibid*, Art.1.
[88] Art. 5.
[89] Art. 8.1.
[90] Art. 33.

the Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. On the 25th of February, 2014, Côte d'Ivoire became the 34th Party to *the 1997 UN Convention on the Non-navigational Uses of International Watercourses*, and the Convention requires one more member to reach the 35 members required for it to come into force.[91]

8.5.4 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the East African Region, 1985

Kenya adopted this Convention on June 21st, 1985. Article 3.1 of the Convention allows the Contracting Parties to enter into bilateral or multilateral agreements, including regional or sub-regional agreements, for the protection and management of the marine and coastal environment of the Convention area. The general obligations of the Contracting Parties are, individually or jointly, taking all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are party, to prevent, reduce and combat pollution of the Convention area and to ensure sound environmental management of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities.[92]

The Contracting Parties are to take all appropriate measures to prevent, reduce and combat pollution of the Convention area caused by discharges from ships and, for this purpose, to ensure the effective implementation of the applicable international rules and standards established by, or within the framework of, the competent international organization.[93] The Parties are also to take all appropriate measures to prevent, reduce and combat pollution of the Convention area caused by dumping of wastes and other matter at sea from ships, aircraft, or man-made structures at sea, taking into account applicable international rules and standards and recommended practices and procedures.[94] Generally, the Convention advocates for non-pollution of the convention areas which include marine and coastal environment of that part of the Indian Ocean situated within the Eastern African region and falling within the jurisdiction of the Contracting Parties to this Convention.

[91] See the International Water Law Project Blog, available at *internationalwaterlaw.org/blog* [Accessed on 29/03/2014].
[92] Art. 4.1.
[93] Art. 5.
[94] Art. 6.

8.5.5 General Comment No. 15 on the Right to Water

The Committee on Economic, Social and Cultural Rights, which is tasked with monitoring the implementation of the economic, social and cultural rights (ICESCR), adopted General Comment No. 15[95] which stresses the importance of water as a human right. Certain principles have been outlined in the General Comment which are meant to guide water governance. One such principle is sufficiency in water supply. In this regard, water is to be supplied in quantities that are enough to meet the needs of consumers. Sufficient supply of water enables people to be able to maintain high levels of hygiene and thus avoid communicable diseases. The water supplied must also be safe and acceptable for consumption and for other household uses. In this regard, measures are to be put in place to rid of the water of any potentially harmful organisms.

Another principle to be observed in the provision of water is the need to ensure that water is accessible to all. This obligation seeks to ensure that adequate facilities are established to ensure the provision of adequate clean water in secure places. This comes against the realization that access to water is usually problematic where certain groups like women have to walk long distances in areas that are not safe in order to access water. Children are also at times forced to miss school in order to fetch water for use in their families. The government is, therefore, supposed to establish facilities in areas that are accessible and safe.

In many areas, water is a resource that is not affordable especially for the poor in both urban and rural areas. The urban poor living in informal areas usually pay more for water which is usually of inferior quality. These areas lack piped water and the occupants rely mostly on water vendors to supply water. Ensuring the affordability of water requires that services match what people can pay.[96] The government is therefore supposed to monitor the water market and ensure that there is regulation of prices.

The Committee reaffirmed the human right to water and guarantees the entitlement of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.[97] According to the Committee the right to water falls within the category of guarantees that are essential for securing an adequate standard of living, mostly because it is one of the most fundamental conditions for survival.[98]

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[95] 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).

[96] WHO, 'The Right to Water,' Health and Human Rights Publication Series, No. 3.Available at *http://www2.ohchr.org/english/issues/water/docs/Right_to_Water.pdf*[accessed 27/02/2015].

[97] Clause 2.

[98] Clause 3.

The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food.[99] Further, the Committee stresses that attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology.[100] Clause 10 thereof, outlines the normative content of the right to water and states that the right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. On the other hand, it provides that the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

The Committee reaffirmed the states' core obligations including, to adopt and implement a national water strategy and plan of action addressing the whole population and that is to be devised and periodically reviewed on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups.[101]

Another important provision is clause 49 which is to the effect that a national water strategy and plan of action should be based, *inter alia,* on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate for the realization of the right, State parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities. The Committee, thus, advocates for good governance in water resources management.

Kenya has sought to ensure that it lives up to its obligations as provided for by the General Comment. It has adopted a legal framework to govern the manner in which water resources are to be used in the country. The Judiciary has further been on the forefront in ensuring that the country lives up to its obligations and this especially relates to the guarantee of the right to water and that the provision of water happens in a manner that is not discriminatory.[102]

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[99] Clause 7.
[100] *Ibid*; See Art. 43(1)(d) of the Constitution of Kenya.
[101] Clause 37(f) (As provided for in General Comment No. 3 (1990).
[102] See *Republic v Tanathi Water Services Board & 2 others ex parte Senator Johnstone Muthama,* Judicial Review Misc. App. No. 374 of 2013, even though the application was struck out as a matter of technicality.

In this regard, judicial decisions have also affirmed the Constitutional guarantees of the right to water. In the case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others,*[103]the court held that the government was to ensure that it adopts a rights-based approach with regard to the provision of water services. The court further relied on the decision by the Indian High Court in *Vishala Koch Kudivella Samarhshana Samithi v State of Kerala,*[104] where the court stated that;

> "*We have no hesitation to hold that failure of the state to provide safe drinking water to citizens in adequate quantities would amount to a violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in the way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with uttermost expediency.'*

From this holding, it can be seen that the court adopted a firm approach which seeks to ensure that the government does not renegade on its obligations. This is a departure from the holding in the South African Constitutional Court in the case of *The Government of the Republic of South Africa v Irene Grootboom,*[105] where it was held that the government was to adopt policies to ensure the provision of housing to all. This case introduced the principle of progressive realisation of rights which gives the State time to ensure that it meets its human rights obligations.[106]

The African Commission on Human Rights has also held in several instances that the state has an obligation to ensure the protection of the right to water provided for in Article 16 of the African Charter. Kenya has thus been held to have obligations to ensure that the right to water is guaranteed. In the case of *Centre for Minority Rights and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya,*[107]where it was held that the rights of the Endorois people to access clean drinking water was severely undermined as a result of loss of their ancestral land around Lake Bogoria. Despite the existence of these numerous legal instruments governing water resources management in the country, several challenges still exist in this sector, and which have already been highlighted in previous sections

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[103] Petition No. 65 of 2010.
[104] 9 2006 (10) KLT 919.
[105] *(2000) (11) BCLR,* 1169.
[106] See also *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09), [2009] ZACC 28.
[107] *Communication No. 276 of 2003.*

8.6 Wetlands Management in Kenya

Wetlands are areas of swamps, marshes, bogs, shallow lakes, ox-bow lakes, dams, riverbanks, floodplains, fishponds.[108] This definition is similar to the one under the Ramsar Convention which defines wetlands to mean lakes and rivers, swamps and marshes, wet grasslands and peatlands, oases, estuaries, deltas and tidal flats, near-shore marine areas, mangroves and coral reefs, and human-made sites such as fish ponds, rice paddies, reservoirs, and salt pans. However, it is noteworthy, that the Ramsar Convention definition is broader in scope. Kenya has not had a law or policy on wetlands. Wetlands management in Kenya has thus been done through other environmental bodies and legal frameworks, dealing with other resources. However, recently there has been formulation of policies and other legal instruments guiding wetlands management. One of them is the Draft *National Wetlands Conservation and Management Policy*, 2013.

8.6.1 Draft National Wetlands Conservation and Management Policy, 2013

The Policy reiterates that it was developed in response to Article 3 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971 (the Ramsar Convention) which obligates contracting parties to "formulate and implement their planning so as to promote the conservation," of wetlands. Kenya ratified the Ramsar Convention in 1990.

The Policy notes that wetlands constitute part of critical natural capital to the country's' economy. For instance, Lake Naivasha contributes 5.3 billion Shillings (US 63 million dollars) while over Thirty thousand (30,000) people derive their livelihoods from this important wetland ecosystem.[109] Lake Nakuru, on the other hand, contributes 2.1billion Shillings (24 Million US dollars) per year. In addition, they provide invariable ecosystem goods and services such as provision of fish, water, reeds, crafts, building material and baskets, regulate climate and sequester carbon from the atmosphere and acts as an important biodiversity habitat.

The Policy outlines the guiding principles and values that inform its implementation including:[110] Wise use of wetlands which is the maintenance of the ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development; precautionary principle; polluter pays principle; principle of equity; Ecosystem Based Management Approach; an integrated ecosystem approach; devolution; public participation; and international and regional cooperation. It requires Environmental Agreements and regional instruments which to be

[108] Draft National Wetlands Conservation and Management Policy (Government Printer, Nairobi, 2013), p. 7.
[109] *Ibid.*
[110] *Ibid*, p. 8.

domesticated and implemented cooperatively for better management of shared wetland resources.[111]

One of the key objectives of the Policy is to establish an effective and efficient institutional and legal framework for integrated management and wise use of wetlands so as to enhance and maintain functions and values derived from wetlands in order to protect biological diversity and improve livelihood of Kenyans. With the foregoing principles and values, it is possible to enhance wetlands management and sound governance in the country.

8.6.2 Importance of Wetlands

The Policy outlines the crucial functions of wetlands and the vital products and services essential for environmental integrity and human well-being derived from wetlands. They are believed to have enormous socio-economic and cultural values, alongside the ecological benefits.

8.6.2.1 Ecological Importance

The ecological benefits of wetlands include:[112]First, flood control and soil erosion prevention. Wetlands act as sponges, absorbing excess storm from heavy rainfall, thereby ensuring flood flow regulation/ flood control and soil erosion prevention. Second, water discharge and recharge. The retention ability of wetland enables them to discharge and recharge both surface and ground water resources respectively. Third, water purification, nutrient and toxic retention. Wetland vegetation absorbs nutrients and toxic substances from inflowing water thereby improving the quality of water downstream. Fourth, wetlands for climate change mitigation and adaptation. Globally, wetlands are recognized as net carbon sinks providing invaluable and effective ecosystems for carbon capture and storage. Fifth, they are wildlife habitats and centers of biodiversity. Wetlands are natural habitats for a variety of plants and animals some of which are of conservation significance including endemic, endangered and migratory species. Sixth, prevention of saline water intrusion. Wetlands are essential for maintaining a buffer zone between freshwater and saline water. Wetlands are, thus, a necessary and useful part of the ecological system and needs sound governance policies and laws to guarantee their sustainability.

[111] *Ibid*, p. 9.
[112] Draft National Wetlands Policy, 2013, p.10.

8.6.2.2 Socio-economic Importance

The Policy also outlines the socio-economic benefits derived from wetlands including:[113] First, energy production. Wetlands provide energy in various forms, including hydropower generation and plant biomass. Second, research and education. Many wetlands are important sites for scientific research and education. Third, transport and communication. Fourth, religious and cultural significance. Wetlands are important historical sites that comprise important components of Kenya's cultural heritage. Fifth, tourism and recreation. The nature and serenity of wetlands makes them important ecotourism and recreation centres. The presence of a wide range of wildlife species as well as their aesthetic value makes them a unique attraction for tourism, which is an important foreign exchange earner at the national level and source of livelihood for local communities. Sixth, wetlands are sources of water and grazing grounds. Wetlands are critical source of water for domestic use and livestock watering. They also form important grazing grounds for livestock and wild animals especially during dry seasons. Seventh, wetlands provide fish and other food products. Eighth, source of soil and minerals. Wetlands are major sources of clay and sand products such as bricks and ceramics.

They are also essential sources of minerals such as sand and salt; and animal and plant products-Wetlands provide a number of wildlife resources and products. These include reptile skins and ornamental (aquarium) fish. The Policy observes that many communities are increasingly harvesting these resources to enhance and improve their livelihoods. Further, it is believed that the Nyando Wetland in Kisumu County provides an aggregated economic value estimated at Kshs. 204.1 billion shillings (US$ 2.1 billion).[114] This makes wetlands an important source of livelihood for a wide range of persons.

The draft Wetlands Policy identifies reclamation and conversion of wetlands for agricultural development, human settlement and industrial development as one of the biggest threats to wetland conservation and management and seeks to curb the same.[115] So as to address the increasing human population and change from subsistence to commercial exploitation of wetland resources which continue to exert increasing pressure on limited wetland resources, resulting in the decline of the quality of regulating provisioning, cultural and support services provided by wetlands, the Policy tasks that the government with: Promoting sustainable extraction and utilization of goods and services

[113] *Ibid,* p. 11.
[114] *Ibid,* Clause 1.3.3.
[115] *Ibid,* Clause 2.1.1.

derived from wetlands; and promoting environmental friendly alternative livelihood activities in line with the wise use principle.[116]

Regarding pollution, the draft Wetlands Policy observes that the quality of many water sources in Kenya is declining as a result of municipal, agricultural and industrial wastes/discharges. It thus tasks the Government with supporting and promoting enforcement of relevant regulations and laws related to environmental pollution; and enhancing public awareness on proper management of waste including reduction, reuse and recycling.[117]

With regard to legal and institutional framework, the draft Wetlands Policy observes that lack of a holistic institutional framework has affected wetland management in Kenya. Different aspects of wetland conservation and management are handled by different agencies. This has therefore meant that no single agency is in charge of overall coordination. This has contributed to massive wetland loss and degradation. The draft Policy thus proposes to identify, strengthen and provide adequate resources to a coordinating agency at national and county levels to implement the National Wetlands policy.[118] There is therefore a need to set up a body charged with the role of wetlands management but with caution to ensure that there is no overlapping and duplication of functions, but instead there is cooperation arising from clearly defined mandate. The draft Policy is inadequate in its proposal as to whether a new body should be set up.

It is noteworthy that, in line with the Constitution,[119] the draft Wetlands Policy seeks to enhance participatory wetland management, by involving concerned non-state actors and local communities in planning and implementation of wetland conservation activities. This approach, it observes, will be used to plan and implement wetland management plans among other strategies to bring on board other stakeholders in wetland management. To address this, the draft Policy obligates the government to support non-state actors and local communities to undertake wetland related conservation activities.[120] Generally, once this Policy sails through, it will enhance wetlands management in the country.

8.6.2.3 The Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009

[116] *Ibid,* Policy Statements 1 and 2.
[117] *Ibid,* Clause 2.1.3.
[118] *Ibid,* Clause 3.1
[119] Art. 10 & 60, Constitution of Kenya.
[120] Draft National Wetlands Policy, 2013, *op cit,* Clause 4.4.

The general objectives of Part II of the Regulations[121] (dealing with wetlands management) include, *inter alia*: to provide for the conservation and sustainable use of wetlands and their resources in Kenya; to promote the integration of sustainable use of resources in wetlands into the local and national management of natural resources for socio-economic development; to ensure the conservation of water catchments and the control of floods; to ensure the sustainable use of wetlands for ecological and aesthetic purposes for the common good of all citizens; to ensure the protection of wetlands as habitats for species of fauna and flora; provide a framework for public participation in the management of wetlands; to enhance education research and related activities; and to prevent and control pollution and siltation.

Regulation 5(1) thereof provides for the general principles that shall be observed in the management of all wetlands in Kenya including: Wetland resources to be utilized in a sustainable manner compatible with the continued presence of wetlands and their hydrological, ecological, social and economic functions and services; Environmental impact assessment and environmental audits as required under the Act to be mandatory for all activities likely to have an adverse impact on the wetland; Special measures to promote respect for, 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; Sustainable use of wetlands to be integrated into the national and local land use plans to ensure sustainable use and management of the resources; principle of public participation in the management of wetlands; principle of international co-operation in the management of environmental resources shared by two or more states; the polluter-pays principle; the pre-cautionary principle; and public and private good.

It also establishes the Standards and Enforcement Review Committee which shall be responsible for advising the Authority on the wise use, management and conservation of wetland resources.[122] These regulations, coupled with political goodwill could promote sustainable management of wetlands which combines their conservation and benefits sharing with the concerned group of persons or the general public. It has been agreed that

[121] Legal Notice No. 19, Act No. 8 of 1999.
[122] Regulation 6(1).

local people's involvement in wetlands management can contribute significantly to maintaining or restoring ecological integrity and community well-being.[123]

8.6.2.4 The Wildlife Conservation and Management Act, 2013[124]

This Act of Parliament was enacted to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.[125] The Act applies to all wildlife resources on public, community and private land, and Kenya territorial waters.[126] It is, noteworthy, that wetlands forms part of the ecosystem providing habitat and occupied by wildlife, hence the Act has provisions on their management. The Act defines "wetlands" to mean areas of marsh, fen, peat land, or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish, salt, including areas of marine water, the depth of which does not exceed six meters at low tide.[127] It provides for their preservation due to their importance as wildlife habitats.

8.6.2.5 The Ramsar Convention on Wetlands

The Convention on Wetlands of International Importance, called the Ramsar Convention, is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. The Ramsar Convention is lauded as the only global environmental treaty that deals with a particular ecosystem and was adopted in 1971 in Ramsar, Iran with membership covering all geographic regions of the planet.[128]

The Convention requires that each Contracting Party designate at least one wetland to be included in the List when signing the Convention or when depositing its instrument of ratification or accession, as provided in Article 9.[129]Kenya is a signatory to the Ramsar Convention and it is therefore under an obligation to identify critical wetlands of international importance (Ramsar Sites) based on the laid down criteria. The current Ramsar recognized wetlands in Kenya include Lakes Nakuru, Naivasha, Baringo, Bogoria, Elementeita and Tana Delta.

The Convention recognises in its preamble, the fundamental ecological functions of wetlands, as regulators of water regimes and as habitats supporting a characteristic flora

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[123] Gawler, M. (ed.), "Strategies for Wise Use of Wetlands: Best Practices in Participator Management," Wetlands International IUCN, WWF Publication No. 56, 2002, p. 1.
[124] Act No. 47 of 2013, Laws of Kenya.
[125] *Ibid*, Preamble.
[126] *Ibid*, s.2.
[127] *Ibid*, s.3.
[128] The Ramsar Convention on Wetlands, available at *http://www.ramsar.org/cda/en/ramsar-home/main/ramsar/1_4000_0__* [Accessed on 26/03/2014].
[129] Art. 2.4.

and fauna, especially waterfowl.[130]Further, it states that wetlands constitute a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreparable. Thus, the Convention, through member states seeks to promote the conservation of wetlands and their flora and fauna which can be ensured by combining far-sighted national policies with coordinated international action.

8.7 Best Practices on Water Governance

8.7.1 Integrated Water Resources Management

According to UNDP, effective water governance must be informed by: Principles such as equity and efficiency in water resource and services allocation and distribution, water administration based on catchments, the need for integrated water management approaches and the need to balance water use between socio-economic activities and ecosystems, and the formulation, establishment and implementation of water policies, legislation and institutions; and clarification of the roles of government, civil society and the private sector and their responsibilities regarding ownership, management and administration of water resources and services.[131]It is therefore, more about the way in which decisions are made (that is, how, by whom and under what conditions) than about the decisions themselves. It covers the manner in which roles and responsibilities (design, regulation and implementation) are exercised in the management of water and broadly encompasses the formal and informal institutions by which authority is exercised.[132]

Article 10(1) of the Constitution of Kenya 2010 provides for the national values and principles of governance, includingsustainable development. Further, Article 69(1) thereof outlines the obligations of the State in relation to the environment and they include the State's obligation to, *inter alia*: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; [133] establish systems of environmental impact assessment,

[130] Ramsar Convention, Art.1.2, "For the purpose of this Convention, waterfowl are birds ecologically dependent on wetlands."
[131] Akhmouch, A., "Water Governance in Latin America and the Caribbean: A Multi-Level Approach", *OECD Regional Development Working Papers*, 2012/04, (OECD Publishing, 2012), p. 9, available *at http://dx.doi.org/10.1787/5k9crzqk3ttj-en* [Accessed on 26/03/2014].
[132] *Ibid.*
[133] Art. 2, *Convention on Biological Diversity*, defines "Biological diversity" to mean the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

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.Governance rests on two core values: inclusiveness (ensuring that all members of the group receive equal treatment) and accountability (ensuring that those in authority answer to the group they serve if things go wrong, and are credited when things go well).[134]Competition for available water resources in much of the developing world is growing rapidly due to ever-increasing and conflicting demands from agriculture, industry, urban water supply and energy production, fueled by factors such as population growth, urbanization, dietary changes and increasing consumption accompanying economic growth and industrialization.[135] Due to this, there is a need to change the approach to water governance so as to effectively tackle this problem. Integrated water resources management is lauded as a viable alternative to the traditional approaches to water and wetlands resources governance.

Effective water governance goes beyond ensuring that policies and institutions are in place to capturing issues of access to resources, information and affordable technology while participating in the decision making process that affects the management and effectiveness of service provision.[136] Moreover, water governance entails the upholding of policies, strategies and legislation where water service providers have to develop and manage water resources in an effective and efficient manner while being accountable to the recipients of the water services. Further, for governance in the water sector to work in a mutually beneficial way, citizens need to be aware of their rights, and also need to be accorded a mechanism where they can communicate when they feel that their rights are not being fully met.[137]

Integrated Water Resources Management (IWRM) approach is said to be a more holistic and coordinated approach to water management, and one that has been internationally accepted as capable of providing the way forward for efficient, equitable and sustainable development and management of the world's limited water resources.[138] It is viewed as a pragmatic approach towards better and more sustainable water

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[134] The World Bank Group, 'Good Governance for Good Water Management,' p.20. Available at *siteresources.worldbank.org/INTENVMAT/.../8GoodGovernance.pdf* [Accessed on 3/03/2014].

[135] United Nations Development Programme, *Integrated Water Resources Management*, available at *http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/water_and_ocean_governance/integrated-water-resources-management/* [Accessed on 20/03/2014].

[136] UNDP, 2007, as quoted in Moraa, H., 'Mobile Governance: Use of mobile technology in promoting transparency issues in water governance Draft Report,' *iHub Research*, Draft Report, January 2013. Available at *http://www.ihub.co.ke/ihubresearch/uploads/2013/february/1360666587__979.pdf*[Accessed on 20/03/2014].

[137]*Ibid*.

[138] *Ibid.*

management: it is believed to be a process which promotes the coordinated development and management of water, land and related resources, without compromising the sustainability of vital eco-systems.[139]

Kenya's Water Policy of 2012, identifies the guiding principles for IWRM as, *inter alia*: access to clean and safe water is a right;[140]fresh water as a finite and vulnerable resource which is essential to sustain life and development; management of water resources along natural catchment/basin boundaries following the IWRM approach; water as both a social and economic good, therefore water resource management shall be partly financed by water users (user/polluter pays principle); separation of regulatory functions from implementation/operations; participatory approach for better conflict resolution and optimal use of resources; treatment of effluents and re-use/recycling; water-related disaster preparedness; and open awareness creation, communication and reporting to public. If these principles are fully implemented through incorporation into the existing and new laws on water and Wetlands, it would streamline their governance effectively ensuring that they are beneficial to the state in general and the people of Kenya in particular.

Adoption of IWRM does not mean that all actions have to be fully integrated and handled by a super-agency that replaces the many actors in water; rather, it is about stakeholders finding ways to coordinate and address coordination problems in the management of water resources.[141]

8.7.2 Ecosystem approach

Under section 4 of the *Wildlife Conservation and Management Act*, 2013, one of the general principles to guide the implementation of the Act is that wherever possible, the conservation and management of wildlife shall be encouraged using an ecosystem approach. The ecosystem approach is said to be a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.[142] Further, the draft National Policy on wetlands, 2013 proposes adoption and implementation of ecosystem-based approach in the management of all wetlands especially the water towers, as a measure to enhance the legal and institutional framework on wetlands management.

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[139] UNEP, *Integrated Water Resources Management Planning Approach for Small Island Developing States*, UNEP, 2012, p. vi. Available at *http://www.unep.org/themes/Freshwater/Documents/Small_Island_Developing_States.pdf* [Accessed on 20/03/2014].

[140] Art.43, Constitution of Kenya, 2010.

[141] UNEP, *Integrated Water Resources Management Planning Approach for Small Island Developing States*, UNEP, 2012, p. vi.

[142] *Ecosystem Approach*. Available at *https://www.cbd.int/ecosystem* [Accessed on 29/03/2014].

It is a concept that integrates the management of land, water and living resources and aims to reach a balance between three objectives: conservation of biodiversity; its sustainable use; and equitable sharing of benefits arising from the utilization of natural resources.[143] It is also the primary implementation framework of the Convention on Biological Diversity (CBD).[144] Adopting this balanced approach ensures that natural resources and society as a whole are positioned in the centre of the decision making process, ensuring a more equitable and long-term future is tenable.[145]

The ecosystem approach is informed by a number of principles namely: First, recognition of objectives as society's choice. Economic, cultural and social perception of ecosystems varies amongst different elements of human society. Human rights, interests and cultural diversity must be taken into account and ecosystems should be equitably managed for their intrinsic, tangible and intangible benefits. Second, aiming for decentralised management (i.e. subsidiarity).Management should involve all stakeholders, balance local interests and wider public interests, ensure management is close to the ecosystem, and encourage ownership and accountability. Third, considering the extended impacts, or externalities managers should take into account and analyse effects (actual or potential) that activities have on other ecosystems. Fourth, understanding the economic context and aim to reduce market distortion. Market distortions that adversely affect biodiversity must be avoided. Incentives should support conservation and sustainable use and costs and benefits ought to be internalized within the focal ecosystem. Fifth, prioritising ecosystem services. Ecosystem functions and structures that supply services must be conserved. Sixth, recognising and respecting ecosystem limits. Management strategies must consider environmental conditions that limit productivity, ecosystem structure, functioning and diversity. Seventh, operating at an appropriate scale, spatially and temporally. Operational boundaries are defined by users, managers, scientists and local peoples. Cross-boundary connectivity should be promoted where necessary. Management options must consider the interaction and integration of genes, species and ecosystems. Eighth, managing for the long-term, considering lagged effects. Characteristic temporal scales and lag-effects within ecosystems must be taken into consideration. Preference of favouring immediate benefits over future ones should be avoided.

Ninth, accepting change as inherent and inevitable. Adaptive management must recognize the dynamic and complex nature of ecosystem properties and anticipate change.

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[143] Joint Nature Conservation Committee, *Ecosystem Approach*, at *http://jncc.defra.gov.uk/default.aspx?page=6276* [Accessed on 25/03/2014]
[144] *Ibid.*
[145] *Ibid.*

Managers need to avoid decisions that limit future options. Actions should consider long-term protracted global change. Tenth, balancing use and preservation. It is important to adopt a flexible management approach that takes conservation and use into context and apply a continuum of measures from fully protected to sustainably managed ecosystems. Eleventh, bringing all knowledge to bear. Relevant information should be shared with all stakeholders. All assumptions should be made explicit and checked against available knowledge and stakeholder views. Finally, involving all relevant stakeholders. To address management complexities decision making should draw upon necessary expertise and involve relevant stakeholders at all levels.[146]

8.7.3 Integrated Pollution Control

Another tool for good water governance is integrated pollution control. The objective of an integrated approach of pollution control is believed to be prevention of emissions wherever this is practicable, taking into account waste management, and, where it is not, to minimize them in order to achieve a high level of protection for the environment, including air, water and soil.[147]This is important in ensuring that even as the available water and wetlands resources are utilized and managed in a sustainable manner, they are protected from pollution which could affect their usefulness.

8.8 Conclusion and Way Forward

The degradation of natural resources, affects farmers' capacity to generate reasonable incomes through constant productivity losses and limited access to cultivatable areas due to increased population pressure. This increasingly makes them turn to areas dedicated to forestry and conservation, thereby contributing to land erosion and affecting water security in the country. Through this process, they enter the vicious circle of endemic poverty.[148]Effective and environmentally sound management and governance of water and wetlands resources, is critical for guaranteeing the realization of the right to the use of safe drinking-water and basic sanitation, with regard to achievement of the

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[146] Joint Nature Conservation Committee, *Twelve Ecosystem Approach Principles***.** Available *at http://jncc.defra.gov.uk/page-6380*[Accessed on 25/03/2014].

[147] Iven, F.W., 'Implementation of Integrated Licensing in Europe German Experience Concerning BAT in IED Permitting Procedures', 11. June 2013, p.7, available at *http://www.sviva.gov.il/English/env_topics/IndustryAndBusinessLicensing/IntegratedEnvironmentalLicensing/Documents/ImplementationOfIntegratedLicencing-GermanExperience-June2013.pdf*[Accessed on 28/03/2014].

[148] IFAD, Case study, Restoring land use through local water governance and technology in High Andes communities: Management of Natural Resources in the Southern Highlands Project (MARENASS), Peru, p. 1. Available at *http://www.ifad.org/events/water/case/peru.pdf* [Accessed on 20/03/2014].

Millennium Development Goals (MDGs) drinking-water and sanitation target.[149] There is need to ensure quality public participation and information dissemination in water governance and wetlands management. Indeed, public participation has in some instances become a mere administrative formality, to the extent that environmental degradation in Sub-Saharan Africa, has many times been attributed to lack of access to information and public participation.[150] It is important that the general public, and particular groups of people, be fully involved from an understanding point of view to help them make informed decisions and to enable them resourcefully participate in sustainable development.

[149] See generally, United Nations Development Programme, *Water Governance for Poverty Reduction: Key Issues and the UNDP Response to Millennium Development Goals*, January 2004, New York.
[150] Mwenda, A., & Kibutu,T.N., "Implications of the New Constitution on Environmental Management in Kenya,", 8/1 *Law, Environment and Development Journal* (2012), p. 81.

Chapter Nine

Wildlife and Biodiversity

9.1 Introduction

Wildlife is an important resource and plays a role in both the social and economic lives of man. However, wildlife is a difficult term to define. The *Wildlife Conservation and Management Act* (WCMA),[1] defines the term wildlife to mean, "*any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land or in water as well as species that have been introduced into or established in Kenya*."[2] This definition is wanting and it does not clearly state what exactly wildlife is.

Biodiversity forms the web of life of which human beings are an integral part and upon which they fully depend.[3] Humanity's survival depends on the conservation of nature.[4] The term 'biodiversity' is a short form of 'biological diversity.' The 1970's biologists, saw the term wildlife as being too narrow in conservation discussions, and therefore, coined the term biological diversity which covered all forms of life.[5] Biodiversity is understood not only in terms of the wide variety of plants, animals and micro-organisms but also the genetic differences within each species.[6] In broad terms, biodiversity includes 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.[7] Both the Environmental Management and Coordination Act[8] and the Wildlife Conservation and Management Act,[9] adopt this definition. In this chapter, the terms wildlife and biodiversity are used interchangeably.

[1] No. 47 of 2013, Laws of Kenya
[2] *Ibid*, S. 3.
[3] UNEP, *Training Manual on International Environmental Law* (UNEP, 2006), p.193.
[4] Birnie, P., *et al*, *International Law and the Environment* (3rd ed., Oxford University Press, 2009), p.583.
[5] Hunter, D., *et al*, *International Environmental Law and Policy* (2nd ed., Foundation Press, 2002) p.912.
[6] UNEP, *Training Manual on International Environmental Law*, *op. cit*,p.193
[7] 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.
[8] S. 2.
[9] S. 3.

9.2 Kenya's Wildlife Resources

Kenya is considered one of the countries with the richest biodiversity due to diversity of landscapes, ecosystems and habitats.[10] Ecosystems vary from savannah grasslands and woodlands to mountainous, semi desert, wetlands and forests. Kenya is ranked third in Africa in terms of richness of mammal species.[11] The major biodiversity concentration sites fall within Kenya's protected areas. However, over 70% of Kenya's biodiversity falls outside protected areas.[12] The area covered by protected areas in Kenya is 12.7% of Kenya's land mass.[13] It is estimated that the number of known species in the world is 1.4 million.[14] Kenya's known biodiversity assets include 7,000 plants, 25,000 invertebrates, 1,133 birds, 315 mammals, 191 reptiles, 180 freshwater fish, 692 marine and brackish fish, 88 amphibians and about 2,000 species of fungi and bacteria.[15]

One of the controversies relating to wildlife in Kenya is the extent to which it should be exploited for human consumption or preserved in its natural state.[16] The Environmental Management and Coordination Act provides for conservation and sustainable use of biodiversity in accordance with national plans to be developed.[17] The Constitution of Kenya 2010, does not clarify the debate but takes a conflicting stance by providing that the State should ensure sustainable exploitation, utilization and conservation of natural resources[18] and that it must utilize natural resources for the benefit of Kenyans[19] while on the other hand providing that the State must protect genetic resources and biodiversity.[20]

The *Wildlife (Conservation and Management) Act* (Cap 376) (now repealed) provided as one of the functions of the Kenya Wildlife Service, as the formulation of policies regarding the conservation, management and utilization of wildlife.[21] However, various provisions within that Act countered this by prohibiting utilization.[22] The new Act gives more clarity by providing for human consumption of wildlife.[23] Section 80(3) of the Act provides for consumptive wildlife use activities including game farming, ranching, live capture, research involving off-take, cropping and culling.

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[10] Ali A.A., *et al*., 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010,* (NEMA, 2011),p.63.
[11] *Ibid.*
[12] *Ibid,* p. 62.
[13] *Ibid,* p.75.
[14] Birnie, P., *et al*., *International Law and the Environment, op cit,* p.583.
[15] Ali, *et al*, 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010, op cit*,p.63
[16] Hunter, *et al, International Environmental Law and Policy, op cit,* p.923.
[17] S. 50(e).
[18] Art. 69(1) (a).
[19] Art. 69(1) (h).
[20] Art. 69(1) (e).
[21] S. 3A (a).
[22] S. 13 on general offences in National Parks; Legal Notice No. 120/1977, on prohibition on hunting.
[23] *The Wildlife Conservation and Management Act*, No. 47 of 2013.

9.3 Role of Wildlife Resources and Biodiversity

The wildlife resources of the earth have been defined as the living wealth of the society.[24] Conventional uses of wildlife include food, ornaments, pets, tourist attractions, display in zoos, scientific research and cultural and religious uses. Wildlife is a major economic resource for many countries in Africa. For example, in 2011, KWS generated Kshs. 3.77 billion from wildlife tourism.[25] Apart from the direct revenues generated from wildlife tourism, the indirect contributions to the economy include creation of jobs in the service and tourism industries and opening avenues for cultural tourism. There are other more scientific roles that biodiversity plays which bring indirect benefits. These include carbon sequestration by wild flora, pollination by insects and seed and spore dispersal. Biodiversity also plays a major role in purification of water and air, climatic stabilization, maintenance of genetic resources as key inputs to crop varieties and livestock breeds, medicines and beauty products.[26]

9.4 Applicable Legal Framework

The law plays an important role in issues related to biodiversity. It can be distributive, conservatory or proscriptive.[27] Legal developments over wildlife have been influenced by results of scientific studies and social changes.[28] Some have stated that the laws relating to living resources have focused on sustaining the reproductive capacity and diversity of resources.[29] In addition, it has been posited that throughout history mankind has sought to exploit the wealth that wildlife resources bring and therefore, the law has primarily been concerned with the problems of allocation of rights over wildlife resources.[30]

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[24] Robinson, N.A., 'Implementing Agenda 21 Internationally through Environmental Law,' in Robinson, N.A., (ed), *Agenda 21: Earth's Action Plan* (Oceana Publications Inc., 1993), p. xxvi.
[25] Kenya Wildlife Service, *KWS Annual Report and Financial Statements, 2011* (KWS, 2012), p.35.
[26] UNEP, *Training Manual on International Environmental Law, op cit*, p.193.
[27] Birnie P., *et al*., *International Law and the Environment, op cit,* p.594; See also Emejuru, C.T. & Emejuru, A.O., 'The Inter/ace Between Ecology and Law,' *Port Harcourt Law Journal*, Vol. 4, No 1, 2012, pp. 49-58.
[28] *Ibid,* p.595; See also Tarlock, A.D., 'The Influence of Ecological Science on American Law: An Introduction (with Fred P. Bosselman),' *Chi.-Kent L. Rev.*, Vol. 69, 1994, p. 847.
[29] Robinson, N.A., 'Implementing Agenda 21 Internationally through Environmental Law,' *op cit*, p. xxvi.; See also McNeely, J.A., 'Economics and Biological Diversity: Developing and Using Economic Incentives to Conserve Biological Resources,' (IUCN, Gland, Switzerland, 1988); Nasi, R., *et al,* 'Conservation and use of wildlife-based resources: the bushmeat crisis,' *Technical Series no. 33,* (Secretariat of the Convention on Biological Diversity, Montreal, and Center for International Forestry Research (CIFOR), Bogor, 2008).
[30] Birnie P., *et al*., *International Law and the Environment, op cit*, p. 595; See also Cooke, H.J., "The Kalahari Today: A Case of Conflict over Resource Use," *The Geographical Journal,* Vol. 151, No. 1 Mar., 1985, pp. 75-85

9.4.1 Historicizing Wildlife Legislation in Kenya

During the colonial period, various Ordinances were enacted to regulate access to and utilization of wildlife. *The Game Ordinance*[31] marked the beginning of legislative control over wildlife in Kenya. Between 1898 and 1945, policy and legislation on wildlife focused mainly on control of hunting and regulation of possession and trade of wildlife trophies.[32] In 1945, there were policy shifts which focused on protection of wildlife through the Protected Area concept and the vesting of all wildlife resources in the government. As a consequence, the National Parks Ordinance of 1945[33] was enacted thus enabling the game department to establish protected areas in the country. Aberdare Royal Park and Mount Kenya Royal Park (later renamed National Parks) were established not only for protection of wildlife but also to offer exclusive recreation to the settlers. This led to problems with the local communities as they were immediately faced with challenges of displacement and human–wildlife conflict.[34]

In the post-independence era, the first attempt at a comprehensive policy review on wildlife management was in 1975 due to the dwindling of wildlife resources. The Government, then, issued Sessional Paper No. 3 of 1975,[35] which marked a radical departure from the colonial preservationist policies preceding it. It recognised that wildlife needed space outside protected areas.[36] Two interesting aspects about the policy are that; first it stated that maximum returns on the land could be secured through proper utilization of wildlife,[37] and second, it condemned the colonial preservationist policies that tended to police and enforce prohibitions about legal and illegal activities regarding wildlife.[38] Although this is the policy that is still in use today, wildlife utilization remains prohibited and where it is allowed, it is burdened by strict regulation and supervision.

For a long time, the main statute that provided for wildlife in Kenya was the *Wildlife (Conservation and Management) Act* (Cap 376) (repealed) which was enacted in 1976 with major amendments in 1989.[39] The key objectives of this Act were the protection, conservation and management of wildlife. The Act created KWS, a state corporation as

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[31] No. 4 of 1898.
[32] See generally Chongw, M.B., "The History and Evolution of National Parks in Kenya," *The George Wright Forum*, Vol. 29(1), 2012, pp. 39–42.
[33] No. 9 of 1945, (Government Printer, Nairobi).
[34] *Ibid*, p.40, quoting Honey, M., *Ecotourism and Sustainable Development: Who Owns Paradise?* Washington, DC: Island Press, 1999.
[35] Statement on Future Wildlife Management Policy in Kenya, (Government Printer, Nairobi).
[36] Mbote, P.K., 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' in C.O. Okidi *et al*.(eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008) , p.291.
[37] Para. 6.
[38] Para. 9.
[39] Wildlife (Conservation and Management) (Amendment), Act No. 16 of 1989.

the lead agency responsible for all matters related to wildlife. Under the Act, the Service was established as a body corporate and it was further established in the case of *Kahindi Lekalhaile & 4 Others v Inspector General National Police Service and 3 Others*,[40] that the service had been established under a separate legal regime and hence not under the supervision of the National Police Service. Although, it was thought to be a good law on the protection and conservation of wildlife at the time of its enactment, its provisions were soon surpassed by modern approaches to wildlife conservation and management. Some of the factors recognised as necessitating revision of the Act are the ascendance of biodiversity to a position of prime importance internationally, and the continued inability of government agencies to integrate, harmonise and enforce land use policies and legislation intended to conserve wildlife and other natural resources.[41] Also of key importance is the recognition of the state as the sole regulator of matters related to wildlife, which was inconsistent with the requirements of public participation and democracy in governance matters. This position also made the Act inconsistent with the current Constitution of Kenya 2010. There was also the need for the law on wildlife to recognise and promote benefit-sharing and sustainable use of wildlife resources instead of a total ban on the same.

9.4.2 Revision of Wildlife Legislation in Kenya

The process of revising wildlife legislation in Kenya has been protracted, with delays caused by political and conflicting stakeholder interests. The first attempt to revamp the WCMA was the Draft Wildlife (Conservation and Management) Bill, 1997. This Bill shifted from 'Wildlife' to 'Biodiversity' to expand the spectrum of conservation. Interestingly, the Bill was not entitled the "Biodiversity (Conservation and Management) Bill." The Bill also proposed to have public participation through wildlife user rights to land owners, a National Wildlife Association, zonal wildlife associations and wildlife scouts in the community. This Bill did not see the light of day. It is speculated that the Environmental Management and Coordination Act of 1999, overtook the intentions of the Bill.

The next attempt to revamp the Act was in 2004 via the Wildlife (Conservation and Management) (Amendment) Bill. The prevailing themes in this Bill were consumptive utilization of wildlife, reintroduction of sport hunting and enhanced compensation for loss of life and injury caused by wildlife. This Bill did not seek to repeal the entire Act but amend specific sections thereof to cater for those themes. The Bill went through

[40] Petition 25 of 2013.
[41] Mbote, P.K., 'Aligning Sectoral Wildlife Law to the Framework Environmental Law,' *op cit*, p.293.

Parliament but was vetoed by former President Kibaki because he had reservations on the reintroduction of hunting in Kenya.[42]

A third attempt came in 2007 with the Draft Wildlife (Conservation and Management) Bill. This Bill also emphasized community participation by providing for community wildlife conservation areas and sanctuaries, constituency wildlife associations and wildlife user rights. It introduced conservation of marine ecosystems and wetlands, which were not provided for in the Wildlife (Conservation and Management) Act. It also legislated on wildlife orders and easements as ways of securing wildlife corridors and buffer zones. It retained the provisions on enhancement of compensation that were in the 2004 Bill. This Bill did not reach Parliament.

In 2009, a fourth attempt was made to overhaul wildlife legislation with the Draft Wildlife (Conservation and Management) Bill, 2009. This Bill was merely a restatement of the 2007 Bill. The key changes were in the administration of wildlife management. It sought to decongest KWS by separating its regulatory, operational, research and training functions. It created the Kenya Wildlife Regulatory Authority (KWRA) as the umbrella wildlife conservation and regulatory agency, the Kenya Wildlife Service College and the Kenya Wildlife Service Paramilitary Academy as the training agencies, the Kenya Wildlife Research Institute as the research agency and the Kenya Wildlife Service Airwing as an operational agency alongside KWS which was retained as the key operational agency. The Bill also introduced the aspect of incentives to encourage individuals and communities to conserve wildlife on their lands. Stakeholders could not agree on many aspects within the Bill and with the promulgation of the 2010 Constitution, the Bill was taken back to the ministry for purposes of alignment with the provisions of the Constitution.

The next attempt was the Wildlife Bill, 2011 which was supposedly a realignment of the 2009 Bill with the Constitution. It was, therefore, a restatement of the 2009 Bill but with provisions regarding new constitutional issues especially community participation. However, there were administrative changes as the Bill retained the KWRA as the umbrella wildlife conservation body but reloading all the other functions back onto KWS. This Bill also, did not see the light of day.

The Draft Wildlife Conservation and Management Bill, 2012 was finally enacted into law in 2013.[43] This new Act restates most of the aspects of the 2009 and 2011 Bills. It emphasises on community participation by providing for County Wildlife Conservation

[42] Akama, J.S., 'Controversies Surrounding the Ban on Wildlife Hunting in Kenya: A Historical Perspective' in Brent Lovelock (ed), *Tourism And The Consumption of Wildlife: Hunting Shooting and Sport Fishing* (Routledge, New York, 2008) 73, p.85.

[43] The Wildlife Conservation and Management Act, No. 47 of 2013.

Committees, Community Wildlife Associations and Wildlife Managers and community conservancies. Administratively, the Act does away with an autonomous regulatory agency and instead gives a large aspect of wildlife regulation and licensing to the Cabinet Secretary in charge of wildlife. The Act also reintroduces consumptive utilization of wildlife which as stated earlier, was not in the previous Act.

However, hunting is prohibited as a form of consumptive utilization. Other changes that this Act brings to the wildlife laws are very hefty penalties for wildlife offences and the creation of an independent Wildlife Research and Training Institute to help train wildlife experts and encourage research driven management of wildlife.

9.4.3 International and Regional Instruments

Kenya is a signatory to various international instruments on wildlife and biodiversity. First, is the 1973 CITES Convention[44] which seeks to regulate international trade in wildlife species. It establishes a scientific list of species endangered with extinction and then provides for national regulation of import and export of products from these species.[45] Then there is the 1979 Convention on the Conservation of Migratory Species of Wild Animals,[46] which provides a framework within which range States take individual and cooperative action to conserve migratory species and their habitats.[47] There is also the 1992 CBD[48] which was the first international treaty to take a holistic, ecosystem-based approach to the conservation and sustainable use of biodiversity. It is a framework instrument laying down broad goals, key objectives and general principles which are to be operationalized at the national level.[49]

Regionally, Kenya became a signatory to the African Convention on the Conservation of Nature and Natural Resources[50] in 1968. The key objective of this Convention is to ensure conservation, utilization and development of natural resources in accordance with scientific principles.[51] Kenya is also a signatory to the Lusaka Agreement

[44] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Signed at Washington, D.C., on 3 March 1973 Amended at Bonn, on 22 June 1979 Amended at Gaborone, on 30 April 1983.
[45] Robinson, N.A., 'Implementing Agenda 21 Internationally through Environmental Law,' *op cit*, p.xxx; Appendix I, *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.
[46] Convention on the Conservation of Migratory Species of Wild Animals, 1979. Kenya ratified this Convention in 1999.
[47] UNEP, *Training Manual on International Environmental Law*, op cit p.172; 1979 Convention on the Conservation of Migratory Species of Wild Animals, Art. III, V.
[48] Convention on Biological Diversity, *op cit.*
[49] UNEP, *Training Manual on International Environmental Law*, *op cit*, p.195.
[50] National Council for Law Reporting, 'African Convention on the Conservation of Nature and Natural Resources (1968),' (kenyalaw.org 2012) <*http://www.kenyalaw.org/treaties/treaties/37/AFRICAN-CONVENTION-ON-THE-CONSERVATION-OF-NATURE-AND*> [Accessed 4/04/2013].
[51] Art. 2.

on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora. This Agreement seeks to reduce and ultimately eliminate illegal trade in wildlife and to establish a permanent Task Force for this purpose.[52] The Task Force is headquartered in Nairobi and focuses on investigation and prosecution of regional wildlife crimes.

9.5 Climate Change Implications

Global environmental threats such as climate change and ozone depletion are contributing to the loss of biodiversity. One of the effects of climate change is global warming. The rise in temperature will displace the limits of tolerance of land species.[53] Some of the most affected species will be those with long gestation periods because they will not have sufficient time to adapt to the changing weather conditions.[54] Global warming is leading to the depletion of glaciers on Mount Kenya and this will have negative implications on biodiversity and water supply in the country.[55]

Another effect of climate change is prolonged droughts and floods and other extreme events. Protected areas will be placed under stress as environmental conditions deteriorate and suitable habitats become difficult to find due to human settlement.[56] For example, Amboseli and Tsavo National Parks were particularly hit by a long dry spell in 2009.[57] Stresses over the already limited resources will also increase conflict between humans and wildlife.[58] Scientists have argued that climate change will also make wildlife prone to new diseases.[59] Disease causing organisms that were only found in high temperatures will now move to areas historically known to have low temperatures but which will now have temperatures suitable for those disease causing organisms.

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[52] UNEP, *Training Manual on International Environmental Law, op. cit,* p.183.

[53] Hunter, *et al*, *International Environmental Law and Policy, op cit*, p.922; Agbogidi, O.M., 'Global Climate Change: A Threat to Food Security and Environmental Conservation,' *British Journal of Environment & Climate Change*, Vol.1, No.3, pp. 74-89, 2011.

[54] Ali, *et al*, 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010, op cit*, p.80; See Gibbons, R., "Examining the Extinction of the Pleistocene Megafauna," *Anthropological Sciences*, Spring, 2004, pp.22-27.

[55] Mutai, C.C., *et al,* 'Climate Change and Variability' in *Kenya State of the Environment and Outlook 2010* (NEMA, 2011) 46, p.49.

[56] Hunter, *et al*., *International Environmental Law and Policy, op cit*, p.922; Lopoukhine, N., *et al*, 'Protected areas: providing natural solutions to 21st Century challenges,' *S.A.P.I.EN.S* [Online], Vol. 5, No.2, 2012.

[57] Ali, *et al*, 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010, op. cit*, p.80.

[58] Hunter, *et al*., *International Environmental Law and Policy, op cit*, p.603; FAO, 'Consequences of climate Change,' available at http://www.fao.org/docrep/015/i2498e/i2498e03.pdf [Accessed 10/04/2013].

[59] Ali, *et al*, 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010, op cit*, p.80; Patz, J.A., *et al*, 'Climate change and infectious diseases,' *Climate Change and Human Health*, http://www.who.int/globalchange/publications/climatechangechap6.pdf [Accessed 10/04/2013]; Lunney, D. & Hutchings, P., 'Wildlife and Climate Change: Towards robust conservation strategies for Australian fauna,' (Royal Zoological Society of New South Wales, 2012).

Unless the law takes urgent measures to address climate change and variability, biodiversity in Kenya will not be properly protected. The new Act provides for the formulation of a national wildlife conservation and management strategy. One of the things that this strategy must provide for is adaptation and mitigation measures to avert adverse impacts of climate change on wildlife resources and their habitats.[60] The Environmental Management and Coordination Act does not address the issue of climate change and its impacts on biodiversity.

9.6 Disaster Preparedness

The main disasters that may affect biodiversity in Kenya are natural disasters such as prolonged droughts, wildfires, floods and diseases. It is said that modernization of Kenya's meteorological systems and information and wider use of communication technologies will improve disaster preparedness.[61] To cushion against prolonged droughts Kenya Wildlife Service has partnered with local communities to buy hay from them to supplement herbivores during periods of drought. There are also artificial water holes which are excavated strategically and filled with water during the dry season.

To prevent wildfires, the Kenya Wildlife Service has dug firebreaks within protected areas. However, this is challenging within mountainous landscapes where excavating equipment cannot reach certain fire-prone areas. The 2013 Act, further seeks to protect wildlife habitats from fire disasters by making it a punishable offence to set fire to vegetation in any wildlife protected area or to allow any fire set by that person to enter into a wildlife protected area.[62]

For floods, the Kenya Wildlife Service has dug artificial water canals to direct water to rivers or other water bodies within the protected areas. To prevent disaster caused by diseases, KWS uses veterinary interventions including vaccination of wild animals. The 2013 Act, provides that one of the things that must be included in the national wildlife conservation and management strategy is measures for wildlife disease surveillance and control.[63] Section 52(1) (c) of the Act provides that one of the functions of the Wildlife Research and Training Institute is to undertake wildlife disease surveillance and control.

There are various checks in place to prevent extinction of wild flora indigenous to Kenya such as the East African Herbarium in the National Museums of Kenya. Under this project, the Plant Conservation and Propagation Unit was established to ensure

[60] S. 5(2), No. 47 0f 2013..
[61] Businge, M.S., *et al*., 'Socioeconomic Status, Poverty, Gender and Environment' in *Kenya State of the Environment and Outlook 2010,* (NEMA, Nairobi, 2011) 24, p.37.
[62] S. 102(1) (b).
[63] S. 5(2) (m).

survival and proliferation of endemic flora.[64]The new law mandates the Wildlife Research and Training Institute with role of giving information on early warning, disaster management impacts and mitigation. [65] The Environmental Management and Coordination Act only provides for disaster preparedness in areas prone to landslides for conservation of hilltops, hillsides and mountainous areas.[66]

9.7 Challenges Faced By the Sector

The challenges facing the wildlife sector in Kenya include loss of biodiversity, loss of habitat, fragmentation due to land use changes, competing land uses, inadequate incentives and compensation, absence of mechanisms for equitable benefit sharing, increased human-wildlife conflicts and non-involvement of communities and land owners.[67] Most of these challenges may lead to mass extinction of some species. It is said that scientists know of only 5 mass extinctions, the last of which occurred 65 million years ago through the striking of the earth by a meteorite.[68] It is thus contended that the earth has entered a sixth wave of mass extinction and by estimates is losing some 27,000 species a year.[69] Unlike previous mass extinctions, the present mass extinction is a result of the day to day decisions and actions of human beings.[70]

9.7.1 Poaching

Loss of biodiversity mainly results from human activities, habitat destruction and over harvesting including poaching.[71] Poaching is driven by several factors including poverty, availability of lucrative markets and lack of institutional capacity to implement anti-poaching laws.[72] The main target species for poaching are elephants for their tusks and rhinos for their horns. Many other animals are poached for the illegal bush meat trade. There is also harvesting of live animals from the wild for the illegal pet trade in the developed world. Animals affected in Kenya include chameleons, some species of birds,

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[64] National Museums of Kenya, 'Herbarium Section' (National Museums of Kenya, 2013). Available at *http://www.museums.or.ke/content/view/116/83/1/4/*[Accessed 1/04/2013].
[65] S. 52(1) (j).
[66] S. 47(2) (d).
[67] Mbote, 'Aligning Sectoral Wildlife Law to the Framework Environmental Law,' *op. cit*, p.281.
[68] Hunter, *et al*., *International Environmental Law and Policy*, *op cit*, p. 6; Erwin, D.H., *Extinction: How Life on Earth Nearly Ended 250 Million Years Ago*, (Princeton University Press, 2006).
[69] *Ibid.*
[70] *Ibid.*
[71] Robinson, N.A., *Agenda 21: Earth's Action Plan*, *op cit*, p.265.
[72] Ali, *et al*, 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010, op cit*, p.79.

tortoises and various primate species.[73] According to Hunter *et al*., a conservative estimate places trade in wildlife species at over USD 10 billion a year and up to one third of this trade is illegal.[74] The 2013 wildlife law provides for very high penalties for poaching and further provides for minimum penalties, including life imprisonment for poaching of protected animals.[75] Conviction of such offenders has been done in many instances. The case of *Biemei Chen v Republic*[76] illustrates the fact that courts are taking poaching as a serious offence by imposing severe jail sentences on persons found guilty of the offence.

9.7.2 Invasive Species

Introduced species are responsible for many recorded species extinctions.[77] The WCMA defines invasive species to mean "*a non-indigenous species trans-located to a place outside its natural distribution range in nature and which dominates other indigenous species or takes over the habitat*."[78] Invasive species usually have the characteristics of early productive maturity, wide environmental tolerance, rapid growth rate and high reproductive capacity which give them an advantage over the endemic species.[79] Invasive species that have altered ecosystems in Kenya leading to loss of biodiversity include the *lantana camara* plant in Nairobi and Meru National Parks, common carp fish species in Lake Naivasha and hyacinth on Lake Victoria. The 2013 law provides a list of invasive species in its Seventh Schedule and proposes to deal with invasive species by making it a punishable offence for any person to knowingly introduce an invasive species into a wildlife conservation area.[80]

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[73] *Ibid*; Mulliken, T., 'The Role Of Cites In Controlling The International Trade In Forest Products: Implications For Sustainable Forest Management,' Non-*Wood Forest Products Working Document No. 7*, (FAO, 2009).
[74] Hunter *et al*., *International Environmental Law and Policy*, *op cit*, p.916.
[75] S. 92.
[76] Criminal Revision No. 136 of 2013, [eKLR]
[77] Hunter, D., *et al*., *International Environmental Law and Policy*, *op cit*, p.921; Sodhi, N.S., 'Causes and Consequences of Species Extinctions,' available at http://press.princeton.edu/chapters/s5_8879.pdf [Accessed on 1/04/2013]; Gurevitch, J. &. Padilla, D.K., "Are invasive species a major cause of extinctions?" *TRENDS in Ecology and Evolution*, Vol.19 No.9, September 2004, pp.470-474.
[78] S. 3.
[79] Oyugi, D., 'Role of Invasion on Population Structures' in *8th Wardens and Scientists Conference Report* (KWS, 2012), p.28.
[80] S. 93.

9.7.3 Pollution

Pollutants strain ecosystems and may reduce or eliminate populations of sensitive species. Contamination may reverberate along the food chain causing mass destruction.[81] An example is the use of herbicides and pesticides in agricultural land. Some of these chemicals seep into rivers that flow through protected areas, causing poisoning of wildlife which drinks from the river. Another problem is the dumping of solid waste into rivers that flow through protected areas.

A major cause of pollution in coastal ecosystems is construction of hotels and other facilities in areas that are not on the sewerage lines.[82] According to Businge *et al*., beach resorts and some households in Mombasa have constructed onsite sewage management systems such as septic tanks and soakage pits.[83] However, these often cause groundwater contamination which in turn causes considerable coral reef dieback and threatens the proliferation of marine life.[84] The 2013 Act deals with pollution by making it an offence to pollute wildlife habitats. [85] The Act applies the polluter pays principle and environmental restoration alongside payment of hefty fines for persons convicted of polluting wildlife habitats.[86] EMCA has very substantive provisions on pollution of the environment and gives deterrent penalties for violation of those provisions. The courts have further upheld the provisions of EMCA relating to pollution of wildlife resources and one such incidence was in the case of *Kwanza Estates LTD v Kenya Wildlife Service*,[87]where the court issued an injunction stopping the construction of a public toilet on the beachfront without approval from NEMA holding that the actions had potentially negative effects on the environment.

9.7.4 Human Wildlife Conflict

Human population increase and changes in lifestyles brought about by economic growth and technology in the past century have greatly increased the demand on wildlife.[88] Kenya's protected areas were largely established by the colonial government

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[81] Hunter *et al*., *International Environmental Law and Policy*, *op cit*, p. 922; FIAN International, 'Study 3: Ecodestruction and the Right to Food: The Cases of Water and Biodiversity,' *Starving the Future*, June 2002, available at http://www.fian.at/assets/Ecodestruction02.pdf [Accessed 1/04/2013].

[82] Businge, M.S., *et al*., 'Environment and Economic Development' in *Kenya State of the Environment and Outlook 2010* (NEMA, 2011) 2, p.14.

[83] *Ibid.*

[84] *Ibid.*

[85] S. 89.

[86] S. 89(2).

[87] Civil Case 133 of 2012 [eKLR].

[88] Birnie, *et al*, *International Law and the Environment*, *op cit*, p.583; Burgess, M., 'The Challenge In Conservation of Biodiversity: Regulation of National Parks in China And South Africa in Comparison,' *Discussion Paper*, No. 2, 2012; Daily, G.C. & Ehrlich, P.R., 'Population, Sustainability, and Earth's Carrying

for purposes of game hunting, photography or securing valuable mineral and timber resources.[89] Due to the low human population in Kenya at the time, it was possible to completely separate wildlife from human activities. Population increase is causing changes in land use patterns which in turn leads to conflict with wildlife.[90] Buffer zones and wildlife corridors are now being cultivated to grow food crops. When wildlife starts migrating through the corridors, they are met with cultivated areas which they trample on or consume, thus causing immense destruction. There are also conflicts of dwindling resources such as water and pastures.

The 2013 Act has dedicated an entire part to addressing issues of human wildlife conflict.[91] Section 77 gives KWS officers powers to destroy wild animals which have been deemed problem animals. Further, any person may destroy a problem animal in immediate defence of life or property. The Act further provides that KWS may use firearms for control of problem animals and animal population control.[92] There are also provisions for compensation for human wildlife conflict including compensation for crop, livestock and property damage which was not there in the previous Wildlife Act.[93] Further, the Act now provides for greater sums for compensation of human death or injury by wildlife. The Act also creates a Wildlife Compensation Scheme which is to be established by the government for financing compensation claims.[94]

The solution for human wildlife conflict is not to increase the amount of money paid as compensation or expanding what may be compensated against, but is by encouraging compatible land uses through land-use plans that are strictly enforced. However, this will require enabling the community to adequately manage and conserve wildlife and accrue greater economic benefits from wildlife than agriculture.

9.7.5 Bio-piracy

Bio-piracy means the appropriation of legal rights over biological materials by international entities without recompensing the countries from which the materials are

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Capacity: A framework for estimating population sizes and lifestyles that could be sustained without undermining future generations,' *BioScience,* American Institute of Biological Sciences, 1992.

[89] Ali, *et al*, 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010, op cit*, p.76; Redford, K.H. & Fearn, E. (eds), 'Protected Areas and Human Livelihoods: Experiences from the Wildlife Conservation Society,' *Wildlife Conservation Society Working Paper* No. 32, 2007, available at http://s3.amazonaws.com/WCSResources/file_20110518_073958_WCS_WorkingPaper_32_EERUj.pdf [Accessed 1/04/2013].

[90] *Ibid.*

[91] Part IX.

[92] S. 112(3) (c).

[93] S. 25.

[94] S. 24.

taken.[95] The 2013 Act defines bio-piracy as "*the exploration of biological resources without the knowledge and non-coercive prior consent of the owners of the resources and without fair compensation and benefit sharing*."[96] Bio-piracy is an issue that dates back to the colonial period.[97] It is exacerbated by lack of appropriate legal and regulatory mechanisms such as strict patent laws that can control the exploitation of these renewable resources.[98] Valuable genetic materials are continually exported to developed countries. They are collected from the wild in the name of field research and exported out of Kenya without the knowledge of government agencies. The most popular example of bio-piracy in Kenya is the extremophile microbes endemic to Lake Bogoria which were collected and taken to the United States of America by Procter and Gamble Ltd. These microbes are estimated to generate about US$ 38 billion annually for the pharmaceutical industry. The microbe is also used to convert jean material into stonewash shades and this reportedly earns an American textile firm about US$ 3 billion annually.[99] However, neither the Kenyan government nor the local community at Lake Bogoria has shared any of the ensuing monetary benefits.[100]

9.8 Opportunities

One aspect of biodiversity conservation that has not been tapped by Kenyans is payment for ecosystem services. Ecosystem services refer to the value people get from ecosystems. Examples are the value of ecosystems in freshwater purification, pollination, clean air, flood control, soil stability, water conservation and climate regulation.[101] The value of ecosystem services is estimated at more than one third of the total value of the world's economy.[102] The primary reason that ecosystem services are taken for granted is that they are deemed to be free.[103] An example of payment for ecosystem services includes the residents of Nairobi paying a certain amount of money to the communities surrounding

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[95] Indigenous Knowledge Project, 'What is Biopiracy?'
Available at <*http://indigenousknowledgeproject.org/biopiracy*> [Accessed on 1/04/2013].
[96] S. 3.
[97] Ali, *et al*, 'Biodiversity,' in *Kenya State of the Environment and Outlook 2010, op cit*, p.78.
[98] *Ibid*, p.76;
[99] *Ibid.*
[100] *Ibid*; See also Noriega, I.L., *et al*, 'The multilateral system of access and benefit sharing: Case studies on implementation in Kenya, Morocco, Philippines and Peru,' (Bioversity International, 2012), available at http://www.bioversityinternational.org/fileadmin/_migrated/uploads/tx_news/The_multilateral_system_of_access_and_benefit_sharing_1575.pdf [Accessed on 1/04/2013].
[101] Hunter *et al*., *International Environmental Law and Policy*, *op. cit*, p. 916.
[102] *Ibid*; Losey, J.E. & Vaughan, M., 'The Economic Value of Ecological Services Provided by Insects,' *BioScience*, Vol. 56, No. 4, April 2006, pp. 311-323; Costanza, R., 'The value of the world's ecosystem services and natural capital,' *Nature*, Vol. 387, 15 May 1997, pp. 253-260.
[103] Hunter *et al*., *International Environmental Law and Policy*, *op. cit*, p. 916; Salzman, J., 'Valuing Ecosystem Services,' *Ecology Law Quarterly*, Vol. 24, Iss. 4, September 1997, pp.887-904.

Aberdare National Park because most of the water used in Nairobi comes from the Aberdare. This will encourage the Aberdare community to continue conserving the resources as such conservation benefits them. However, in Kenya, the value of ecosystem services rarely enters policy debates or public discussions.[104]

Another opportunity is, Community-Based Natural Resource Management (CNRM). This is the involvement of community members and local institutions in the management of natural resources for their economic growth and development. It involves devolution of power and authority from the State to local levels. This will legitimise indigenous resource uses and rights and will include traditional values and ecological knowledge in modern resource management.[105] The Constitution provides that the state shall protect and enhance indigenous knowledge of biodiversity of the communities.[106] The use of indigenous knowledge in biodiversity conservation will encourage community participation and benefits from conservation and ultimately lead to reduction in human-wildlife conflict.[107] The 2013 Act provides for CBNRM through the recognition of community conservancies and sanctuaries.

Another opportunity is use of incentives to encourage participation in wildlife management. Command and control approaches to wildlife management have failed to curb loss of wildlife. If private land owners and communities are given incentives to keep wildlife on their land, then they will perceive wildlife as an economic good and protect it in the same manner they protect their private property. The WCMA now provides for incentives for wildlife management.[108] Economic incentives such as tax exemptions and waiver of stamp duties on land relating to wildlife would go a long way in encouraging Kenyans to conserve wildlife as an alternative land use method.

9.8.1 Devolution, Wildlife and Biodiversity Management in Kenya

The issue of devolution of wildlife and biodiversity management has been captured in the *National Wildlife Conservation and Management Policy*, 2012. One of the factors that led to the need for the revised Policy, as well as a new legislation on wildlife, was the need for decentralization and devolution of wildlife management to the lowest level possible and enlist the participation of the private sector, non-governmental organizations (NGOs), community based organizations (CBOs) and other non-state actors.[109]

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[104] *Ibid.*

[105] Kellert, S.R., *et al*, 'Community Natural Resource Management: Promise, Rhetoric and Reality,*' Society and Natural Resources: An International Journal*, Vol.13, No.8, 2000, p.706.

[106] Art. 69(1) (c).

[107] Warren, M., 'Indigenous Knowledge, Biodiversity Conservation and Development' in Bennun*et*, L.A., *al*., (eds), *Conservation of Biodiversity in Africa: Local Initiatives and Institutional Roles* (Centre for Biodiversity, National Museums of Kenya, 1995) 93, p.96.

[108] S. 70.

[109] Republic of Kenya, *The National Wildlife Conservation and Management Policy*, 2012.

The Policy was founded on the principles, *inter alia*, that: wildlife conservation and management will be devolved, wherever possible and appropriate to those owners and managers of land where wildlife occurs; conservation and management of wildlife shall entail effective public participation; wildlife conservation and management should be encouraged and recognized as a form of land use on public, community and private land. In exercising that form of land use, benefits should be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline; and that wildlife conservation and management is exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations; the use of precautionary principle; benefits accruing from wildlife conservation and management shall be enjoyed and equitably shared by the people of Kenya; an integrated ecosystem approach to conserving wildlife resources will, wherever possible be adopted and enhanced to ensure that as much as possible all ecosystems are managed in an integrated manner while also providing a range of benefits to people.

The policy also takes cognizance of the requirement of the Constitution in respect of public participation by and involvement of all sections of society, including gender, gender equality, the youth, marginalized and disadvantaged groups and communities as well as persons living with disabilities.[110] Further, the Policy stipulated that good corporate governance principles, rule of law, effective institutions, transparency and accountability, respect for human rights and the meaningful participation of citizens will be integrated in wildlife conservation and management. The policies set out in the Policy have been captured in the 2013 law.

Under the Act, devolution is defined to mean the transfer of rights, authority and responsibilities by the national wildlife agencies to the local delimited geographic and functional domains.[111] One of the principles guiding the implementation of the Act is the devolvement of wildlife conservation and management.[112] In establishing a Board of Trustees for KWS, the Act includes communities and private land owners so that they can represent the views of those constituencies when decisions on wildlife management that may affect them are made.[113] It also establishes County Wildlife Conservation and Compensation Committees which will be at the County Level with representatives from communities[114] and are to play a major role in wildlife conservation decision-making at the local level.[115] Further, the Act establishes a Wildlife Endowment Fund whose

[110] *Ibid*, Art. 3.0, Guiding Principles and National Values.
[111] S. 3, Wildlife (Conservation and Management) Act, 2013.
[112] *Ibid*, S. 4(a).
[113] S. 8(1) (f).
[114] S. 18(g).
[115] S. 19.

functions include facilitating community-based wildlife initiatives.[116] When making guidelines on incentives and benefit sharing of wildlife resources, the Cabinet Secretary is to ensure there is sufficient public participation and take into account laws on devolution and land management.[117] These provisions are meant to encourage devolution of wildlife conservation and management to the grassroots level and ensure that wildlife conservation in Kenya is not the sole responsibility of the national government through KWS.

The Act also takes into account the interests of communities in human-wildlife conflict resolution and mitigation measures as well as sharing of benefits from wildlife conservation initiatives. Decisions relating to human-wildlife conflict resolution are to take into account the rights and privileges of communities living adjacent to wildlife protection areas and relevant laws on devolution and land management to ensure more concise mitigation measures that work to the advantage of the local communities.[118] Further, any dispute arising in relation to wildlife management, protection or conservation is in the first instance, to be referred to the lowest possible structure under the devolved system of government, as set out in the laws dealing with devolution including traditional dispute resolution mechanisms.[119]

One of the functions of the national government under paragraph 22 of the Fourth Schedule to the Constitution is the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including the protection of animals and wildlife.[120] Wildlife management is not expressly mentioned as one of the functions of the county governments in the Constitution. However, under paragraph 10 of Part II of the Fourth Schedule to the Constitution, Counties are given the function of implementing specific national government policies on natural resources[121] and environmental conservation, including soil and water conservation and forestry.

These constitutional Provisions, when read together with the spirit of the WCMA, leads to the view that it is impossible to exclude County governments from the management of wildlife. County governments are bound to participate in the management and conservation of wildlife at their level, in cooperation with the national Government. Article 189 of the Constitution calls for consultation and exchange of information between

[116] S. 23(3) (e).
[117] S. 76(3).
[118] S. 75 (1).
[119] S. 117(1).
[120] The Sectoral Committee on Agriculture, Environment and Natural Resources is to lead in this role.; See also S. 102, *County Governments Act*, No. 17 of 2012, Laws of Kenya-Principles of planning and development facilitation.
[121] Art. 260 of the Constitution defines 'natural resources'‖ to mean the physical non-human factors and components, whether renewable or non-renewable, including— (*a*) sunlight; (*b*) surface and groundwater; (*c*) forests, biodiversity and genetic resources; and (*d*) rocks, minerals, fossil fuels and other sources of energy.

the two levels of government and Article 62(2) encourages consultation and cooperation between the two levels of government as they carry out their functions.

The *Intergovernmental Relations Act*,[122] which establishes a framework for consultation and co-operation between the national and county governments and amongst county governments, reinforces the constitutional provisions on cooperation.[123] Under devolution, it is possible to achieve sustainable use and management of wildlife resources, while at the same time ensuring that the public participate in a beneficial way. What is therefore, required under county governments is political goodwill to facilitate all this in order to promote community-based natural resource management (CBNRM). Where opportunities for public participation in wildlife utilization are increased, and resulting benefits are made available to participants, then the public is likely to be more willing to contribute to the costs of controlling wildlife, rather than considering wildlife as a competitor for resources.[124] Other advantages that are said to derive from public participation in decision-making and implementation include people's support to the measures adopted and consequent improved implementation and enforcement.[125]

9.9 Conclusion

Biodiversity is a renewable resource, but only if conserved and managed sustainably. Unlike, other non-renewable resources, wildlife cannot be substituted by human innovation.[126] It is, therefore, paramount that decisive action be taken to conserve biodiversity. The extinction of species and their habitats and the destruction of ecosystems are an ecological tragedy that has profound implications for social and economic development. UNEP estimates that at least 40% of the world's economy and 80% of the needs of people in developing countries are derived from biodiversity.[127]

The 2013 Act, is now law and although its implementation has just began, it is hoped that it will now prevent destruction of biodiversity. The new Act has dynamic provisions that can adapt to and address new challenges and emerging issues. Important aspects such as climate change, disaster preparedness, bio-piracy and others are now addressed. Further, community participation is put at the centre of the enforcement of the new Act. The participation and support of local communities are elements essential to the

[122] No. 2 of 2012, Laws of Kenya.
[123] *Ibid*, Preamble.
[124] Cirelli, M.T., Legal Trends in Wildlife Management: Approaches to People's Involvement in Wildlife Management' Rome, 2002, Available at *http://www.fao.org/docrep/005/y3844e/y3844e08.htm* [Accessed on 9/04/2014].
[125] *Ibid.*
[126] Birnie *et al*., *International Law and the Environment, op. cit*, p.584.
[127] UNEP, *Training Manual on International Environmental Law, op. cit*, p.193.

success of conservation of biodiversity.[128] Education and public awareness need to be embraced to ensure acceptance of wildlife in Kenya. Wildlife Education should be included in school curriculum so that Kenyans are aware of their wildlife resources and the opportunities they may get from those resources.

Going forward, there is need to address the delicate balance between preservation and sustainable utilization to ensure that Kenya's biological resources do not become extinct. The enormity of the problem can be seen from KWS's new mission to 'save the last great species and places on earth for humanity'[129] a move from their last mission which was 'to sustainably conserve and manage Kenya's wildlife and its habitats for posterity.'[130] KWS is moving from sustainable conservation of wildlife in Kenya to saving species which shows the amount of loss of biodiversity in the country.

[128] Robinson, N.A.,, 'Implementing Agenda 21 Internationally through Environmental Law,' *op. cit*, p.266.
[129] KWS, *Strategy 2.0: Strategic Plan 2012-2017*, (KWS, 2012), p.5.
[130] KWS, *Our Heritage, Our Future: Strategic Plan 2008-2012*, (KWS, 2008), p.18.

Chapter Ten

Minerals

10.1 Introduction

Minerals are critical to the social, political and economic activity of any country.[1] They are core raw materials for the manufacturing sector, high technology industries, resource industries and the construction industry.[2] The International Mineralogical Association defines "minerals" as an element or chemical compound that is normally crystalline and that has been formed as a result of geological process.[3] According to the United Nations Environment Programme (UNEP), mining is an economic activity that consists of extraction of potentially useable and non-renewable mineral resources (excluding petroleum, natural gas and water) from land or sea without involving agriculture, forestry or fisheries.[4]

The Mining Act[5] defines "minerals" as all minerals and mineral substances other than mineral oil as defined in the Mineral Oils Act[6] and may be precious metals, precious stones or non-precious minerals.[7] This excludes clay, murram, limestone or other stones except as stated in the Mining (Safety) Regulations.[8] The Mining Act further defines mining as the intentional winning of minerals.[9] The Mining Bill 2014[10] defines a "mineral" as a substance formed by a geological process including building materials but excluding petroleum and ground water.[11] The Bill also defines mining operations to include winning minerals from their natural state and disposal of minerals or resultant waste.[12] The Petroleum (Exploration and Production) Act[13] defines petroleum as mineral oil including crude oil, natural gas and hydrocarbons produced or capable of being

[1] Kariuki, D., "A Report of the Civil Society Review of the Implementation of Agenda 21 in Kenya," available at http://*www. worldsummit2002.org/texts/Kenya/KENYAminerals.pdf* [Accessed on 4/04/2013].
[2] *Ibid.*
[3] Nickel, E.H., 'Definition of a mineral,' (Commission on New Minerals and Minerals Names of the International Mineralogical Association, 1995), available at http://www.minersoc.org/pages/Archive-MM/Volume_59/59-397-767.pdf [Accessed on 4/04/2014].
[4] UNEP, "Production and Consumption: Mining,"
Available at, *http://www.uneptie.org/pc/mining/index.html* [Accessed on 4/04/2014].
[5] Chapter 306, Laws of Kenya.
[6] Chapter 307, Laws of Kenya.
[7] S.2.
[8] *Ibid.*
[9] S. 2.
[10] Kenya Gazette Supplement No. 28 (National Assembly Bills No. 8).
[11] S. 4.
[12] *Ibid.*
[13] Chapter 308, Laws of Kenya.

produced from oil shales or tar sands.[14] In the Act, "petroleum operations" is defined as the exploration for, development, extraction, production, separation, and treatment, storage, transportation and sale or disposal of, petroleum including natural gas processing but does not include petroleum refining operations.[15]

Mining operations often exist in remote parts of developing countries, with the combined challenges in public services delivery and development assistance and mining sector players are always called upon to catalyze development in such areas.[16] Further, an increase in the number of multinational corporations has led to a greater presence of private corporations amongst communities around the world, and this, combined with a global decline in public sector development assistance has cast the private sector as an important player in social and economic development.[17] Under the requirement for corporate social responsibility, these corporations play an active role in betterment of the lives of locals in their countries' and specifically areas of operation. They, therefore, appear to be more useful in upgrading the lives of locals as compared to the often inefficient or absent government bodies.

This has been attributed to various factors including the existence of mining operations in environments where government institutions may be absent, weak, lack in capacity or corrupt, leaving gaps in essential public service provision. Further, the social and environmental footprint of mining operations often has impacts on local communities, requiring compensation and mitigation programmes and the remote locations of many operations accentuates the expectation for employment and economic development within host communities. The enclave nature of the mining industry can limit the "trickle down" of benefits unless specific social investment programmes are undertaken.[18]

[14] *Ibid*, S. 2.
[15] *Ibid.*
[16] "World Bank, Mining Foundations, Trust and Funds: A Sourcebook. Washington, DC., 2010, p. 7, available at *https://openknowledge.worldbank.com/handle/10986/16965* [Accessed on 28/04/2014].
[17] The World Bank, 'Examining Foundations, Trusts and Funds (FTFs) in the Mining Sector,' Part 1, p.17. Available at http://siteresources.worldbank.org/EXTOGMC/Resources/Sourcebook_Part1_Main_Findings.pdf[Accessed on 28/04/2014].
[18] *Ibid.*

10.2 The State of the Mining Sector in Kenya

Kenya is a mineral rich country with great mineral diversity.[19] Kenya's profile as a mineral rich country rose with the discovery of significant oil and gas deposits reserves in the North Rift and natural gas resources off the coast of Malindi.[20] Despite its rich minerals, the mining sector has not been fully exploited and mining and mineral extraction, as well as petroleum production, remains an emerging economic sector in Kenya. Kenya's mining and petroleum production industry is primarily concerned with the production of non-metallic minerals which are mainly industrial minerals such as soda ash, fluorspar and gemstones. The sector accounts for a small part of Kenya's economy and is reported to contribute to less than 2% of the country's GDP.[21] Some of the minerals found in Kenya are:

a. Petroleum

Petroleum production is at its nascent stage as the focus has always been on the upstream petroleum sub-sector which is concerned with petroleum refining, transportation and sale of petroleum products. Though 90% of Kenya is geologically mapped and mineral occurrence documented, the mining and petroleum production industry is not developed. Mapping is intended to enable Kenya to fully and effectively exploit its minerals.

b. Gold

In the Lake Victoria region, including the Western region, the Achaean rocks which constitute the Greenstone Belt hosts numerous gold bearing quartz veins often associated with minor amounts of sulphides. Turkana County has Proterozoic gold bearing shear zones, and alluvial deposits.[22] Gold has also been documented to exist in the Counties in the upper Eastern region. The potential of the Counties in Central and Eastern has not been explored.[23]

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[19] The Department of Mines and Geology at the Ministry of environment and Natural Resources has surveyed and documented the minerals that are found in Kenya.
[20] *Ibid.*
[21] *Ibid.*
[22] Lakkundi, T., 'Geology and Mineral Resources of Kenya with special emphasis on minerals around Mombasa.' Available at *https://www.academia.edu/3478616/Geology_and_Mineral_Resources_of_Kenya_with_special_emphasis_on_minerals_around_Mombasa* [Accessed on 10/05/2014].
[23] *Ibid,* p. 20.

c. Gemstones

Kenya boasts of a wide range of coloured and ornamental stones such as Ruby found in Kasigau and Baringo; Tsavorite in Kasigau and Kuranze in the coast region; Rhodolite in Kasigau; Tourmaline in Turkana and Pokot; Garnet, Sapphire, Peridot, Aquarmarine, Amethyst, Illuminite, and Rutile mined in Kwale County.[24]

d. Base Metals

Base metals found in Kenya include: Nickel and Chrome in Pokot, Samburu and Mandera; Iron Ore in Taita, Kitui and Mwingi Counties; Lead, / Zinc, Titanium, Manganese, Niobium and Rare Earth found in the Coastal Region of Kenya.[25]

e. Industrial Minerals

Limestone, Cement, Barite and Dimension stone are found in various parts of the country. Fluorspar is found in Rift valley; Wollastonite found in Kajiado; Kyanite found in Taveta; Soda ash found in Magadi; Diatomite, bentonite, vermiculit found in Kariandusi near Gilgil in Nakuru County; and carbon dioxide is found in Kiambu.[26]

10.3 Legal Framework for Accessing Minerals and Petroleum

The mineral and mineral oil and gas industry in Kenya is guided by laws and policies that have been enacted to guide various areas in this sector. Notably, various legislations have been enacted to guide various aspects of the mining sector ranging from the granting of permits for the extraction activities to the manner in which the extraction activities are to be undertaken.

Firstly, the Mining Policy (Final Draft) of 2010 has a number of objectives which are relevant for the optimal exploitation of minerals. It seeks to ensure that a proper legal and institution framework is established to guide the mining industry in Kenya. The Policy has taken cognizance of the need to ensure the accruing of maximum benefits from mining

[24] IDEX, 'Out of Africa,' December 14, 2006,available at http://www.idexonline.com/FullArticle?Id=26670 [Accessed on 10/05/2014]; Thomas R. Yager, T.R., 'The Mineral Industry Of Kenya,' *U.S. Geological Survey Minerals Yearbook*, 2004, PP.22.1-22.4.

[25] Government of Kenya, 'Using Mineral and Energy Resources & Infrastructure Development as the engine for sustainable development and economic integration in Kenya,' *Kenya Mining, Energy/Oil & Gas and Infrastructure Indaba Conference & Exhibition, 2013*, ("KMEOGII 2013), 5-6, June, 2013, KICC, Nairobi, available at *http://aamig.com/wp-content/uploads/2013/03/Kenya-Mining-Indaba-2013.pdf* [Accessed on 10/05/2014].

[26] *Ibid.*

activities in the country and ensuring that the mining industry contributes to sustainable economic development in the country.

The Policy borrows from the Africa Mining Vision which seeks to ensure 'transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development.'[27] The Vision has identified the challenges that riddle the mining industry in Africa and it proposes several solutions to address these challenges.

The Vision not only seeks to guide the mining industry in Africa, it also seeks to ensure sustainable utilization of natural resources in Africa in order to ensure that the continent's natural resources are used to transform the social and economic development path of the continent. Further, the Vision seeks to ensure the adoption of an integrated approach in the governance of Africa's mineral resources and the involvement of all stakeholders in the governance process. The following section looks at the legal regime governing the mining industry in Kenya and it looks at the applicability of these laws.

10.3.1 Mineral Resources

Mineral exploration prospecting and exploitation in Kenya are currently carried out under the Mining Act. These activities are administered by the Department of Mines and Geology under the Ministry of Environment and Natural Resources.[28] The Department has the responsibility of undertaking geological surveys, geo-scientific research, coordination and regulation of the activities of the mining sector.[29] The Mining Act provides that all un-extracted minerals under or upon any land are vested in the Government, subject to any rights which under the Act, have been granted to any other person.[30] The following licences can be granted under the Mining Act:[31]

a. Mining Location Licences

This is mostly granted to small scale miners. The conditions attached to this licence are onerous than in the case of other licences. A location consists of a block of not more than 10 claims. A claim is an area of; 20,000 square metres in the case of precious metal i.e. gold, silver and precious stones (ruby, emerald, opaland other minerals.),[32] and 50,000 square metres for all other minerals (copper, lead, graphite, barites.[33]

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[27] African Union, *Africa Mining Vision,* 2009.
[28] Government of Kenya, Ministry of Environment and Natural Resources website, available at *http://www.environment.go.ke/* , accessed on 09/09/2014.
[29] *Ibid.*
[30] S. 4.
[31] *Ibid,* Part 11 and 111 of the Act.
[32] *Ibid.*
[33] *Ibid.*

b. Exclusive Prospecting Licence

It is granted over an area selected by the applicant who has a valid prospecting right, has deposited a sum of Kshs.2, 000.00, has written consent from the relevant local authorities, and has a written consent from land owners.[34]

c. Mining Lease

This is granted for the exploitation of a mineral deposit which has been discovered following successful prospecting and exploration.[35]

10.3.2 Precious Metals

Trade in unwrought precious metals is regulated by the Trading in Unwrought Precious Metals Act.[36] "Precious metal" means gold, silver or metal of platinoid group in the un-manufactured state.[37] Unwrought precious metal is defined as precious metal in any form whatever, which is not manufactured or made up into an article of industry or the arts but does not include *ores in situ*.[38] The Act prohibits possession, transport or dealing in unwrought precious metals without a licence.[39] The Act places restrictions on the dealing in unwrought precious metal when in possession of a licence and on the export and import of unwrought precious metal.[40] The Gold Mines Development Loans Act[41] provides for a legal framework for the granting of financial assistance for the underground development of gold mine in Kenya.

10.3.3 Diamond

The diamond industry is regulated by the Diamond Industry Protection Act.[42] The Act is intended for the protection of the diamond industry. The Act defines diamond to mean any rough or uncut diamond.[43] The Act prohibits possession, cutting and setting aside, transport or dealing in diamond without a licence.[44] There are controls and

[34] *Ibid.*
[35] *Ibid.*
[36] Chapter 309, Laws of Kenya.
[37] *Ibid*, S. 2.
[38] *Ibid.*
[39] *Ibid*, SS. 3-5.
[40] *Ibid*, SS. 9-14.
[41] Chapter 311, Laws of Kenya.
[42] Chapter 310, Laws of Kenya.
[43] *Ibid*, S. 2.
[44] *Ibid*, SS. 3-11.

restrictions on the production, dealing in, export and import of, diamond when in possession of a licence.[45]

10.3.4 Petroleum

The exploration for, development, production and transportation of petroleum is regulated under the Petroleum (Exploration and Production) Act.[46] The Act provides that property in petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the government of Kenya subject to any rights which have been or are granted or recognized as vested, in any other person by or under any written law.[47] The Act regulates petroleum operations and provides for petroleum agreements and access to private land for purposes of petroleum operations.[48]The Mining Act,[49] the Petroleum (Exploration and Production) Act,[50] the Trading in Unwrought Precious Metals Act[51] and the Diamond Industry Protection Act[52] provide that royalties and export permits fees are payable for all minerals and petroleum.

10.4 Mineral Development in Kenya

The mining sector in Kenya contributes insignificantly to the country GDP. Almost all the minerals are exported in their raw form due to lack of specialised skills. There is need for value addition within the country for higher returns, industrialisation and economic growth. The sector is being revamped through various policies that have been either passed or are in draft form ready for enactment.[53] Therefore, the prospects of the mining sector are expected to change as some minerals are being discovered in various parts of Kenya. For instance, coal has been recently discovered in Kitui County and oil in Ngamia Turkana County.[54]

Mining activities have not been coordinated very well since there are so many small artesian mining groups that do not adhere to environmental protection policies and guidelines.[55] This has been reinforced by the complexity of the sector and lack of capacity

[45] *Ibid.* See also the Diamond Industry Protection Regulations.
[46] Chapter 308, Laws of Kenya.
[47] *Ibid*, S. 3.
[48] *Ibid*, S. 10.
[49] *Ibid*, S. 12.
[50] Chapter 308, Laws of Kenya.
[51] Chapter 309, Laws of Kenya.
[52] Chapter 310, Laws of Kenya.
[53] National Minerals and Mining Policy, 2010, (Final Draft), (Government Printer, Nairobi)..
[54] Omolo, M.W.O. & Mwabu, G. (eds), 'A Primer to the Emerging Extractive sector in Kenya: resource Bliss, Dilemma or Curse,' (Institute of Economic Affairs (IEA), 2014), p.2.
[55] Mutie, B., "Policy Gaps in Mining and Mineral Sector in Kenya," available at *Frontline-interactive.co/online-leaf//wp-content/uploads/2012/10/mining and minerals.* [Accessed 5/04/2013].

by the regulators.[56] The major setback in policy implementation is due to fragmented stakeholders and oversight authorities with overlapping mandates.[57] For instance, sand and limestone mining has been observed to have far reaching impact on the environment and yet it closely involves communities. The communities are not involved in the decision-making processes of these regulatory institutions.[58]

The National Environment Action Plan Committee (NEAP) established under Environmental Management and Co-ordination Act [59] is a multi-sector committee responsible for the development of a five year national environment action plan.[60] The National Environment Action Plan should contain an analysis of the natural resources of Kenya and their distribution, quantity and various uses. [61] The Kenya government undertakes to take measures to ensure that investment in the mining sector is promoted and facilitated.[62] Developing the mining and minerals sector in Kenya and value addition is significant in order to ensure the minerals in Kenya contribute to national income.

10.5 Oil, Gas and Coal Prospecting, Exploration and Mining

Kenya is endowed with commercially viable quantities of oil, natural gas and coal. The deposits are in various parts of the country.[63] Kenya has four petroleum exploration basins namely: Lamu, Tertiary Rift, Anzu and Mandera with a combined surface area of 500, 000 square kilometres.[64] These basins have been mapped out into 46 petroleum exploration blocks.[65] They are revised from time to time to meet prospecting demands.[66] Petroleum (Exploration and Production) Act[67] provides that exploration blocks cover all the land within the areas under the block.[68] As exploration continues, it is expected that

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[56] *Ibid.*
[57] *Ibid*; Barczewski, B., 'How Well Do Environmental Regulations Work in Kenya? : A Case Study of the Thika Highway Improvement Project,' (Center for Sustainable Urban Development (Columbia University) & the University of Nairobi, June, 2013), available at *http://csud.ei.columbia.edu/files/2013/06/How-Well-Do-Environmental-Regulations-Work-in-Kenya.pdf [20, September, 2014]*.
[58] *Ibid.*
[59] Act No. 8 of 1999.
[60] *Ibid*, S. 37.
[61] *Ibid.*
[62] See Government of Kenya, Kenya National Industrialization Policy Framework, Draft Five, (Government Printer, Nairobi, November, 2010).
[63] Government of Kenya, Draft National Energy Policy, 2014, (Government Printer, Nairobi, November, 2014), p.2.
[64] National Oil Corporation of Kenya website, available at < *http// www.nationaloil.co.ke* > [Accessed 5/04/2013].
[65] *Ibid.* See the Petroleum Exploration Blocks Map (Fig. 2.0).
[66] *Ibid.*
[67] Chapter 308, Laws of Kenya.
[68] Petroleum (Exploration and Production) Act, S. 7.

more oil, gas and coal reserves will be discovered. In response, Kenya is planning to map out more petroleum exploration blocks.[69] Therefore, it will be necessary to acquire some of these lands for exploration and, if commercially viable oil gas and coal reserves are found, for production.

Kenya has joined the club of countries that are endowed with commercially viable quantities of natural oil and gas.[70] The government of Kenya has confirmed the revelation by foreign companies licensed to explore for oil in the country, that indeed there are significant oil and gas deposits reserves in the North Rift.[71] The news generated lot of excitement amongst Kenyans particularly on the unexpected change of the country's fortunes.[72]

No doubt, the prospects of oil, coal and gas exploration, prospecting and production in Kenya are enormous. However, after the initial optimistic excitement, the critical issue of land ownership and the manner in which the proceeds of these discoveries would be shared have emerged.[73] The manner in which land is expropriated for mineral exploitation may also lead to serious human rights violations[74] or affect economic exploitation of natural resources, if a clear legal process is not followed.[75] These will be occasioned by protracted litigation and conflicts over land.

For example, the government of Kenya issued a licence to Tiomin, a Canadian company, on land that did not belong to the government contrary to law.[76] The affected citizens opposed the mining activities and filed a case challenging the allocation of land to the company.[77] Eventually, Tiomin stopped its mining activities to allow the government to acquire the parcels of land in compliance with the law.[78] Ultimately, the disputes over the land mines and access to the mining site were identified as cause of the delays and escalated cost of that project.[79] Likewise, the process by which land is acquired by the government for mineral oil, gas and coal exploitation will be critical in the

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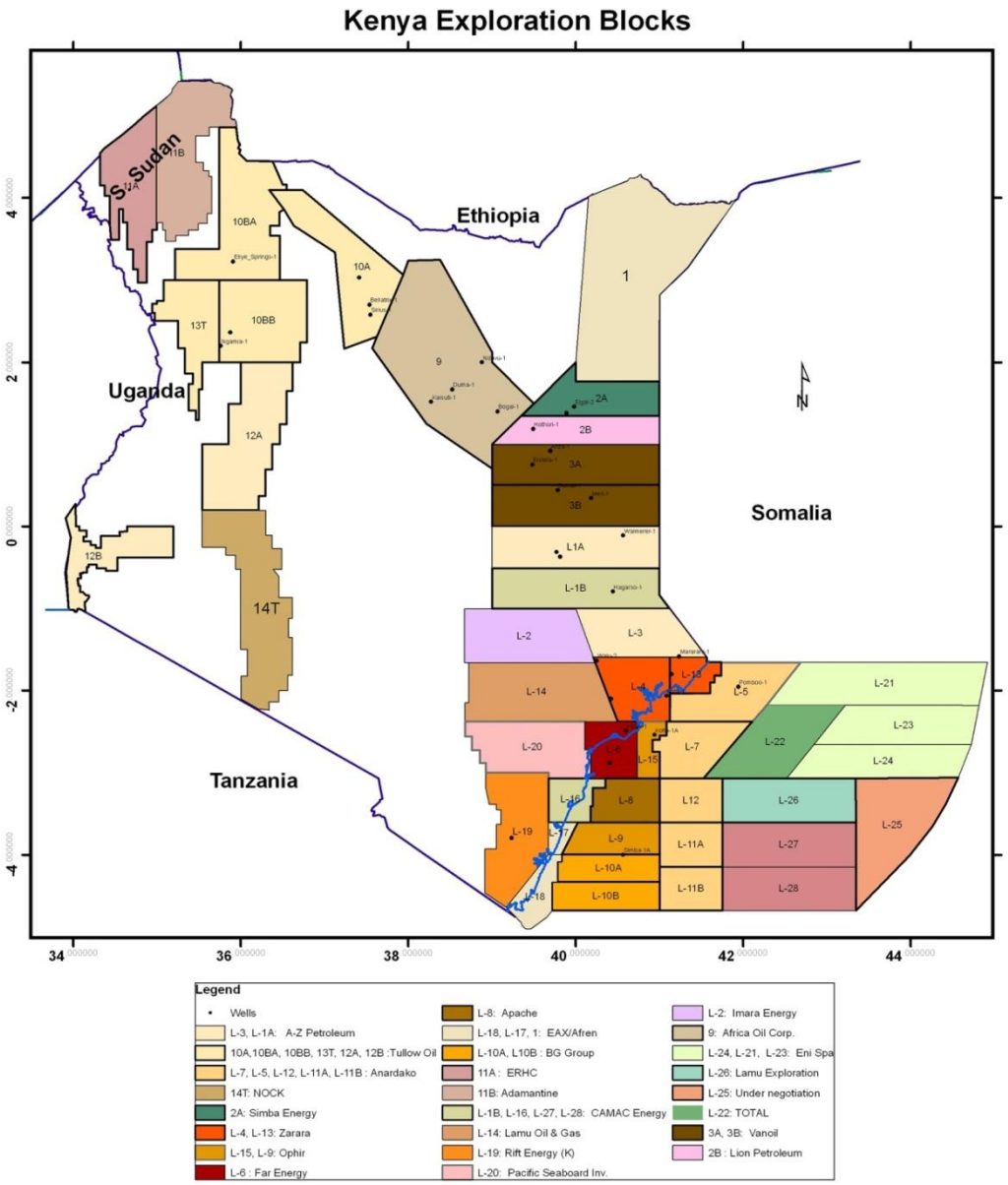
[69] National Oil Corporation of Kenya website, *op cit*.
[70] Kenya government, Statehouse website, available at www.statehouse.go.ke/ [accessed on 5/04/2013].
[71] *Ibid.*
[72] Mudiari, S., "Experts Push for Laws on Sharing of Kenya Oil Reserves", in the Daily Nation, Tuesday, June 5, 2012, at<*www.nation.co.Ke/business/news/ Kenya/index.html.*> [Accessed on 5/04/2013].
[73] *Ibid.*
[74] For example, in July 2005, the Kenya National Commission of Human Rights undertook a public inquiry and confirmed allegations of human rights violations arising from the activities of salt manufacturing companies in Magarini Division of Malindi District. See www.knchr.org.portal [accessed on 5/04/2013].
[75] Since most exploration and production of petroleum in Kenya is mainly conducted by foreign companies, instability and uncertainty arising from land disputes will negatively affect foreign investment in the sector.
[76] The facts set out in the case filed by the affected land owners.
[77] *Rodgers M. Nzioka & others v. Attorney & others*, High Court Petition No. 613 of 2006 [eKLR]
[78] *Ibid.*
[79] Assumani N. N., "Attracting FDI to Kenya: Does the Law Fit the Bill?" LL.M Dissertation, University of Nairobi, 2007.

exploitation of these resources. There will be fundamental concerns particularly property rights to land and human rights issues and the national interest to attract investment in mineral oil, gas and coal exploitation to contend with.

Fig. 2.0 © Exploration Block Map of Kenya: Government of Kenya Revised Edition 2006



10.6 Role of Minerals in World Trade and World Peace

Globalisation and competition for scarce and valuable natural resources particularly minerals and mineral oil brings new opportunities and challenges in the world economy.[80] The manner in which natural resources particularly oil and gas are exploited is the most common cause of conflict of our times. It has been referred to as "the curse of oil". Ross argues that since 1980, the developing world become wealthier, more democratic and more peaceful.[81] However, he adds a rider that this is only true for countries without oil. According to him, many oil rich developing countries have been scarred by civil war. The oil curse can be blamed on several factors including intervention of foreign powers in oil rich countries to manipulate their governments and pursuit of extraordinary profits by international oil companies.[82]

Alao takes the view that minerals have been linked to conflicts in three circumstances, which can be summarised as being: rivalry for benefits accruing from the minerals among local communities or ethnic groups; local communities' mistrust of government policies that may alienate them from potential benefits of the minerals; and political interference in the management of the entire mining process including award of contracts and ultimate benefit sharing.[83]

10.7 Concerns Arising from Mineral Prospecting, Exploration and Mining.

Mineral prospecting, exploration and mining present juridical, political economy, ecological and social concerns. These include questions of environmental justice, land and property rights and natural resources benefit sharing.

10.7.1 Juridical Concerns

Mineral resources are found within the land surface or in the sea or under water surfaces. In this regard, a need usually arises for the land to be used for extraction and/or exploration purposes, to be acquired from their owners for these purposes. In instances where such lands are under private and community ownership, it will have to be acquired by the government. The fundamental question will be how the government of Kenya will

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[80] USAID Kenya, "Kenya Land Policy: Analysis and Recommendations", (United States Agency for International Development, 2009), p.v.
[81] Ross, M.L., *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (Princeton University Press, 2012), p.1.
[82] *Ibid*, p.4.
[83] Alao, A., *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (University of Rochester Press, 2007), p.113.

compel involuntary transfer of property in land to itself or to other entities for this purpose. A key concern is, therefore, the manner in which these lands are to be acquired.

The recent discoveries of minerals such as coal in Kitui County, titanium in Kwale and the breakthrough in oil exploration in Turkana County has raised the demand for land for such mining, exploration and prospecting to unprecedented levels.[84] The need to protect local communities where such land is set aside for mineral prospecting, exploration and mining is, therefore, critical. Where compulsory acquisition of private or community land is necessary, public purpose or public interest test should always be applied to protect local communities and individuals. There is also need to ensure that private land is protected from unlawful expropriation for mining activities. The court, in *Kasigau Ranching (DA) Ltd v Kihara & 4 others,*[85] stated that mineral expropriation was not to occur on private land except by the consent of the land owner.

a. Citizenship

In Kenya, most of the mining is by private or public foreign companies.[86] For instance, currently, 29 out of 46 petroleum exploration blocks are licensed to 14 foreign oil and gas exploration companies.[87] The question of non-citizens and non-citizen entities acquiring land arises. The Constitution provides restrictions on landholding by foreign or non-citizen entities.[88] Kenya needs foreign direct investment to boost development. Therefore, the rules on determination of the citizenship of corporate bodies under Kenyan law should be harmonised. The Investment Promotion Act[89] classifies a foreign investor to include companies incorporated outside Kenya. As such, there is no legal definition of a citizen or non-citizen. Problems would arise in cases of companies which are incorporated outside Kenya by Kenyan citizens. Mining in Kenya will invariably involve acquisition of private and public land by foreign investors, arrangement under which foreign companies lease land will again have to ensure that benefits from such leasing arrangements benefit the locals.

10.7.2 Benefit Sharing

The Constitution of Kenya 2010 provides for the national values and principles of governance and states that these shall bind all State organs, State officers, public officers

[84] Kibugi, R., "Non-Citizens and Land Tenure in Kenya: Land Acquisition for Investment in a New Constitutional Era," July, 2012, available at *http://www.ldgi.org/index.php/our-research-2/34-non-citizens-and-land-tenure-in-kenya/file [Accessed on 4/04/2013]*.
[85] [2006] KLR (E&L), p.323.
[86] Ministry of Environment and Natural Resources Website [Accessed on 4/04/2013].
[87] *Ibid.*
[88] Art. 65, Constitution of Kenya.
[89] No. 6 of 2004, Laws of Kenya.

and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[90] These national values and principles of governance include patriotism, national unity, 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. It, therefore, follows that even the legal framework governing minerals and energy sectors must be consistent with these values and principles, if they are to benefit the local communities.

The Mining Act provides for benefit sharing. The Mining Bill, 2014 provides for accruing benefit in the form of financial and other benefits to which communities in mining areas are entitled to receive from the proceeds of mining and related activities. The Petroleum (Exploration and Production) Act[91] provides that the relationship between the Government and an exploration and production company is governed by a Production Sharing Contract (PSC).[92]

The PSC stipulates that the exploration and production company gets a share of the oil and gas produced, and its share is in the form of oil barrels. Essentially, the petroleum exploration and production company does not own the oil or gas but rather the Government retains title to the oil or gas produced. Should the exploration and production company not find any oil then the cost of exploration is borne solely by the company. The Government does not participate in meeting any exploration costs that do not result in any oil revenue. Therefore, should oil be produced, the exploration and production company can recover that cost against the oil produced. The work commitments include the expected level of seismic data acquisition.

The PSC will normally provide for the shooting of seismic data. The PSC obliges the company to process or interpret the seismic data and provide that data to the Government. The work commitment also provides for certain drilling obligations including the number of exploratory wells and/or the minimum expenditure for such an activity. A PSC also provides the basis on which a company can recover costs of exploration and development, against oil or gas production. This is known as "cost oil". Typically, the exploration and production company is normally allowed to recover the cost of exploration and development of the oil and gas resource on the commencement of commercial production. Thereafter, the exploration and production company is allowed to share in the oil and gas produced after recovering its operating costs. The PSC typically

[90] Art. 10(1).
[91] Chapter 308, Laws of Kenya.
[92] *Ibid.*

provides that Government can participate in the equity holding of an oil block once a discovery has been made for which the exploration and production would have to cede some interest. This will ensure that the Government enjoys an additional share of the oil revenues directly.

The Government needs to come up with a comprehensive oil and gas policy. With the latest development in the oil and gas sector in Kenya and its neighbouring countries, it is important that Government reviews the overall legal and regulatory framework as it appertains to oil and gas. This would impact both policy and legislation including the Petroleum (Exploration &Production) Act,[93] the Ninth Schedule to the Income Tax Act[94] to ensure that the people of Kenya maximize the value of the oil and gas resources. Petroleum policy and legislation helps to promote, license, monitor and manage the impact of oil and gas on the economy and the environment.

However, all is not lost as the Government of Kenya (GoK) has demonstrated efforts to streamline the sector. The Ministry of Energy of Kenya sent a letter to the World Bank to request technical assistance funded by the Extractive Industries Technical Advisory Facility (EI-TAF) on June 22, 2012. The project aims to include *inter alia*:[95] design of fiscal and contractual terms for the development of gas reserves- policy options to be incorporated in the design of the gas terms, draft changes to the Petroleum Act and model PSC as well as to the relevant fiscal law; scoping out how the GoK can best organize the management and development of the oil and gas sectors in Kenya and receive support from Development Partners (DPs) to maximize the developmental impact for the long-term benefit of the people of Kenya.

A World Bank team will assist the GoK to develop a strategic work program of support required along the extractive industries value chain[96] to effectively meet the challenges it will face. The team will also engage in gas sector awareness building by organizing workshops for key stakeholders on the wider aspect of natural gas developments, including safety and environmental dimensions, legal and policy review.

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[93] *Ibid.*

[94] *Ibid.*

[95] African Development Bank, World Bank, *Multi-Donor Secretariat for Extractive Sector (MDSES)* available at *http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/multi-donor-secretariat-for-extractive-sector-mdses/partners/world-bank/* [Accessed 0n 29/04/2014].

[96] According to the World Bank, the Extractive Industries Value Chain goes beyond public reporting and monitoring of revenues and covers the award of contracts and licenses, regulations and monitoring operations, collection of taxes and royalties, distribution of revenues and implementing sustainable development projects and policies. See, The World Bank, 'Extractive Industries Value Chain: A Comprehensive Approach to Developing Extractive Industries, in the Extractive Industries for Development', *Series No.3 & Africa Region Working Paper Series No. 125*, (Washington D.C.: World Bank, March 2009).
Available at *http://siteresources.worldbank.org/INTOGMC/Resources/ei_for_development_3.pdf*[Accessed on 21/04/2014].

These are just but a few of the reforms aimed at ensuring sound governance and use of mineral resources in the country. Well implemented, these reforms will enhance the mineral, gas and oil sectors in Kenya.

According to the draft National Energy Policy, 2014,[97] the Government seeks to adopt and implement the Extractive Industries Transparency Initiative (EITI) Treaty as a demonstration of its commitment to good governance, increased scrutiny over revenue collection from petroleum and coal resources and improvement of the country's investment climate, reconstitution of the National Fossil Fuels Advisory Committee (NAFFAC) and development of mechanisms for sharing of benefits between the national and county governments as well the local communities in accordance with Article 69 of the Constitution. The Government also commits to establish a one-stop shop for licensing of fossil fuel operations and undertakings with a view to enhancing development of the requisite infrastructure for fossil fuels.[98]

10.7.3 Ecological Concerns

Mining impacts diversity on the biological and physical environment. The effects vary depending on the location and type of operation. However, in so far as it affects ground water in various ways, mining generally impacts on the hydrological functions and hence water quality. Often, mining involves cutting and removes the earth surface affecting the natural topography and scenic beauty. The Mining Act has provisions for the protection of the environment. The Environmental Management and Coordination Act,[99] provides a comprehensive legal framework for the management of environment and all related matters. In this regard, persons undertaking mining activities are to ensure that adequate measures are put in place to ensure the protection of the environment from the potential harm posed by these activities and this requires undertaking of Environmental Impact Assessments to determine the possible consequences of the project. Where these requirements are lacking, the courts have held that this can amount to a criminal offence. An illustration of this is seen in *Nzioka & 2 others v Tiomin Kenya Ltd,*[100] where the applicants sought an injunction to restrain the defendant from carrying out mining activity in Kwale and a declaration that any such mining activities carried out would illegal. This was based on the fact that the defendant had not submitted an Environmental Impact Assessment Plan. The injunction sought by the applicants was thus granted.

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[97] Draft National Energy Policy, 2014, (Government Printer, Nairobi).
[98] *Ibid*, p. 4.
[99] Act No. 18 of 1999.
[100] Civil Case No. 97 of 2001.

10.7.4 Social Concerns

a. Surface issues

As oil production gets under way, are there workable procedures in place to assess and pay fair compensation to the people whose land is compulsorily purchased, occupied, or otherwise affected by the extensive infrastructure that will be needed for production, storage, transport and waste disposal, and for associated public works? Answering this question is critical in light of the rush to acquire land in areas where minerals or oil has been discovered by local and national elites. The presumed motive is investment in land whose value, as the region becomes an oil-boom area, is soaring. Speculators eye the profits which are expected to come either from later compensation deals, or by re-sale for private developments. Because land in the region is, overwhelmingly, held on a customary tenure basis, most communities believe that they have secure and hereditary rights over it, and are dismayed to find that it is being sold from under their feet in deals of, at best, dubious legality. Yet when these deals lead to conflicts, local authorities and police appear generally to side with the buyers.[101]

b. Gender Dimension

It is invariably men who decide to sell land and who decide how to use the proceeds. If these are spent in a consumption splurge, women are often left struggling to feed the family. Individualization of tenure in communal land held under the repealed Trust Land Act, adversely affected women who used to access this land for food, pastureland, firewood, building materials, and herbal medicines. Culture and custom support male inheritance of land rights, and this clearly disenfranchises women land ownership since the early period of land adjudication, consolidation and registration. The registration of titles was done in the name of the male heads of the household and where they were not available; it was in the name of uncles. This practice led to the disinheritance of many widows and orphans.[102]

Moreover, women are not sufficiently represented in institutions that deal with land but this is expected to change with the gender sensitive laws that are being enacted under the new Constitution. Land distribution to the landless in re-settlement schemes are often biased towards the male heads of the families. This has put the single women and widows at a disadvantage. The National Land Policy recognized the disadvantages faced by

[101] Oil in Uganda, 'No end to land wrangles,' August 2012, Issue 2, available at *http://www.oilinuganda.org/wp-content/plugins/downloads-manager/upload/OIL%20IN%20UGANDA%20ISSUE%202%20(AUGUST%202012).pdf* [Accessed on 21/04/2014].

[102] See generally the repealed Land (Group Representatives Act), Cap 287, Laws of Kenya.

women and recommended, among other things, that appropriate legislation should be put in place to ensure effective protection of women's rights to land; repeal of existing laws and regulations, customs and practices that discriminate against women in relation to land. The Constitution has provided for equality and equity among men and women as a fundamental human right. The Land Act[103] and Land Registration Act further recognized land rights of women by requiring their consent on any transaction on matrimonial property.[104]

c. Cultural Identity and Conflict

Land for many people, especially under customary systems, is intimately entwined not only with livelihood but also with issues of cultural heritage and identity. Purchases by outsiders, even with due legal process, can be experienced as cultural encroachment and invasion. These issues are amplified by a widely held sense of historical grievance over lands forfeited in the colonial era, and subsequent economic marginalisation. Yet this is further complicated by the fact that, tensions over land have already sparked inter-community conflicts.

d. An Uncertain Future

Economists agree that, even with good management, oil revenues will tend to strengthen currency, raise the price of services such as construction, and make agricultural exports less competitive.[105] One effect of this may well be to increase policy pressure for concentrating land holdings in larger-scale, commercial farms, whose economies of scale, it will be argued, make them better able to compete on world markets. Former subsistence farmers, should be absorbed into other occupations; otherwise the country may be left with a large, impoverished and landless underclass.

10.8 Climate Change Implications

Climate change refers to a change in the state of climate that can be identified (for example using statistical tests) by changes in the mean and/ or the variability of its properties. It persists for an extended period, typically decades or longer.[106] Evidence of climate change include rising temperatures, more extreme weather conditions such as

[103] Act No. 12, 2012.
[104] S. 28 (a), Land Registration Act.
[105] See Danaher, T., 'Investors, Pay Attention: Causes and Implications of U.S Dollar Strength,' *Financial Sense,* (10th March 2014).
Available at http*://www.financialsense.com/contributors/guild/investors-pay-attention-causes-implications-u-s-dollar-strength* [Accessed 27/02/2015].
[106] Muta C, *et al*, "Climate Change and Variability," available at, *www.nema.go.ke,* [Accessed on 4/04/2013].

hurricanes, erratic rainfall, flooding and prolonged draught. Global environmental threats such as climate change and ozone depletion are contributing to the loss of biodiversity. One of the effects of climate change is global warming. The rise in temperature will displace the limits of tolerance of land species.[107]

Climate change affects ecosystems, water resources, agriculture, healthcare, coastal zones, and human settlements. The effects include widespread poverty and recurrent droughts and floods. The dependence on rain fed agriculture coupled with a few coping mechanisms increase peoples vulnerability to climate change. Rain fed agriculture is the back bone of Kenya's economy and is vulnerable to increasing temperatures, drought and floods. Drought and water scarcity impacts on fisheries, agriculture tourism, forest fires and reduce hydropower generation.[108] Floods destroy water and sanitation facilities leading to widespread environmental diseases such as typhoid, amoeba, cholera and bilharzia. The poor are the most likely to suffer from the effects of climate change due to poor housing and reliance on natural resources for livelihood.

The threat of disasters as a result of/by climate change have led to a realization of the need to include environmental management principles in the National Land Policy since most of the natural resources are land based. According to the National Land Policy Kenya faces a number of environmental problems including the degradation of natural resources such as forests, wildlife, water, marine and coastal resources as well as soil erosion and the pollution of air, water and land. No doubt mining will escalate the situation unless environmental management is integrated into mining activities.

10.9 Disaster Preparedness

Kenya has experienced many disasters which have had far reaching impact on our land based natural resources such as lakes, forests, wildlife as well as economic and social activities.[109] The National Land Policy has incorporated disaster management as a key component in the management of land in Kenya. The National Land Policy succinctly puts this in the right perspective, by stating that disasters such as floods, earthquakes and landslides have negative impacts on agriculture, the natural environment and the destruction of property and that there is a need for a legal, policy and institutional frameworks for the prevention and management of land-related disasters.[110]

This policy aims at promoting safe and healthy environment in places of work especially mining sector which not only uses dangerous chemicals in extraction of

[107] Hunter, *et al*, *International Environmental Law and Policy*, *op. cit*, p.922.
[108] Leakey, R., "How climate change Affects East Africa," available at, *www.kenvironnews.wordpress.com*, [Accessed on 4/04/2013].
[109] *Ibid.*
[110] National Land Policy, No. 3 of 2009, p.49.

minerals but also exposes the workers to health hazards like dust. The main gap in this policy is the implementation strategy that is conclusive and concrete. Due to lack of a clear legal framework governing mining in Kenya, many accidents have been experienced especially in small mining activities undertaken by individuals without the skill or capacity to undertake the activities.[111] For instance, in many Counties in Western Kenya, gold mines have claimed many lives of people in cases of collapse of mining shafts or stones falling on workers who are quarrying. Although these cases get reported, nothing is done to prevent reoccurrence.

10.10 Development Prospects

In Kenya, almost all the minerals are exported in their raw form due to lack of specialized skills for value addition within the country for higher returns, industrialisation and economic growth. Like other African countries with similar natural endowments, there are legal and policy challenges facing the sector. To begin with, there is lack of adequate and up-to-date regulations addressing the plight of key stakeholders, such as communities in mineral rich areas. Additionally, the laws are outdated and full of loop holes that have provided for fragmented and unregulated mining activities that are usually dangerous to the inexperienced miners.[112] The Draft Mining and Minerals Bill, is expected to provide a new and up-to-date legal and policy framework.

Further, there is also lack of cohesive policies relating to land reclamation on land that has been exhausted of minerals.[113] To cure this, the Draft Mining and Minerals Bill have provisions for disposal of waste after mining operations cease. The trade and foreign investment attrition policies into the country in the mineral industry are also poor. The Draft Mining and Minerals Bill provides for measures to promote and facilitate industrialisation, processing and value addition of mineral products. It, further, provides as a condition to the grant of any licence, the submission of an acceptable plan by the applicant on the procurement of local goods and services. Finally, the legal and policy mechanisms for land acquisition, compensation or resettlement of communities living in land rich in minerals are inadequate.

10.11 Conclusion

Minerals including petroleum are critical to a country's economy. Natural resources utilisation including prospecting, exploration, mining and processing presents many

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[111] Munyiri, S., *Policy position paper on the proposed amendments of the mining and minerals bill 2009*, (Kenya Chamber of Mines, Nairobi, 2009), p. 4, available at *http://www.businessadvocacy.org/dloads/ppp%20KCM%20mining&minerals.pdf* [Accessed on 4/04/2013].

[112] The current legal framework governing mining in Kenya is the Mining Act, a statute enacted in 1940 to succeed the Mining Ordinance of 1933.

[113] *Ibid.*

challenges to the environment, social political economy as well as world peace. Notably, mineral resource utilisation is environmentally high risk; often, mining exposes the people to disasters. There is need for a comprehensive legal and policy framework to regulate the sector for environmental sustainability.

Chapter Eleven

Energy Sector

11.1 Introduction

The linkage between the energy sector and the environment is as a result of, among others, impacts of extractive industries, health concerns (that is, due air pollution from energy generation), and natural resources depletion from the use of traditional fuel.[1] The Constitution of Kenya guarantees the right of every person to a clean and healthy environment including the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69.[2] One of the obligations of the State under Article 69 is to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits.[3]

The energy sector raises critical issues such as access to clean, modern and affordable energy services for the poor and sustainability in the environmental, financial, and fiscal aspects of energy sector of different countries.[4] According to the *draft National Energy Policy, 2014*, energy is a critical component in the economy, standard of living and national security of every country. The draft Policy points out that the level and the intensity of energy use in a country is a key indicator of economic growth and development. Further, the Kenya Vision 2030 identifies energy as one of the infrastructural enablers of its social economic pillar. Sustainable, competitive, affordable and reliable energy for all citizens is thus a key factor in realization of the Vision.

Kenya has over time relied on various sources of energy, both renewable and non-renewable. Renewable sources that have been relied on include: water for the generation of hydroelectric power, wind, solar and geothermal energy. The non-renewable sources that have been relied on include fossil fuels and biomass.

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[1] The World Bank, 'Energy & Mining,' available at *http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/0,,contentMDK:20882150~menuPK:2462263~pagePK:148956~piPK:216618~theSitePK:244381,00.html*[Accessed on 28/05/2014]

[2] Art. 42; Art. 70(1) of the Constitution states 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.

[3] Art. 69(1) (a), Constitution of Kenya, 2010.

[4] *Ibid.*

Solar energy is one of the sources of energy which is most relied on especially by the poor in the rural areas.[5] The location of Kenya at the Equator makes it possible for this source of energy to be harnessed easily since the country experiences reliable amounts of sunshine throughout the year. It has been determined that Kenya receives daily insolation of 4-6kWh/m.[6] In this regard, a number of households, in Kenya have installed solar panels (photovoltaic systems) and the use of these panels is mostly limited to the domestic context. The use of solar energy has, however, been hindered by the fact that the initial installation costs are usually high. It was, therefore, realized that there was need to encourage people to use solar energy in the country. This has been taken into consideration in Sessional Paper No.4 of 2004. The government has further sought to ensure that the photovoltaic systems that are introduced in the country are of good quality. This has seen the adoption of the *Energy (Solar and Photovoltaic Systems) Regulations, 2012* which prescribes the standards to be met by the suppliers of the solar panels and technicians involved in the installation and maintenance of the same.

Wind has also been used in the country as a source of energy. Wind is used to drive turbines for the purpose of generating energy and Kenya has embraced this technology which is relatively new in the country. Studies have indicated that Kenya has a proven wind potential of as high as 346w/m^2 in some parts of Nairobi, Rift Valley, Eastern, North Eastern and Coastal areas with the country having a current installed capacity of 5.1 MW that is operated by KenGen at the Ngong site.[7] Despite the huge potential offered by wind energy, much is yet to be seen in terms of harnessing of this energy. The government has thus sought to invest in wind energy in order to ensure that there is a move to green energy. There have been plans to establish wind farms in Turkana. When completed, the Lake Turkana Wind Power Project (LWTP) is expected to provide 300MW of wind power to the national grid and once completed it is expected to be the largest wind power farm in Sub-Saharan Africa.[8]

Kenya has vast geothermal resources which are mainly located within the Rift Valley. Geothermal resources in Kenya have an estimated potential of between 7,000 MWe to 10,000 MWe which is spread over 14 prospective sites.[9] Harnessing of this resource has in the past largely been undertaken by the Government but private players have started being involved in the recent past. Currently, the exploration of geothermal

[5] See Jacobson, A., "Connective Power: Solar Electrification and Social Change in Kenya," *World Development*, Vol. 35(1), 2007, pp. 144–162.
[6] Republic of Kenya, *Scaling-Up Renewable Energy Program (SREP): Investment Plan for Kenya*, May, 2011.
[7] *Ibid*, p.22.
[8] See *http://ltwp.co.ke/the-project/project-profile* [Accessed on 28/05/2014].
[9] *Scaling-Up Renewable Energy Program (SREP), op cit*, p.25.

resources is regulated by the Geothermal Resources Act, 1982 and the Geothermal Resources Regulations.[10]The Act defines geothermal resources as "any product derived from and produced within the earth by natural heat; and includes steam, water vapour and a mixture of any of them that has been heated by natural heat whether as a direct product or resulting from other material introduced artificially into an underground formation and heated by natural heat."[11] The government has established the Geothermal Development Company (GDC) which is tasked with the development of geothermal resources in the country.

Gas plays a key role as a source of energy as it is considered to be clean in comparison to other energy sources with high carbon contents.[12] However, 100% of gas is imported and packaged into cylinders for accessibility and affordability. New developments in discovery of gas in large quantities will contribute to transformation of rural lives that are still dependent on charcoal, fuel wood and other high-polluting energy sources.[13] There are possibilities of creating employment opportunities in the energy sector that will support penetration of gas as a source of energy to a majority of Kenyan population. The AfDB Multi-Donor Secretariat will document necessary and relevant information and engage stakeholders on possible options of promoting use of gas other than flaring it.[14]

11.2 Legal and Institutional Framework on Energy

The minerals, oil and the energy sector in Kenya is governed by a number of laws and institutions. It is, noteworthy, that the sector is regulated by a range of legislation as energy is conceived, in a broad manner, as deduced from Section 2 of the *Energy Act*, 2006. "Energy" is defined therein to mean any source of electrical, mechanical, hydraulic, pneumatic, chemical, nuclear, or thermal power for any use; and includes electricity, petroleum and other fossil fuels, geothermal steam, biomass and all its derivatives, municipal waste, solar, wind and tidal wave power.[15] All these components fall under different laws in the sector.

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[10] Legal Notice No. 206 of 1990.
[11] *Geothermal Resources Act*, (Cap. 314 A), S. 2.
[12] Newsletter Number One-Multi-Donor Secretariat for the Extractive Sector in Kenya–15th May 2013, Message from Mr. Gabriel Negatu, Regional Director, AfDB/EARC, p. 4, available at *http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-andOperations/Kenya%20%E2%80%93%20Monthly%20Economic%20Review%20%E2%80%93%20May%202013.pdf*[Accessed on 28/05/2014].
[13] *Ibid.*
[14] *Ibid.*
[15] The Energy Act, 2006, S. 2.

The main legislation relating to the sector, includes the Constitution of Kenya 2010, the Energy Act, 2006, the Petroleum (Exploration and Production) Act,[16] (the Petroleum Act), Regulations made under the Petroleum Act, the Ninth Schedule to the Income Tax Act, chapter 470 of the Laws of Kenya and various regulations meant to regulate specific subsectors including renewable and non-renewable energy sectors.

The enactment of the Constitution of Kenya, 2010, saw a transformation in the energy sector. This particularly arose from the adoption of a devolved system of governance where both the national and county governments have been tasked with various roles. The Constitution has further reiterated the fact that sustainable development is one of the principles of governance and hence the energy sector is also to ensure that the activities are in line with the demands for sustainability.[17]

The Fourth Schedule to the Constitution defines the roles of the two levels of government. The national government is tasked with the formulation of energy policy including policy for electricity and gas reticulation and energy regulation. The national government is further tasked with the establishment of transport and communication networks within the country and this also entails the establishment of pipelines in the country.

The county government, on the other hand, is tasked with general planning of the county and this also entails electricity and gas reticulation and energy regulation. In this regard, the county government is thus tasked with the development of a grid system within the county to enable reticulation of electricity and gas. It, therefore, appears that energy sector is one of the areas where both national and county governments play complimentary roles. The Energy Bill, 2014 is expected to clearly define the role that the county government has in relation to the provisions in the Fourth Schedule.

a. Sessional Paper on Energy, 2004

The *Sessional Paper on Energy of 2004* was formulated for purposes of laying the policy framework upon which cost-effective, affordable and adequate quality energy services will be made available to the domestic economy on a sustainable basis over the period 2004-2023.[18] The Sessional Paper highlighted the fact that the success of socio-economic and environmental transformation strategies pursued by the Government at present and in the future is to a large extent, dependent on the performance of the energy sector as an economic infrastructure.

[16] Chapter 308, Laws of Kenya.
[17] Constitution of Kenya, Art. 10(2) (d).
[18] Draft 1, National Energy Policy, Sessional Paper on Energy, 2004, p. viii.

The Sessional paper points out the challenges facing the energy sector. These include, *inter alia*: a weak power transmission and distribution infrastructure due to limited investments in power system upgrading, resulting in high electric power system losses estimated at 20% of net generation, extreme voltage fluctuations and intermittent power outages at 11,000 per month, which cause material damage and losses in production; high cost of power from independent power producers (IPPs) contributing to high cost of doing business in Kenya; low per capita power consumption; and low countrywide electricity access.

Further, the Sessional paper observes that the petroleum industry is constrained by limited supply facilities for fuels including liquefied petroleum gas (LPG), domestic production of motor fuels which do not meet international quality standards, inadequate distribution infrastructure in the remote parts of the country which contribute to high product prices, price leadership which inhibits competition, and insufficient legal and regulatory framework to guide sub-sector operations in consonance with international best practices for liberalized markets, thus exposing the public to health, environmental and safety hazards.[19] In addition, and as a result of the inadequacies in the legal and regulatory framework, the Sessional paper observes that the sub-sector has witnessed proliferation of substandard fuel dispensing facilities, and under-dispensing of products including mixing of motor fuels with kerosene and dumping of export fuels for illicit financial gains at the expense of both the consumer and government revenue. It is, noteworthy, that this Sessional paper preceded the enactment of the Energy Act of 2006.

b. Energy Act, 2006

The Energy Act[20] was passed to amend and consolidate the law relating to energy, to provide for the establishment, powers and functions of the Energy Regulatory Commission and the Rural Electrification Authority, and for connected purposes.[21]As per section 3, the provisions of the Act are to apply to every person or body of persons importing, exporting, generating, transmitting, distributing, supplying or using electrical energy; importing, exporting, transporting, refining, storing and selling petroleum or petroleum products; producing, transporting, distributing and supplying any other form of energy, and to all works or apparatus for any or all of these purposes.

The act establishes the Energy Regulatory Commission (ERC) whose objects and functions are, *inter alia*, to: regulate importation, exportation, generation, transmission, distribution, supply and use of electrical energy; importation, exportation, transportation,

[19] *Ibid*, p. viii.
[20] Revised Edition 2012 [2006].
[21] Preamble.

refining, storage and sale of petroleum and petroleum products; production, distribution, supply and use of renewable and other forms of energy; protect the interests of consumers, investor and other stakeholder interests; maintain a list of accredited energy auditors as may be prescribed; monitor, ensure implementation of, and the observance of the principles of fair competition in the energy sector, in coordination with other statutory authorities; and collect and maintain energy data; prepare indicative national energy plan; perform any other function that is incidental or consequential to its functions under this Act or any other written law.[22]

The ERC also has powers to, *inter alia*: issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector; make proposals to the Minister, of regulations which may be necessary or expedient for the regulation of the energy sector or for carrying out the objects and purposes of this Act; formulate, enforce and review environmental, health, safety and quality standards for the energy sector, in coordination with other statutory authorities; enforce and review regulations, codes and standards for the energy sector.

The Act provides for the requirement of a licence or permit as the case may be, for the generation, importation or exportation, transmission or distribution of electrical energy; or supply of electrical energy to consumers: provided that for undertakings involving a capacity not exceeding 3,000 kW, the provisions of subsections (2), (3) and (4) are to apply.[23] The Act also provides that the Commission should, in granting or rejecting an application for a licence or permit, take into consideration, *inter alia*, the impact of the undertaking on the social, cultural or recreational life of the community; the need to protect the environment and to conserve the natural resources in accordance with the *Environmental Management and Co-ordination Act* of 1999 (No. 8 of 1999); land use or the location of the undertaking; economic and financial benefits to the country or area of supply of the undertaking; and the economic and energy policies in place from time to time.[24]

Regarding contracts for bulk supply of electrical energy, the Act states that all contracts for the sale of electrical energy, transmission or distribution services, between

[22] S.4.
[23] S. 27(1); ss. (2) provides that a permit shall be required in respect of all undertakings— (a) intended for the supply of electrical energy to other persons or consumers; and (b) with a generating plant of over 1000 kW intended for own use; ss. (3) provides that any undertaking operating pursuant to a permit granted under this Act shall — (a) in any case where conveyance of electrical energy to or from any transmission or distribution network is possible, meet the minimum requirements of the owner or operator of the transmission or distribution network as approved by the Commission, and the owner or operator of any such undertaking shall inform the network owner or operator of all connected load and generation equipment that might have material effect on the network; and (b) be subject to such conditions as may be specified by the Commission.
[24] S. 30(1).

and among licensees, and between licensees and large retail consumers are to be submitted to the Commission for approval before execution.[25]

The Act demands that the tariff structure and terms for the supply of electrical energy must be in accordance with principles prescribed by the Commission.[26] Further, all tariffs charged for electrical energy supplied must be just and reasonable.[27] A person must seek permission to survey and use land to lay electric supply lines upon any land, other than his own, from the owner. In cases where the owner consents, there must be compensation for the same.[28]

Where a licensee requires the compulsory acquisition of land for any of the purposes of a licence, the licensee may apply to the Minister to acquire the land on his behalf but they must bear the cost thereof.[29]

c. Establishment of the Rural Electrification Authority

Section 66(1) of the Act establishes the Rural Electrification Authority (hereinafter referred to as "the Authority"). Further, section 67 of the Act provides for the functions of the Authority as, *inter alia* to: manage the Rural Electrification Programme Fund established under section 79; develop and update the rural electrification master plan; implement and source additional funds for the rural electrification programme; promote use of renewable energy sources including but not limited to small hydros, wind, solar, biomass, geothermal, hybrid systems and oil fired components taking into account specific needs of certain areas including the potential for using electricity for irrigation and in support of off-farm income generating activities; manage the delineation, tendering and award of contracts for licences and permits for rural electrification; and to perform such other functions as the Board may direct.

According to the draft National Energy Policy, 2014, the Government shall transform the Rural Electrification Authority into the National Electrification and Renewable Energy Authority (NERA) to be the lead agency for development of renewable energy resources other than geothermal and large hydros. With enhanced efficiency and the required support, this Authority is capable of rolling out projects to facilitate access to energy for all, including those in the rural areas, thus fostering development. Since most of the resources for generation of energy, especially renewable energy sources are to be found in remote areas, ensuring that they benefit from these

[25] S. 43 (1).
[26] S. 45(1).
[27] S.45(2)
[28] SS. 47-50, 52.
[29] S. 54(1). See Art. 40; Part VIII, Land Act, No. 6 of 2012.

projects by connecting them to energy sources and supply, will boost their support for these programmes.

(d) Sessional Paper No. 10 of 2012 on Kenya Vision 2030

The *Kenya Vision 2030* is the long-term development blueprint for the country which is expected to transform Kenya into a middle income country by the year 2030. The Vision is grounded on three key pillars namely: economic; social; and political governance. The economic pillar aims to achieve an average economic growth rate of 10 per cent per annum and sustaining the same till 2030 in order to generate more resources to meet the MDGs and vision goals. The social pillar seeks to create a just, cohesive and equitable social development in a clean and secure environment, while the political pillar aims to realise an issue-based, people-centered, result-oriented and accountable democratic system.[30]

The economic, social and political pillars of Kenya Vision 2030, are said to be anchored on the following foundations: macroeconomic stability; continuity in governance reforms; enhanced equity and wealth creation opportunities for the poor; infrastructure; energy; science, technology and innovation (STI); land reform; human resources development; security; and public sector reforms. Indeed, Article 11(1) of the Constitution of Kenya 2010 provides that the State should, *inter alia*, recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya. This is aimed at promoting science, technology and innovation in the country and ensuring that it benefits not only the larger population, but also the brains behind the developments.

From the foregoing, it is apparent that the mineral and energy sectors in the country will play a major role in the actualisation of Kenya's Vision 2030 especially in terms of raising funds and providing the necessary raw materials. The increased energy demands for development in the country requires diverse sources of energy which will come from exploitation of geothermal power, coal, and even renewable energy sources. The implication of this is that the minerals sector will play a huge role in provision of these energy requirements.

The realisation of the social pillar, that is, globally competitive and quality education, training and research, high quality affordable health care system, high quality water supplies, clean, secure and sustainable environment, and adequate and decent housing for all, requires financial support which finances would be available through sound governance of mineral resources and other valuable natural resources in the country. Vision 2030 is also concerned with security, peace-building and conflict

[30] Sessional paper No. 10 of 2012 on Kenya Vision 2030, (Government Printer, Nairobi, 2012), p. ii.

management. Vision 2030 aims at "security of all persons and property throughout the Republic".[31] As witnessed in other countries, such as Sierra Leone with its diamonds, mineral resources exploitation is capable of degenerating into a war. Effective governance of the energy and mineral sectors is thus necessary for security and peace.

Article 10(1) of the Constitution of Kenya 2010 provides for the national values and principles of governance. The incorporation of these values and principles in the exploitation of mineral resources and energy generation, as well as actualisation of Vision 2030, will create a secure and conducive environment for development of the country. The Sessional Paper No. 4 of 2004 is being reviewed and a Draft National Energy Policy, 2014 has been prepared which puts into consideration the constitutional provisions, Vision 2030 and the Energy Act 2006.[32]

e. Draft National Energy Policy, 2014

The overall objective of the energy policy is to ensure affordable, competitive, sustainable and reliable supply of energy to meet national and county development needs at least cost, while protecting and conserving the environment.[33] Regarding fossil fuels, the Policy states that there is need to develop adequate petroleum production capacity in the country, and also develop the petroleum supply infrastructure to meet market requirements to match the increasing demand for petroleum products locally and in the region. These developments will include setting up a new refinery at Lamu given its strategic location. This will make oil and gas products more competitive in the region, enable creation of wealth, ensure supply security and stability of their prices.[34]

The Draft Policy also states that the Government will ensure that there are strategic petroleum reserves in the country. The increased use of LPG shall also be encouraged so as to eliminate the use of kerosene in households and reduce over-reliance on bio-mass. According to the draft Policy, the Government is also evaluating the possibility of using natural gas to support commercial and industrial activities including transportation.

With regard to renewable energy resources such as geothermal, hydro, solar, wind and ocean energy, biomass, biofuels, biogas and municipal waste, the draft Policy provides that these can supply the energy needs of the present generation and those of future generations in a sustainable way if effectively harnessed through careful planning

[31] *Ibid*, p. viii.
[32] The reviewed draft National Energy Policy recognises that with adoption of the Kenya Vision 2030 and the promulgation of the Constitution of Kenya 2010, there is need to review both the policy and all the statutes so as to align them with the Vision and the Constitution; the statutes shall be reviewed and amalgamated into one.
[33] National Energy Policy**,** Draft of 24th February 2014, p. 3.
[34] *Ibid*, p. 3.

and advanced technology. Further, renewable energy resources are also capable of enhancing energy security, mitigating climate change, generating income, creating employment and generating foreign exchange savings.[35]

The Government is to establish an inter-ministerial Renewable Energy Resources Advisory Committee (RERAC) to, *inter alia*, advise the cabinet secretary on the criteria for allocation to investors of energy resource areas; licensing of renewable energy resource areas; management of water towers and catchment areas; development of multi-purpose projects such as dams and reservoirs for power generation, portable water, flood control and irrigation with a view to ensuring proper coordination at policy, regulatory and operational levels on matters relating to the various uses of water resources; and management and development of other energy resources such agricultural and municipal waste, forests, and areas with good wind regimes, tidal and wave energy.[36]

11.3 Coal

In search of sustainable and affordable sources of energy, there has been discovery of commercially viable coal deposits in Kitui County's Mui Basin. Coal prospects exist in a number of Counties across the country including Kwale, Kilifi, Taita-Taveta, Tharaka-Nithi, Machakos, Makueni, Isiolo, Marsabit, and Baringo.[37] Four mining blocks have been gazetted and advertised in Kitui County.

The Draft National Energy Policy, 2014, points out that coal is an affordable, competitive, reliable and easily accessible source of energy, especially for electricity generation. According to the Policy, extensive coal exploration has taken place in the Mui Basin of Kitui County where a total of 76 wells have been drilled with 42 wells intercepting coal seams of various thicknesses at different depths. More wells are being drilled to appraise the coal reserves in the basin, of which Block C has been appraised to have 400 million tonnes. These resources are expected to provide about 1,900MW of electricity generation by 2016 and 4,500MW by 2030.[38]

Further, the Policy provides that the government should promote an intensive coal exploration programme and efficient utilisation of coal resources while at the same time minimising the environmental impacts associated with its use. The government should also establish data and information on coal resources and intensify promotional campaigns in local and international conferences and exhibitions. A conducive investment

[35] *Ibid*,p.5.
[36] *Ibid*.
[37] Wachira, G., 'Why Kenya should urgently put in place a coal development authority', *Business Daily*, Tuesday, September 24, 2013, available at *http://www.businessdailyafrica.com/Opinion-and-Analysis/Why-we-need-a-coal-development-authority/-/539548/2005388/-/4j38mc/-/index.html* [Accessed on 27/04/2014].
[38] Draft National Energy Policy, 2014, p. 4.

environment for exploration and exploitation of coal should be created by providing fiscal incentives to attract investment in this sector. The national government should also establish a coal development corporation as a special purpose vehicle to be the lead agency in the development of the coal industry.

Coal mining comes with both positive and negative effects on the surrounding communities and the environment.[39] Although the government has assured communities living in coal rich areas of resettlement, relocation and compensation, the locals have expressed concern about benefit-sharing and the environmental impact associated with mining activities. They argue that environmental risks could lead to degradation of vegetation cover, soil contamination, reduced water quality and quantity and loss of biodiversity that often reduce an indigenous community's capacity to fend for itself.[40] It is important that these fears are addressed, so as to ensure social acceptability of the projects in the area, and to ensure that the locals get to appreciate the benefits of the mineral products while at the same time understanding how to deal with the negative effects arising therefrom.

11.4 International Best Practices

If not properly managed, minerals, oil and gas resources extraction can result in more harm than good to the very people that they are supposed to benefit. This calls for participation of all concerned persons or players in their extraction, use and management. Further, it is also important that, sustainable practices are adopted in the exploration works in the energy sector in the country. This is because most of the energy resources are exhaustible and non-renewable. It is thus important that initiatives be developed to ensure that the energy needs in the country are not met at the expense of the demands for sustainable development.

11.4.1 Sustainable Practices in Exploitation of Energy Resources

In seeking to meet the energy needs of the country, measures must be put in place to ensure that this does not happen at the expense of the needs of future generations to meet their developmental needs. Energy plays a critical role in economic growth and development, and future economic growth has been seen to be largely hinged on the long-

[39] Kavilu, S., 'Prospects of Coal Deposits Bring Fear and Uncertainty among Kamba Indigenous People' GALDU, *Resource Centre for the Rights of Indigenous peoples*, available at *http://www.galdu.org/web/index.php?&odas=5518&giella1=eng* [Accessed on 27/04/2014].
[40] *Ibid.*

term availability of energy which is to be derived from sources that are affordable, accessible and environmentally friendly.[41]

This augurs well with the demands that all three pillars of sustainability are to be met in order for the benefits of development to be felt by all. Ensuring that the energy sector develops sustainably requires the adoption of both substantive and procedural elements of sustainable development. The Rio Declaration provides that the substantive aspects of sustainable development are, *inter alia*, intragenerational equity and poverty alleviation; the reduction of unsustainable consumption and production and population reductions and; effective environmental legislation.[42] Procedural aspects on the other hand, are said to be; ensuring broad public participation and access to information and judicial review; use of precaution where there are threats of serious or irreversible damage; internalization of costs; environmental impact assessment; notification and consultation with the affected states and the involvement of major groups.[43]

Sustainability in the energy sector thus calls for the identification of the needs of the consumers in the country and ensuring that these needs are met in a manner that is efficient. Players in the energy industry, especially those involved in the exploitation and extraction of petroleum and natural gas in Kenya, are required to ensure that measures are adopted to ensure that the projects are acceptable to the communities and that they are socially sustainable.[44] This necessitates the involvement of members of the communities in the energy governance process and also in ensuring that just compensation is accorded to them where their property rights are to be affected by the development of energy resources.[45]

The development of energy resources should also ensure that the environment is not negatively affected as a result of the activities. There exists a strong nexus between the environment and energy. Environment has been defined to mean "the totality of nature and natural resources, including cultural heritage and human infrastructure essential for socio-economic activities".[46] Within this definition, energy-related infrastructure also falls within the category of infrastructure construed to facilitate socio-economic

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[41] Olayinka O., 'Energy and Sustainable Development in Nigeria: the way forward,' *Energy, Sustainability and Society* 2012, available *at http://www.energsustainsoc.com/content/2/1/15* [accessed 20/03/2015].
[42] *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/6/Rev.1, (1992).
[43] *Ibid.*
[44] Odote, C & Otieno, S., 'Getting it Right: Towards Socially Sustainable Exploitation of the Extractive Industry in Kenya,' *East African Law Journal*, Vol.3, 2015.
[45] See Mwangi, M., 'Deal Unlocks Sh. 13 billion wind power project,' *Daily Nation*, November 2, 2014 available *at http://mobile.nation.co.ke/counties/-Sh13bn-wind-park-project-endorsed/-/1950480/2508316/-/format/xhtml/-/ruvgkxz/-/index.html* [Accessed 20/03/2015.
[46] IUCN, *Draft International Covenant on Environment and Development*, (4th ed., 2010).

activities. [47] The establishment and development of these infrastructures, has environmental implications and may alter the balance in the ecosystem. Ensuring that there is environmental sustainability, has a beneficial outcome to the energy sector. Environmental sustainability ensures energy sustainability. In addition, and that a well-crafted energy regime, is beneficial to the environment.[48] This arises from the fact that exploitation of energy resources where the regime is well-crafted, ensures that the environment, which is the primary source of all forms of energy, is not exposed to harm. Conservation of the environment also ensures that certain renewable sources of energy, such as water used for the generation of hydroelectricity is not exhausted due to the depletion of forests and other water catchment areas.

The development of a well-crafted energy regime, thus calls for the adoption of energy sources that are efficient. The adoption of efficient sources of energy has positive outcomes as it ensures that negative environmental impacts are eliminated. The activities involved in the generation of energy also have deleterious effects on the environment. It is also important that there is shift in the type of energy used. Environmental sustainability, calls for the adoption and use of renewable sources of energy which do not contribute to the greenhouse effect. In this regard, it is imperative that there is synergy between the various institutions tasked with environmental conservation and those tasked with the development of the energy sector.

11.4.2 Mode of Benefit Sharing and Resources Governance

As a result of the foregoing, there are various approaches employed by the industry players so as to achieve the same. One of these is the Foundations, Trusts and Funds (FTFs) initiatives in the sector.

a. Foundations, Trusts and Funds (FTFs) in the Mining Sector

FTFs are taken to represent a wide range of financial and institutional instruments designed to channel revenues generated from mining operations to communities.[49] FTFs encompass financial and institutional instruments, although they vary from one jurisdiction to another.[50] FTFs incorporate revenues generated by mining operations mainly to government payments, compensation, and community investments; and

[47] Kindiki, K., 'Synchronising Kenya's Energy Law with the Framework Environmental Law,' in Okidi, C.O., *et al* (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (E.A.E.P, 2008).
[48] Ochich, G., "Towards a Sustainable Energy Law in Kenya," *Law Society of Kenya Journal*, Vol. 1, 2006.
[49] Wall, E. & Pelon, R., 'Sharing Mining Benefits in Developing Countries: The Experience with Foundations, Trusts, and Funds,' *The World Bank, Oil, Gas, and Mining Unit Working Paper; Extractive Industries for Development Series*, No.21, June 2011, pp. 3-4.
[50] *Ibid*, p. 4.

government payments as taxes and royalties as well as other payment schemes that may exist between mining companies and various levels of government.[51] They also involve compensation which may exist in direct payments or other benefits (such as housing, in case of resettlement) provided by companies to affected communities to compensate for economic, social, environmental, or cultural damage directly caused by the mining operation. Community investments refer to voluntary actions or contributions by companies that are beyond the scope of their normal business operations and intended to benefit local communities in their area of operation.[52]

FTFs have been associated with a number of advantages that make them worth exploring, although they are usually initiated by the mining companies. These include: establishment of a formal, professional, and systematic approach to development that can help, *inter alia:* to build an informal expression of consensus ("social license to operate"); supporting long-term, multi-year development projects without necessarily being tied to annual company budget cycles; fostering stakeholder participation in the management and operation of community investment programs, as independent management and governance structures are believed to be capable of providing a more formal approach to shared decision making and to the inclusion of the community, non-governmental organizations, and governments; building bridges to other development actors and formalizing collaboration between a company and other stakeholders by providing a neutral facilitator, and their role as a neutral party can also increase the likelihood of being able to find and obtain external financing; providing a guarantee of financial support for development independent of the boom-and-bust cycle of mining; and representing a participatory, transparent, and accountable mechanism for investing revenues in development, particularly in situations where public and private institutions are distrusted or seen as corrupt.[53]

Under FTFs, the payments made by mining companies as compensation for social and environmental impacts can be pooled through a trust structure that can help ensure effective management of funds intended for compensation, related community projects and payments over time.[54] According to the World Bank, governments may establish FTFs or promote their use for a number of reasons which include, *inter alia*: to bypass existing structures, processes, and politicians and establish direct channels to beneficiaries; to manage mandatory or voluntary funds received from companies through taxes, royalties, or fees; to stabilize economic contributions from the mining sector to

[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid,* pp. 11-12.
[54] *Ibid,* p.12.

weather severe fluctuations in commodity prices; and to set communities and regions on a path to sustainable development that will extend beyond the life of the mine.[55]

FTFs are also said to be favourable to governments during particular times. For instance, since governments may face difficulties in renegotiating taxation arrangements with companies, especially during times of changing mineral prices, governments may also resort to FTFs for the following intentions: to invest a portion of the taxation and royalties received from mining into a stabilization fund to help balance annual budgets and allow the government to plan longer-term projects; to avoid renegotiating contracts during times of windfall profits; where public services are inadequate, establishment of a company FTF model may provide complementary resources to fill gaps in service provision or extend the scope of services which may allow a beneficiary to experience more rapid development than would have resulted from government distribution of revenues for infrastructure due to resource limitations, low capacity, political factors, or corruption; and the negotiation of mineral licenses may identify the whole package of benefits and payments due to communities, which integrated approach to benefits can generate large lumped sums of money payable to communities over an extended period of time. The use of an FTF model in such situations can maintain transparency between communities, government, and companies in such cases.[56]

With the foregoing advantages, FTFs are capable of streamlining benefit-sharing in this sector if well implemented. What requires to be addressed are programming approaches; financing structures; geographic focus; community participation in governance; the influence of the mining company; and the influence of government. Such an approach has been employed in other jurisdictions such as Australia, Senegal, Ghana, South Africa and even Canada. With an understanding of how the same has been made successful in those places, Kenya can learn useful lessons. This approach would not only ensure benefit sharing, but would also promote environmental protection, sustainable development and create a conducive environment for conflict management where the same arises.

11.5 Conclusion

Minerals including petroleum are critical to a country's economy. Natural resources utilisation including prospecting, exploration, mining and processing presents many challenges to the environment, social political economy as well as world peace. Notably, mineral resource utilisation is environmentally high risk. Quite often, mining exposes the

[55] *Ibid,* p.13.
[56] *Ibid,* p. 14.

people to disasters. There is need for a comprehensive legal and policy framework to regulate the sector for environmental sustainability.

Chapter Twelve

Coastal and Marine resources

12.1 Introduction

The Kenyan Coastline and particularly the marine areas are rich with biodiversity.[1] The marine and coastal ecosystems at the Kenyan coast include coral reefs, seagrass beds, mangroves, sandy beaches, sand dunes and terrestrial forests.[2] Coastal and marine ecosystems, including tropical rainforests, estuarine and near-shore areas and the open ocean, are among the most productive, yet most highly threatened ecosystems in the world. These ecosystems provide essential ecological services, support production, and provide livelihood and income-generation opportunities for coastal and inland populations.[3] The ecosystem services they provide include provisioning of goods and services; regulation of climate and natural hazards; cultural services; and supporting marine life such as fisheries.[4] Some like the Mangrove forests, trap sediments from inland areas, reducing siltation of seagrass and coral reefs. In addition, they act as buffer zones between land and the sea, by regulating fresh water output by evapotranspiration, protecting corals and coastal forests from high variations in salinity. Coral reefs act as barriers against strong waves, thereby protecting seagrass and mangroves, while reef erosion creates sediment for the growth of seagrass colonies in lagoons.[5] Coral reefs are also sources of income from fishing, tourism, coastal protection and biodiversity. They have significant cultural and spiritual value to coastal communities and are also sources of attraction to thousands of domestic and international tourists.[6]

[1] Kenya Marine and Fisheries Research Institute, available at *http://www.kmfri.co.ke/* [Accessed on 1/06/2014].
[2] *Ibid*, p. ix.
[3] It is reported that they support the livelihoods of about 2.7 million coastal communities.
[4] Government of Kenya, 'State of the Coast Report: Towards Integrated Management of Coastal and Marine Resources in Kenya,' (National Environment Management Authority (NEMA), Nairobi, (2009), p. vii, available at *http://www.unep.org/NairobiConvention/docs/Kenya_State_of_Coast_Report_Final.pdf*[Accessed on 1/06/2014].
[5] *Ibid*.
[6] Nyamongo, G., '*Massive Coral reefs death encountered in Lamu due to global warming'*, available at *http://www.kmfri.co.ke/News/coral%20bleaching_press%20briefingN.pdf*[Accessed on 2/06/2014].

12.2 Coastal and Marine Resources Management in Kenya

12.2.1 Threats to Marine and Coastal resources

Coastal ecosystems and marines need to be managed sustainably, if they are to continue providing goods and services to support life and human welfare. These habitats are however faced with challenges that threaten their existence. Marine pollution, unregulated fishing, physical alteration and destruction of habitats, shoreline change and climate change are some of the challenges that the country needs to address in order to ensure sustainability of the coastal and marine resources.[7]Also identified, as specific root causes of ecosystem degradation, is population pressure, poverty, lack of community involvement in resource management, inadequate enforcement of legislation and lack of integrated management.[8]

a. Coastal development

Coastal development in coastal areas is leading to the conversion of the natural environment into ports, tourist beaches, hotels and industrial zones. Coastal developments such as the LAPPSET project often entail dredging up bottom sediments and/or the wholesale cutting of mangrove forests and other habitat to reshape the shoreline. This alters local current patterns and normal sediment transport which results in severe erosion of beaches and excessive sedimentation. Consequently, habitats such as seagrass beds are destroyed, while corals and other marine invertebrates are killed. Coastal development is a problem facing all the Regional Seas. Increasing populations, human migration and the exploitation of the ecosystems for commercial purposes are placing enormous constraints on the limited land and coastal marine ecosystems and the biodiversity they contain. The diverse development projects are being undertaken without appropriate normative, structural or institutional frameworks to cater for the long-term consequences of such activities.[9] The problem of coastal development is being addressed through programmes for integrated coastal zone management and the promotion of environmentally sound tourism.

In Kenya, the Kenya Coastal Development Project is promoting environmentally sustainable management of Kenya's coastal and marine resources by strengthening the capacity of existing relevant government agencies and by enhancing the capacity of rural micro, small and medium-sized enterprises, in selected coastal communities. This will

[7] *Ibid.*
[8] *Ibid.*
[9] Olowu, D., "Environmental Governance Challenges in Kiribati: An Agenda for Legal and Policy Responses," *Law, Environment and Development Journal*, Vol. 3(3), 2007, pp 265-266, p. 259.

lead to social and economic well-being, improve standard of living, and create wealth for and by coastal zone communities by diversifying the coastal economy, creating viable jobs and empowering youth and women; and encourage environmentally and socially sustainable utilization of coastal marine resources.[10]

b. Pollution

Pollution of the coastal and marine ecosystems is one of the most formidable menaces to environmental protection and the conservation of biodiversity. Pollution mostly originates from discharge from ships [11] and land-based pollution and sedimentation.[12] This especially comes in the wake of marine and coastal tourism which is to one of the fastest growing areas within the world's largest industry.[13]Apparently, the development of beach resorts and the increasing popularity of marine tourism (such as fishing, scuba diving, windsurfing, and yachting) have all placed increased pressure on the coast, an already highly concentrated area in terms of agriculture, human settlements, fishing and industrial location.[14] Due to the highly dynamic nature of the coastal environment, any development which interferes with the natural coastal system, may have severe consequences for the long-term stability of the environment.[15]

c. Marine Litter

Marine litter is any persistent, manufactured or processed solid material discarded, disposed of or abandoned in the marine and coastal environment. It consists of items made or used by people and deliberately discarded into the sea or rivers or on beaches; brought indirectly to the sea with rivers, sewage, storm water or winds; or accidentally lost, including material lost at sea in bad weather. Marine litter originates from a variety of sources and causes a wide spectrum of environmental, economic, safety, health and cultural impacts. The very slow rate of degradation of most marine litter items, mainly

[10] Kenya Coastal Development Project available at http://www.kcdp.co.ke/, [Accessed on 20/08/2013].
[11] These include oil spills, toxic spills and ballast discharges.
[12] These may be from sources such as sewage, waste disposal, industrial discharges, fish waste disposal, urban run-off, siltation from agricultural practices and logging.
[13] Hall, C.M., 'Trends in ocean and coastal tourism: the end of the last frontier?' *Ocean& Coastal Management, OCMA-2190, Elsevier Science Ltd*, pp. 12-18, p. 1. Hall observes that the concept of coastal tourism embraces the full range of tourism, leisure, and recreationally oriented activities that take place in the coastal zone and the offshore coastal waters. These include coastal tourism development (accommodation, restaurants, food industry, and second homes), and the infrastructure supporting coastal development (e.g. retail businesses, marinas, and activity suppliers). Also included are tourism activities such as recreational boating, coast- and marine-based ecotourism, cruises, swimming, recreational fishing, snorkeling and diving. He differentiates marine tourism from the concept of coastal tourism in that the former includes ocean-based tourism such as deep-sea fishing and yacht cruising.
[14] *Ibid,* pp. 1-2.
[15] *Ibid.*

plastics, together with the continuously growing quantity of the litter and debris disposed, is leading to a gradual increase in marine litter found at sea and on the shores.[16]

d. Oil Spilling by Foreign Vessels

UNEP reports that 20% of sea pollution comes from the deliberate dumping of oil and other wastes from ships, from accidental spills and offshore oil drilling. But of all the sources of marine pollution, the discharge of oily engine wastes and bilge from day-to-day shipping operations may be the worst, because it is steady and occurs everywhere. The Regional Seas programme identifies ship-generated marine pollution, oil spill preparedness and response, and construction of port reception facilities for ships' wastes as a priority.[17]

e. Illegal, Unregulated And Unreported Fishing

The Food and Agriculture Organization of the United Nations observes that illegal, unreported and unregulated (IUU) fishing is not a new phenomenon in capture fisheries nor is it confined to high seas fisheries. It also occurs in the exclusive economic zones (EEZs) of coastal States by national and foreign vessels and in river and inland fisheries.[18] There is a possibility that unlicensed fishing vessels poach within Kenya's territorial waters and exclusive economic zone.[19] These activities have the resulting effect of affecting effective management of high seas fish stocks as these activities are mostly unregulated. Illegal, unreported and unregulated (IUU) fishing covers a wide range of behaviors some of which are illegal due to the fact that they are undertaken in violation of national and international law and regulations, and thus having the effect of undermining the conservation initiatives that are in place.[20] These activities usually have an effect of undermining conservation initiatives that are undertaken and further making the administration of these fisheries difficult. The European Commission observes that illegal, unreported and unregulated fishing (IUU) depletes fish stocks, destroys marine habitats, distorts competition, puts honest fishers at an unfair disadvantage, and weakens coastal communities, particularly in developing countries.[21]

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[16] United Nations Environment Programme, *environment for development: About Marine Litter*, available at *http://www.unep.org/regionalseas/marinelitter/about/default.asp* [Accessed on 25/05/2014].
[17] See *http://www.unep.org/regionalseas/about/default.asp* [Accessed 27/02/ 2015]
[18] FAO, *Illegal, Unreported and Unregulated (IUU) fishing*, available at *http://www.fao.org/fishery/iuu-fishing/en* [Accessed 27/06/ 2015]
[19] State of Coast Report, Government of Kenya, 2009.
[20] See *http://www.globaloceancommission.org/wp-content/uploads/GOC-paper08-IUU-fishing.pdf*[Accessed 27/06/ 2015]
[21] European Commission, *Illegal fishing (IUU)*,
available at http://ec.europa.eu/fisheries/cfp/illegal_fishing/index_en.htm [Accessed 27/02/ 2015].

Fishing in Kenya, is largely done on a small-scale basis. In this regard, small-scale fisheries are usually open access areas with no restrictions on entry. There is usually massive competition of fish resources by the numerous fishermen who exploit the resources in the area usually leading to overexploitation. This in turn leads to conflicts among the small-scale and large-scale (industrial) fishers.[22] The small-scale fishers are the ones who are mostly affected by this when there are dwindling fish stocks.

Initiatives have been taken at the global level to support States which are not able to combat illegal fishing within their territorial waters. It is, however, noteworthy that in order for these initiatives to be successful, the members of the various fishing communities must be involved in the conservation initiatives. The government is, therefore, supposed to sensitize these communities and other stakeholders on the importance of the conservation initiatives and ensure that they participate in the formulation of conservation policies.

f. Fragility of Kenya's Marine Environment and Diversity of Endangered Biodiversity

Coral reefs are among the most productive of all marine ecosystems, providing habitat for numerous species, including turtles, dugongs, and whale sharks. Their ecosystem services, such as protecting the coastline from ocean waves, are irreplaceable.[23]

It is estimated that about ten percent of the world's reefs have been completely destroyed.[24] This has resulted from increased human population who continue to engage in activities that contribute to global warming. There are two different ways in which humans have contributed to the degradation of the earth's coral reefs, indirectly and directly. Indirectly, they have destroyed their environment. Coral reefs can live only in very clear water. The large population centres near coasts has led to silting of reefs, pollution by nutrients that lead to algal growth that smothers the coral, and overfishing that has led to an increased in number of predators that eat corals.[25]

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[22] Drammeh, O.K., 'Illegal, Unreported and Unregulated Fishing in Small-Scale Marine and Inland Capture Fisheries' Document AUS: IUU/2000/7. 2000,
available at *http://www.fao.org/docrep/005/y3274e/y3274e09.htm* [Accessed 27/02/ 2015].

[23] USAID, 'Kenya Tropical Forest and Biodiversity Assessment: Prosperity, Livelihoods And Conserving Ecosystems (Place) IQC, TASK ORDER AID-121-TO-11-00008, p. 7,
available at *http://www.brucebyersconsulting.com/wp-content/uploads/2011/11/Kenya-Tropical-Forest-and-Biodiversity-Assessment-Sept-2011.pdf* [Accessed on 2/06/2014].

[24] OceanWorld, Coral Reef Destruction And Conservation, available at
http://oceanworld.tamu.edu/students/coral/coral5.htm [Accessed on 2/06/2014].

[25] *Ibid.*

Further, warming of the ocean causes corals to sicken and die. The most obvious sign that coral is sick is coral bleaching.[26] That is when either the algae inside die or the algae leave the coral. The algae are what give coral its color, so without the algae, the coral has no color and the white of the limestone shell shines through the transparent coral bodies.[27] The direct way in which humans destroy coral reefs is by physically killing them.

In Kenya, coral colonies have increasingly reduced in number due to the human activities in the areas having corals. The destruction of these corals is mainly attributable to the fishing pressure in these areas.[28] The tourism industry in the coastal areas is also to blame for the increased destruction of these areas. The tourism industry has created increased demands for corals and shells and this has resulted to overexploitation of certain species and the destruction of their habitat.

The Marine Conservation Areas (MCAs) that have been established in certain areas in the coastal parts of the country have resulted to the protection of some of the coral areas. Protection is, however, minimal in areas where the MCAs have not been established and in these areas, the mortality rates of corals are usually high. In this regard, it is important that there be coordination of the management of these areas and that the local communities are involved more in their management and conservation.

g. Increased Extraction of Minerals

The recent discovery of huge reserves of mineral resources, oil, and gas means that Kenya must start thinking about putting in place substantive measures to combat the resultant negative environmental impact. Increased extraction of sea minerals, gases and other sea-bed based mineral resources are likely to interfere with the natural habitats therein, thus affecting the marine life. It is also likely to cause pollution which can even cause death of fragile marine lives. Mining activities in many areas usually have a great potential in causing the degradation of the environment. These activities especially pose great harm when undertaken in fragile ecosystems like in marine areas.

The coastal areas in Kenya are seen to be good grounds for the extraction of different minerals which include; salt, limestone and oil and gas. Exploration of mineral oil and natural gas is being aggressively pursued at the Kenyan coast. Some of the companies prospecting for oil at the coast have been successful particularly in the Lamu

[26] See generally, Nyamongo, G., '*Massive Coral reefs death encountered in Lamu due to global warming,' op cit.*

[27] Ocean World, Coral Reef Destruction and Conservation, *op cit*.

[28] Muthiga, N., *et al,* 'Status of Coral Reefs in East Africa: Kenya, Tanzania, Mozambique and South Africa' Status of Coral Reefs of the World,
available at *http://02cbb49.netsolhost.com/gcrmn/2008/6.%20East%20Africa.pdf* [Accessed 27/02/2015].

basin.[29] The discovery of these minerals and the prospecting activities undergoing in some areas, pose the problem of potentially disturbing the balance in the ecosystem and interfering with marine life.

Further, the increased activities in these areas are likely to interfere with the breeding cycle of the various species in the oceans and also interfere with their migration patterns. It is, therefore, imperative that measures are put in place to ensure that the economic benefit to be reaped from the exploitation of the mineral resources in the coastal areas is not at the expense of conservation of the flora and fauna found in these areas.

The legislative framework dealing with the exploitation of these resources has not adequately provided protection for these resources and this particularly relates to the Petroleum (Exploration and Production) Act which is seen to be purely commercial and lacks provisions on the protection of marine areas where exploration and production activities are being undertaken. Some opine that the Act lacks provisions requiring that an environmental impact assessment is done thus creating room for possible chaos in the process of exploration, production and transport of oil in the country's territorial waters.[30]

h. Multiplicity of Agencies

Most of the countries in the region have multiple agencies addressing specific components of the marine and coastal zone. This is due to a sectoral approach to coastal zone management. As a result, there has been a challenge in coordinating the various agencies. For example, it is possible for both the Kenya Forest Service and Kenya Wildlife Service to have powers over the management and conservation of mangrove forests. This creates institutional overlaps and conflicts which occasions poor management of marine resources. Section 7 of the Wildlife Conservation and Management Act, 2013 mandates the Kenya Wildlife Service with among others; conservation and management of national parks, wildlife conservation areas, and sanctuaries under its jurisdiction. The Kenya Forest Service is, on the other hand, mandated with the conservation, protection and management of all forests in Kenya.[31] In this regard, the jurisdiction to protect mangrove areas, which fits within both the category of conservation areas and forests, is seen to fall within the mandate of both the Wildlife Service and the Forest Service.

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[29] 'Oil Discovered off Kenya's Coast,' *Business Daily*, 18th June 2014, available at *http://www.businessdailyafrica.com/Oil-discovered-off-Kenya-s-coast/-/539552/2353076/-/5nsmgq/-/index.html*[Accessed 27/02/2015].

[30] Okidi, C.O, 'Legal Aspects of Management of Coastal and Marine Environment in Kenya,' in Okidi, C.O, *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (E.A.E.P., 2008).

[31] The Forests Act, 2005, s.4.

12.2.2 Critical Issues in the Eastern African region

Peculiar challenges in the Eastern African region include lack of infrastructure and treatment facilities for large quantities of domestic sewerage generated by expanding coastal urban populations and increasing number of visiting tourists. UNEP notes these as major threats to public health, coastal habitats and economic development in each state of the region.[32] Soil erosion, pollution of coastal waters by untreated sewage and chemical wastes and rapid disappearance of ecosystems are also identified as major problems in the region.[33] Pollution from land-based sources is particularly severe in the region. Rapid population growth in the region has led to increased waste generation which is further exacerbated by fact that majority of population in the region use septic tanks and pit latrines.

In addition, many states including Kenya have a multiplicity of agencies responsible for the management of the resources of the coastal and marine environments such as fisheries, forestry, agriculture, harbor developments and nature conservation each of which has a specific mandate assigned to it under legislation. For instance, fisheries interests are likely to come into conflict with nature protection as with forestry, agriculture and urban authorities, regarding the protection of mangroves or establishment of national parks.[34] There is need for harmonization of institutional frameworks at both national and international levels.

Marine waters off the coast of East Africa are used as one of the main transportation routes for petroleum from the Middle East en route Europe and USA. There are, therefore, many incidents of oil spills with devastating long-term effects on coastal habitats.[35] For example, the 1988 Makupa oil spill caused the death of 10 hectares of mangrove forests in Kenya. Another oil spill at Kipevu Oil Terminal, affected 234 hectares of the mangroves at Port Reitz. In addition, lack of monitoring data concerning the concentrations of agricultural nutrients and pesticides in the coastal and fresh waters of the region makes any assessment of associated pollution very tentative. For example, decrease of coral-reef-building algae in Zanzibar has been attributed to eutrophication associated with the release of inorganic nutrients such as phosphate, nitrate and ammonia into coastal waters from domestic sewage.

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[32] UNEP, "Overview of Land-based Sources and Activities Affecting the Marine, Coastal and Associated Freshwater Environment in the Eastern African Region," *UNEP Regional Seas Reports and Studies,* No.167, 1998.

[33] UNEP, "Management and Conservation of Renewable Marine Resources in the Eastern African Region," *UNEP Regional Seas Reports and Studies,* No.66, 1985.

[34] *Ibid.*

[35] *Ibid.*

Climate change is the other factor affecting the region, including sea-level rise, rising temperatures, sedimentation, prolonged drought and increase in carbon dioxide levels that act synergistically with other environmental stresses to compromise the integrity of marine and coastal resources, thus subsequently impacting on the coastal economy. The effects of climate change affect the mangrove ecosystems, corals, and shoreline and on people's livelihoods.[36]

In relation to fishing, it is reported that the Western Indian Ocean (WIO) region, is among the regions with the lowest levels of marine industry. Coastal fishing in the region is largely done by local artisanal communities while oceanic fisheries are mainly harvested through seine-netting and long-lining by foreign fishing vessels from Europe and Eastern Asia. Artisanal fishery is mostly concentrated over a range of coastal habitats such as sandy beaches, estuaries, coral reefs, lagoons, wetlands, bays, mangrove forests and seagrass beds.[37] Fishing is, therefore, dependent on the health of the various ecosystems which are breeding grounds and food resources for marine life. Fishing in the region is also faced with the problem of destructive fishing practices, overfishing and Illegal, Unregulated and Unreported (IUU) fishing.

12.3 Legal and Institutional framework

Kenya's legal framework for the protection of the coastal and the marine environment is contained in a variety of sectoral laws such as those on maritime, environment, fisheries, tourism, wildlife, mining, energy, agriculture and forestry. Kenya is also a party to numerous treaties touching on marine and coastal resources.[38]

Article 2(5) and (6) of the Constitution provides that the conventions ratified by Kenya and the general principles of international law are part of the laws of Kenya. Key obligations are imposed on Kenya from these treaties. The general rule of international law is that when a state is a party to a treaty, it has a duty to harmonise its laws with the international obligation. A common thread running across all the conventions and agreements that Kenya is a party to; is the need for state cooperation, information sharing, public participation, sustainable development and benefit sharing. States are also to

[36] Available at *http://www.unep.org/NairobiConvention/docs/Inception_workshop_report_final_6_Sep_11.pdf*, [accessed on 20/08/2013].

[37] UNEP-GEF WIO-LaB Project, "Transboundary Diagnostic Analysis of Land-based Sources and Activities in the Western Indian Ocean Region," (UNEP, 2008), p.7.

[38] These include *inter alia The International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/1978; United Nations Convention on the Law of the Sea (UNCLOS); Convention for the Protection, Management and Development of Marine and Coastal Environment of the Eastern African Region (Nairobi Convention) International Maritime Organization (IMO); the UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995.*

delimit the various ocean zones of jurisdiction.[39] UNCLOS effectively delineates the rights and obligations of all states. It divides the oceans into different zones of jurisdiction where different states have different rights. Kenya has rights and obligations in these zones.

The oceanic zones are: the territorial water which is this has been provided for in the Maritime Zones Act.[40] This Act states that this zone shall extend to twelve (12) nautical miles. The United Nations Convention on the Law of the Sea has provided that states have the right to exercise their sovereignty over the area considered to be their territorial sea. The contiguous zone consists of waters reserved for exercise of jurisdiction by the coastal states over specific function to cushion territorial interests. Article 33 of UNCLOS provides for some of the rights assertable by a state on the contiguous zone. States are allowed to enter this zone in order to prevent infringement of its customs, fiscal and other laws.

The exclusive economic zone (EEZ) as provided by the Maritime Zones Act consists of the "areas of the sea, seabed and subsoil that are beyond and adjacent to the territorial waters, having as their limits a line measured seaward from the baselines, low water line or low tide elevations described in the First Schedule every point of which is 200 nautical miles from the point on the baseline, low water mark or low tide elevations."[41] Kenya has the right to exercise its sovereign rights in this area. This right can be exercised with respect to exploration and exploitation, conservation and management of natural resources within the Zone. The ICJ in deciding the *Libya-Malta Continental Shelf, Case* found the institution of the EEZ with its rule on entitlement by reason of distance by practice of states, to have become part of customary international law.[42] This grants coastal states rights that extend beyond the region claimed as territorial sea.

The High Seas are areas that are open to all States and consist of the waters that are considered not to be part of territorial sea or the exclusive economic zone. The right to exploit the high seas is vested on both the coastal and land-locked countries. States have certain rights in these areas as provided for by Article 87 of UNCLOS. These are, *inter alia*, the right to freely navigate, freedom of overflight and the freedom to lay submarine cables and pipelines. The high seas extend from 200 nautical miles outwards.

Kenya has adopted several initiatives which are driven at ensuring that the country has implemented UNCLOS. For example, Kenya has applied to extend its EEZ by 150

[39] United Nations Convention on the Law of the SEA (UNCLOS), Art.194.
[40] S.3(1), Cap 371, Laws of Kenya.
[41] S. 4(2).
[42] ICJ Reports (1985), p.13, para 34.

nautical miles, in order to sharpen focus on marine policy, a cabinet office on marine policy has been established and the country has initiated efforts meant to ensure the adoption of an integrated Coastal Zone Management Plan.

12.3.1 Constitution of Kenya, 2010

The Constitution provides perhaps the single most important opportunity to implement the treaties, agreements and protocols to which Kenya is a party. It captures some of the most important international best practices on natural resources management. This is evident from the constitutional provisions requiring the state to, *inter alia*, ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources, equitable sharing of the accruing benefits, requiring the state to strive towards achieving and maintaining a tree cover of at least ten per cent of the land area in Kenya; and encourage public participation in environmental protection efforts and the elimination of activities and process likely to endanger the environment.[43]Article 10 provides for the national values and principles of governance as including and sustainable development. Coastal and marine resources must be managed in accordance with these principles. The right to a clean and healthy environment is a justifiable right under the Constitution. The right includes, *inter alia*, the right to have marine and coastal environments protected for the benefit of present and future generations through legislative and other measures, and the right to have obligations relating to the environment fulfilled under article 70. Article 60 on the principles of land policy includes the sustainable and productive management of land resources. This invariably includes coastal and marine land. Article 69 sets out the obligations of the state with respect to the environment. Again, these obligations apply to coastal and marine environments.

12.3.2 Regulation of Marine Environment in Kenya

In Kenya, several legislations have been enacted to address the protection and preservation of the marine environment. The Maritime Zones Act of 1989 is one such legislation enacted to provide for among others, the delimitation of the exclusive economic zone. The Kenya Maritime Authority Act, 2006 establishes the Kenya Maritime Authority. The Authority is mandated with the regulation, co-ordination and overseeing maritime affairs and with the administration of the Merchant Shipping Act. The Authority is further mandated with advising the government on flag and port state obligations. The Environment Management and Coordination Act (EMCA) 1999 seeks to ensure the protection of the marine environment. The Act in section 54 and 55 contains provisions for the protection of coastal zones. In order, to ensure maximum protection of the marine

[43] See Art. 69, Constitution of Kenya, 2010.

environment, the Minister for Environment and Natural Resources promulgated the Environmental (Prevention of Pollution in Coastal Zone and other Segments of the Environment) Regulations in 2003.[44] NEMA is Kenya's national focal institution under the Nairobi Convention.

In Kenya, the courts have also played a big role in ensuring the protection of the marine environment. The National Environmental Tribunal has also been on the forefront in ensuring that the environment, including the marine environment is protected. This can be seen from the tribunal's decisions in cases like *Malindi Green Town Movement and another v Director General, NEMA and two others*.[45]

12.3.3 Challenges in Managing Marine and Coastal Resources

Despite the fact that several initiatives have been undertaken driven at protecting the marine environment, challenges still exist in this area. One of the challenges that have been faced in this sector is the lack of technology and capacity by the agencies tasked with conservation. These agencies usually lack adequate technical know-how to enable them to effectively deal with the challenges faced in the marine environment.

Lack of funds, is the other challenge that has riddled marine and coastal resources conservation initiatives. For instance, Kenya relies on the Kenya Navy for enforcement of its port and coastal state responsibilities under the Kenya Maritime Authority Act yet this is not the mandate of the Kenya Defence Forces under the Constitution and under the Kenya Defence Forces Act. The other challenge that has largely affected conservation initiatives is the existence of overlapping mandates of the various agencies tasked with implementing the laws and regulations on marine and coastal resources. This has largely affected service delivery as there has been lack of accountability by these institutions.

Most of the communities living near the marine areas have also not showed much concern towards the conservation of these areas as they perceive these initiatives to be driven at ensuring that they do not benefit from these resources. High poverty rates have also forced the communities in these areas to overexploit the marine resources leading to their depletion. Further, the constantly increasing populations in these areas have led to the overexploitation of these resources.

12.4 Cooperation with other States

Management of coastal and marine resources requires constant cooperation with other states. Kenya has implemented its obligation to cooperate with other States by

[44] Legislative Supplement No. 48 of 19 September 2003, Legal Notice No. 159, signed by the Minister on 18 September, 2003.
[45] Appeal No NET/ 06/2005.

entering into the Nairobi convention. It has also cooperated with other States such as Pemba Channel Agreement, through negotiations and Exchange of Notes between the United Republic of Tanzania and the Republic of Kenya concerning the delimitation of the territorial waters boundary between the two States from 17 December, 1975 to 9 July, 1979.

Subsequent to the adoption of the Nairobi Convention, the Protocol concerning Protected Areas and Wild Fauna and Flora in the East African Region (SPAW Protocol) was adopted. The Protocol obliges the contracting parties to undertake certain initiatives towards the protection and preservation of the ecosystem. The Protocol particularly relates to regional waters and it seeks to protect the species found in these waters.

The other Protocol to the Nairobi Convention is the Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region which was adopted in 1985. Article 2 of the Protocol provides that it applies to "marine pollution incidents which have resulted in or which pose a significant threat of, pollution to the marine and coastal environment of the Eastern African region or which adversely affect the interests of one or more of the Contracting Parties." The other Protocol relating to the East Africa region, is the Protocol for the Protection of the West Indian Ocean Marine Environment from Land-Based Sources and Activities (LBSA Protocol) enacted in 2010.

The Nairobi Convention together with its three protocols constitutes the current regional legal framework for the protection and conservation of the marine and coastal environment of the Western Indian Ocean region. There is a fourth protocol on Integrated Coastal Zone Management in the Western Indian Ocean region which is currently under development.

12.5 National Implementation of the Regional Seas programme: Kenya

The implementation of the Nairobi Convention has faced a number of problems and challenges that have affected its performance. These include inadequate financing and lack of capacity for implementing the Nairobi Convention and the Action Plan for the Eastern African region.[46] In Kenya, tourism generates an average of 18% of the foreign exchange earnings and contributes 9.2% to GDP. It also provides 270,000 jobs both directly and indirectly. Coastal tourism contributes over 60% of Kenya's tourism earnings and accounts for 45% of the coastal economy. However, in the last two decades, increased population pressure, urban development and poverty have contributed to physical alteration and the destruction of coastal habitats, resource over-exploitation and water

[46] Available at *http://www.unep.org/eou/Portals/52/Reports/MCZ_NC_ExecSummary.html,* [Accessed on 20/08/2013].

quality degradation. Unregulated land use patterns and poor regulatory regimes reduce the aesthetic, cultural and tourism value of the coasts and also reduce the protection of the coasts thus increasing coastal erosion rates.[47] Increase in industrial activity in the Kenyan coast, has also led to more destruction of marine and coastal ecosystems. Moreover, the susceptibility of Kenya's coast to major ship-borne pollution is one of the factors that led to adoption of the convention.

12.5.1 Activities Undertaken under the Auspices of the Nairobi Convention

In Kenya, UNEP is carrying out various activities under the auspices of the Convention to reduce stress on the coastal and marine environment through improved water and sediment quality; strengthen regional legal basis for preventing land based sources of pollution, including implementation of United Nations Global Programme of Action (GPA)[48] and to develop regional capacity and strengthen institutions in the Western Indian ocean for sustainable, less polluting development including implementation of the Nairobi Convention.

These activities include the Shimo–La-Tewa Prison Wastewater Management Demonstration Project, in Mombasa, which was implemented by the Coast Development Authority (CDA) and Kenya Prison Service to improve water and sediment quality. There is also a UNEP-GEF WIO-LaB project addressing land-based pollution in the region. This project forms an integral part of the work programme of the Nairobi Convention. It is a direct follow up to the 2002 World Summit for Sustainable Development and the Johannesburg Plan of Implementation, which calls for advanced implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA). The main transboundary problems related to land-based sources are: water and sediment quality degeneration due to pollution from land-based sources; physical alteration and destruction of habitats; and alteration in freshwater flows and sediment loads from rivers.

12.5.2 Legal and Institutional Framework

Implementation of the Convention will also be facilitated by the adoption of a robust legal and institutional framework on the environment and marine environment specifically. The pertinent laws include:

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[47] *Ibid.*

[48] The UN Global Programme of Action (GPA) aims at the development of a conceptual and practical guidance for decision-makers at the national and/or regional level dealing with actions to prevent, reduce, control and/or eliminate marine degradation from land-based activities.
See http://actionguide.info/m/orgs/209/ [Accessed 0n 24/07/2015].

a. Constitution of Kenya 2010

There are numerous provisions in the Constitution whose implementation will by extension operationalise the objectives of the Nairobi Convention. These include the recognition of the principle of sustainable development in Article 10 as one of the national values and principles of governance. Article 42 of the constitution recognizes the right to a clean and healthy environment including the right to fulfill the obligations in articles 69 and 70 of the constitution. Article 69(1) outlines the obligations of the state in respect of the environment.

There is also a duty imposed on every person in Article 69 (2) to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. These provisions equally apply to the coastal and marine environments. Their implementation will go a long way in fulfilling Kenyans obligations under the Nairobi Convention.

b. Kenya Maritime Authority Act

The objective of this Act[49] is to provide for the establishment of the Kenya Maritime Authority as a body with responsibility to monitor, regulate and coordinate activities in the maritime industry, and for all other matters connected therewith and incidental thereto. Section 5 outlines the duties of the Authority which are to: administer and enforce the provisions of the Merchant Shipping Act and any other legislation relating to the maritime sector for the time being in force; co-ordinate the implementation of policies relating to maritime affairs and promote the integration of such policies into the national development plan; advise government on legislative and other measures necessary for the implementation of relevant international conventions, treaties, and agreements to which Kenya is a party; undertake and coordinate research, investigation, and surveys in the maritime field; discharge flag State and Port State responsibilities in an efficient and effective manner having regard to international maritime conventions, treaties, agreements and other instruments to which Kenya is a party; develop, co-ordinate and manage a national oil spill contingency plan for both coastal and inland waters and shall in the discharge of this responsibility be designated as the - competent oil spill authority; maintain and administer a ship register; deal with matters pertaining to maritime search and rescue and co-ordinate the activities of the Kenya Ports Authority, the Kenya Navy and any other body engaged during search and rescue operations; enforce safety of shipping, including compliance with construction regulations, maintenance of safety standards and safety navigation rules; conduct regular inspection of ships to ensure maritime safety and prevention of marine pollution; oversee matters pertaining to the

[49] Act No. 5 of 2006, Laws of Kenya.

training, recruitment and welfare of seafarers; plan, monitor and evaluate training programmes to ensure conformity with standards laid down in international maritime conventions; conduct investigations into maritime casualties including wreck; undertake enquiries with respect to charges of incompetence and misconduct on the part of seafarers; *ensure, in collaboration with such other public agencies and institutions, the prevention of marine source pollution, protection of the marine environment and response to marine environment incidents*; regulate activities with regard to shipping in the inland waterways including the safety of navigation; implement and undertake co-ordination in maritime security; and undertake any other business which is incidental to the performance of any of the foregoing functions.

c. Merchant Shipping Act

In addressing the issue of ship-borne pollution, Kenya has enacted the Merchant Shipping Act[50] to make provision for the registration and licensing of Kenyan ships, to regulate proprietary interests in ships, the training and the terms of engagement of masters and seafarers and matters ancillary thereto; to provide for the prevention of collisions, the safety of navigation, the safety of cargoes, carriage of bulk and dangerous cargoes, the prevention of pollution, maritime security, the liability of ship-owners and others, inquiries and investigations into marine casualties; to make provision for the control, regulation and orderly development of merchant shipping and related services; generally to consolidate the law relating to shipping and for connected purposes.

d. Environmental Management and Coordination Act

Enactment of EMCA was a major step forward in implementing the provisions of the Nairobi Convention. It has provisions on EIA, Strategic impact assessment (SEA), monitoring and auditing. Section 55 of EMCA provides a basis for integrated coastal zone management in Kenya. There is an ICZM Action Plan in place addressing coastal zone issues including the need for partnership and cooperation between government and non-governmental stakeholders at local, national and regional level in development and management of the coastal zone. It also seeks to address the issue of the destruction and loss of coastal and marine habitats as a result of over-exploitation, poor land use practices, encroachment and unplanned and unregulated human settlement and urban development. This will be quite necessary in addressing land-based sources of pollution. Sections 54 and 55 (1) of EMCA provides for Marine Protected Areas. Coral reefs in Kenya are managed as MPAs in Malindi and Watamu. The Minister is also empowered to declare a particular area a protected coastal zone. Moreover, section 55 (6) of EMCA empowers the

[50] No. 4 of 2009, Laws of Kenya.

Minister in consultation with lead agencies to issue appropriate regulations to prevent, reduce and control pollution or other forms of environmental damage in the coastal zone. It is evident that EMCA has to a great extent attempted to localize the provisions of multilateral environmental agreements and regional agreements in Kenya, although implementation has been wanting.

e. Draft Integrated Ocean Management Policy

In August this year the government came up with a draft integrated ocean management policy. This policy is Kenya's first attempt to future approach to ocean management. It establishes a holistic approach to ocean governance and recognizes the current sectoral approaches and intends to embrace their strengths to focus on how to create national synergies and linkages in the management of marine sector. It is developed in conformity with internationally accepted principles of "Ecosystem-Based Management (ESBM)" and "Multiple Use Management (MUM)."

The draft policy adopts and customizes the following principles to guide national efforts for in situ management of Kenya's marine sector: ecosystem-based management; sustainable development; polluter pays; user/beneficiary pays; multiple use management (MUM); precautionary approach; best scientific based information and adaptive management; participatory and inclusive approach; stewardship; regional and international responsibility; promotion of peaceful use of the ocean; and economic diversification and value addition.

The policy also recommends the setting up of a National Ocean Office (NOO) to coordinate and integrate the management of marine related activities. A singe National Ocean Office will ensure that integration and coordination functions will be placed within a single body which will lead to increased transparency and efficient arrangements and better outcomes in all matters involving ocean governance. This arrangement will create inter-sectoral linkages and synergies which will shift from the current sectoral arrangements of ocean governance which has become a bottleneck to sustainable development of the marine sector in Kenya. NOO will work closely with other departments such as fisheries, water and irrigation, national heritage, environment and natural resources, industry, trade and transport among others. NOO will also work in liaison with agencies such as Kenya Marine and Fisheries Research Institute (KMFRI); NEMA; National Council of Science and Technology (NCST); KWS; KFS; Kenya Ports Authority etc.

f. Fisheries Laws

In relation to fisheries, the Kenya Fisheries Policy of 2006 recognizes the need for regional cooperation in fisheries management by providing that its "…*main fishery resources are shared with neighbouring countries either by virtue of geographical location or the migratory nature of key fish stock*." However, the Fisheries Act, Cap. 378, does not make provision for regional or sub-regional cooperation in this regard. There is need to review this law in light of the provisions of the Policy and the Nairobi Convention.

g. Coast Development Authority Act (Cap. 449)

This law provides for the establishment of an authority to plan and coordinate the implementation of development projects in the whole of the coast province and the EEZ and for connected purposes. It is mandated with coastal zone development and governance including coastal planning and co-ordination of developments. Its implementation can, therefore, ensure that coastal development does not cause loss or degrade coastal habitats and marine ecosystems.

h. Forests Act, 2005

This Act provides for the establishment, creation and management of all forests in Kenya. Mangrove forests are classified as forest reserves and placed under the protection of the Kenya Forest Service. The Kenya Wildlife Service also has some mandate over mangroves as they are part of wildlife. In addition, EMCA provides that the Minister may declare mangrove areas as "protected coastal zones". This creates jurisdictional challenges over management of mangroves. The problem is further exacerbated by the fact that less than 50% of all coastal forests in Kenya have been granted some form of protection.

12.6 Best Practices in Marine Resources Management

The Convention on Biological Diversity (CBD)[51] is one of the international legal instruments that seek to promote the conservation and sustainable use of biodiversity. Its main objective is to encourage actions which will lead to a sustainable future.[52] It is, noteworthy, that the Convention defines "biological diversity" to mean the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

It, therefore, follows that any approach adopted in the management of coastal and marine resources should aim at achieving sustainable development. The Convention

[51] 1760 UNTS 79; 31 ILM 818, (1992).
[52] *Ibid.*

reaffirms that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, but with the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[53]This requires each Contracting Party, as far as possible and as appropriate, to cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.[54]

The Convention places general obligations on Contracting States in that each should, in accordance with its particular conditions and capabilities: develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which should reflect, *inter alia*, the measures set out in the Convention relevant to the Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.[55] The CBD, thus, recommends for certain actions to be undertaken by the state parties to ensure conservation of marine and coastal resources. These will be discussed in the subsequent section.

12.6.1 Public/Community Participation

Public participation is an important consideration to be taken into account by the state seeking to ensure conservation of the coastal and marine resources. In this regard, contracting states are to ensure that members of the public are educated and made aware of the importance of the conservation of biological diversity. The authorities tasked with conservation are also to take the views of the communities in these areas into account and also to integrate the traditional cultural practices that are compatible with conservation or sustainable use requirements.[56]

The Contracting parties are also required to support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.[57] An example of an instance, where such cooperation may be useful is in the management of fisheries

[53] Art. 3.
[54] Art. 5.
[55] Art. 6.
[56] Convention on Biological Diversity, Chapter 2.
[57]Art. 10.

where institutions can be established to co-manage these facilities with the local communities. Co-management of these resources has several advantages as it overcomes the many limitations and pitfalls of centralized, top-down resource management hence resulting in more efficient, appropriate and equitable resource management.[58] Further, it fosters meaningful communication in the decision-making process thus contributing to effective management of the marine resources.

12.6.2 In-situ Conservation

In-situ conservation is another tool outlined by the CBD that can ensure effective conservation of coastal and marine resources. In-situ conservation describes conservation of biological diversity within their natural habitats. The CBD mandates the contracting parties to, among others, establish a system of protected areas and areas where special measures are to be undertaken to conserve biological diversity. This is usually done especially in order to protect species that are rare or that are endangered.

Several advantages arise from the conservation of bio-diversity within their natural environments. The adoption of in-situ conservation mechanisms is important in the conservation of a wide variety of species. The viability of the species conserved increases through their protection in their natural habitats and is also financially sustainable.[59]

States are, therefore, supposed to ensure that the areas surrounding the conservation areas are also conserved to prevent a spill-over effect of harm into the areas being conserved. In-situ conservation areas are supposed to promote the recovery of species that are threatened, and measures taken to prevent the introduction of harmful species into the conservation areas. States are also supposed to cooperate to provide technical and financial assistance to developing states that are not able to adequately cater for their conservation obligations.[60]

12.6.3 Ex-situ Conservation

The Convention also provides for ex-situ conservation. It requires each Contracting Party, as far as possible and as appropriate, and predominantly for the purpose of complementing *in-situ* measures to: adopt measures for the *ex-situ* conservation of components of biological diversity, preferably in the country of origin of such components; establish and maintain facilities for *ex-situ* conservation of and research on plants, animals and micro-organisms preferably in the country of origin of genetic

[58] *Ibid.*
[59] Possiel, W., *et al,* 'In-situ conservation of biodiversity,' available at *http://www.oas.org/dsd/publications/unit/oea04e/ch04.htm* [Accessed 28/02/2015]
[60] Art. 8.

resources; adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions; regulate and manage collection of biological resources from natural habitats for *ex-situ* conservation purposes so as not to threaten ecosystems and *in-situ* populations of species except where special temporary *ex-situ* measures are required under subparagraph (c) above; and cooperate in providing financial and other support for *ex-situ* conservation outlined in subparagraphs (a) to (d) above and in the establishment and maintenance of *ex-situ* conservation facilities in developing countries.[61] The Convention also requires that each Contracting Party adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.[62]

12.6.4 Public Education and Awareness

As a way of boosting public participation, the Convention requires the Contracting Parties to promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.[63]

12.6.5 Environmental Impact Assessment

To facilitate sustainable development, the Convention provides for environmental impact assessment. It provides that each Contracting Party should, *inter alia*: introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account; promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral

[61] Art. 9.
[62] Art. 11.
[63] Art. 13.

arrangements as appropriate; in the case of imminent or grave danger or damage originating under its jurisdiction or control to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.[64]

12.6.6 Liability and Redress for Damage to Biological Diversity

The Convention also provides for examination, based on studies to be carried out,[65] the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.[66]

12.6.7 Access to Genetic Resources

Regarding access to genetic resources, the Convention requires that each Contracting Party to endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.[67] It is argued that no control of prevalence and impact of threats to protected areas will succeed, if local communities are not socio-economically empowered and resource management policies made to include their needs and aspirations.[68] If they do not benefit, or get compensated for opportunity costs and harm incurred as a result of resource conservation, then threat to biodiversity may be carried to the ultimate conclusion, extinction of species.[69]

12.6.8 Integrated Coastal Zone Management

Internationally, the Integrated Coastal Zone Management approach to coastal and marine resources management is hailed as part of the best practices in natural resources management and conservation and indeed, it features prominently in the international

[64] Art. 14.1
[65] By Conference of the Parties as established under Art. 23 of the Convention.
[66] Art. 14.2.
[67] Art. 15.
[68] Kiringe J.W. & Okello, M.M. 'Threats and their relative severity to wildlife protected areas of Kenya,' *Applied Ecology and Environmental Research,* Vol.5(2), 200, pp. 49-62, p. 60. Available at *http://www.ecology.kee.hu/pdf/0502_049062.pdf* [Accessed on 28/05/2014].
[69] *Ibid.*

legal instruments on natural resources management and conservation. The "Integrated coastal zone management" (ICZM) is defined as a dynamic process for the sustainable management and use of coastal zones, taking into account at the same time the fragility of coastal ecosystems and landscapes, the diversity of activities and uses, their interactions, the maritime orientation of certain activities and uses and their impact on both the marine and land parts.[70]

The objectives of integrated coastal zone management as outlined in the *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* (Mediterranean Convention) are to *inter alia*: facilitate, through the rational planning of activities, the sustainable development of coastal zones by ensuring that the environment and landscapes are taken into account in harmony with economic, social and cultural development; preserve coastal zones for the benefit of current and future generations; and to ensure the sustainable use of natural resources, particularly with regard to water use.[71]

The Convention further outlines the general principles of integrated coastal management in Article 6. Public participation is emphasized and is said to be important in decision-making process. In this regard, the opinion of all they is to be taken into account and the stakeholders are also to be involved in all the activities driven towards conservation. Another important consideration provided by the Convention is the need to ensure institutional coordination in order to avoid sectoral approaches to conservation. Further, the competent national, regional and local coastal zone authorities must, insofar as practicable, work together to strengthen the coherence and effectiveness of coastal strategies, plans and programmes.[72] Under Article 10 of the Convention, the Contracting Parties are under an obligation to take measures to protect the characteristics of certain specific coastal ecosystems, such as: wetlands and estuaries, marine habitats, coastal forests and woods, and dunes.

12.6.9 Southern Indian Ocean Fisheries Agreement (SIOFA)

This is a Multilateral Agreement,[73] that Kenya is a party to. It was entered into with the objective of ensuring the long-term conservation and sustainable use of the fishery resources in the area through, cooperation among the Contracting Parties, and to promote

[70] Art. 2(f), the Protocol on Integrated Coastal Zone Management (Protocol to the Mediterranean Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, done at Barcelona on 16 February, 1976, as amended on 10 June 1995).
[71] Mediterranean Convention, Art. 5.
[72] *Ibid*, Art. 7.2.
[73] The Southern Indian Ocean Fisheries Agreement (SIOFA) is a legally-binding treaty with the objective of ensuring the long-term conservation and sustainable use of non-highly migratory fish stocks in the high seas of the southern Indian Ocean.

the sustainable development of fisheries in the area, taking into account the needs of developing States bordering the area that are Contracting Parties to this Agreement, and in particular the least developed among them and small-island developing States.[74]

The Agreement establishes a mechanism through which Contracting Parties can cooperate to manage and conserve non-highly migratory fishery resources in the high seas of the Southern Indian Ocean and promote the long-term conservation and sustainable use of fisheries resources by applying principles such as the precautionary approach, ecosystem-based approaches to fisheries management and effective monitoring, control and surveillance measures to ensure compliance.[75]

12.7 United Nations Convention on Law of the Sea

In adopting the United Nations Convention on Law of the Sea (UNCLOS), which was a product of the United Nations Conference on Environment and Development, it was realized that the marine environment forms an essential component of the global life-support system and needed protection and conservation. The adoption of the Convention sought to ensure that countries align their national marine issues to the required standards regionally and globally.

UNCLOS ensures the adoption of integrated coastal and ocean management. This embodies the making of rational decisions, comprehensive planning and management of human activities in both the ocean and adjacent coastal areas for the purpose of achieving sustainable use of the resources within them.[76] In order to ensure the conservation of marine and coastal resources, UNCLOS establishes institutions which include the Division for Ocean Affairs and the Law of the Sea (DOALOS), the Commission on Limits of the Continental Shelf (CLCS), the International Sea Bed Authority (ISA) and the International Tribunal on the Law of the Sea (ITLOS).

The Convention requires States to take measures to ensure the minimization of harm to the coastal and marine resources. States are thus required to carry out environmental impact assessment and establish monitoring and contingency plans against pollution and to notify other States of imminent damage.[77] Therefore, States are required

[74] Came into force on 21st June, 2012.
[75] Southern Indian Ocean Fisheries Agreement, Australian Government, Department of Agriculture, available at *http://www.daff.gov.au/fisheries/international/siofa* [Accessed on 28/05/2014].
[76] Kibiwot, R., 'Towards the Formulation of Kenya's Integrated Ocean Management Policy Including Institutional Framework' United Nations-The Nippon Foundation Fellowship Programme 2007/2008, available at
http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/kibiwot/kibiwot_0708_kenya.pdf [Accessed 7/03/2015].
[77] Art., 198, 199, 204 &206.

to take all the requisite measures to ensure that potential sources of pollution are controlled and imposes liability in cases of violation.[78]

Provisions of UNCLOS have been implemented at various levels both internationally, regionally and locally. At the regional level, the Eastern African Plan, also known as the Nairobi Convention and its related Protocols adopted in 1985 have sought to address a number of issues including, *inter alia,* the promotion of environmentally sound sustainable development and management of marine and coastal systems within the East African region. At the national level, Kenya has undertaken measures meant to ensure compliance with the provisions of UNCLOS. In this regard, two key sectoral initiatives have been adopted: the Marine Protected Areas (MPAs) and Integrated Coastal Zone Management, and these have been practiced with the purpose of enhancing coastal and ocean management and promoting sustainable use of the associated resources.[79]

The World Conservation Union (IUCN) has defined the term 'Marine Protected Area' as any area of the intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment.[80] In Kenya, there are established MPAs which are generally classified into two broad categories; marine national parks and marine national reserves.[81] In marine national parks, total protection is accorded to marine resources and no form of consumptive use is allowed while in marine national reserves, traditional harvesting of resources is allowed.

The other approach that has been adopted is the adoption of Integrated Coastal Management (ICM). This process involves bringing together environmental, social, economic and political considerations to provide a coordinated management approach in the coastal areas.[82] This approach is meant to do away with the sectoral approach that was adopted in the past in the management of the coastal and marine resources and involves more stakeholders in the management process.

12.8 Conclusion

From the foregoing discussions, various initiatives have been undertaken in Kenya to ensure conservation of coastal and marine resources. Challenges are, however, evident in the implementation of some of these initiatives. The implementation of the Nairobi

[78] See *Corfu Chanel Case,* ICJ Reports (1949), p.3.
[79] Kibiwot, R., 'Towards the Formulation of Kenya's Integrated Ocean Management Policy Including Institutional Framework,*' op cit,* p.10.
[80] See Kelleher, G., 'Guidelines for Marine Protected Areas,' (IUCN, Gland, Switzerland & Cambridge, UK, 1999).
[81] Tuda, A. & Omar, M., 'The Need for Marine Protected Areas,'
available at*http://www.georgewright.org/291tuda.pdf* [Accessed 17/09/2014].
[82] Kay, R & Alder, J, *Coastal Planning and Management* (Taylor and Francis Press, 2nd ed, 2005).

Convention and the other international and regional legal instruments faces a number of challenges. These include inadequate financial and technical resources; overlapping and uncoordinated mandates; state dominance in governance and lack of capacity for implementing the Nairobi Convention and the Action Plan for the Eastern African region. Nonetheless, Kenya has taken some policy, legal and institutional steps towards implementing the provisions of the Convention in the region. To ensure effective implementation, there is need for reviewing of the agreed contributions to the Trust Fund to reflect the ability of the countries to pay; extending invitations to additional members such as the European Union to become party to the Convention; as well as establishing new and strengthening the existing linkages with global conventions, programmes and international non-governmental organizations.[83]

Mechanisms for ensuring cooperation and collaboration in managing the marine resources in the region will be necessary, including harmonization of laws especially those dealing with highly migratory species and straddling fish stocks. Laws and policies on land-based sources of pollution will also require harmonization. The countries in the region will also need to enhance modalities of ensuring compliance with the Nairobi Convention and monitoring of the marine and coastal environment.

There is need for continuous assessment and monitoring of the marine and coastal environment to generate data that will inform ration management of the coastal and marine environment. This will require effective implementation of the resource management tools as required under the Nairobi Convention such as EIA; environmental audit and monitoring. Other tools such as the MPAs have faced pressures from population pressure. In addition, the boundaries of the MPAs begin from the water mark, leaving out adjacent and interlinked ecosystems such as mangroves. Kenya can borrow from other regions that have established a network of MPAs that encompass a diversity of marine habitats to afford greater resilience to ecosystems and protection of marine communities.

Challenges are also faced under the SIOFA and this particularly relates to the management and governance of the fisheries established under this agreement. The WIO region is faced with overexploitation of the fisheries and failure of effective management of these resources. This has further resulted to increased conflicts among the small-scale fishermen who constantly violate restrictions on fishing zones. It is, therefore, important that effective governance structures be put in place to ensure maximum conservation of the resources. Further, members of the community are to be involved in the governance of the conservation areas in order for them to realize the importance of conservation.

[83] UNEP, Available at *http://www.unep.org/eou/Portals/52/Reports/MCZ_NC_ExecSummary.html*, [Accessed on 20/08/2013].

Clear institutional mandates are also to be established in order to ensure that the various institutions are held accountable for their actions and to ensure that members of the public are also made aware of the roles of the various institutions. The government is also to develop the requisite technical capacity for these institutions and ensure that the institutions are adequately financed in order to deliver their mandate effectively.

Chapter Thirteen

Fisheries Management in Kenya

13.1 Introduction

Fisheries resource management involves conservation and protection; information gathering, processing, analysis and dissemination, stakeholders participation and empowerment.[1] Fisheries management is vital as it allows for sustainable exploitation and utilization of fishery resources with the overall goal of producing sustainable ecological, social, and economic benefits. This chapter discusses fisheries as a natural resource in Kenya, their importance and the policy, legal and institutional frameworks regulating their management.

13.2 Importance of Fisheries

Besides being a rich source of protein especially for riparian communities, fisheries are also important for the preservation of culture, national heritage and recreational purposes.[2] Fishery resources are also important for sports fishing thus making them key resource in tourists' attraction and consequently generating foreign exchange earnings. The world seafood industry is important in the economic and social wellbeing of nations, and is a source of livelihood for a significant part of the world's population.[3] The advent of modern mechanized fishing vessels has brought vast changes in the attitude of the public to fishing and seafood processing.[4] Fishing and processing activities are believed to provide employment to millions of people around the world. It is reported that the world population will increase by 36% in the years 2000 to 2030, to 8.3 billion, and that the estimated total seafood demand by 2030 will be 183 million tons. However, the estimated supply will be only 150 to 160 million tonnes, against an expected global capture of only 80-100 million tons of fish. In addition, the global seafood market is estimated at US$ 100 billion per annum with the world demand for seafood increasing by 3% each year.[5] Such figures illustrate that there is an urgent need to manage our fisheries resources on a sustainable basis.

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[1] Sobo, F.S., 'Community Participation In Fisheries Management In Tanzania,' IIFET 2012 Tanzania Proceedings, available at *https://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/33202/Community%20Participation%20in%20Fisheries%20Management%20in%20Tanzania.pdf?sequence=1* [Accessed on 02/07/2014], p. 2.

[2] FAO, *Review of the state of world marine capture fisheries management*: Indian Ocean, 2005.

[3] Theuri, F.S., *et al*, "Determinants of Value Addition in the Seafood Industry in Developing Countries: An Analysis of the Kenyan Context," *IOSR Journal of Business and Management*, IOSR Vol.16 (1) Ver. VI I, Feb., 2014), pp. 17-25.

[4] *Ibid.*

[5] *Ibid.*

13.3 Fisheries Resources in Kenya

The *Fisheries Act*[6] defines "Kenya fishery waters" to mean the inland waters and the waters of the maritime zones described in the *Maritime Zones Act*[7] and for the purposes of the Act excludes government fish ponds and fish farms and any private fish ponds or fish farms not established for commercial purposes.[8] Kenya's fisheries sector is mainly composed of freshwater (lakes, rivers and dams) and marine (Indian Ocean), although aquaculture is said to be at infancy since in terms of development, it produces only about 1,000 metric tonnes annually.[9] With fish production estimated at 150,000 metric tonnes (MT) annually, the fisheries sector contributes about 5% to the country's gross domestic product (GDP) and an average producer value of Kenya shillings 8 billion in 2004 and supported the livelihood of about 500,000 people the same year. There are at least 50,000 people working in the sector directly, mainly as fishermen, traders, processors and employees. There are a few medium scale aquaculture firms specializing in trout and tilapia, but the vast majority of aquaculture activities consist of pond culture, spread across the country. The sub-sector is constrained by lack of modernization and commercialization and inadequate availability of quality seed, feed and extension services.

The freshwater fish accounts for about 96% of Kenya's total fish production, with the principal fishery being Lake Victoria notwithstanding the fact that the country's share of the lake surface area is only 6% or 4,300 km^2. Lake Victoria production consists mainly of Nile perch, omena (Rastrineobola argentea) and tilapia. In 2003, the lake accounted for 106,000 MTor 71% of the country's total annual production. Lake Turkana, Kenya's largest freshwater body (7,400 km^2) produces about 4,000MT of fish annually. Other freshwater bodies of commercial importance include lakes Naivasha, Baringo, Jipe and the Tana River dams.[10]

[6] Cap. 378, Laws of Kenya [Revised Edition, 2012 [1991].

[7] Cap. 371, Laws of Kenya. This Act of Parliament was enacted to consolidate the law relating to the territorial waters and the continental shelf of Kenya; to provide for the establishment and delimitation of the exclusive economic zone of Kenya; to provide for the exploration and exploitation and conservation and management of the resources of the maritime zones; and for connected purposes. S. 2 of the Act defines "maritime zones" to mean the exclusive economic zone together with the territorial waters and the air space above the exclusive economic zone.

[8] S. 2, Cap. 378.

[9] Draft Kenya Fisheries Policy, Government of Kenya, Ministry of Livestock and Fisheries Development, 29 October, 2005, Government Printer, Nairobi. The Policy sought to *"Create an enabling environment for a vibrant fishing industry based on sustainable resource exploitation providing optimal and sustainable benefits, alleviating poverty, and creating wealth, taking into consideration gender equity."*

[10] *Ibid.*

It is noteworthy that most fishing in Kenya is artisanal, with a little industrial fishing by prawn trawlers.[11] According to government records, Distant Waters Fishing Nations (DWFN) currently exploit the deep sea (Exclusive Economic Zone, EEZ) fishery resources through a licensing system, and only a small quantity of the catch from the EEZ lands in Kenya, primarily tuna for export. This is because the local fishers lack the capacity to exploit deeper water resources.[12] Out of the fishing crafts along the coast, 135 are motorized, 991 use paddles while 1,179 use sails for propulsion, with the most common fishing gears being gillnets, traditional traps, seine nets, long lines, hooks and line and traps.[13] Fishing in the territorial waters is carried out by 2 trawlers, which fish for shrimp, although they also harvest large quantities of by–catch, some of which is discarded.

The annual marine fish production from artisanal fishery in Kenya from 1980 to 2005 shows a high of 9,972 tonnes in 1990 and a low of 4,336 tonnes in 1993. The Food and Agriculture Organization, observes that overfishing in inshore areas has continued to cause a decline in fish catches, while the deeper territorial waters remain underexploited due to the lack of deep sea fishing capacity by the local fishers.[14] That notwithstanding, Kenya enjoys a reputation as one of the world's great big game sports fishing destinations. Its marine waters contain most of the major target game species, primarily billfishes, especially sailfish, swordfishes, the marlins, sharks and some tunas.[15] Sport fishers are registered in the several sport–fishing clubs, which coordinate the fishing activity and record data. The peak sport fishing season is in September to March, with the popular sport fishing areas being Malindi, Watamu, Shimoni and Lamu.[16]

The inland fisheries of Kenya are based predominantly on its major freshwater lakes, the most notable being Lake Victoria, Lake Naivasha, Lake Nakuru and Lake Turkana. It is estimated that inland fisheries contribute between 2-12% of the GDP of the country and produces fish for domestic and export markets.[17]

Fish trade in Kenya revolves mainly around artisanal fishers; intermediaries involved in product conveyance to the markets, usually with some value addition such as drying, smoking and deep-frying; and a large scale export-oriented processing sector

[11] FAO, 'Field Identification Guide to the Living Marine Resources of Kenya,' *FAO Species Identification Guide for Fishery Purposes*, Rome, 2012, p.3.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.* p. 3.
[15] *Ibid.*
[16] *Ibid,* p. 4.
[17] Scullion, J., 'Inland Fisheries Co-Management in East Africa,' *Conference Paper 13,* p. 2, available at *http://www.worldfishcenter.org/resource_centre/WF_37457.pdf* [Accessed on 02/07/2014].

currently consisting of about 18 EU-certified firms.[18] However, trade is hampered by a poor network of roads into production sites and lack of cold storage and ice preservation. There are no auction systems for fish, a factor that also contributes to high price differentials across locations. As a result, there are significant post-harvest losses, which also restrict market expansion. Sanitary and phytosanitary standards imposed by major export destinations, and other non-tariff barriers to trade limit Kenya's international trade in fish and fishery products.[19] Rapid increases in human populations, have also placed increasing pressure on natural resources, and resulting in considerable increase in the number of people involved in fishing, putting fish stocks under increasing pressure with evidence, in some cases, of stock decline.

Furthermore, lake waters are subjected to increasing environmental threats from catchment modification such as deforestation, increasing urbanization, industrialization, and agricultural expansion.[20] Increase in human populations and intensive land-use in lake catchments and shorelines is threatening the sustainability of fisheries.[21] Fisheries in the various water-bodies of Kenya are at different levels of exploitation. Lake Turkana stocks are considered underexploited, mainly due to poor road infrastructure and long distances from main market centres. Some of the Indian Ocean stocks are also considered underexploited. Fishing in Lake Victoria is considered to be at its maximum sustainable level, while such lakes as Naivasha and Jipe are considered to be overexploited. The riverine system is exploited by artisanal fishers for domestic consumption.[22] Kenya's aquatic ecosystem and species are faced with both anthropogenic and natural threats such as proliferation of alien invasive species, pollution, uncontrolled water abstraction, deforestation, siltation and unregulated physical developments.[23]

13.4 International Frameworks on Fisheries

13.4.1 The United Nations Convention on the Law of the Sea, 1982 (UNCLOS)

The *United Nations Convention on the Law of the Sea*,1982 (UNCLOS)[24] lays down a comprehensive regime of law and order in the world's oceans and seas establishing

[18] Draft Kenya Fisheries Policy, 2005, *op cit.*
[19] *Ibid.*
[20] Scullion, J., *Inland Fisheries Co-Management in East Africa*, *op cit*, p. 2.
[21] *Ibid*, p. 2.
[22] Draft Kenya Fisheries Policy, 2005, *op cit.*
[23] *Ibid.*
[24] The Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica and entered into force in accordance with its Art. 308 on 16 November 1994. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea.

rules governing all uses of the oceans and their resources.[25] The Convention provides a framework for the sound management of marine resources. It gives coastal States rights and responsibilities for the management and use of fishery resources within the areas of their national jurisdiction. In this regard, coastal states are supposed to develop regulations and establish institutions to ensure effective management of coastal areas and fisheries resources. Kenya has established a legal and policy framework to ensure the management of its coastal and fisheries resources. Institutions have also been established to implement the various laws and policies.

It is noteworthy that the Convention allows all States to enjoy the traditional freedoms of innocent passage,[26] scientific research[27] and fishing on the high seas,[28] although they are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve living resources therein.[29] This is in recognition of the fact that the activities of one State usually have potential effects on the conservation initiatives undertaken by another state. Further, fisheries resources are highly mobile and hence can move from the territorial waters of one state to the waters of another state where they may be harmed.

Under the Convention, coastal States are entitled to exercise sovereignty over their territorial sea where they have the right to establish its breadth up to a limit not to exceed 12 nautical miles.[30] Foreign vessels are allowed only "innocent passage" through those waters.[31] The coastal States have sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection.[32]

The coastal State is entitled to determine the allowable catch of the living resources in its exclusive economic zone.[33] However, the coastal State, taking into account the best scientific evidence available to it, must ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive

[25] *United Nations Convention on the Law of the Sea of 10 December 1982.*
[26] Under the Convention, passage of a foreign ship is considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in, *inter alia*, any act of willful and serious pollution contrary to this Convention; or any fishing activities. (Art. 19.2).
[27] However, all marine scientific research in the EEZ and on the continental shelf is subject to the consent of the coastal State, but in most cases they are obliged to grant consent to other States when the research is to be conducted for peaceful purposes and fulfils specified criteria (Art. 238-241).
[28] Art. 116.
[29] Art. 17, 52, 58, 87. 117-120.
[30] Art. 3.
[31] Art. 17-26.
[32] Art. 56 & 193.
[33] Art. 61.1.

economic zone is not endangered by over-exploitation.[34] Such measures must also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub regional, regional or global.[35]

In taking such measures, the coastal State must nevertheless take into consideration the effects on species associated with or dependent upon harvested species, with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may not become seriously threatened.[36] This is in order to ensure that a balance is struck and the ecosystem is left in the stable condition which it was previously in.

Available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks must be distributed and exchanged on a regular basis through competent international organizations, whether sub-regional, regional or global, where appropriate and with participation of all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.[37]

In respect of the utilization of the living resources, the Convention provides that the coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61. It is entitled to determine its capacity to harvest the living resources of the exclusive economic zone, and where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations, give other States access to the surplus of the allowable catch.[38]

Regarding land-locked and geographically disadvantaged States, the Convention states that they have the right to participate on an equitable basis in exploitation of an appropriate part of the surplus of the living resources of the EEZ's of coastal States of the same region or sub-region; highly migratory species of fish and marine mammals are accorded special protection.[39] Coastal States have sovereign rights over the continental

[34] Art. 61.2.
[35] Art. 61.3.
[36] Art. 61.4.
[37] Art. 61.5.
[38] Art. 62.
[39] Art. 69.

shelf (the national area of the seabed) for exploring and exploiting it. The shelf can extend at least 200 nautical miles from the shore, and more under specified circumstances.[40]

The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of, *inter alia*, the prevention of infringement of the fisheries laws and regulations of the coastal State, or the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.[41]

States bordering enclosed or semi-enclosed seas are expected to cooperate in managing living resources, environmental and research policies and activities.[42] Further, subject to the provisions of the Convention, States bordering straits are entitled to adopt laws and regulations relating to transit passage through straits, in respect of *inter alia*: the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; or with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear.[43]

Under the Convention, an archipelagic State is obligated to respect existing agreements with other States and must recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.[44] Also important under the Convention are the provisions obligating States to prevent and control marine pollution and liability for damage caused by violation of their international obligations to combat such pollution.[45] This is in recognition of the fact that, fisheries are common resources which are open for exploitation by all, and as such every state has an obligation to ensure the protection of this common resource. The polluter pays principle is invoked where one state occasions harm to the common resources.

Regarding disputes, State Parties are obliged to settle by peaceful means, disputes concerning the interpretation or application of the Convention. Such disputes can be submitted to the International Tribunal for the Law of the Sea, established under the

[40] Art. 76-77.
[41] Art. 22.1.
[42] Art. 123.
[43] Art. 42.1.
[44] Art. 51.1.
[45] Art. 73, 202, 211, 213-222 and 242. "pollution of the marine environment" is defined under the Convention to mean the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities (Art. 1.4).

Convention, to the International Court of Justice, or to arbitration. Conciliation is also available and, in certain circumstances, submission to it would be compulsory.[46]

13.4.2 The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[47]

The objective of the Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.[48] It applies to the conservation and management of straddling fish stocks (these are fish stocks which occur both within the EEZs and in the area beyond and adjacent to the EEZs) and highly migratory fish stocks beyond areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.[49]

The Agreement sets out principles for the conservation and management of those fish stocks and establishes that such management must be based on the precautionary approach and the best available scientific information.[50] The Agreement elaborates on the fundamental principle, established in the Convention that States should cooperate to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond the exclusive economic zone.[51] It promotes good order in the oceans through the effective management and conservation of high seas resources by establishing, among other things, detailed minimum international standards for the conservation and management of straddling fish stocks and highly migratory fish stocks; ensuring that measures taken for the conservation and management of those stocks in areas under national jurisdiction and in the adjacent high seas are compatible and coherent; ensuring that there are effective mechanisms for compliance and enforcement of those measures on the high seas; and recognizing the special requirements of developing States in relation to conservation and management as well as the development and participation in fisheries for the two types of stocks.[52]

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[46] Part XV (Art. 279-299).
[47] In force as from 11 December, 2001.
[48] Art. 2.
[49] Art. 3.
[50] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, available at *http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm* [Accessed on 08/07/2014].
[51] *Ibid.*
[52] *Ibid.*

13.4.3 Convention on Biological Diversity (CBD)

The 1992 Convention on Biological Diversity[53] (the Biodiversity Treaty) was one of two major treaties opened for signature at the United Nations Conference on Environment and Development (UNCED) in 1992.[54] The treaty defines biodiversity as "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.[55] Its objectives are the conservation of biological diversity, sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[56]

Contracting parties are required to cooperate with each other directly or where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.[57]This is in realization of the fact that the activities of one state may have effects on the biological diversity in another state as some of the organisms are highly mobile or due to the fact that some of the ecosystems are transboundary and hence the activities in one state are likely to affect the biological diversity in another state.

Further, the Convention provides that each Contracting Party shall, in accordance with its particular conditions and capabilities: develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 7 of the convention mandates countries to adopt precautionary approach to conservation. In this regard, the contracting parties are required to make assessments and identify the essential components of biological diversity that are necessary for conservation, the states are then required to monitor these components of biological

[53] [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992). [Date of Entry into Force: 29 December 1993, (Art. 36)].
[54] CIESIN Thematic Guides, The Convention on Biological Diversity, available at *http://www.ciesin.org/TG/PI/TREATY/bio.html* [Accessed on 03/07/2014].
[55] Art. 2.
[56] Art. 1.
[57] Art. 5.

diversity and identify those in need of urgent conservation and maintain a database of the resources that are in need of urgent conservation.

The convention has further identified two methods of conservation that are to be adopted by the contracting parties. In-situ conservation has been identified as one of these methods while ex-situ conservation has also been identified to be important in complementing in-situ conservation. Further, it has been provided in Article 10 of the Convention that the contracting states are to adopt sustainability principles in conservation and in the overall national decision-making process.

The contracting states are further required to take initiatives to ensure that members of the public are made aware of the conservation initiatives and that they are aware of the importance of these initiatives. The contracting states are, therefore, supposed to use different platforms to ensure that members of the public are aware of the conservation initiatives and this includes the use of platforms such as the media in doing this.

In order to further ensure the protection of biological diversity, the Convention mandates the contracting parties to carry out impact assessments to identify the potential impacts of proposed projects which are likely to have significant adverse effects on biological diversity and members of the public are to be allowed to participate in these processes. Countries are also to cooperate in the conducting of the impact assessments and in the development of contingency plan.

13.4.4 International Convention for the Regulation of Whaling

This convention was concluded in 1946 and seeks to ensure the conservation and management of whale resources and ensure their sustainable use as marine resources. This came against the realization that human activities continue to pose challenges to the whale stocks causing their overexploitation. There was thus a need for a balance between the commercial interests by states and the need to ensure that these activities are pursued in line with sustainability principles.

The International Convention for the Regulation of Whaling,[58] applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments, and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers.[59]Under the Convention, the Contracting Governments agree to establish an International Whaling Commission.[60] The Commission may either in collaboration with or through independent agencies of the Contracting Governments or other public or private agencies, establishments, or organizations, or independently:

[58] Washington, 19 November 1956.
[59] Art. 1.2.
[60] Art. III.

encourage, recommend, or if necessary, organize studies and investigations relating to whales and whaling; collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon; and study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.[61]

IWC has, therefore, taken several initiatives meant to ensure that whales are protected and it has worked progressively to reduce the harvesting of whales. In 1982, it declared a worldwide moratorium on commercial whaling which was to commence in 1985.[62]This had the effect of increasing the whale stocks in the oceans as countries cooperated towards the conservation initiatives. Participation in the activities of IWC is open to both members and non-members.

Countries can raise concerns with the IWC, where another country is undertaking whaling activities contrary to any restrictions that have been put in place. Challenges usually arise where a member state to the IWC raises a concern about the activities of another state which is a non-member. There is evidence of ineffectiveness of controls put in place when objecting to the activities of a non- member state.[63] Concerns also arise due to increased demand on whaling by scientists conducting studies.

Despite the numerous challenges faced, the IWC is seen to have been largely successful in its conservation initiatives. Certain species of whales have increased in number following the conservation initiatives undertaken by the IWC. These efforts will be more productive if there will be involvement of more countries. Countries are also supposed to take cognizance of the fact that they have reciprocal obligations towards each other in ensuring the conservation of marine resources.

13.4.5 Agenda 21

The Agenda 21[64] seeks to enable the poor to achieve sustainable livelihoods through combating poverty.[65] One of the Programme areas that Agenda 21 seeks to promote is integrated watershed development and alternative livelihood opportunities. One of the objectives of this programme area is to promote income-generating activities, such as sustainable tourism, fisheries and environmentally sound mining, and to improve

[61] Art. IV.
[62] 34 International Whaling Commission Rep. 2, (1982).
[63] Drimmelen, V., "The International Mismanagement of Whaling," *Pacific Basin Law Journal*, Vol.10(1).
[64] United Nations, Sustainable Development, *United Nations Conference on Environment & Development*, Rio de Janeiro, Brazil, 3 to 14, June, 1992.
[65] Chapter 3.

infrastructure and social services, in particular to protect the livelihoods of local communities and indigenous people.[66]

Agenda 21 also seeks to improve farm production and farming systems through diversification of farm and non-farm employment and infrastructure development. It seeks to improve farm productivity in a sustainable manner, as well as to increase diversification, efficiency, food security and rural incomes.[67] This is to be done while taking measures to ensure that potential risks to the ecosystem are minimized.

13.4.6 FAO Code of Conduct for Responsible Fisheries

The Food and Agricultural Organisation (FAO) Code of Conduct for Responsible fisheries was initiated in 1991 by the FAO Committee on Fisheries and it is a voluntary instrument.[68] It recognizes transparency and stakeholders' participation, as important aspects of responsible and sustainable fisheries. The Code focuses on marine capture fisheries, with some coverage of aquaculture. The Code provides principles and standards applicable to the conservation, management and development of all fisheries. It also covers the capture, processing and trade of fish and fishery products, fishing operations, aquaculture, fisheries research and integration of fisheries into coastal area management. The objectives of the Code are to, *inter alia*: establish principles, in accordance with the relevant rules of international law, for responsible fishing and fisheries activities, taking into account all their relevant biological, technological, economic, social, environmental and commercial aspects; establish principles and criteria for the elaboration and implementation of national policies for responsible conservation of fisheries resources and fisheries management and development; serve as an instrument of reference to help States to establish or to improve the legal and institutional framework required for the exercise of responsible fisheries and in the formulation and implementation of appropriate measures; facilitate and promote technical, financial and other cooperation in conservation of fisheries resources and fisheries management and development; promote the contribution of fisheries to food security and food quality, giving priority to the nutritional needs of local communities; promote the trade of fish and fishery products in conformity with relevant international rules and avoid the use of measures that constitute hidden barriers to such trade; promote research on fisheries as well as on associated ecosystems and relevant environmental factors; and provide standards of conduct for all persons involved in the fisheries sector.[69] According to FAO,

[66] Clause 13.15.
[67] Clause 14.26.
[68] Adopted on 31 October 1995.
[69] Art. 2.

National and international fisheries policies and management practices that better reflect the principles of the Code of Conduct will lead to an improved and sustainable economic, social and environmental contribution of the fisheries sector.[70]

13.4.7 Fisheries Partnership Agreements

These are mainly bilateral Fishing Partnership Agreements (FPA) concluded between third world countries and the European Union or other first world countries on fishing in the EEZ region where most of the third world countries and their local small-scale fishermen cannot fish due to challenges of technology and financial constraints. For instance, the European Union (EU) has, for more than twenty years, entered into agreements with developing countries to gain access to their coastal fishing waters in return for financial compensation.[71]

Fisheries Partnership Agreements negotiations have been criticised for secrecy with the participation of the developing country fishing sector being merely cosmetic.[72] Accordingly, it also raises issues about the general lack of transparency afflicting the management of developing country fisheries, particularly the way access to resources is allocated, and the lack of space given to public debate.[73]

13.4.8 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing[74] (IPOA) is a voluntary instrument that applies to all States and entities and to all fishers. The measures to prevent, deter and eliminate IUU fishing focuses on all State responsibilities, flag State responsibilities, coastal State measures, port State measures, internationally agreed market-related measures, research and regional fisheries management organizations.

The objective of the IPOA is to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate regional fisheries management organizations established in accordance with international law.[75] The IPOA incorporates the following

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[70] FAO, Fisheries and Aquaculture Department, available at *http://www.fao.org/fishery/code/en* [Accessed on 06/07/2014].
[71] The Overseas Development Institute (ODI), *Case Study: The Fisheries Partnership Agreements*, available at *http://www.odi.org/publications/2800-fisheries-partnership-agreements* [Accessed on 08/07/2014].
[72] *Ibid.*
[73] *Ibid*, p. 2.
[74] FAO, *International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing*, Rome, FAO. 2001, p.24.
[75] Para. 8.

principles and strategies: participation and coordination, phased implementation, comprehensive and integrated approach, conservation, transparency, and non-discrimination.

13.4.9 Protocol for Sustainable Development of Lake Victoria Basin

This is a Protocol entered into by the Republic of Uganda, the Republic of Kenya, and the United Republic of Tanzania with the objective of governing the Partner States Cooperation in the Sustainable Development of Lake Victoria Basin.[76] The Partner States are to cooperate in the areas as they relate to the conservation and sustainable utilisation of the resources of the Basin including, *inter alia*: sustainable development, management and equitable utilisation of water resources; sustainable development and management of fisheries resources; promotion of sustainable agricultural and land use practices including irrigation; promotion of development and management of wetlands; promotion of research, capacity building and information exchange; environmental protection and management of the Basin; promotion of public participation in planning and decision-making; integration of gender concerns in all activities in the Basin; and promotion of wildlife conservation and sustainable tourism development.[77]

The management of the resources of the Basin is to be guided by *inter* alia: the principle of equitable and reasonable utilisation of water resources; the principle of sustainable development; the principle of prevention to cause environmental harm to members; the principle of prior notification concerning planned measures; the principle of Environmental Impact Assessment and Audit; the precautionary principle; the 'polluter pays' principle; the principle of prevention, minimization and control of pollution of watercourses; the principle of the protection and preservation of the ecosystems of international watercourses; the principle of community of interests in an international watercourse; the principle of gender equality in development and decision-making; the principle that water is a social and economic good and a finite resource; and the principle of subsidiarity.[78]

The Protocol requires that Partner States take all appropriate measures, individually or jointly and where appropriate with participation of all stakeholders to protect, conserve and where necessary rehabilitate the Basin and its ecosystems in particular by, *inter alia*; protecting and improving water quantity and quality within the Basin; preventing the introduction of species, alien or new, into the Basin's water resources which may have effects detrimental to the ecosystems of the Lake; identifying the components of and

[76] Art. 2.
[77] Art. 3.
[78] Art. 4.

developing strategies for protecting and conserving biological diversity within the Basin; conserving migratory species of wild animals; conserving endangered species of wild fauna and flora; protecting and conserving wetlands within the basin; restoring and rehabilitating degraded natural resources; and conserving fisheries Resources.[79] Notably, the Protocol requires that the Partner States through the institutional framework established under this Protocol, take steps to harmonize their laws and policies in relation to paragraph 1 of this Article.[80]

The Protocol provides that the Partner States are to manage, develop and utilize fishery resources of the Basin in accordance with the Convention establishing the Lake Victoria Fisheries Organization.[81] Under the Protocol, the Partner States are to enact and harmonize laws and policies for: the prevention of pollution from vessels which dump wastes into the Lake; and regulating the movement of hazardous wastes in the Basin.

The Protocol establishes the Lake Victoria Basin Commission whose objectives are to, *inter alia*, promote sustainable utilisation and management of natural resources; and promote the protection of the environment within the Lake Victoria Basin.[82] The broad functions of the Commission are to promote, facilitate and coordinate activities of different actors towards sustainable development and poverty eradication of the Lake Victoria Basin through, *inter alia*: harmonization of policies, laws, regulations and standards; promotion of stakeholders' participation in sustainable development of natural resources; promotion of capacity building and institutional development; promotion of research development and demonstration; monitoring, evaluation and compliance with policies and agreed actions; and prepare and harmonize negotiating positions for the Partner States against any other State on matters concerning the Lake Victoria Basin. In the event of a dispute between Partner States concerning the interpretation or application of the Protocol, the Partner States concerned are to seek solution by negotiation, and if the Partner States do not resolve the dispute by negotiating, either Partner State or the Secretary General may refer such dispute to the East African Court of Justice whose decision shall be final.[83]

13.5 National Fisheries Frameworks

Being a large contributor to the GDP of Kenya, it is imperative that the fisheries sector is managed with a comprehensive legal and policy framework to give guidance to sustainable development and utilization of the fisheries resources. The legal and policy

[79] Art. 6.1.
[80] Art. 6.2.
[81] Art. 8.
[82] Art. 33.2.
[83] Art. 46.

framework is further to be backed up with a strong institutional framework to ensure the effective implementation of the laws and policies adopted. In this regard, there exist laws and policies that guide this sector and institutions to implement these laws.

In this regard, the Kenya Fisheries Policy was adopted in 2005 to guide the fishing industry in the country. The policy notes that the lack of a comprehensive national fisheries policy has led to the reduction in management and research in the fisheries industry and in turn resulted to the constraining of growth in the industry. Other challenges included the under exploitation of the fisheries resources in the country due to lack of adequate gear to be used by the fishermen in the exploitation of these resources.

Further, the Policy notes that there is need to develop the aquaculture capacity in the country to ensure that the stress occasioned to the lakes in the country due to overexploitation is reduced. The Policy thus notes that the challenges facing aquaculture include inadequate availability of quality seed, feed and extension services. It is further noted that the government needs to invest in equipment to ensure that there is reduction of post-harvest losses which usually result from the poor handling of the harvest.

The Policy notes that there are institutions that have been established to ensure effective management of fisheries in the country with the government taking a leading role through the establishing of institutions to facilitate the management of these resources. It is, however, noted that effective management of these resources is challenging since most of the small scale stakeholders are not in strong associations which are able to effectively advocate for their welfare and ensure that they reap adequate financial benefits from the fishing activities.

The Policy thus notes it is imperative that the existing institutions be strengthened to ensure efficient use of the fishery resources. It states that there is need for the restructuring of the institutional framework for there to be coordinated efforts towards sustainable utilization of the fisheries resources.

The Constitution in the Fourth Scheduled outlines the roles that the various levels of government have. In relation to fisheries management, the Constitution states that the national government has the role of protecting the environment and natural resources including fisheries resources. The County government, on the other hand, is mandated with agricultural activities within the country and including matters to do with fisheries. The Agriculture, Fisheries and Food Authority Act, 2013, provides for the role of the various levels of government with the national government being vested with authority over policy formulation while county governments have authority over agricultural matters in their counties.[84]

[84] S. 29.

Laws enacted to guide fisheries in the country have also played a role in ensuring that the objectives outlined in the Policy are met. An example of this is the Fisheries Act (Cap. 378) which through the Fisheries (Beach Management Units) Regulations 2007, provides for the establishment of Beach Management Units (BMUs). These units are to ensure sustainable development of the fisheries sector and the improvement of the welfare of different individuals involved in fishing activities. Through the BMU's, the fishing communities are able to access markets for their catch and hence become more economically sustainable.

Fishery resources in Kenya are managed by the Department of Fisheries through the Fisheries Act,[85] and under the Maritime Act,[86] the Kenya Marine Fisheries Research Institute (KMFRI), which is established as a state corporation through the Science and Technology Act,[87] undertakes fisheries research.[88] These two institutions, which have often been in different ministries, are currently under the Ministry of Livestock and Fisheries Development. Due to the lack of a fisheries apex institution at the ministry level, these two institutions lack a mechanism for setting coordinated agenda.

The large-scale export-oriented private sector is organized under the Kenya Fish Processors and Exporters Association (AFIPEK), which has facilitated industry self-regulation, marketing and interfacing with the Government.[89]The small, medium and large scale fish traders in Kenya are considering the formation of an umbrella organization. This association shall have corporate membership, comprising of associations into which these traders belong, and is aimed at influencing Government policy, providing training services and facilities to accelerate efficient and sustainable trade. A major drawback is that most of the small scale traders are not organized into strong associations. Fishermen lack strong cooperatives or associations, but there are efforts by several organizations, including the newly launched Beach Management Units (BMUs) to organize this vital group. In addition to these private sector players, there are several civil society and non-governmental organizations (NGOs) working in fisheries, especially on socio-economic and conservation issues.[90]

The Kenyan fisheries sector has benefited greatly from regional collaborative initiatives such as joint management measures in Lake Victoria (through the Lake Victoria Fisheries Organization, LVFO) and research, and the South West Indian Ocean (SWIO,

[85] Cap. 378, Laws of Kenya.
[86] Cap. 371, Laws of Kenya.
[87] Cap. 250, Laws of Kenya.
[88] Other public institutions involved with fishery activities include regional development authorities under the Ministry of Regional Development, Ministry of Environment and Natural Resources, universities and public laboratories.
[89] Kenya Fisheries Policy, 2005, para 1.4.
[90] *Ibid.*

IOTC and WIOMSA). On the other hand, the sector also continues to make useful contributions to international organizations dealing with fisheries. Given the trans-boundary and interdependent nature of fisheries resources and activities, it is important for the country to strengthen the ongoing regional and international collaborative and cooperation efforts to ensure a fair share of shared stocks, and to encourage trade and development partnerships.

13.5.1 The Constitution of Kenya 2010

The Constitution of Kenya 2010, generally sets out the manner in which natural resources should be managed in the country. The Constitution provides for the national values and principles of governance which must bind all in enacting, applying or interpreting any law or making or implementing public policy decisions and these include *inter alia* participation of the people, inclusiveness, good governance, transparency, accountability and sustainable development.[91]

These principles of governance are applicable to all governance processes including the governance of marine resources. In this regard, the authorities tasked with the management of these resources are to take into consideration the views of members of the public before making decisions and to ensure accountability in the governance process. Further, in the governance of the fisheries resources, consideration is to be put to sustainability measures to ensure that the future generations are also able to benefit from these resources.

The Constitution further creates obligations on 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; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.[92]

As the custodian of the fisheries resources on behalf of the people, the State is therefore, under an obligation to ensure that these commons are preserved and protected for the benefit of all. The State is also under an obligation to establish both protective and

[91] FAO, *International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing, op cit,* Art. 10.
[92] Art. 69(1).

conservative measures to ensure sustainable utilization of these resources. This is through the formulation of laws and policies and also through the establishment of institutions to facilitate this.

The Constitution also places on every person 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.[93] In this regard, citizens, either individually or through their citizen associations, are to be involved in making decisions concerning the conservation initiatives that have been undertaken. Further, the Constitution provides that a transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and is entered into on or after the effective date.[94]

13.5.2 The Fisheries Act, Cap. 378

The Fisheries Act[95] was enacted to provide for the development, management, exploitation, utilization and conservation of fisheries. The Act provides for a Director who is, subject to the directions of the Cabinet Secretary, to be responsible for the administration of this Act.[96] The Director is appointed to the office in the public service of Director of Fisheries.[97]

Regarding fisheries development, the Act requires that the Director, in co-operation with other appropriate agencies and other departments of Government, promote the development of traditional and industrial fisheries, fish culture and related industries through such measures as: providing extension and training services; conducting research and surveys; promoting co-operation among fishermen; promoting arrangements for the orderly marketing of fish; providing infrastructure facilities; and stocking waters with fish and supplying fish for stocking.[98] This provision has taken cognizance of the fact that the small-scale fisheries sector is largely underdeveloped and hence the need for government intervention to ensure that this sector also contributes to the economy.

The Director is further required to undertake certain measures to ensure effective fisheries management. These measures are meant to ensure proper management of fisheries and they are *inter alia*: closed seasons for designated areas, species of fish or methods of fishing; prohibited fishing areas for all or designated species of fish or methods

[93] Art 69(2).
[94] Art. 71.
[95] Cap. 378, Laws of Kenya [Revised Edition 2012 [1991].
[96] S. 3.
[97] S. 2.
[98] S. 4.

of fishing; limitations on the methods of gear, including mesh sizes of nets, that may be used for fishing and; limitations on the amount, size, age and other characteristics and species or composition of species, of fish that may be caught, landed or traded.[99] All these measures are driven at sustainable utilization of the fisheries resources and a balance is thus struck between the need for utilization of these resources and the importance of ensuring that there is no overexploitation of the resources.

Further, the Act allows for limitation of fishing where proper management of fisheries requires limitation of the number of persons or of vessels, nets or areas or other means employed in a fishery, the Director may by notice in the Gazette limit such means and the limitation may include: refusal to issue or renew licences; imposition of special licence and catch fees; or preferential licensing in other fisheries. The Act also provides that before any person uses any vessel for fishing in Kenya's fishery waters there must be in force in relation to the vessel, a valid certificate of registration.[100] This is of importance in order to ensure that no foreign vessels enter Kenyan waters in order to exploit the resources in these waters. This provision also ensures that the authorities are able to control the number of vessels entering into the waters for exploitation of the fisheries resources. The fisheries authorities are thus required to keep statistics of the number of individuals involved in the exploitation of the fisheries resources.

The Act prohibits any person other than persons fishing for their own consumption, from catching or assisting in catching fish in Kenya fishery waters otherwise than under and in accordance with the terms and conditions of a valid licence issued to him under the Act, provided that the Cabinet Secretary may by order published in the *Gazette* determine the quantity of fish which may be deemed to be fit for their own consumption under this section, and different orders may be made for different areas of Kenya.[101] It is important to note that the Act, states that licence issued there under shall be valid for such species of fish, type of fishing gear, method of fishing and area as may be specified in the licence.[102]

There exist mainly two types of licences under the Act namely: local fishing vessel licence[103] and foreign fishing vessel licence[104] However, the Act provides that the Cabinet Secretary may, in addition to licences for fishing vessels, make regulations requiring a licence for any fishery activities including sport fishing or the use of any gear or method

[99] S. 5.
[100] S. 7.
[101] S. 8(1).
[102] S. 8(3).
[103] SS. 9-10.
[104] SS. 11-13.

of fishing with or without the use of a vessel, or fish processing or dealing in fish.[105] All this is meant to ensure that the fisheries department is able to keep statistical records of the persons engaged in fishing activities in order to ensure that there is sustainable exploitation of these resources.

The Act also prohibits methods of fishing that include use of explosives, poisonous or noxious substances or electric shock device for the purpose of killing, stunning, or disabling fish so as to render them more easily caught.[106] It is noteworthy that this Act is based on the state-centred approach, with no public participation in management of fisheries as contemplated under the current Constitution of Kenya. Sustainable utilisation and management of fisheries resources is also missing from the Act.

13.5.3 Environmental Management and Coordination Act, 1999 (EMCA)

EMCA was enacted to provide a legal framework governing environmental protection and this also entails the protection of different ecosystems. In this regard therefore, the Act has introduced several provisions which are aligned towards conservation. Section 42 provides for the protection of rivers, lakes and wetlands which are important habitats for fisheries resources. It takes cognizance of the fact that it is important that, *in situ* conservation is undertaken for certain species. Section 51 mandates the National Environment Management Authority, to consult with other agencies to prescribe measures to ensure that *in situ* conservation is undertaken. Furthermore, *ex situ* conservation is important in complementing *in situ* conservation of biological resources, including fisheries resources.

Section 50 of the Act is aligned towards the conservation of marine and fisheries areas. In this regard, NEMA has been given authority in consultation with other agencies to, *inter alia,* identify, prepare and maintain an inventory of biological diversity in Kenya and to undertake measures driven at ensuring that potential threats to biological diversity are removed or arrested. Section 55 mandates the Minister to prepare a survey of the coastal areas containing such features as coral reefs, mangrove and marshes and document the sources of pollution in fisheries areas. From the foregoing, EMCA has introduced a series of provisions driven at ensuring the conservation of fragile ecosystems and those likely to face harm from human activities. In this regard, the Act has laid the basis for effective conservation of these areas in recognition of the fact that various ecosystems are interrelated hence the need to introduce integrated conservation initiatives.

[105] S.14.
[106] S. 15.

13.5.4 The Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

These Regulations are useful in promoting sustainable fisheries management by prohibiting any person from engaging in any activity that may: have an adverse impact on any ecosystem; lead to the introduction of any exotic species; lead to unsustainable use of natural resources, without an Environmental Impact Assessment Licence issued by the Authority (NEMA) under the Act.[107] To facilitate conservation of threatened species, the Regulations require that the Authority (NEMA), in consultation with the relevant lead agencies, impose bans, restrictions or similar measures on the access and use of any threatened species in order to ensure its regeneration and maximum sustainable yield.[108] Further, the Regulations require that the Authority, in consultation with the relevant lead agencies, monitor the status and the components of biological diversity in Kenya and take necessary measures to prevent and control their depletion.[109]This Part apply to any area of land, sea, lake or river which the Minister has, by notice in the Gazette, declared to be a protected natural environment system for purposes of promoting and preserving biological diversity in accordance with section 54 of the Act.[110]

13.5.5 The Environmental Management and Coordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009

The Regulations were formulated with the objective of management of wetlands and wetland resources in Kenya whether occurring in private or public land. Several objectives formulated for the conservation of wetlands have thus been outlined in the Regulations. These objectives are useful in achieving sustainable management of fisheries in the country as wetlands form important habitat for fisheries resources.

Notably, the Regulations spell out the general principles that must be observed in the management of all wetlands in Kenya. The Regulations require that these principles are to be integrated into the national and local land use plans and that the management of wetlands is to take into consideration public participation requirements.[111]

However, one of the permitted sustainable uses of wetland resources not subject to these Regulations is fishing, subject to the provisions of the *Fisheries Act*.[112] These Regulations are important in the context of this discussion as they seek to protect areas

[107] Regulation 4.
[108] Regulation 5.
[109] Regulation 7.
[110] Regulation 8.
[111] Regulation 5.
[112] Regulation 11.

that are important habitat for fisheries resources. Thus, in a bid to facilitate the sustainable utilization and conservation of resources on river banks, lake shores, and on the seashore by and for the benefit of the people and community living in the area; promote the integration of sustainable use of resources in riverbanks, lake, shores and the seashore into the local and national management of natural resources for socio economic development; and prevent siltation of rivers and lakes and control pollution or and other activities likely to degrade the environment, the Regulations provide for the general principles which shall be observed in the management and conservation of river banks, lake shores and the seashore. These include: resources on the river banks, lake shores and the sea shore to be utilized in a sustainable manner; environmental impact assessment is mandatory for all major activities on river banks, lake shores and the seashore; and special measures, including prevention of soil erosion, siltation and water pollution are essential for the protection of river banks, lake shores and the seashore; and identification and inventory of degraded river banks, lake shores and sea shores and conservation measures.[113]

13.5.6 Wildlife (Conservation and Management) Act, 2013

The *Wildlife Conservation and Management Act*, 2013[114] was enacted to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. The application scope of the Act includes fisheries since it defines wildlife to mean any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land or in water, as well as species that have been introduced into or established in Kenya.[115] It has important provisions with implications on the management of marine areas and fisheries resources in general.

The Act has established protective measures to ensure the conservation of fisheries resources. Section 31 of the Act grants powers to the Cabinet Secretary to declare an area to be a marine protected area. This is meant to ensure the conservation of marine resources that are threatened by overexploitation and by other human activities. These areas are to be zoned appropriately depending on the conservation needs in these areas.

In order to ensure conservation, the Cabinet Secretary is granted the power to declare an area to be a national reserve. In this regard, studies are to be undertaken in order to identify areas that are rich in biodiversity or contain endangered species and these areas are to be managed by the respective county governments. The county governments are to manage the marine conservation areas taking into consideration the need to involve

[113] Regulations 17 and 18.
[114] Act No. 47 of 2013.
[115] S. 3; S. 2 thereof provides that the Act shall apply to all wildlife resources on public, community and private land, and Kenya territorial waters.

local communities in the management initiatives. The Act in section 72 requires that the exploitation of the wildlife resources, which includes fisheries resources, is to be done in a manner that is sustainable taking consideration of the needs of the various communities and ensuring that the benefits accruing from the exploitation is shared with the communities.

13.5.7 Water Act, 2002

The Act vests every water resource in the State, subject to any rights of user granted by or under the Act or any other written law.[116] The Cabinet is also empowered to exercise control over every water resource in accordance the Act.[117] Further, the Act vests on the Cabinet Secretary, the duty to promote the investigation, conservation and proper use of water resources throughout Kenya.[118] The Act also vests in the Cabinet Secretary the right to the use of water from any water resource except to the extent that it is alienated by or under this Act or any other written law.[119] Under the Act, a permit is required for some of the purposes of water resources including, *inter alia,* the discharge of a pollutant into any water resource.[120] Such Permit must be the subject of public consultation and, where applicable, of environmental impact assessment in accordance with the requirements or the *Environmental Management and Co-ordination Act*, 1999.[121]

The foregoing provisions of the Water Act are important in fisheries management to the extent that they deal with conservation and management of water resources which are obviously the main habitat of fisheries resources. Any deterioration of these resources have a direct implication on fisheries resources and the two must therefore go hand in hand, if the country is to achieve sustainable management of fisheries resources.

13.5.8 The Water Quality Regulations, 2006

The Regulations[122] apply to water used for domestic, industrial, agricultural, and recreational purposes; water used for fisheries and wildlife purposes, and water used for any other purposes. Different standards apply to different modes of usage and these regulations provide for the protection of lakes, rivers, streams, springs, wells and other water sources. The objective of the regulations is to protect human health and the environment. The regulations also provide guidelines and standards for the discharge of

[116] Sec. 3.
[117] Sec. 4(1).
[118] Sec. 4(2).
[119] Sec. 5.
[120] Sec. 25.
[121] Sec. 29.
[122] Legal notice No. 121.

poisons, toxins, noxious, radioactive waste or other pollutants into the aquatic environment in line with the Third Schedule of the regulations. The regulations have standards for discharge of effluent into the sewer and aquatic environment. NEMA in collaboration with sewerage companies regulates discharge of all effluent into the aquatic environment. All firms or persons discharging effluent into the aquatic environment are required to submit quarterly discharge monitoring records to NEMA based on prescribed procedures of sampling and analysis. Further, everyone is required to refrain from any actions, which directly or indirectly cause water pollution, whether or not the water resource was polluted before the enactment of the Environmental Management and Coordination Act (EMCA) gazetted in 1999.

13.5.9 The Agriculture, Fisheries and Food Authority Act, 2013[123]

The was enacted with the aim of providing for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes. This Act is relevant to fisheries management in that it defines "agriculture" to mean cultivation of land and the use of land (whether or not covered by water) for any purpose of husbandry, aquaculture and food production and includes, *inter alia*: breeding of aquatic animals and plants in the Kenya fishery waters and sea ranching and fish farming in the sea as provided for in the Fisheries Act; and fish harvesting within the meaning of the Fisheries Act.[124]

The most significant thing about the Act is that it establishes an authority to be known as the Agriculture, Fisheries and Food Authority,[125] which Authority is charged with, in consultation with the county governments, perform the functions of *inter alia*: administering the *Crops Act*, and the *Fisheries Act* in accordance with the provisions of these Acts; promoting best practices in, and regulating, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural and aquatic products excluding livestock products as may be provided for under the Crops Act, and the Fisheries Act; collecting and collating data, maintaining a database on agricultural and aquatic products excluding livestock products, documents and monitoring agriculture through registration of players as provided for in the Crops Act and the Fisheries Act; advising the national government and the county governments on

[123] No. 13 Of 2013, Laws of Kenya.
[124] *Ibid*, S. 2.
[125] *Ibid*, S. 3.

agricultural and aquatic levies for purposes of planning, enhancing harmony and equity in the sector; and carrying out such other functions as may be assigned to it by this Act, the Crops Act, the Fisheries Act and any written law while respecting the roles of the two levels of governments.[126]

The Authority is likely to experience challenges in discharging their duties especially with regard to fisheries because they are to rely on the Fisheries Act, an Act that needs to be amended to reflect the Constitutional positional more so in relation to promotion of sustainable fishing and co-management of fisheries resources as opposed to the state-centered approach promoted by the Act.

13.6 International Best management practices in Fisheries Management

13.6.1 International Cooperation in Fisheries Management

Over the years, the fisheries sub-sector in Kenya has gradually evolved from a domestic consumption oriented industry to an export oriented industry with value added processing being applied.[127] The implication of this is that Kenya should strive to adopt and integrate into domestic laws the best management practices on fisheries, to achieve sustainable management of the same.

13.6.2 Integrated natural resource management

An ecosystem approach to aquaculture (EAA) is a strategy for the integration of the activity within the wider ecosystem, such that it promotes sustainable development, equity and resilience of interlinked social-ecological systems.[128] In a bid to promote inland fishing, improved integration between aquaculture and agriculture sectors is a crucial means for enhancing fish production and food security.[129] Further, the overall objective of integrating fisheries and agriculture is to maximize the synergistic and minimize the antagonistic interactions between the two sectors.[130]

Some of the opportunities and benefits of integrating fisheries and aquaculture into agricultural development efforts are mainly derived from the recycling of nutrients arising in the course of agricultural, livestock and fish production processes, from integrated pest

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[126] *Ibid,* S. 4.
[127] Theuri, F.S., *et al*, 'Determinants of Value Addition in the Seafood Industry in Developing Countries: An Analysis of the Kenyan Context,' *op cit*, p. 18.
[128] FAO, 'Aquaculture development: Ecosystem approach to aquaculture,' FAO *Technical Guidelines for Responsible Fisheries*, No. 5(4), 2010, p. 2.
[129] Halwart, M., 'Fisheries and Aquaculture topics: Selected management approaches in aquaculture,' *FAO Fisheries and Aquaculture Department* [online], Rome, Updated 27 May 2005. Available at *http://www.fao.org/fishery/topic/13543/en*[Accessed on 29/06/2014].
[130] *Ibid.*

management and from the optimal use of water resources.[131] Direct antagonistic interactions between agriculture and fisheries occur where these two sectors compete for land and water, and where measures aimed at higher agricultural production can alter fish habitats and fish stocks.[132]

Agenda 21 requires Governments at the appropriate level, with the support of the relevant international and regional organizations, to adopt integrated farm management approaches and this is to entail the integration of agricultural and forestry activities, as well as water and fisheries. Further, Chapter 17 of Agenda 21 contains provisions on the protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection of the living resources found within these areas. Conservation in this case is to extend not only to the marine environment but also to the adjacent coastal areas. It has thus been realized that these ecosystems are largely intertwined and hence the need to ensure integrated approaches to the conservation of these areas. Integrated management of these areas is to be done both at the national and local levels. This therefore calls for the incorporation of all the stakeholders in the conservation initiatives at both national and local levels.

The provisions of Agenda 21 have been buttressed in the *Protocol for Sustainable Development of Lake Victoria Basin.* This Protocol provides that each Partner State must *inter alia* integrate, as far as possible and as appropriate, the conservation and sustainable use of the resources of the Basin into relevant sectoral or cross-sectoral plans, programmes and policies.[133]

13.6.3 Information and Data Sharing

Agenda 21 provides that Governments at the appropriate level, with the support of the relevant international and regional organizations, should, *inter alia*: promote a multidisciplinary and cross-sectoral approach in training and the dissemination of knowledge to local people on a wide range of issues which include among others, information on fisheries.[134]Further, Agenda 21 states that Coastal States should promote and facilitate the organization of education and training in integrated coastal and marine management and sustainable development for scientists, technologists, managers (including community-based managers) and users, leaders, indigenous peoples, fisherfolk, women and youth, among others. Management and development, as well as environmental protection concerns and local planning issues, should be incorporated in

[131] *Ibid.*
[132] *Ibid.*
[133] Art. 27.1.
[134] Clause 13.22.

educational curricula and public awareness campaigns, with due regard to traditional ecological knowledge and socio-cultural values.[135] This is useful in promoting sustainable and inclusive fisheries management through empowering the local people to participate qualitatively in the same.

13.6.4 Use of Biotechnology

For purposes of increasing the availability of food, feed and renewable raw materials, Agenda 21 provides that Governments at the appropriate level, with the assistance of international and regional organizations and with the support of non-governmental organizations, the private sector and academic and scientific institutions, should, among others, improve both plant and animal breeding and micro-organisms through the use of traditional and modern biotechnologies in order to enhance sustainable agricultural output to achieve food security particularly in developing countries. Biotechnology is also to be used to ensure increased fish yields and also for other aquatic species and hence the need to broaden the capacity and scope of existing research centres.[136] Biotechnology is however to be used in a manner that ensures the maintenance of environmental integrity and also ensures the protection of the lives of the consumers of these products.[137]

13.6.5 Monitoring, Control and Surveillance

In order to protect the fisheries resources from depletion, various initiatives have been undertaken towards this. One such has been through the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. Through this, States are supposed to undertake comprehensive and effective monitoring of fishing and keep statistics on the manner in which this resource is being exploited. This is driven at ensuring that the fisheries resources are effectively managed and it is required that the states shall undertake to train and educate all persons involved in monitoring, control and surveillance (MCS).[138]If efficaciously adopted and implemented, Kenya can streamline its MCS through the foregoing measures.

13.7 Challenges in Fisheries Management

[135] Clause 17.15.
[136] Clause 16.5.
[137]Clause 16.4.
[138] Para. 24.

13.7.1 Legal and Institutional Challenges

The Fisheries Act, which is the current Act on management of fisheries is state-centered, and if it is to be efficient in facilitating sustainable management of fisheries resources in the country, there is need for amendments to reflect the current constitutional position of co-management of natural resources, effective information sharing, benefit sharing as well as promotion of sustainable development. The Fisheries Department should be financially supported to ensure that it carries out its mandate effectively in consultation with other regional bodies.

13.7.2 Climate Change

Climate change is expected to alter the physical, biophysical and biochemical characteristics of marine eco-systems in Kenya, and the Kenyan coast is regarded as one of the most vulnerable to sea level rise.[139] The international political response to climate change began with the adoption of the *United Nations Framework Convention on Climate Change* (UNFCCC) in 1992. The convention sets out the framework for actions aimed at stabilizing the atmospheric concentration of Greenhouse Gases (GHG) at a level that would prevent dangerous anthropogenic interference with the climate system. The Conference of Parties, which manages the Convention and meets annually, adopted the *Kyoto Protocol* in 1997[140] that commits industrialized countries and countries in transition to market economies to reduce their overall emissions of GHGs. Similarly, the convention requires all countries to take up climate actions taking into account their common but differentiated responsibilities and respective capabilities.

The main challenge for Kenya is to develop strategies, which would promote sustainable development, without contributing to increased emission of GHGs.[141] It is, therefore, necessary to develop appropriate policies and response strategies to manage GHG emissions. In recognition of the fact that climate change is a major challenge in practising sustainable development, and in particular sustainable fisheries management, due to the dwindling levels of water, Kenya has passed laws, which aims at tackling climate change. Kenya ratified the United Nations Framework Convention on Climate

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[139] National Environment Management Authority, Ministry of Environment and Natural Resources, Draft Report, *Report on Kenya's Capacity Needs to Implement Article 6, of the United Nations Framework Convention on Climate Change*, May 2005. p.26; See also United Nations Environment Programme, *Kenya Country Programme: Climate Change in Kenya*, available at *http://www.unep.org/roa/Programmes/KenyaCountryProgramme/ClimateChangeinKenya/tabid/52011/Default.aspx* [Accessed on 28/06/2014].

[140] Entered into force in 2005.

[141] National Environment Management Authority, Multilateral Agreements: *Climate Change in Kenya*. Available at *http://www.nema.go.ke/~nemago/index.php?option=com_content&view=article&id=318:climate-change-in-kenya&catid=121&Itemid=660*[Accessed on 28/06/2014].

Change in 1994 and the Kyoto Protocol in 2005.[142] Kenya also published a *National Climate Change Response Strategy* in 2010 and a *National Climate Change Action Plan* in 2013.

The Government of Kenya developed the National Climate Change Action Plan, 2013-2017[143] with the aim of implementing the National Climate Change Response Strategy (NCCRS) that was launched in 2010. The Action Plan encourages people-centred development, ensuring that climate change actions support Kenya's achievement of development goals, and also supports efforts towards the continued attainment of Vision 2030 through guiding the transition of the country towards a low carbon climate resilient development pathway.[144] At the regional level, the African Union adopted an *African Climate Change Strategy* in 2011, whereas, in the East Africa Community, *Climate Change Policy, Strategy and Master Plan* (2011) have been developed and adopted. These policy documents provide priority actions in the region, which shape national climate change policies and strategies in member countries.

The *Climate Change Bill*, 2014[145] is a Bill, which if enacted, seeks to provide for the legal and institutional framework for the mitigation and adaption to the effects of climate change; to facilitate and enhance response to climate change; to provide for the guidance and measures to achieve low carbon climate resilient development and for connected purposes. The National Climate Change Council, is a body established under the Bill whose role is to, *inter alia*, advise the national and county governments on legislative measures for mitigating and adapting to the effects of climate change.[146] The Council is required to coordinate the formulation of national and county climate change action plans, strategies and policies and must make the action plans, strategies and policies available to the public in the prescribed form. These action plans are to contain measures relating to *inter alia* adaptation, mitigation and assessment of climate change.[147]

The Constitution of Kenya (2010), on the other hand, provides ground for the formulation of adaptation and mitigation legislation, policies and strategies. It does this by providing for sustainable development as one of the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets

[142] The main objective of the Convention is …. "Stabilization of the greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system …."
[143] Government of Kenya, National Climate Change Action Plan, (Government Printer, Nairobi, 2013).
[144] *Ibid*, p. v.
[145] The Bill 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 (s.2).
[146] S. 5.
[147] S. 14.

any law; or makes or implements public policy decisions.[148] The Climate Change Bill is in line with the constitutional position of promoting sustainable development and good governance and therefore, if passed and fully implemented, it will go a long way reversing the effects of climate change especially on the country's water resources and also facilitate sustainable management of fisheries resources.

The *Education for Sustainable Development* (ESD) Implementation Strategy,[149]offers an opportunity for educating the Kenyan people on the importance of sustainable development and the contribution of various stakeholders, with a view to influencing peoples' views and attitudes towards sustainable development. [150] The Strategy creates an overall re-orientation of education through formal, informal and non-formal learning to enhance implementation of sustained development across sectors. All stakeholders are encouraged to develop and implement their specific sector ESD Strategies in order to pull together towards enhancing sustainable development for Kenya.[151]

13.8 Conclusion

Arguably, the fisheries management in Kenya has not adequately delivered on its social, economic and environmental goals, under the current legal and institutional framework on fisheries. The legal and regulatory framework of the fisheries sector in Kenya requires transparency, public participation, sustainability and accountability. The effective implementation of the legal and regulatory framework requires adequate capacity to enforce and monitor compliance with the laws governing the sector, so as to effectively deal with illegal fishing and trade practices as well as promoting sustainable management of fisheries resources in the country. Although, the Ministry of Environment and Natural Resources is responsible for fisheries management in the country, it will take the concerted efforts of all concerned government agencies, industries, interested client groups and individuals to facilitate the achievement of sustainable management of fisheries resources in Kenya.

[148] See Art. 10 and 69.
[149] National Environment Management Authority, 2008, (First published 2008).The United Nations (UN) declared the period (2005 - 2014) as the UN Decade on Education for Sustainable Development.
[150] *Ibid.*
[151] *Ibid.*

Chapter Fourteen

Managing Transboundary Natural Resources in Kenya

14.1 Introduction

Under international law, every state has the right to exercise sovereignty over its natural resources found within its territorial borders. However, natural resources that cross political borders, presents a complex challenge in particularly in managing environmental threats, and in regulating access to and use of the accruing benefits. As such, international environmental law comes in since no single country can allege to be solely entitled to access, use or manage such resources to the exclusion of all the others. All the concerned States must be involved in the management of shared resources.[1] This chapter examines the management of transboundary resources that Kenya shares with its neighbors.

14.2 What are Transboundary/Shared Natural Resources?

Transboundary or shared natural resources are resources that cross the political boundaries of two more States. They are natural resources that are transected in their natural state by a political boundary such as a national frontier.[2] Plants, animals, micro-organisms, waters, weather systems, and other elements that constitute the environment, including people, do not remain within jurisdictional boundaries. Therefore, issues of common concern arise out of shared natural area, resource system, or migratory species. A good example is the Mara-Serengeti wildebeests which migrate annually from Kenya to Tanzania and back.

14.3 Transboundary Natural Resources in Kenya

There are various transboundary natural resources located within the territorial boundaries of Kenya that are shared with other states. These include lakes, mountains,

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[1] Principle 10 of the Rio Declaration on Environment and Development, 1992, provides as follows: "*Environmental issues are best handled with 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*."

[2] Beyene, Z. & Wadley, I., 'Common goods and the common good: Transboundary natural resources, principled cooperation, and the Nile Basin Initiative,' *Breslauer Symposium on Natural Resource Issues in Africa*, Center for African Studies, UC Berkeley, 2004, p. 3, Paper presented as part of the Breslauer Graduate Symposium on Natural Resource Issues in Africa - held March 5th, 2004 at UC Berkeley. Available at *http://escholarship.org/uc/item/9492s0k4* [Accessed on 22/07/2014].

rivers and river basins, aquifers, wildlife etc. Kenya shares most of her natural resources with countries such as Tanzania, Uganda, South Sudan and Ethiopia.

14.3.1 Serengeti-Mara Ecosystem

The Serengeti-Mara Ecosystem is a trans-boundary ecosystem between Tanzania and Kenya. It is located on south-western Kenya and north-central Tanzania and comprises of ecological units within and outside the Protected Area (PA) systems of the Serengeti National Park (SNP) in Tanzania and the Maasai Mara National Reserve (MMNR) in Kenya.[3] The Serengeti-Mara Ecosystem is believed to support the most diverse migration of grazing mammals on earth. The Mara, although only a quarter of the total ecosystem area, is the most crucial to the survival of the entire system because it is the source of forage for wildlife migrating through the Serengeti during critical points in the dry season.[4] Further, according to statistics, only 25% of the wildlife habitat in the Mara part of the ecosystem is protected (in the Mara Reserve), while the rest lies within pastoral and agricultural areas north of the reserve.[5] These lands outside the reserve are also under more pressure than the rest of the ecosystem, with recent unprecedented human population growth, expansion of wheat farming in wildebeest calving grounds and expansion of tourism facilities.[6] All these issues have an impact on sustainable management of these ecosystems by the member States.

[3] Retouch Africa International Limited, 'Serengeti-Maasai Mara Ecosystem Protection and Monitoring Plan,' p. viii,
available at
*http://195.202.82.11:8080/jspui/bitstream/123456789/198/1/Serengeti%20%20Maasai%20Mara%20Ecosystem%20%20%20Serengeti%20%20Maasai%20Mara%20Ecosystem%20Transboundary%20Protection%20and%20Monitoring%20Plan.pd*f [Accessed on 26/06/2014].
[4] Reid, R.S., *et al*., 'People, Wildlife and Livestock in the Mara Ecosystem: the Mara Count 2002,' Report, Mara Count, 2002, (International Livestock Research Institute, Nairobi, Kenya, 2003).
[5] *Ibid*.
[6] *Ibid.*

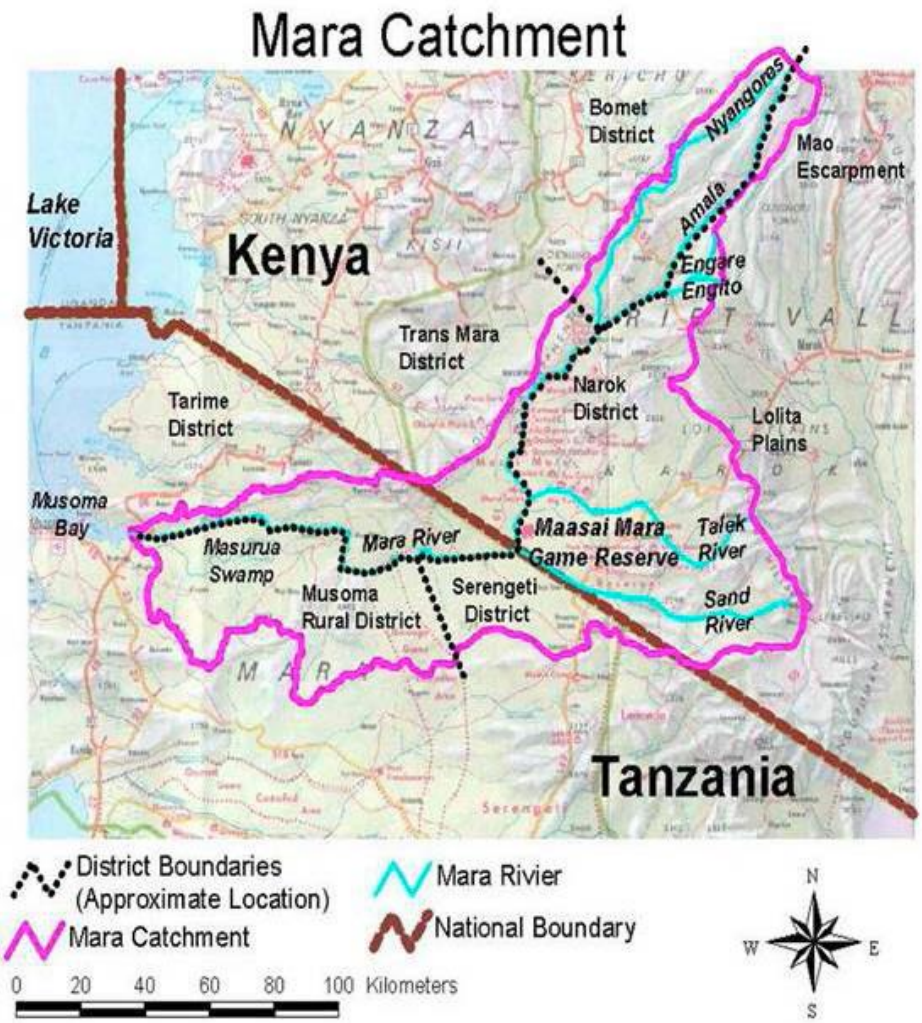

Fig. 3.0 Source: Copyright ©Retouch Africa International Limited

14.3.2 Lake Victoria Basin

The Lake Victoria basin is located in the central region of East Africa and covers an estimated area of 194,000 square Kilometers of which 7% is in Burundi, 22% in Kenya, 11% in Rwanda, 44% in Tanzania and 16% in Uganda. The lake basin contains Lake Victoria, the second largest lake in the world with an area of 68,800 Km^2 and a number of satellite lakes and rivers. The main lake and satellite lakes are fringed in many places by extensive wetlands. About 35 million people (about 30% of the entire population of East Africa) are estimated to live and derive their livelihood directly or indirectly from

the basin.[7] Lake Victoria also supports one of the largest freshwater fisheries in the world. By 2007, the lake was producing about one million tons of fish annually valued between 300-400 million US dollars. The lake had a high fish species diversity of over 500 species of fish most of which were endemic to the lake and were of economic and scientific value.[8] The lake provides water for irrigation, hydropower generation, industrial and domestic use, and modulates local climate.

14.3.3 Nile River Basin

The Nile River, with an estimated length of over 6800 km, is the longest river in the world flowing from south to north over 35 degrees of latitude. It is fed by two main river systems: the White Nile, with its sources on the Equatorial Lake Plateau (Burundi, Rwanda, Tanzania, Kenya, Zaire and Uganda), and the Blue Nile, with its sources in the Ethiopian highlands. The sources are located in humid regions, with an average rainfall of over 1000 mm per year. The arid region starts in Sudan and can be divided into three rainfall zones: the extreme south of the country where rainfall ranges from 1200 to 1500 mm per year; the fertile clay-plains where 400 to 800 mm of rain falls annually; and the desert northern third of the country where rainfall averages only 20 mm per year. Further north, in Egypt, precipitation falls to less than 20 mm per year.[9]

The total area of the Nile basin represents 10.3% of the continental area and spreads over ten countries.[10] For some countries, like Zaire, the Nile basin forms only a very small part of their territory while others like Burundi, Rwanda, Uganda, Sudan and Egypt, are almost completely integrated into the Nile basin. However, all the waters in Burundi and Rwanda and more than half the waters in Uganda are produced internally, while most of the water resources of Sudan and Egypt originate outside their borders: 77% of Sudan's and more than 97% of Egypt's water resources.[11]

14.4 Issues in the Management of Shared Natural Resources

The main challenge in managing shared resources is balancing the interests of all the concerned parties. Because of the competing interests over the resources, conflicts are bound to arise. The international regime of the management of shared resources is further coupled with challenges, as in many cases State consent is required before a decision is

[7] Lake Victoria Basin Aquatic Biodiversity Meta-Database, available at *http://lvbcom.org/aquatic/index.html* [Accessed on 26/06/2014].
[8] *Ibid.*
[9] FAO, *The Nile Basin*, available at *http://www.fao.org/docrep/w4347e/w4347e0k.htm* [Accessed on 26/06/2014].
[10] *Ibid.*
[11] *Ibid.*

taken concerning a certain shared natural resource.[12] In this regard, consent is at times difficult to get since most States usually want to benefit most from these resources and they also jealously guard the sovereignty that they have over natural resources within their territories.

Challenges are particularly seen in cases which involve countries in transition who in most cases want to reap the greatest benefits, from these resources. One of the main challenges in the management of transboundary resources arises from shared water resources. This is especially the case where it is a shared freshwater resource.[13] In the management of these resources, states usually feel that they have different entitlements which may at times clash with those claimed by another state and this may lead to conflicts between or among states.

A good example of a case concerning the management of transboundary water resources, is the controversy surrounding the use of the river Nile waters between the lower and upper riparians. Egypt, the major downstream State and the regional power-broker, is said to consider the Nile River flow a national security issue and when the upstream State of Sudan suggested in 1995 that it might review its existing water arrangements with Egypt, the 1959 Nile Waters Agreement, the then Egyptian President Muhammed Hosni Mubarak resorted to threats of military action against Sudan, stating that: '*Any step taken to this end will force us into confrontation to defend our rights and our life. Our response will be beyond anything they can imagine*.' The Sudanese Government withdrew its threats of damming the Nile.[14]

There is also the example of the dispute in *River Oder Case*,[15] where it was held that "…*when the States bordering an international waterway decide to create a joint regime for the use of its waters, they are acknowledging a 'community of interests' which leads to a 'community of law*.'[16] This case acknowledges the importance of states respecting these shared resources which are used as commons and the aspect of 'community of interest' was also introduced in this case. The holding in this case was further discussed in the *Gabcikovo-Nagymaros Project* which involved the construction of a dam on river Danube where the court stated that:

> *'…in 1929, the Permanent Court of International Justice, with regard to navigation in the River Oder, stated as follows: 'the community of interest in a*

[12] Benvenisti, E., *Sharing Transboundary Resources*, (Cambridge University Press, 2002).
[13] See *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* Judgment, ICJ Reports 1997, p.7.
[14] Beyene, Z. & Wadley, I., 'Common goods and the common good: Transboundary natural resources, principled cooperation, and the Nile Basin Initiative,' *op cit*, pp. 1-2.
[15] [1929] PCIJ.
[16] Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v. Poland, Order Territorial Jurisdiction of Int'l Comm'n of River Oder (U.K. v. Pol.), 1929 P.C.I.J. (ser. A), No. 23, annex 4 (Order of Aug. 15).

> *navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any riparian state in relation to the others* '[17]

Further, in the *Pulp Mills on the River Uruguay case*[18], which was a case concerning transboundary environmental harm, the ICJ recognized the role of institutions such as the Administrative Commission of the River Uruguay (CARU) in the protection of transboundary resources.

The case of *LakeLanoux Arbitration*[19] involved the determination of the use of the waters of Lake Lanoux, in the Pyrenees. The French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of May 26, 1866, between France and Spain and the Additional Act of the same date. It was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.

The ICJ, further held in the *Trail Smelter Arbitration*[20] that Canada was in violation of the duty to prevent activities within its territory from causing injury to the territory of another state. States sharing transboundary resources with other states are under an obligation to ensure that they consult with the other state before making any changes or developments which are likely to affect the shared resource.[21] The decision in this case is seen to be of particular importance in the conservation of transboundary freshwater resources.

In Kenya, legislation also provides for the manner in which transboundary natural resources are to be shared among countries. The Water Policy is one example that provides for the manner in which water resources in the country are to be shared. In its objectives, the Policy provides, *inter alia,* that the government is to maximize the use of trans-boundary water resources in coordination with other riparian countries. The government is, thus, required to domesticate international legal instruments governing transboundary water resources.

This comes against the realization that Kenya shares numerous water resources with other countries, the major one being the Lake Victoria Basin. This basin is shared by

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[17] *Gabcikovo-Nagyaros Project (Hungary v Slovakia), Judgment, ICJ Reports 1997,* 56, para 85.
[18] *Argentina v Uruguay*, Judgment, ICJ Reports, 2010.
[19] *France v Spain*, [1957] 12 R.I.A.A. 281; 24 I.L.R. 101, Arbitral Tribunal, 1 November 16, 1957.
[20] *US v Canada,* [1949] 3 UN Reports of Arbitral Awards 1905, rep. In Annual Digest of Public International Law Cases (1938-40), p.315.
[21] See *Lac Lanoux Arbitration,* (1957), 24 Int. L.R. 101.

Kenya, Uganda, the United Republic of Tanzania, Rwanda and Burundi, and occupies about 251 000 km^2, while the Lake itself covers 69 000km^2.[22]

The National Land Policy recognizes the need to ensure protection of ecosystems and their sustainable management. This is in recognition of the fact that Kenya has diverse ecosystems which are in need of protection. The Policy further notes that the management of these resources make their conservation to be challenging due to conflicting uses and varied governance frameworks.[23] The government is supposed to undertake a survey to establish all critical ecosystems and determine their sustainable land uses.

On the other hand, the Forest Policy, 2014 recognises that effective management of trans-boundary environmental resources including forestry necessitates the cooperation of states at both regional and international sphere. In this regard, Kenya being a signatory to a number of multilateral and regional agreements is to ensure that these instruments are integrated into the national policies and plans.

The case of *Friends of Lake Turkana Trust v Attorney General & 2 others*,[24] was based on an alleged memorandum of understanding entered into by the Government of Kenya and Government of Ethiopia in the year 2006, for the purchase of 500 MW of electricity from Gibe III, as well as an $800 million grid connection between Ethiopia and Kenya. The Petitioner sought to have an order of mandamus compelling the Government of Kenya and the Kenya Power and Lighting Company Limited (as it was then) to make full and complete disclosures of each and every agreement or arrangement entered into or made with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of 500MW from Gibe III including, but not limited to, the Memorandum of Understanding signed in 2006. Further, they sought to have an order of prohibition strictly enjoining and prohibiting the Government of Kenya and the Kenya Power and Lighting Company Limited, from entering into further agreements and/or making further arrangements with the Government of Ethiopia(including its parastatals) relating to the proposed purchase of 500MW from Gibe III including, but not limited to implementing the Memorandum of Understanding signed in 2006, until and when a full and thorough independent environmental impact assessment, on the potential effects of Gibe III project on Lake Turkana and the affected communities has been undertaken.

The petitioner argued that, first, by agreeing to purchase 500MW of electricity from the Government of Ethiopia, the Respondents were acting in a manner that would deprive the members of the affected communities their livelihood, lifestyle and cultural heritage

[22] UNEP, 'Transboundary issues,'
available at *http://www.unep.org/dewa/africa/kenyaatlas/PDF/KenyaAtlas_Chapter3.pdf*[Accessed 2/03/2015].
[23] National Land Policy, S.133.
[24] [2014] eKLR, ELC Suit No. 825 of 2012.

and attachment to Lake Turkana, in violation of Articles 26, and 28 of the Constitution, unless restrained by the Court. Further, it was argued that the proposed purchase would impinge the fundamental liberties and freedoms of members of the affected communities. Secondly, it was argued that the Government of Kenya had failed to act as a public trustee, in violation of Articles 62 and 69 of the Constitution, by failing to conduct a full, proper and thorough comprehensive impact assessment on the potential effects of construction and operation of Gibe III before committing itself to the purchase of the said 500MW. Thirdly, it was argued that the arrangements between the Government of Kenya and Government of Ethiopia would jeopardize the environment for the present communities around Lake Turkana and also threaten their cultural heritage.

It was argued by the respondents that the Government of Ethiopia had permanent sovereignty over the natural resources found within its territory and the respondent sought to rely on the *ICJ Case Concerning East Timor*[25] where it was held by the International Court of Justice that sovereignty over the economic resources is, for any people, an important component of the totality of their sovereignty. One the other hand, it was submitted by the interested party that the principle of permanent sovereignty requires that a state, in developing its resources, has due regard for the environment of neighboring states and these considerations were also to be taken into account in this case, the Omo River, being a transboundary river. Based on these considerations, the court directed that the government was to take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed.

In a bid to deal with the foregoing issues or even prevent disputes over transboundary natural resources intensifying into threats of the use of force, international law has put in place common principles and accepted international norms and standards by which transboundary natural resources may be equitably and efficiently utilized, without causing significant harm to the environment or to other users of the resource.[26]

14.5 Principles Governing the Management of Natural Resources

14.5.1 General Principle of Not Causing Transboundary Harm

States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas

[25] *(Portugal v Australia) 1995.*

[26] Beyene, Z. & Wadley, I., 'Common goods and the common good: Transboundary natural resources, principled cooperation, and the Nile Basin Initiative,' *op cit* p. 2.

beyond the limits of national jurisdiction.[27] Further, States are urged to cooperate to further develop the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.[28] In addition, States are to ensure that international organizations play a coordinated, efficient and dynamic role in the protection and improvement of the environment.[29]

14.5.2 Unlimited Sovereignty of States to Use Natural Resources for National Development

Under international law, the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[30] The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.[31] The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.[32]

The *General Assembly Resolution 1803,* declares that international co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.[33] Further, violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.[34]

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[27] Principle 21 of the *Declaration of the United Nations Conference on the Human Environment*, 1972 (Stockholm Declaration).
[28] *Ibid*, Principle 22.
[29] *Ibid*, principle 25.
[30] 1962 General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources (GAR 1803), GA Res. 1803 (XVII) / 17 UN GAOR Supp. (No.17) at 15 / UN Doc. A/5217 (1962), Part 1.1.
[31] *Ibid*, part 1.2.
[32] *Ibid*, part 1.5.
[33] *Ibid*, Part 1.6.
[34] *Ibid*, part 1.7.

14.5.3 Cooperation Based on Information and Prior Consultation

Principle 24 of the Stockholm Declaration proclaimed that international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. State cooperation through multilateral or bilateral arrangements or other appropriate means, is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

14.5.4 Public Participation

Decisions usually have to be made concerning the management of transboundary natural resources. Each state usually has its systems that have been established to provide for the manner in which decisions on the management of these resources are to be made. In formulating the decision making structures, an important consideration that has to be taken is the need to establish flexible structures which can be subject to periodic amendments in light of new conditions or knowledge that may arise.[35]

Participation of members of the public is necessary both at the time of establishment of the joint institutions and when operating within these institutions. Participation is to be made effective through availing necessary information to members of the public and civil society organisations. All the groups likely to be affected in the management of the transboundary resources have to be involved in these processes and minority groups have to be particularly encouraged to take part in these processes.

14.5.5 Principle of Equitable and Reasonable Utilization

This principle seeks to ensure that the various countries sharing the transboundary resource get a reasonable and equitable share of these resources while respecting the share that other states are entitled to. Equitable and reasonable utilization rests on a foundation of shared sovereignty and equality of rights.[36] Certain considerations are usually taken into account in determining what is equitable to a given state. One of the main considerations that is usually taken into account is an examination of the needs of a state, both present and future.

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[35] Benvenisti, E., *Sharing Transboundary Resources: International Law and Optimal Resource Use,* (Cambridge University Press, 2002).

[36] Rahaman, M.M., 'Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis,' *International Journal of Water Resources Development*, available at *http://www.tandfonline.com/doi/pdf/10.1080/07900620802517574* [Accessed on 26/06/2014].

14.5.6 Peaceful Settlement of disputes

It has been noted that the exploitation of transboundary resources is usually coupled with conflicts between these states. In this regard, what is important is the need to ensure that whatever conflicts arise they are settled amicably. In this regard, where settlement of disputes through negotiations has failed, states are required to seek the settlement of the dispute through other peaceful means. This is meant to ensure that conflicts emanating from the use of natural resources are eliminated and that natural resources have beneficial impact on states.[37]

14.5.7 Human Rights

Governments in many places have adopted short-term gains which usually come at the expense of communities within the country. The exploitation of resources within a country, in many cases have resulted to widespread human rights violations and where such projects as the construction of dams have been undertaken and led to the displacement of many people from their homes, many times without compensation.

The entry of foreign investors in these development projects in many cases exacerbates the problems as most of these investors are mostly pre-occupied with the maximization of profits at the expense of local communities. The long-term externalities of these investors are therefore in most cases borne by the local communities and particularly by indigenous groups.[38] It is, therefore, imperative that the needs of the local communities are respected by these companies and this particularly relates to the exploitation of transboundary resources like rivers and that where dams are constructed on these rivers, the members of the community are to be accorded adequate compensation and given alternative land to settle.

14.6 National Frameworks governing the Management of Shared Resources in Kenya

14.6.1 Constitution of Kenya, 2010

The Constitution of Kenya, 2010 has important provisions that relates to the management of the environment and natural resources. Although it lacks no specific provision relating to the management of transboundary natural resources, the Constitution directs how the natural resources within the territory of Kenya are to be managed. The

[37] See Vinogradov, S., *et al*, 'Transforming Potential Conflict into Cooperation Potential: The Role Of International Water Law,' (University of Dundee, UK, 2003), available at http://unesdoc.unesco.org/images/0013/001332/133258e.pdf [Accessed on 26/06/2014].
[38] Benvenisti, E., *Sharing Transboundary Resources,* (Cambridge University Press, 2002).

State is charged with the obligation to, *inter alia*: ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.[39]

14.6.2 Environment (Management and Co-Ordination) Act, 1999

The *Environmental Management and Co-Ordination Act*[40] (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.[41] The Act provides that in exercising the jurisdiction conferred upon it under the Act, the High Court is to be guided by the principles of sustainable development, *inter alia*; the principle of international co-operation in the management of environmental resources shared by two or more states[42]; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.[43]

One of the bodies under EMCA is the National Environment Council whose functions are, *inter alia*: policy formulation and directions; setting national goals and objectives and determining policies and priorities for the protection of the environment; and promoting co-operation among public departments, local authorities, private sector, Non-Governmental Organisations and such other organisations engaged in environmental protection programmes.

The National Environment Management Authority (NEMA) also established under the Act is charged with *inter alia:* taking stock of the natural resources in Kenya and their utilization and conservation; carrying out surveys which will assist in the proper management and conservation of the environment; advising the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be; and advising the Government on regional and

[39] Art. 69(1).
[40] Act No 8 of 1999.
[41] *Ibid*, Preamble.
[42] The case of *Friends of Lake Turkana v Attorney General and 2 others, ELC Suit 825 of 2012.*
[43] EMCA,S. 3(5).

international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party.

The Act requires that where Kenya is a party to an international treaty, convention or agreement, whether bilateral or multilateral, concerning the management of the environment, the Authority should, subject to the direction and control of the Council, in consultation with relevant lead agencies, *inter alia*:- initiate legislative proposals for consideration by the Attorney-General, for purposes of giving effect to such treaty, convention or agreement in Kenya or for enabling Kenya to perform her obligations or exercise her rights under such treaty, convention or agreement; and identify other appropriate measures necessary for the national implementation of such treaty, convention or agreement.[44]

14.7 Regional Legal and Institutional Frameworks

14.7.1 The African Convention on the Conservation of Nature and Natural Resources

The *African Convention on the Conservation of Nature and Natural Resources*[45]applies to all areas which are within the limits of national jurisdiction of any Party; and to the activities carried out under the jurisdiction or control of any Party within the area of its national jurisdiction or beyond the limits of its national jurisdiction.[46] The objectives of the Convention are: to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.[47]

The implementation of the Convention is to be guided by the principles of the right of all peoples to a satisfactory environment favorable to their development; the duty of States, individually and collectively to ensure the enjoyment of the right to development; and the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner.[48] The fundamental obligation of Parties under the Convention is to adopt and implement all measures necessary to achieve the objectives of the Convention, in particular through preventive measures and the application of the

[44] S. 124.
[45] AU African Union, 1969.
[46] Art. 1.
[47] Art. 2.
[48] Art. 3.

precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.[49]

14.7.2 East Africa Community Treaty, 1999

The East African Community (EAC) as established by the East African Community Treaty [50] is the regional intergovernmental organization of the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Burundi and Republic of Rwanda with its headquarters in Arusha, Tanzania. The EAC aims at widening and deepening co-operation among the partner states and other regional economic communities in, among others, political, economic, and social fields for their mutual benefit.[51] The objectives of the Community, as outlined in the treaty are, *inter alia*, to ensure sustainable growth and development among the partner states and to promote the sustainable utilization of the natural resources of the partner states and to take measures that would effectively protect the natural environment of the Partner States.[52]

Articles 111 and 114 of the EAC Treaty provides for joint management and utilization of natural resources within the Community for the mutual benefit of the partner States. In particular, the Partner States are to: take necessary measures to conserve their natural resources; co-operate in the management of their natural resources for the conservation of the eco-systems and the arrest of environmental degradation; and adopt common regulations for the protection of shared aquatic and terrestrial resources.[53] Kenya has lived up to its obligations in accordance with this provision, as it has enacted various laws and policies which guide the manner in which the country is to utilize the transboundary resources that it has. The adoption of the Fisheries Policy is a good example of this.

With regard to conservation of these transboundary resources, the actions by the community shall have the objective: ensuring sustainable utilization of natural resources like lakes, wetlands, forests, and other aquatic and terrestrial ecosystems and to jointly develop and adopt water resources conservation and management policies that ensure sustenance and preservation of ecosystems.[54]

The East African Court of Justice is established under the treaty as the judicial body of the Community, and is mandated with ensuring the adherence to law in the

[49] Art. 4.
[50] Art. 2, Treaty for the Establishment of the East African Community 1999 (As amended on 14th December, 2006 and 20th August, 2007).
[51] Art. 5.
[52] *Ibid.*
[53] Art. 114(1).
[54] Art.111.2(c) and (d).

interpretation and application of and compliance with the Treaty.[55] In this regard, the Court is to ensure that the objectives of the Community are met. One such is ensuring the sustainable utilization of resources found within the Community. In this regard, the court has ensured sustainable utilization of resources in the Community and the protection of transboundary resources.

In *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*,[56] it was the Applicant's contention that the construction of a trunk road across the Serengeti National Park would have deleterious effects on the Serengeti and also on the adjoining ecosystems such as Masai Mara in Kenya. It was therefore the submission of the Applicant that;

> *The actions of the Respondent are a violation of Article 114 (1) (a) of the Treaty which enjoins all Partner States to conserve, protect and manage the environment and natural resources and Articles 5 (3) (c), 8 (1) (c) and 111 (2) of the Treaty which obligates Partner States to co-operate in the management and utilization of natural resources within the Community and to abstain from any measures that would jeopardise the attainment of the objectives of the Treaty in that regard.*[57]

The Court held that the actions by the Respondent were unlawful and contrary to the Treaty and a permanent injunction was thus issued to the respondent restraining it from operationalizing its initial proposal for the construction of the road. The Court in this regard took cognizance of the fact that the construction of the road had potentially negative effects on the Serengeti-Mara ecosystem, which is a transboundary natural resource and hence it was imperative for the court to take some measures towards its protection in line with the Treaty.

In 2003, the member states of the EAC adopted the *Protocol for the Sustainable Development of Lake Victoria Basin*, in realization that there was need for sustainable utilization of the waters in the Lake Victoria basin and to introduce an integrated approach in the management of this resource. The Partner states thus sought to cooperate in the conservation and sustainable utilisation of the resources of the basin. Member states of the EAC have further taken cognizance of the need to ensure the protection of the resources that are shared among these countries and in this regard they have adopted the *Transboundary Environmental Assessment Guidelines for Shared Ecosystems in East Africa*. It is acknowledged that effective management of the transboundary resources within the Community has the potential effect of reducing poverty in the region. The guidelines seek to ensure that member states of the EAC participate in common

[55] Art. 23.
[56] Reference No. 9 of 2010.
[57] *Ibid.*

environmental assessments, have common regulations, procedures and guidelines for shared ecosystems. These guidelines have further taken into consideration the need to ensure that citizens of the EAC member states are also provided with opportunities to participate in the environmental assessment processes.

14.7.3 The Protocol on Environment and Natural resources Management

This protocol[58] was adopted to govern cooperation among partner states in the management of the environment and natural resources over the area of their jurisdiction and also including the governance and management of transboundary resources. Article 9 of the Protocol requires that the Partner States are to develop mechanisms meant to ensure sustainable utilization of transboundary ecosystems. The Protocol in particular provides for the cooperation in Environment and natural resources management.[59] More specifically, on its Article 13 on management of water resources, the protocol provides that; the partner States are to develop, harmonize and adopt common national policies, laws and programmes relating to the management and sustainable use of water resources and to utilize water resources, including shared water resources, in an equitable and rational manner.

As stated in the Kenyan Water Policy, the formulation of the Policy took into consideration principles derived from international resolutions and treaties including the EAC treaty. Similarly, the National Water Policy of Tanzania takes cognizance of the fact that the country shares water resources with other countries and hence the need to ensure that approaches are adopted to conserve these water resources. These initiatives by the EAC countries are seen to go a long way in ensuring the conservation of the water resources shared by these countries.

Article 18 of the Protocol is related to the management of mineral resources. It requires, *inter alia,* that: the Partner States should develop and harmonize common policies, laws and strategies for access to exploitation of mineral resources for the socio-economic development of the Community. This is further buttressed by the provisions of Africa Mining Vision particularly in Annex 1 which requires mining policies in different countries to be harmonized in order to ensure that there is sustainable exploitation of the mineral resources.

[58] East African Community, Arusha, Tanzania, 3 April, 2006.
[59] Chapter Three.

14.7.4 The EAC Regional Environment Impact Assessment Guidelines for Shared Ecosystems

Noting the urgency to institute measures, policies, guidelines, laws and programmes that will promote their cooperation in the conservation and sustainable use of the shared ecosystems EAC has developed the regional EIA Guidelines for shared ecosystems. The regional EIA Guidelines are for enabling the identification and application of environmentally sound approaches to management and ensure the sustainability and biophysical integrity of the shared ecosystems within the East African region. The activities that are to be considered for trans-boundary environment impact assessments have been said to be those that are implemented in the geographical area of the transboundary ecosystem and include such activities that are likely to involve major changes in land use and likely to cause transboundary impacts in neighbouring countries.[60] A criterion has thus been established for determining transboundary environmental impacts and the costs associated with conducting of these assessments are to be met by the developer of a certain project in these areas. The Guidelines play an important role in the management and conservation of the shared ecosystems such as fresh water, forests and protected areas.

14.7.5 Lake Victoria Basin Commission (LVBC)

The East African Community has designated Lake Victoria and its Basin as an "area of common economic interest" and a "regional economic growth zone" to be developed jointly by the Partner States.[61] The East African Community established the Lake Victoria Basin Commission formerly known as the Lake Victoria Development Programme in 2001, as a mechanism for coordinating the various interventions on the Lake and its Basin; and serving as a centre for promotion of investments and information sharing among the various stakeholders.[62]

The Commission envisages a broad partnership of the local communities around the Lake, the East African Community and its Partner States as well as the development partners. The Commission's activities are focusing on the: Harmonization of policies and laws on the management of the environment in the Lake and its catchment area; Continuation of the environmental management of the Lake, including control and eradication of the water hyacinth; Management and conservation of aquatic resources, including fisheries; Economic activities in the development of fishing, industry,

[60] EAC, 'Transboundary Environmental Assessment Guidelines for Shared Ecosystems in East Africa,' May 2005.
[61] Lake Victoria Basin Commission. Available at *http://www.lvbcom.org/index.php/who-we-are/overview-of-lvbc* [Accessed on 2/09/2014].
[62] *Ibid.*

agriculture and tourism; and Development of infrastructure, including revamping the transport system on and around the Lake. In this regard, focal ministries have been identified in the different countries sharing this resource and these are supposed to assist with the implementation of the policies adopted.

In Kenya, the focal point is the Ministry of Environment, Water and Natural Resources. This Ministry has overseen the implementation of various legislations meant at ensuring conservation of these resources. These include implementation of EMCA and the Fisheries Act. The focal point in Tanzania is the Ministry of Water. Through this Ministry several activities have been undertaken and this includes the improvement of the collaborative management of the transboundary natural resources of the Lake Victoria basin. The Ministry of Water and Environment forms the focal point in Uganda. Through this Ministry, polices are to be adopted to govern the transboundary resourced shared with other countries. The Commission further places emphasis on poverty eradication and the participation of the local communities. It is expected to make a significant contribution towards reduction of poverty by uplifting the living standards of the people of the Lake region. This is to be achieved through economic growth, investments and sustainable development practices that are cognizant of the environment.[63]

14.7.6 Lake Victoria Fisheries Organisation (LVFO)

The LVFO East African Community Institution constituents are from Kenya, Tanzania and Uganda. The Organization's aim is to harmonize, develop and adopt conservation and management measures for the sustainable utilization of living resources of Lake Victoria to optimize socio-economic benefits from the basin for the three Partner States.

The fisheries of Lake Victoria are shared between Kenya, Tanzania and Uganda and provide an immense source of income, employment, food and foreign exchange for East Africa.[64] The lake produces a fish catch of over 800,000 tonnes fish annually, currently worth about US $590 million of which US $340 million is generated at the shore and a further US$ 250 million a year is earned in exports from the Nile perch fishery. The lake fisheries support almost 2 million people with household incomes and meet the annual fish consumption needs of almost 22 million people in the region.[65]

LVFO is implementing fisheries co-management on Lake Victoria, by legally empowering fisheries communities to become equal and active partners with Government

[63] *Ibid.*
[64] East African Community Lake Victoria Fisheries Organization, available at *http://www.lvfo.org/index.php/2-uncategorised/1-welcome-to-lvfo* [Accessed on 22/07/2014].
[65] *Ibid.*

in fisheries management and development. LVFO is guiding, supporting and implementing the building of the capacity of communities to participate in management and is making a real difference to their lives.[66]

14.7.7 UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997)

The UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997) [67]applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.[68] The Convention defines "International watercourse" to mean a watercourse, parts of which are situated in different States.[69] Certain general principles have been outlined in the Convention as being important in guiding its application. One of the principles that has been outlined is the requirement that watercourse states utilize international watercourses in an equitable and reasonable manner driven at ensuring sustainable utilization of these resources.[70]

The Convention provides that, utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances and the potential impacts on other states.[71] Further, in utilizing an international watercourse in their territories, watercourse States are, to take all appropriate measures to prevent the causing of significant harm to other watercourse States. [72] Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm is, in the absence of agreement to such use, to take all appropriate measures, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.[73]

Watercourse States are to cooperate based on sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.[74] The Watercourse states can thus establish joint mechanisms for cooperation on different matters.[75] Cooperation by these states can

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[66] *Ibid.*
[67]*Adopted by the General Assembly of the United Nations on 21 May 1997. Not yet in force. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).*
[68] Art. 1(1).
[69] Art. 2 (b).
[70] Art. 5(1).
[71] Art. 6(1).
[72] Art. 7(1).
[73] Art. 7(2).
[74] Art. 8(1).
[75] Art. 8(2).

take the form of exchange of data on the condition of watercourse upon request by other states.[76]

The absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses. In the event of a conflict between uses of an international watercourse, it is to be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs.[77]Watercourse States are, individually and, where appropriate, jointly, to protect and preserve the ecosystems of international watercourses.[78]

The Convention states that watercourse States are, at the request of any of them, to enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism. [79] The Watercourse States are also to cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.[80]

Provisions for dispute resolution have also been provided for by the Convention. Parties are thus required to settle arising disputes by peaceful means and may seek mediation by a third party state or subject the dispute for determination by the International Court of Justice.[81]

14.8 Transboundary Environmental Conflicts Management

As already pointed out, the main challenge in managing shared resources is the balancing of the interests of all the concerned parties, with the eventuality that conflicts are bound to arise due to the competing interests of the concerned parties. In a bid to ensure compliance with the international principles on the management of transboundary resources, which are meant to help in balancing such interests, there have been numerous cases, settled through both litigation and Alternative Dispute Resolution Mechanisms (ADR), before international law institutions. Article 33 of the U.N. Charter states that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, 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.[82]

[76] Art. 9(2).
[77] Art. 10.
[78] Art. 20.
[79] Art. 24(1).
[80] Art. 25.
[81] Art. 33(2).
[82] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

However, there are problems in resorting to public international law in dealing with transboundary environmental disputes. The opponents argue that there is lack of a forum with universal compulsory jurisdiction in transboundary environmental cases. There are also no remedies to states and their scope.[83]

One of the most famous case law on transboundary environmental harm is the *Trail Smelter Arbitration,*[84] which is an arbitration case where the United States (P) sought damages from Canada by suing it in court and also prayed for an injunction for air pollution in the state of Washington, by the Trail Smelter, a Canadian corporation which is domiciled in Canada (D).[85] The issue was whether it is the responsibility of the State to protect other states against harmful acts by individuals from within its jurisdiction at all times. The question was answered in the affirmative in that the duty to protect other states against harmful acts by individuals from within its jurisdiction at all times is the responsibility of a State. It was held that, no state has the right to use or permit the use of its territory in a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, as stipulated under the United States (P) laws and the principles of international law. This case is widely accepted as an illustration of environmental litigation. It is noteworthy, that the United Nations and the international community at large endorse all the mechanisms outlined under Article 33 of the Charter, as long as they are aimed at peace building.

14.9 Conclusion

The utilization of transboundary resources in most cases can result to conflicts among States that usually have competing interests over those resources. There is, therefore, need for joint efforts towards the management of these resources in order to ensure that they are sustainably used and managed. It is also important that transnational institutions be established to oversee the management of resources and to also ensure that any disputes arising from the utilization of these resources are resolved amicably. There is particular need to involve NGOs in the management of these resources. These groups

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[83] See Ladan, M.T., 'Access To Environmental Justice In Oil Pollution And Gas Flaring Cases As A Human Right Issue In Nigeria,' Paper Presented at Institute For Oil And Gas Law Training Workshop For Federal Ministry of Justice Lawyers, Abuja, November, 28-30, 2011, p.15,
available at www.abu.edu.ng/publications/2012-11-10-143702_3901.docx [Accessed 2/09/2014]; Mrinmoi, C., 'Environmental Harm in Developing Countries: An Interface of Public and Private International Law,' November 25, 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359748 [Accessed 2/09/2014]; Hanqin X., 'Transboundary Damage in International Law,' *Cambridge Studies in International and Comparative Law*, Vol. 27, (Cambridge University Press, 2003).

[84] *United States v Canada*, Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

[85] *Casebriefs, Trail Smelter Arbitration*, (United States v. Canada),
available at *http://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-18/trail-smelter-arbitration*[Accessed 2/09/2014].

play a critical role in overseeing the management of these resources on behalf of the public who may not have sufficient resources to administer them. Further, it is important that the citizens of the respective countries, where these resources are found, be involved in the process of managing these resources and avenues for their participation be availed.

The transboundary natural resources falling within Kenya's territorial boundaries, can indeed contribute to the economic development and wellbeing of the people of Kenya. However, due to the challenges of their international co-management, it is important to enlighten the communities living around them on the implications of this management so as to ensure that Kenya as a state abides by international principles of management and best practices. There is also the need to fully exploit the regional institutional and legal frameworks, and actively engage other state players to ensure that there is minimal conflict.

Chapter Fifteen

Multinational Corporations, Investment and Natural Resource Management in Kenya

15.1 Introduction

This chapter casts a critical look at multinational corporations and natural resource management. International trade law has assisted Multinational Corporations (MNCs) to access new markets and new resources in the developing world. Foreign companies are able to move to regions where there are abundant resources, including cheap labour with few restrictions.[1] Criticisms have arisen that the relations between multinational corporations and host countries favour the MNCs. It is said that host countries receive few benefits, and that foreign investments distort local economies and politics.[2] This chapter discusses concerns arising from the involvement of multinationals in natural resource exploration and exploitation. It also analyses the laws governing these investments and the extent of their conformity with the constitution and the political, economic, social, scientific and technological factors that play an important role in natural resources management.[3]

15.2 Background

MNCs or TNCs are for-profit enterprises marked by two basic characteristics. They engage in business activities including sales, distribution, extraction, manufacturing, and research and development outside their country of origin so that it is dependent financially on operations in two or more countries; and its management decisions are made based on regional or global alternatives.[4] MNCs control 50% of all oil extraction and refining, and a similar proportion of the extraction, refining, and marketing of gas and coal. Additionally, they have virtually exclusive control of the production and use of ozone-destroying chlorofluorocarbons (CFCs) and related compounds. Their activities are

[1] Jensen, N.M., 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment,' *International Organization* Vol. 57, 2003, pp 587-616.
Available at*: 10.1017/S0020818303573040*. [Accessed on 01/08/2014].

[2] Moran, T.H., 'Multinational corporations and dependency: a dialogue for dependentist as and non-dependentist as,' *International Organization,* Vol. 32, 1978, pp 79-100.

[3] Jensen, N.M., 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment,' *op cit.*

[4] Greer, J. & Singh, K., 'A Brief History of Transnational Corporations,' (Global Policy Forum, 2000), available at https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html *[*Accessed on 12/08/2014].

believed to generate more than half of the greenhouse gases emitted by the industrial sectors with the greatest impact on global warming.[5]

15.3 MNCs and Natural Resources

Natural resources have been exploited in many countries and used to boost economic development in these countries through the revenue derived from these endeavors. The exploitation of Africa's natural resources is normally carried out by foreign Multi-national Corporations (MNCs) which have shown almost no regard for the impact of their actions on people in Africa.[6] Although there are advantages associated with MNCs, they have also been vilified because in some cases they take a country's natural resources, paying but a pittance while leaving behind environmental and social disasters.

Their activities have had the result of destruction of the environment and livelihoods of local populations and caused widespread pollution and even war, with the desire to control economically profitable natural resources being the reason behind several conflicts in Africa, especially in Congo DRC.[7] MNCs have contributed greatly towards conflicts and taken advantage of the occurrence of conflicts to continue exploiting these resources. This scenario is not unique to DRC Congo only but is a reflection of what is happening across Africa.[8]

MNCs usually enter into negotiations with governments for the exploitation of mineral resources and thereafter are usually awarded contracts to exploit these resources. When entering into these negotiations, these corporations usually aim at ensuring maximum profits from the undertakings which in most cases is done at the expense of the host State. The concession contracts are usually drawn in a manner that ensures that the companies have unlimited rights to the natural resources leaving no room for future

[5] *Ibid.*

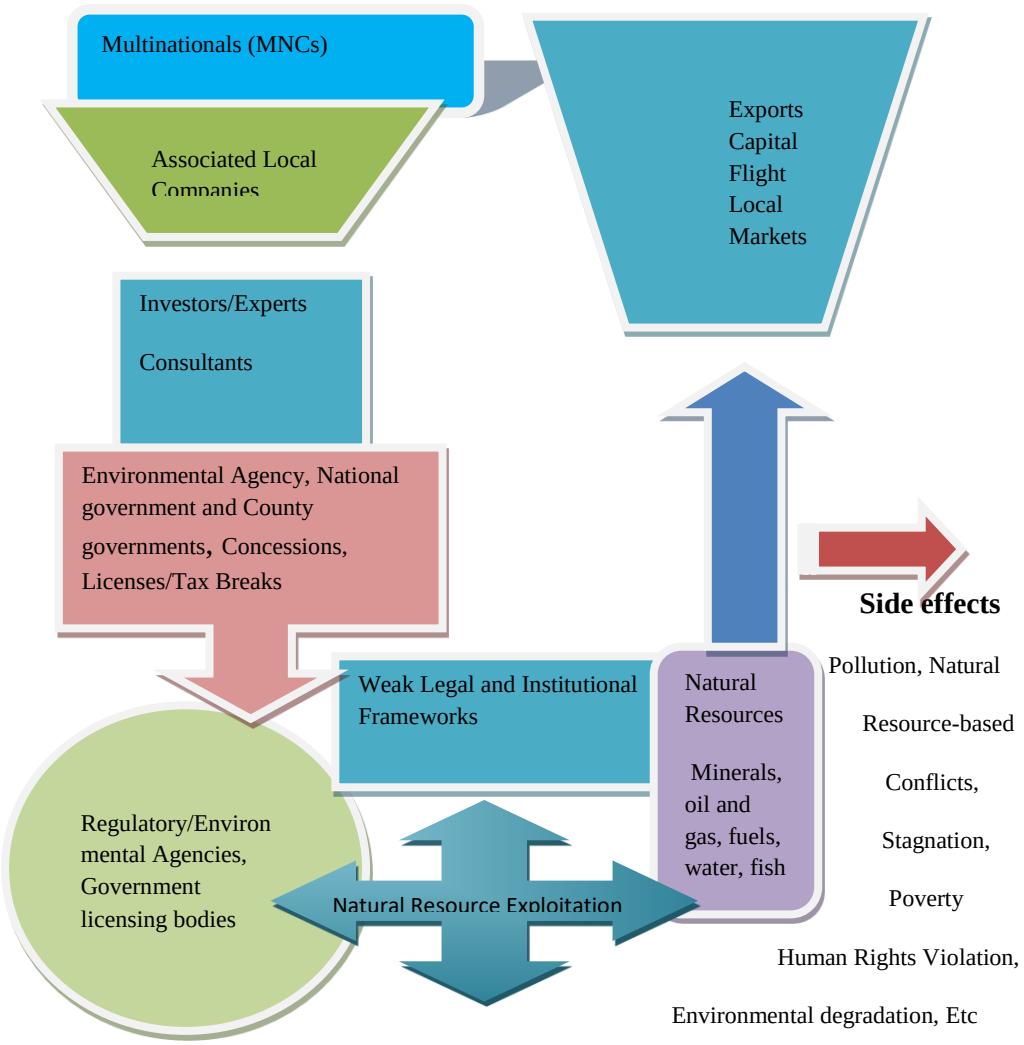
[6] Africa Europe Faith & Justice Network (AEFJN), The Plundering of Africa's Natural Resources, available at *http://www.aefjn.org/tl_files/aefjn-files/publications/Fact%20Sheets%20EN/120521-NatResources-Factsheet-eng.pdf* [Accessed on 12/08/2014].

[7] See generally, Batware, B., 'Resource Conflicts: The Role of Multinational Corporations in the Democratic Republic of Congo,' (MA Peace and Conflict Studies, EPU, 2011), available at http://acuns.org/wp-content/uploads/2012/06/RoleofMultinationalCorporations.pdf [Accessed on 12/08/2014].

[8] See generally United Nations Expert Group Meeting on 'Natural Resources and Conflict in Africa: Transforming a Peace Liability into a Peace Asset,' *Conference Report*, 17-19 June 2006, Cairo, Egypt. Organized by the Office of the Special Adviser on Africa (OSAA) in cooperation with the Government of Egypt.

amendments by the host state. This makes the host states to lose out on revenue, where there are changes in the fiscal regime in the future.[9]

Fig. 4.0: Multinationals and Natural Resources



[9] *Ibid*, p. 224. It has been suggested that one of the tools that can be used to counter this scenario is the use of additional profits tax (APT).

Source: Authors.

15.4 FDI and Natural Resources

Foreign Direct Investment (FDI) is a form of international inter-firm co-operation that involves significant equity stake and effective management decision power in, or ownership or control of foreign enterprises.[10] It also encompasses other broader, heterogeneous non-equity forms of co-operation that involve the supply of tangible and intangible assets by a foreign enterprise to a domestic firm.[11]

FDI reflects a lasting interest by a resident entity of one economy in an enterprise that is resident in another economy.[12] The ideological underpinning of this concept is the transmission to the host country of a package of capital, managerial skill and technical knowledge, as a potent agent of economic transformation and development.[13] The role of natural resources in economic development touches on many issues, from FDI to the environment to the level and management of exchange rates. MNCs are the main players engaging in value adding activities based on cross-border transactions. They base most of their industrial activities on natural resources. They derive the raw materials from the host countries and export the same either in their raw form or semi-processed one for value addition, which later comes back as a finished product ready for the local market as well as the international markets. For instance, with regard to oil, the exploration and production of oil results in foreign direct investment (FDI) inflows only when the activities are financed by foreign MNCs.[14] The dominance of MNCs in Africa's extractive industries is because mineral extraction is capital-intensive, requires sophisticated technology, has long gestation periods and is also risky. There is no guarantee that oil may be discovered after spending an extensive amount of resources on exploration. As a consequence, the increased exploration and production in the region has led to a substantial increase in extractive industry FDI.[15] Further, countries that are rich in natural resources, in particular oil, tend to have weak institutions,[16] suggesting the direct link between FDI and natural resources exploitation. In such arrangements, the host countries

[10] Mello, R., 'Foreign direct investment-led growth: evidence from time series and panel data,' *Oxford Economic Papers*, No. 51, pp.133-151, p. 135, (Oxford University Press, 1999).
[11] *Ibid.*
[12] Duce, M. & Espana, B., 'Definitions of Foreign Direct Investment (FDI): a methodological note,' available at http://bis.hasbeenforeclosed.com/publ/cgfs22bde3.pdf [Accessed 3/03/2015].
[13] Kojima, K., 'A Macroeconomic Approach to Direct Foreign Investment,' *Hitotsubashi Journal of Economics*, June 1973, p. 3.
[14] Asiedu, E., 'Foreign direct investment, natural resources and institutions,' *Working Paper*, March 2013, p. 2.
[15] *Ibid,* p. 2.
[16] *Ibid.*

often derive little benefits while the lion's share goes to the MNCs and their home countries. The unsustainable development of natural resource endowments has several basic limitations as a means of promoting broad-based economic development. Primary product exports have low value added compared to processed and manufactured goods, and the lion's share of value addition occurs in developed countries, where raw materials are converted into manufactured goods.[17] In this cycle, MNCs play a central role.

15.5 State Sovereignty over Natural Resources vis-à-vis Multinational Corporations

International law has put in place a framework law on natural resources allocation.[18] It establishes basic rules under which nations can assert property rights in resources. This influences how nations deal with resource allocation. However, apart from international law, other factors ranging from political, economic, social, scientific and technological factors also contribute to allocation of resources. Under international law, property rights are defined in terms of national sovereignty or territorial or jurisdictional rights.[19] The dissolution of colonial bonds in a rising tide of nationalism has led to assertions of sovereignty over natural resources by States.[20]

However, in the face of globalization and need for economic development States have had to enter into agreements with Multinational Corporations (MNCs) for exploitation of natural resources, mainly due to their infrastructural (in)capacities (technological, financial, human resource). They also do so with the objective of boosting foreign direct investments (FDIs) which are believed to be key for development. Countries invest in developing countries, with the object of securing increased imports of primary products, which are vitally important for their economy, although the benefits of such development assistance have been criticized as being limited; the employment and training effects are small in so far as the goods are exported in the form of raw materials.[21]

MNCs have also been criticized as being exploitative of the weak legal regimes in most developing countries. Most of these corporations use this to evade liability where they are in violation of the laws. Further, these corporations have used their financial muscles to frustrate legal proceedings brought against them and further collaborate with

[17] Cronin, R., *et al*, (eds), 'Exploiting Natural Resources: Growth, Instability, and Conflict in the Middle East and Asia,' *Natural Resources and the Development-Environment Dilemma,* 2009, p. 72.
[18] Bilder, R.B., 'International Law and Natural Resources Policies,' *Natural Resources Journal, Vol. 20,* 1980, pp. 451-486 at p. 451.
[19] *Ibid.*
[20] Brown, R., 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources,' *op. cit*, p. 218.
[21] *Ibid,* p. 4.

corrupt government officials to ensure that they are not held liable for violations attributable to them. They have also taken advantage of their financial muscle to enter into contracts with governments and the imbalance of power usually occasions the entering into bad deals by governments. These actions by the MNCs have rightly been viewed as an affront or encroachment on sovereignty and an attempt by contract to limit the legislative competence of the host country.[22] Arguably, the cumulative effect of it is weakened effect of state sovereignty especially in the case of developing countries.

15. 6 Multinational Corporations and Human Rights Violations

Most MNCs have been identified as gross human rights violators in their areas of operation. In this regard, the relationships between the MNCs and the host communities have often been characterized by conflict, ranging from ideological opposition and dispute, to armed conflict and the extensive loss of lives, livelihoods, and environments.[23] This arises from the fact that these corporations are in most cases viewed as 'outsiders' who come to interfere with the relative peace enjoyed by communities. MNCs operating in most developing countries have in many cases suppressed the rights of workers in their facilities leading to gross human rights violations, such as killings.[24] The activities by the MNCs especially in the mining sector have also resulted both directly and indirectly to the deaths of members of communities and livestock owned by these communities.

In this regard, the civil society in most of the countries where the MNCs are in operation, have been on the forefront in seeking to hold these entities accountable for their actions, with the aim of protecting and promoting fundamental human rights and labour rights of the employees of these corporations.[25] This is largely attributable to the fact that a majority of the populace amongst whom these corporations operate, are not usually aware of their rights and the mechanisms for enforcement of those rights.

Efforts by civil society organisations have, however, proved to be futile in certain instances due to the laxity in legal processes to remedy the situation, with certain players in the legal sectors being aiders and abettors of the violations. This is as a result of lack

[22] Brown, R., The Relationship between the State and the Multinational Corporation in the Exploitation of Resources, *op cit*, p. 223.
[23] Ballard, C., & Bank, G., 'Resource Wars: The Anthropology of Mining,' *Annual Review of Anthropology*, Vol. 32, 2003, pp. 287-313, p. 289.
[24] Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' *Share the World* Resources, 3rd October 2006, *http://www.stwr.org/multinational-corporations/multinational-corporations-mncs-beyond-the-profit-motive.html#legalrights* [Accessed on 13/08/2014].
[25] Social Watch Report 2009 - *Making finances work: People first*, 'Holding transnational corporations accountable for human rights obligations: the role of civil society,' available at *http://socialwatch.org/node/812* [Accessed on 13/08/2014].

of political will in the host countries to prosecute the violators.[26] In *SERAC v Nigeria*,[27] the communication alleged that the exploitation of oil resources in Ogoniland resulted to the violation of the right to health and the environment of the community, and that the government of Nigeria had condoned and facilitated the violations by the Nigerian National Petroleum Company (NNPC) whose majority shareholder was the Shell Petroleum Development Corporation (SPDC). The African Commission on Human and People's Rights held that the State of Nigeria was in violation of the African Charter on Human and People's Rights. States are supposed to take measures to ensure that the actions of MNCs operating within their respective countries, are not in violation of national and international law, and to also ensure that these actions are not in violation of human rights.

In order to ensure that their activities are sustainable and 'acceptable' in the different countries where they operate, it is imperative that the MNCs respect the rights of the communities amongst whom they operate. Host States must ensure that these corporations are held accountable in case of any violations. Particularly, these corporations must ensure that they respect the fundamental rights of individuals and respect the environmental rights in the societies amongst whom they operate. Most importantly, they respect the rights of pastoralist communities who mostly hold land in groups or communities. Respect of these rights will ensure that these corporations gain 'legitimacy,' among these communities thus granting them 'social licence' to operate in these areas.

15.7 International Policy, Legal and Institutional Frameworks

The *Agreement on Trade-Related Investment Measures* (TRIMs),[28] seeks to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members.[29] The agreement, thus, takes note of the vulnerable position which most developing countries usually are at and seeks to alleviate the situation in these countries. The agreement further provides for the importance of ensuring that transactions between corporations and states are done in a manner that is transparent.

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[26] *Ibid.*
[27] [2001] AHRLR 60 (ACHPR 2001).
[28] Marrakesh Declaration of 15 April 1994, ANNEX 1A: Multilateral Agreements on Trade in Goods, (GATT secretariat publication, Sales No. GATT/1994-7).
[29] Preamble.

The *Agreement on Trade-Related Aspects of intellectual Property Rights* (TRIPs),[30] seeks to reduce distortions and impediments to international trade, and takes into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.[31] TRIPS plays a useful role in the protection of intellectual property rights. However, it has been a subject of criticism in many African countries as it largely embodies western standards in I.P. Therefore, the agreement does not offer much protection especially to traditional knowledge, which is an important form of intellectual property in Africa.

The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,*[32] seeks to ensure that States establish mechanisms to ensure that parties to international business transactions who engage in corrupt practices are held liable for these actions. Each contracting party must thus take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.[33] This Convention has recognized that corruption plays a big role in illegal transactions and corrupt practices which are usually done at the expense of the governed and has sought to ensure that these entities are held accountable. This Convention could be very useful in ensuring that cases of corruption by MNCs often reported in developing countries are effectively dealt with, so as to ensure that the proceeds of natural resource exploitation benefit the locals. In this regard, institutions have to be established which will ensure that the MNCs are held to account for their actions.

The Convention has realized the importance of good governance in the running of MNCs and the need to ensure accountability. Accountability and transparency are said to be related principles which ensure good governance. In this regard, accountability mechanisms ensure that oversight is exercised over the actions of various entities. The broad aim of oversight is to ensure that initiatives by the government meet their planned

[30] The TRIPS Agreement, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
[31] Preamble.
[32] Dec. 18, 1997, 37 I.L.M. 1 (1998), *Convention On Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted At Paris On November 21, 1997, by a Conference Held Under The Auspices Of The Organization For Economic Cooperation And Development (OECD). Convention Signed In Paris on December 17, 1997, By the United States and 32 other Nations, adopted by the Negotiating Conference on 21 November, 1997.
[33] Art. 2.

objectives, respond to the needs of the citizenry and contribute to better governance and the reduction of poverty.[34]

The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies and ensure that confidence is built among the societies amongst whom these enterprises operate. The Guidelines are part of the *OECD Declaration on International Investment and Multinational Enterprises*, the other elements of which, relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.[35] They apply to multinational enterprises (MNEs) in all sectors, wherever they operate.

Enterprises should contribute to sustainable development, respect human rights, abstain from improper involvement in local political activities and refrain from retaliating against workers who report practices that contravene the law, the *Guidelines* or the enterprise's policies.[36] Further, they should conduct due diligence to avoid being involved in adverse impacts on matters covered by the *Guidelines*. These entities are also to endeavor to ensure that they take into consideration the views of members of the public in the governance process. All these initiatives relate to inclusion of democratic principles in the governance of MNCs. Democratic governance of MNCs is important in ensuring that there are increased levels of economic growth. The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise.[37]

The *OECD Principles of Corporate Governance*[38] are intended to assist OECD and non-OECD governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries. It seeks to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance. The Principles

[34] Ako, R. & Uddin, N., 'Good governance and resources management in Africa,' in Botchway, F. (ed), *Natural Resource Investment and Africa's Development,* (Edward Elgar Publishing, Inc., 2011), p. 25.
[35] Organisation for Economic Cooperation and Development (OECD), OECD Guidelines for Multinational Enterprises, 27, June, 2000.
[36] The Trade Union Advisory Committee to the OECD (TUAC) 2012, The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, Trade Union Guide. *op cit*, p. 2.
[37] OECD Guidelines for Multinational Enterprises, 2008.
[38] OECD, 2004.

are of importance to both traded and non-traded companies and they represent a common basis that OECD member countries consider essential for the development of good governance practices.

The United Nations Environmental Programme (UNEP) helps States cooperate to achieve agreed environmental priorities, and supports efforts to develop, implement and enforce new international environmental laws and standards.[39] UNEP observes that to achieve their environmental commitments and goals, States need strong legislative, political and judicial systems. To promote this, UNEP seeks to use its expertise in environmental policy and law to help States further develop these institutions, and enhance their ability to effectively participate in international negotiations.[40] In this regard, therefore, Multilateral Environmental Agreements (MEAs) have been formulated and they are driven at formulating guidelines to states on how to deal with transboundary hazards. Despite the fact that these guidelines are in existence, practice has shown widespreadoccurrence of non-compliance by states and non-enforcement with respect to many MEAs.[41]

The United Nations Global Compact is a call to companies everywhere to voluntarily align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of UN goals and issues.[42] The principles seek to guide the manner in which businesses are to operate and it seeks to ensure that these entities respect human rights in their operations. The UN Global Compact has largely adopted a voluntary approach to sustainability and currently has over 12,000 signatories from business and key stakeholder groups based in 145 countries.[43]

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[39] United Nations Environment Programme, Environmental Governance, *op cit*, p2. It is noteworthy that the UN Environmental Assembly of the UN Environment Programme (UNEP), has since replaced the UNEP Governing Council. During a plenary meeting on 13 March 2013, the UN General Assembly (UNGA) adopted a draft resolution that changes the UN Environment Programme (UNEP) Governing Council to the "United Nations Environment Assembly of UNEP." The resolution, contained in an Annex to the note, states that the UNGA decides to change the designation of the GC of UNEP to the United Nations Environment Assembly of UNEP. This was meant to reflect its universal character.

[40] *Ibid.*

[41] Neumayer, E., Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement, *A report for the Consumer Unity & Trust Society Jaipur, India*, p. 4, available at *http://www.lse.ac.uk/geographyandenvironment/whoswho/profiles/neumayer/pdf/cuts.pdf*[Accessed on 13/08/2014].

[42] Available *at https://www.unglobalcompact.org/* [Accessed 303/2015].

[43] The United Nations Global Compact, Background: UN Global Compact and Leaders Summit 2013, About The UN Global Compact, available at

The *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, provides guidance on the application of the "arm's length principle,"[44] which is the international consensus on transfer pricing, i.e. on the valuation, for tax purposes, of cross-border transactions between associated enterprises.[45] In a global economy, where multinational enterprises (MNEs) play a prominent role, transfer pricing is high on the agenda of tax administrators and taxpayers alike, and governments need to ensure that the taxable profits of MNEs are not artificially shifted out of their jurisdictions and that the tax base reported by MNEs in their respective countries reflect the economic activity undertaken therein.[46]

The existing international framework governing multinational corporations is, however, seen to be inadequate as the international framework largely relies on implementation by States. The problem is particularly seen where there are violations within developing countries. These countries are usually not in a position to regulate the MNCs which operate within their countries since states have trans-border limitations and thus not in a position to effectively regulate the operations of the MNCs.[47] States have also been complacent in ensuring that the MNCs are held to account for their actions. States are, thus, supposed to ensure that international norms that have been established are domesticated and ensure that any violations arising from the operations of these corporations are redressed.

http://www.unglobalcompact.org/docs/about_the_gc/UNGC_Leaders_Summit2013_Fact%20Sheet.pdf [Accessed on 13/08/2014].

[44] Notably, OECD member countries have agreed that to achieve a fair division of taxing profits and to address international double taxation, transactions between connected parties should be treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by unconnected parties. This is the arm's length principle. See H.M Revenue & Customs, INTM412040-Transfer pricing: legislation: rules: the arm's length principle, available at *http://www.hmrc.gov.uk/manuals/intmanual/intm412040.htm* [Accessed on 13/08/2014]. The arm's length principle is endorsed by the OECD and enshrined in Art. 9 (the Associated Enterprises Article) of the OECD Model Tax Convention on Income and on Capital (usually referred to as the OECD Model Treaty or Model Convention).

[45] OECD (2010), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, OECD Publishing, available *at http://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2010_tpg-2010-en* [Accessed on 13/08/2014].

[46] *Ibid.*

[47] Deva, S., "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" *Connecticut Journal of International Law*, Vol. 19, 2003, pp. 1-57.

15.8 Natural Resource Management and Multinational Corporations in Kenya

Kenya is well endowed with diverse natural resources including non-metallic minerals such as geothermal energy, soda ash, fluorspar, with the latest boosting coming from the petroleum oil discovered in Turkana. Its entrance into the extractive industries is expected to generate fiscal revenues, foreign exchange earnings and surpluses to finance much needed socio-economic development in the country.

Most of the players involved in the extractive industries are multinational companies. It is expected that these corporations are to operate in accordance with the principles of governance outlined in Article 10 of the Constitution and this includes the principle of sustainable development. Further, these entities are also to take into consideration the principle of social justice. In this regard, these entities are to ensure that the benefits accruing from the exploration of these resources are equitably shared with the members of the communities amongst whom they operate.

The benefits to be shared are usually either in monetary or non-monetary form. Kenya is also in the process of formulating the Natural Resources (Benefit Sharing) Act which seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities and; to establish the Natural Resources Benefits Sharing Authority. Benefit sharing agreements are to be entered into between the corporations seeking to conduct exploration activities with the respective counties.

The corporations involved in the extraction activities are not only supposed to focus on maximising profits, but also impact positively on the lives of the communities amongst whom they operate. Corporate Social Responsibility is, thus, an important tool that can be used by MNCs as a business tool to promote a positive image to business stakeholders, and as a way to improve the quality of life among citizens of the host countries.[48] However, the work of MNCs must go beyond CSR and be sustainable in the long run, as CSR in most cases is largely philanthropic and not anchored in law.[49]

In carrying out their functions, the various MNCs are to ensure that they operate in a manner that is sustainable. They are to ensure that their activities are socially sustainable, environmentally sustainable and economically sustainable. These three pillars of sustainability were identified by the World Commission on Environment and Development (WCED), *Our Common Future,* to be inextricably linked and deserving

[48] Pimpa, N., 'Multinational Corporations: Corporate Social Responsibility and Poverty Alleviation in Thailand,' School of Management, RMIT University.

[49] See generally, Porter, M.E. & Kramer, M.R., 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility,' *Harvard Business Review*, December, 2006.

attention by all stakeholders. The emergence and popularization of sustainable development, has led to concerted efforts by players in the private sector to integrate sustainability in their activities and operations.[50]

Further, the principle has been the subject of judicial interpretation as was the in *Case Concerning the Gabcikovo-Nagyoros Project (Hungary v Slovakia)* where Judge Weeremantry, argued that the concept of sustainable development reaffirms that there must be both development and environmental protection, and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law.[51]

Various initiatives driven at ensuring sustainability have thus been undertaken by players in the private sector. The banking industry has particularly played a key role in this and this was particularly seen in 2003 when private banks adopted the Equator Principles which enable banks to evaluate the social and environmental impacts of their actions and the risks potentially posed by projects which they finance. In addition to this, the UN Global Compact initiative was also established in 2000 with the aim of having 'a more sustainable and inclusive global economy.'[52] All these initiatives have been adopted on order to curb the ill associated with the activities of MNCs.

It is, however, important that the sustainability models adopted by MNCs be able to meet the needs of the countries where they operate. MNCs must be mindful of how they identify, define and prioritise their sustainability agenda.[53] In this regard, these entities are supposed to ensure that they take into consideration the various sustainability challenges in order to ensure that the initiatives are successful and that they do not lead to further marginalization of certain groups.

Due to the infrastructural and financial (in) capacity of the country, Kenya could only work with MNCs to achieve its dream of joining oil producing countries, and in this case Tullow oil, amongst others were contracted to carry out the work. It is hoped that Kenya and the local people will benefit from this discovery. However, the resource-curse phenomenon is very real and Kenya must not follow the steps of other countries around Africa and the world where natural resources, particularly hydrocarbons have resulted in environmental degradation and violent conflicts, ultimately leading to impoverishment and devastation of the lives of the locals. It has been rightly pointed out that governance

[50] Kariuki, F., 'Sustainability in the Financial Sector in Kenya,' Kenya Bankers Association, WPS/01/15.
[51] *Hungary v Slovakia*, 1997, WL 1168556 ICJ.
[52] United Nations Global Compact, 'The Ten Principles,' available at *www.unglobalcompact.org/abouttheGc/TheTenprinciples/index.html,* [Accessed 4/03/2015].
[53] Richardon, B., 'Africa: from object to agent of socially responsible investment' in Francis Botchway, F. (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar Publishing Limited, 2011).

issues such as weak environmental policy, resource utilization policy and fiscal policies has come to be viewed as key factors inhibiting the ability of countries to use revenues from their extractive industries for development.[54]

15.8.1 Constitution of Kenya, 2010

The Constitution of Kenya 2010 has provisions that seek to guide the operations of various entities in the country, including MNCs. Firstly, the Constitution in Article 10(1) provides for national values and principles of governance which are to bind all State organs, State officers, public officers and all persons, including legal persons.

The principle of sustainable development is particularly of importance in Kenya. Related to this principle are the principles of intragenerational equity and that of intergenerational equity. The former has been defined in Section 2 of EMCA to mean that all people within the present generation have the right to benefit equally from exploitation of the environment, and that they have an equal entitlement to a clean and healthy environment. The principle of intergenerational equity, on the other hand, asserts that all generations hold the natural environment of our planet in common with other species, people, and with past, present and future generations.[55]

In Kenya, the two principles have received constitutional recognition in Article 60(1) which provides for the principles of land holding, stating that land in the country is to be held in a manner that is *inter alia* equitable, efficient, productive and sustainable. The government has a mandate of ensuring that investments made on land benefit members of the community and Parliament is mandated to enact legislation ensuring that investment in property benefits local communities and their economies.[56] In this regard, mechanisms are supposed to be put in place to ensure that there is benefit-sharing with the local communities.

The Constitution further seeks to ensure that entities or persons who are not citizens, including MNCs, are to hold land for a limited period of time (99 years) and that they are only to hold land under leasehold tenure.[57] This is meant to ensure sustainable land utilisation and that the leases are able to take future land needs into consideration. Article 42 further provides for the right to a clean and healthy environment which includes

[54] Obati, G.O. & Owuor, G., 'Extractive Industries, Natural Resources Management and Sustainable Development: a Review', August, 2010, p. 1,
available at *www.sap4africa.net/.../EI_NRM_and_Sustainable_Development_August* [Accessed on 14/08/2014].
[55] Muigua, K. & Kariuki, F., 'Sustainable Development and Equity in the Kenyan Context' UNLJ, Vol. 7(1), 2012.
[56] Art. 66(2).
[57] Art. 65 (1).

the right to have the environment protected for the benefit of present and future generations. The government is to undertake legislative measures to ensure the protection of the environment and ensure communities are able to benefit from the activities undertaken in their environments.

Further, the Constitution creates an obligation on all persons to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[58] A 'person' has been defined in the Constitution to include a company, association or other body of persons whether incorporated or unincorporated.[59] In this regard, the MNCs are also under an obligation to ensure the protection and respect of the environment. These corporations can also be held liable for the violation of human rights as the provisions of the Bill of Rights binds State organs and persons.[60] The Constitution requires Parliament to enact legislation to: ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.[61]

Noteworthy are the obligations of the State regarding the environment. The Constitution outlines them as including the obligation to, *inter alia*: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities and; encourage public participation in the management, protection and conservation of the environment..[62]

The Constitution provides that a transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and is entered into on or after the effective date.[63] The foregoing constitutional provisions lay a basis for other legislation to be enacted in the country to govern investments by MNCs in the country.

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[58] Art.69 (2).
[59] Art.260.
[60] Art.20 (1).
[61]Art. 11(3).
[62] Art. 69(1).
[63] Art. 71, Constitution of Kenya. Art. 260 thereof defines natural resources to mean the physical non-human factors and components, whether renewable or non-renewable, including—sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy.

15.8.2 The Petroleum (Exploration and Production) Act

The *Petroleum (Exploration and Production) Act*[64] is an Act of Parliament to regulate the negotiation and conclusion by the Government of petroleum agreements relating to the exploration for, development, production and transportation of, petroleum and for connected purposes.[65] "Petroleum" is a broad term that is used to mean mineral oil and includes crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.[66] The Act vests all petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other person.[67] The Act empowers the Minister (now Cabinet Secretary) to, on behalf of the Government, negotiate, enter into and sign petroleum agreements with a contractor and petroleum agreements must, subject to the provisions of this Act, be in the prescribed form.[68]

The Government is to enter into petroleum agreements only with contractors who have the financial ability, technical competence and professional skills necessary to fulfill the obligations under the petroleum agreement.[69] The Act also provides for the general terms and conditions of petroleum agreements, which notwithstanding any other written law and subject to this Act, shall be implied in every petroleum agreement an obligation on the contractor.[70] Any petroleum agreement must be negotiated on the basis of the model production sharing contract substantially in the form set out in the Schedule.[71] Missing from the general terms and conditions of petroleum agreements provided under the Act, is the implied requirement to preserve and clean the environment. Public participation as required by the Constitution of Kenya 2010 is also missing from the Act as a whole. There is also no express requirement for benefit sharing under the Act.

15.8.3 Land Act, 2012

The *Land Act*, 2012,[72] is an Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the

[64] Cap. 308, Laws of Kenya.
[65] Preamble.
[66] S. 2.
[67] S. 3.
[68] S. 5.
[69] S. 8.
[70] S. 9.
[71] *Petroleum (Exploration and Production) Regulations*, 1984 [L.N. 193/1984.], Regulations under S.6.
[72] No. 6 of 2012, Laws of Kenya.

sustainable administration and management of land and land based resources, and for connected purposes.[73] The Act also provides for allocation of public land by the National Land Commission and states that subject to the Constitution and any other law, the Commission may, in consultation with the national and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the *Vienna Convention on Diplomatic Relations*.[74] The Act goes further to state that at the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be.[75]

15.8.4 The Wildlife Conservation and Management Act, 2013[76]

This Act provides for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.[77] Under the Act, the Kenya Wildlife Service is established with functions which include, *inter alia*, promoting or undertaking commercial and other activities for the purpose of achieving sustainable wildlife conservation.[78] The Act has made attempts to provide for the regulation of wildlife dealings connected to bio-piracy[79] and bio-prospecting.[80] For one to undertake such activities, the Act provides that such persons must obtain a permit from the Cabinet Secretary.

Certain considerations are to be taken into account before granting the permit and these include; ensuring that the interest of all stakeholders, both public and private is taken into account and that the interests of communities amongst whom these resources are found is protected. There are certain prerequisites before a person is granted a licence. An applicant for the licence has to disclose all material information relating to the relevant bio-prospecting and on the basis of that disclosure has obtained the prior consent of the

[73] Preamble.
[74] S. 12(5).
[75] S. 12(6).
[76] No. 47 of 2013, Laws of Kenya.
[77] Preamble.
[78] S. 7.
[79] S. 3 of the Act defines bio-piracy to mean the exploration of biological resources without the knowledge and non-coercive prior consent of the owners of the resources and without fair compensation and benefit sharing.
[80] S. 3 of the Act defines bio-prospecting to mean the exploration of biodiversity for commercially valuable genetic and biochemical resources. This definition echoes that offered by the Convention on Biological Diversity (CBD) Secretariat which defines bioprospecting as 'the exploration of biodiversity for commercially valuable genetic and biochemical resources,' [UNEP/CBD/COP/5/INF/7].

stakeholders for the provision of or access to such resources. The applicant must also disclose any benefit-sharing arrangements that have been proposed by the stakeholders.[81]

The Act states that the Service shall, in all bio-prospecting involving any wildlife resources, be a joint partner on behalf of the people of Kenya.[82] In what may be seen as a move to strengthen the Service's work, the Act states gives the Cabinet Secretary the mandate, on the recommendation of the Service, to require that a particular per centum of the proceeds from the bio-prospecting be contributed to the Wildlife Endowment Fund,[83] established under the Act.[84] In establishing conservation measures, it is required that the provisions of this Act are to be in line with those of EMCA.[85]

Section 27 of this Act is of great significance as it provides that no user rights or other licence or permit granted under this Act shall exempt a person from complying with any other written law concerning the conservation and protection of the environment.[86] Subsequently, before one is granted user rights over a certain natural resource, they have to ensure that they are in compliance with the requisite environmental impact assessment studies.[87]

The Act has further mandated the county governments with the management of resources, such as national reserves within their jurisdictions and the county governments have been authorized to enter into agreements on the management of the national reserves, and the management plans formulated should include provisions for the resolution of disputes that may arise from conflicts on these resources.[88] The foregoing provisions are useful in preventing recurrence of bio-prospecting and bio-piracy cases such as the Lake Bogoria extremophile case, where Kenya Wildlife Service sought money from a multinational for taking, patenting, cloning and selling "extremophile" microorganisms collected from lakes in Kenya.

In the late 1980s, scientists connected to Leicester University (UK) collected microorganisms living in the hot geysers of two of Kenya's lakes. The organisms produce enzymes that were found to be great fabric softeners and "faders," giving fabrics a stone-washed appearance popular with consumers.[89] With assistance from scientists at the

[81] S. 22(4).
[82] S. 22(6).
[83] See s. 23.
[84] S. 22(7).
[85] S. 26.
[86] S. 27(1).
[87] S. 27(2).
[88] S. 35(3).
[89] Heuer, S., 'The Lake Bogoria Extremophile: A Case Study,' 2004, pp. 8-9, available at *http://www.public.iastate.edu/~ethics/LakeBogoria.pdf* [Accessed on 14/08/2014].

International Centre of Insect Physiology and Ecology (ICIPE), KWS launched a claim for a share of the proceeds accruing to the US multinational giant Procter & Gamble and to Genencor International BV of the Netherlands with respect to the sales of Tide Alternative Bleach Detergent and "stonewashing" material.[90]

Kenya Wildlife Service maintains that the collectors never had the proper permits to take the microorganisms for commercial use in the first place. The Kenya Wildlife Service (KWS) sought a share of the hundreds of millions of dollars generated from the sales of the popular detergent and a bleaching agent manufactured in the US whose active ingredients were acquired in Kenya illegally. The case has not yet been resolved and it is yet to be seen what will become of it.

The most serious legal issue facing bioprospecting in the global commons, areas beyond national jurisdiction internationally recognised as the shared resources of humankind, is the lack of clear rules and guidelines, since various environmental, trade, and geographically-specific agreements currently offer incomplete, ambiguous, or conflicting provisions relating to bioprospecting activities; resulting in no clear rules on ownership, access, benefit-sharing, and environmental responsibility for bioprospecting in the global commons. The result of lack of clarity and distinct gaps in the existing laws encourages bioprospecting by companies keen to exploit the fragmented legal frameworks and policies for their own commercial benefit.[91] Going by the foregoing provisions, it is hoped that the Act may enable Kenya effectively deal with such incidences in future, at least at the national level. However, there is required much political goodwill to see this fully implemented.

15.8.5 Mining Act

The *Mining Act*[92] is an Act of Parliament to consolidate the law relating to mining. However, the Act does not confer any right to prospect for or to win any mineral oil.[93] The Act vests in the government all unextracted minerals (other than common minerals) under or upon any land, subject to any rights in respect thereof which, by or under this Act or any other written law, have been or are granted, or recognized as being vested, in any other person.[94] The Act states that except as provided in law any person who prospects

[90] *Ibid.*
[91] United Nations Environment Programme, 'Bioprospecting in the Global Commons: Legal Issues Brief,' p. 1, available at *http://www.unep.org/delc/Portals/119/Biosprecting-Issuepaper.pdf* [Accessed on 23/08/2014].
[92] Cap. 306, Laws of Kenya. Revised Edition 2012 [1987].
[93] S. 3.
[94] S.4.

or mines on any land in Kenya is guilty of an offence and liable to a fine of two thousand shillings or to imprisonment for a term not exceeding six months and to the forfeiture of all minerals obtained in the course of such unauthorized prospecting or mining, or, if such minerals cannot be forfeited, to the payment to the government of such sum as the Court assesses as the value of such minerals.[95] This penalty is not in any way punitive to discourage illegal mining or prospecting especially by foreigners. For one to deal in minerals, the Act requires one to obtain relevant permits and be granted prospecting rights. They must also pay royalties to the government.[96] The Act also allows the Commissioner to grant an exclusive prospecting licence to any person who holds a prospecting right or to any person, company, body of persons or partnership whose agent is the holder of a prospecting right issued to him as such agent.

This Act needs to be reviewed to bring it into conformity with the constitutional principles in the management of natural resources, and the national values and principles of governance.

15.8.6 The Environmental (Management and Co-Ordination) Act, 1999

The *Environmental (Management and Co-Ordination) Act*, 1999[97] was enacted to provide the framework provisions to regulate access to genetic resources (bio-prospecting) and benefit sharing, implemented through gazettement of *Ministerial Regulations on Access to Genetic Resources and Benefit Sharing,*[98] and generally providing for the establishment of an appropriate legal and institutional framework for the management of the environment.

Section 3(1) thereof states that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may take such orders, issue such writs or give such directions, as it may deem appropriate to, *inter alia*, prevent, stop or discontinue any act or omission that is deleterious to the environment; compel any public officer; to take measures to prevent or discontinue any act or omission deleterious to the environment; require that any on-going activity be subjected to an environmental audit in accordance

[95] S. 6.
[96] SS. 12, 13.
[97] No. 8 of 1999, Laws of Kenya.
[98] Legal Notice number 160.

with the provisions of this Act; compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and provide compensation for any victims of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing. Unless these issues are sufficiently addressed, Kenya and its people risk suffering both in the short-term and long-term in the hands of MNCs.

15.9 Regulating MNCs

The Regulation of multinational companies operating in developing countries, presents difficulties especially with regard to extractive industries. Scholars have pointed out that demands for greater regulation have been met with demands for stronger protection. In fact, corporations have been expected to pursue more active strategies to achieve sustainable solutions to social and environmental problems, make a major contribution to development, take account of their impact on society and the environment in the ways that they do business, employ environmentally sensitive facilities; product design and production methods that reduce energy consumption and control emissions and active participation in social and humanitarian projects.[99]

However, this has not always been the case since the MNCs have put forth a list of demands in countries where they operate. For instance, in Kenya, it has been noted that after independence, most MNCs entering Kenya were interested in import substitution rather than in export production, and they produced final consumer goods rather than intermediate capital goods. In the negotiations that preceded their entry, they demanded from the Kenya government import barriers and market protection.[100]

MNCs operating in Kenya are required to operate within the legal structure that has been established and this includes the international legal frameworks that the country is party to. Other stakeholders like the civil society play a big role in ensuring that these corporations are held accountable. In this regard, the pressures from these entities have had positive results and it can be seen that most of the MNCs have adopted sustainable practices.

In cases of violation of their obligations, the MNCs are to be held liable and this ensures that these entities are able to comply with their obligations. Challenges however

[99] Haugh, H.M. & Talwar, A., "How Do Corporations Embed Sustainability across the Organization?" *Academy of Management Learning & Education*, Vol. 9(3), pp.384–396.
[100] Jansen, K., "Multinational Corporations in the Political Economy of Kenya by Steven W. Langdon," *The Journal of Developing Areas*, Vol. 17, No.4, Jul., 1983, pp. 526-528, p. 52.

usually arise in the enforcement of liability since most of these entities are not usually incorporated in Kenya. In this regard, even where judgment is entered against these entities, enforcement becomes difficult and further worsened when these entities remove their assets from the jurisdiction.

The investment agreements between MNCs and governments have been one-sided, governments give foreign companies rights without imposing responsibilities, or without even facilitating their ability to ensure that the MNCs live up to their obligations.[101] Corporations' limited liability and corporate personhood rights, must be eliminated, and they should no longer have the same rights as human beings, and should instead serve the public. Holding shareholders accountable for any harm caused to the community, employees or the environment would create socially responsible business models.[102]

In Kenya, the legal framework governing the operations of MNCs is scattered in different laws with the Constitution laying the basis for this. As discussed in the preceding sections, the Constitution contains provisions meant at ensuring that these entities respect the rights of the people amongst whom they operate. Further, the Constitution has provided in Article 20 that the provisions of the Bill of Rights are applicable to all persons, including private persons. In this regard, a person claiming that their rights have been violated by these private entities can seek the enforcement of their rights in a court of law.

Several Acts of Parliament have also been enacted to provide for the manner in which these entities are to operate. Firstly, the Investment Promotions Act, 2004 (the IPA) seeks to encourage investment in the country and ensure the elimination of bureaucratic red-tapes which are usually faced by investors in the country. Under the Act, the Kenya Investments Authority is established and tasked with the implementation of the goals of the IPA.

In order to eliminate illegal transactions by the MNCs, the Central Bank of Kenya Act (Cap 491) provides that any payments to be made outside the country by these entities must be effected through a bank that has been authorized by the CBK to ensure accountability in the transactions effected by these entities.

The Natural Resources Benefit Sharing Bill, 2014 provides for offences that an organisation can be held liable for. An organisation which fails to furnish information that is required by the Benefit Sharing Authority under the Act or which furnishes wrongful information commits an offence and is liable for a fine. This provision seeks to ensure that the officers tasked with managing these organisations are held accountable for their actions and seeks to ensure integrity in their actions.

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[101] *Ibid*, p. 473.
[102] Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' *op cit.*

In order to ensure compliance with environmental regulations, EMCA provides that environmental inspections are to be conducted. In this regard, these inspections are to be conducted to determine whether corporations are in compliance with environmental requirements. The Act has thus prohibited any person from hindering or obstructing environmental inspectors in the exercise of their duties under the Act or regulations made thereunder.[103] Under the Act, it is also required that corporations carry out improvements recommended by the environmental inspector and ensure that they comply with the environmental standards that have been provided. This Act thus ensures that corporations are held accountable for any harm that they occasion on the environment and that corrective measures are adopted in case of violation.

The foregoing discussions reveal the fact that the legislation regulating MNCs are to be found in various legislations enacted in the country. The fact that the provisions regulating MNCs in the country are scattered in different legislations makes it difficult for these provisions to be effectively enforced and as such MNCs can easily evade liability in cases where they are in violation of their obligations. There exists loopholes in the national legal frameworks, and there is need to establish legally binding framework to ensure that they operate in a socially responsible manner to protect local communities and the environment.

15.9.1 Human Rights-Based Approach to Natural Resources Governance

The *Declaration on a Human Rights-Based Approach to Natural Resources Management*[104] which was adopted in preparation to the Rio+20 Summit in March, 2012 affirmed the interdependence between human and economic development as well as the integral nature of the earth, our home.[105] Also noteworthy, is the *1992 Rio Declaration* which places "*human beings at the centre of concerns for sustainable development, and are entitled to a healthy and productive life in harmony with nature*." The right to a healthy environment is a human right recognized and protected by the *International Covenant on Economic, Social and Cultural Rights,* as well as in the jurisprudence of a number of national legislations, including Kenya's.[106] According to the OECD Principles of Corporate Governance, Enterprises should respect human rights. They should have a human rights policy, conduct human rights due diligence and have legitimate processes

[103] EMCA, S.137 (a).
[104] Inter-American Commission on Human Rights and African Commission on Human and People's Rights.
[105] Preamble.
[106] See Art. 42 & 43, Constitution of Kenya, 2010.

in place for remedying actual adverse impacts where they have *caused* or *contributed to* those impacts.[107]

The Constitution of Kenya 2010, states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Further, it states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[108] Article 10 provides the national values and principles of governance which include, *inter alia*, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development. Read together, the foregoing constitutional provisions bind even MNCs. While engaging in natural resource exploitation they are to observe human rights.[109] Natural resources can be used to jump-start economies and invest in the infrastructure, institutions, and quality public services needed to translate growth into human development, if managed in transparent, inclusive, and sustainable ways.[110]

15.9.2 Sustainability Reporting

Sustainability reporting has emerged as a common practice of 21st-century business, in that whereas sustainability disclosure was the province of a few unusually green or community-oriented companies, today it is a best practice employed by companies worldwide.[111] Further, a focus on sustainability helps organizations manage their social and environmental impacts and improve operating efficiency and natural resource stewardship, and it remains a vital component of shareholder, employee, and

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[107] The Trade Union Advisory Committee to the OECD (TUAC) 2012, The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, Trade Union Guide, p. 2,
available at *http://www.tuacoecdmneguidelines.org/Docs/TradeUnionGuide.pdf*[Accessed on 14/08/2014].
[108] Art. 19.
[109] Art. 20(1) state that 'the Bill of Rights applies to all law and binds all State organs and all persons.'
[110] Grynspan, R., "The role of natural resources in promoting sustainable development," Remarks for Rebeca Grynspan, Associate Administrator of UNDP on the occasion of the Opening of the 67th UN General Assembly side event on "The Role of Natural Resources in Promoting Sustainable Development" UN New York, 28 September, 2012, available at
http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/09/28/rebeca-grynspan-the-role-of-natural-resources-in-promoting-sustainable-development-/ [Accessed on 14/08/2014].
[111] Ernst & Young Global Limited, 'The Value of Sustainability Reporting,' available at *http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/Value-of-sustainability* [Accessed on 13/08/2014].

stakeholder relations.[112] Indeed, sustainability reporting has been linked to a number of benefits including: better reputation; meeting the expectations of employees; improved access to capital; and increased efficiency and waste reduction.[113]

Sustainability reporting provides firms with the knowledge necessary to reduce their use of natural resources, increase efficiency and improve their operational performance. In addition, sustainability reporting can prepare firms to avoid or mitigate environmental and social risks that might have material financial impacts on their business, while delivering better business, social, environmental and financial value — creating a virtuous circle.[114] For reporting to be as useful as possible for managers, executives, analysts, shareholders and stakeholders, a unified standard that allows reports to be quickly assessed, fairly judged and simply compared is a critical asset. As firms worldwide have embraced sustainability reporting, the most widely adopted framework has been the Global Reporting Initiative (GRI) Sustainability Reporting Framework.

15.9.3 Environmental Litigation

Environmental litigation often transcends national jurisdictions, and it has been asserted that there is need for more effective national and international dispute settlement systems for resolving conflicts.[115] Judges, public prosecutors and auditors have the responsibility to emphasize the necessity of law to achieve sustainable development and help make institutions effective.[116] In a Congress organized by UNEP, Chief Justices from around the world declared that States should cooperate to build and support the capacity of courts and tribunals, as well as prosecutors, auditors and other related stakeholders at the national, sub-regional and regional levels, to implement environmental law, and to facilitate exchanges of best practices in order to achieve environmental sustainability by encouraging relevant institutions, such as judicial institutes, to provide continuing education.[117]

They further stated that environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law, predicated on: fair, clear and implementable environmental laws; public participation in decision-making, and access to justice and information, in accordance

[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] UNEP, Advancing Justice, Governance And Law For Environmental Sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General, 2004, Declaration No. 1.
[116] *Ibid.*
[117] *Ibid.*

with Principle 10 of the *Rio Declaration*, including exploring the potential value of borrowing provisions from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (*Aarhus Convention*) in this regard; accountability and integrity of institutions and decision makers, including through the active engagement of environmental auditing and enforcement institutions; clear and coordinated mandates and roles; accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies; recognition of the relationship between human rights and the environment; and specific criteria for the interpretation of environmental law.[118]

In addition to this, they declared that environmental sustainability, can only be achieved if there exist effective legal regimes, coupled with effective implementation and accessible legal procedures, including with regard to *locus standi* and collective access to justice, and a supporting legal and institutional framework and applicable principles from all world legal traditions. Justice, including participatory decision-making and the protection of vulnerable groups from disproportionate negative environmental impacts, must be seen as an intrinsic element of environmental sustainability.[119]

In the *Endorois* case, the African Commission on Human Rights interpreted the right to property as including a justiciable right to the use of land by an indigenous community without real title.[120] The Commission laid down more detailed requirements for the justification of encroachment upon property. It examined the justifiability of the state's eviction of the Endorois from their ancestral land against the criteria of proportionality, participation, consent, compensation and prior impact assessment basically derived from Article 14 of the African Charter.[121] It found the state in violation of the right to property, as well as the right to development for its 'disproportionate' forced removal of the community, its failure to allow effective participation or hold prior consultation with a view to secure the consent of the Endorois, the absence of reasonable benefit enjoyed by the community, the failure to provide collective land of equal value or compensation after dispossession, and the failure to conduct prior environmental and social impact assessment.[122] Well implemented, the recommendations contemplated by

[118] *Ibid*, Declaration 2.
[119] *Ibid*.
[120] *Centre for Minority Rights Development & Others v Kenya* (2009), AHRLR 75 (ACHPR 2009) (*Endorois* case), para. 287.
[121] *Ibid*, para. 218 & 224-228.
[122] *Ibid*, para. 238 & 281-298.

the Declaration can go a long way in empowering the national courts and international legal institutions to enforce laws against MNCs.

15.10 Conclusion

Transnational corporations are capable of taking a more proactive role in environmental protection due to their financial, managerial and technological strength; the latter includes access to clean technologies and pollution-abatement technology.[123] They must be closely monitored by law and policy enforcers to ensure that they abide by the law and fulfill their obligations as per the law and the agreements.[124] However, it is to be appreciated, as already noted herein, that host governments especially in developing countries, in their dealings with the multinationals are in a very weak bargaining position, and this is ultimately reflected in the terms of mining and petroleum agreements, particularly the ones directly touching on the fiscal regime.

Foreign direct investment is of assistance for economic growth. However, taking full advantage of the benefits of FDI requires a well-educated labor force, to promote technological diffusion and the adoption of better technologies.[125] The same applies to the development of natural resources. Here too, it is beneficial to have a high level of human capital,[126] to allow for innovation to take place, starting in the natural resources sector and spreading downstream or to other sectors.[127] An economy with strong institutions and protection of property rights is the best incentive for FDI.[128]

Geographical proximity and cultural affinity are thought to give regional MNCs an advantage in terms of familiarity with the operational environment and business needs in

[123] Gafaru, A.A., Are Multinational Corporations Compatible With Sustainable Development? The Experience of Developing Countries, Georgia Tech Center for International Business Education and Research, Working Paper Series 2007-2008, *Working Paper*, 001-07/08, p. 12.

[124] Looking at the role of MNCs in host countries, the UNCTAD report notes that 'through their foreign investments and global value chains, TNCs can influence the social and environmental practices of businesses worldwide for the better, although there is uneven application and a lack of standardization regarding reporting' (p. cxxxvi). The need, stresses the report, is for the promotion of investment to be tied to CSR standards, not with one impeding the other. In this regard the role of government policies and institutional frameworks is seen as pivotal by the reports' authors.

[125] See generally, Javorcik, B.S., 'Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers through Backward Linkages,' *The American Economic Review*, Vol. 94(3), Jun., 2004, pp. 605-627.

[126] See Gregorio, J.D., The Role Of Foreign Direct Investment And Natural Resources In Economic Development, Central Bank of Chile, Working Papers, N° 196, Enero 2003, p. 12.,; See also Borensztein, E., *et al*, 'How does foreign direct investment affect economic growth?' *Journal of International Economics*, Vol.45 (1)1 June 1998, pp. 115–135.

[127] *Ibid*, p. 12.

[128] *Ibid*, p. 13.

the host country. From the host country's point of view, developing country MNCs are seen as likely to be in possession of more appropriate technologies, with a greater potential for technology transfer – and better able to address the needs of local consumers, especially the poor.[129] Good environmental governance should take into account the role of all actors that affect the environment. From governments, to NGOs, the private sector and civil society, cooperation is critical to achieving effective governance that can help move towards a more sustainable future.[130]

Multinational Corporations should operate within the rule of law as envisaged by the Constitution of Kenya and respect the previously mentioned values and principles.

[129] Obuah, E.E. (ed), 'The Sub-Saharan Business Environment Report (SABER): 2011 Findings', *International Academy of African Business and Development (IAABD)*, Vol. 13, pp. 186-206, p. 201, (Peer-Reviewed Proceedings of the 13rd Annual International Conference), held at Mazagan Beach Resort 2400 El Jadida, Casablanca, Morocco, May 15-19, 2012,
available at
http://www.clas.ufl.edu/users/aspring/publications/Spring_2012_2012IAABD_SABER_Findings.pdf[Accessed on 13/08/2014].

[130] United Nations Environment Programme, *Environmental Governance*, *op. cit* p. 2; See also Art. 10, Constitution of Kenya.

Chapter Sixteen

Natural Resources and Conflict Management

16.1 Introduction

This chapter examines the various approaches to the management of natural resource based conflicts in Kenya with a view to determining their efficacy in achieving environmental justice for the Kenyan people. The discussion focuses on the legal and institutional frameworks at the international, regional and national level. Further, the chapter highlights the need for prompt and effective management of natural resource based conflicts.

16.2 Conflicts and Disputes

Conflicts arise due to issues about values which are non-negotiable.[1]They arise due to non-fulfillment of needs and values that are shared by the parties and are inherent in all human beings.[2]It is arguable that most of the conflicts arise out of feelings of injustice being perpetrated. It has been posited that the desire for justice, and in this context, environmental justice, is one that people tend to be unwilling to compromise with assertions of injustice often leading to intractable conflicts as well, with an individual's sense of justice being connected to the norms, rights, and entitlements that are thought to underlie decent human treatment.[3]If not well addressed, such feelings of dissatisfaction may result in conflicts.

On the other hand, a dispute refers to issues or interests that are finite and divisible can therefore be negotiated. A dispute can be interest- based, rights-based or power-based. Interest-based disputes are best addressed through negotiation and mediation, rights-based disputes through litigation while power-based disputes are addressed through *inter alia*, use of force, threats and violence.

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[1] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

[2] *Ibid*. See also Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32(2), May, 1995, p.152-153; Muigua, K., *Resolving Conflicts through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter Four, pp.56-65.

[3] Maiese, M., "Causes of Disputes and Conflicts," in Guy Burgess, G. & Burgess, H. (eds), *Beyond Intractability*, Conflict Research Consortium, University of Colorado, Boulder; See also generally Okidi C.O., *et al* (Eds), *Environmental Governance in Kenya*, (East African Educational Publishers Ltd., Nairobi, 2008).Posted: October 2003 <*http://www.beyondintractability.org/essay/underlying-causes*>.[Accessed on 09/08/2014].

16.3 Settlement and Resolution Mechanisms

Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.[4] Settlement is considered to be power-based in that the outcome majorly relies on the power that is possessed by the parties to the conflict. Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. Settlement practices fail to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Thus, the real causes of conflict remain unaddressed with possibilities of erupting in future.[5]Dispute settlement mechanisms remain highly coercive allowing parties limited or no autonomy. To this end, settlement mechanisms may not therefore be very effective in facilitating satisfactory management of natural resource based conflicts. The main dispute settlement mechanisms are litigation or judicial settlement and arbitration.[6]

Conflict resolution refers to a process where the outcome is based on mutual problem-sharing with the conflicting parties cooperating in order to redefine their conflict and their relationship.[7]Resolution is non-power based and non-coercive thus enabling it achieve mutual satisfaction of needs without relying on the parties' power.[8]A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.[9]

This outcome is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and it is also not zero-sum since gain by one party does not mean loss by the other; each party's needs are fulfilled.[10] Such needs cannot be bargained or fulfilled through coercion and power. These advantages make resolution potentially superior to settlement. Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation. It is, therefore, arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, each of the two approaches has their own

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[4] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland," *op cit,* p.152.

[5] Fetherston, A.B., "From Conflict Resolution to Transformative Peace building: Reflections from Croatia," *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4*,April, 2000, pp. 6-8; See also generally Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D. Thesis, 2011, *Unpublished,* University of Nairobi.

[6] See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, *op cit.*

[7] Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op cit,* p. 153.

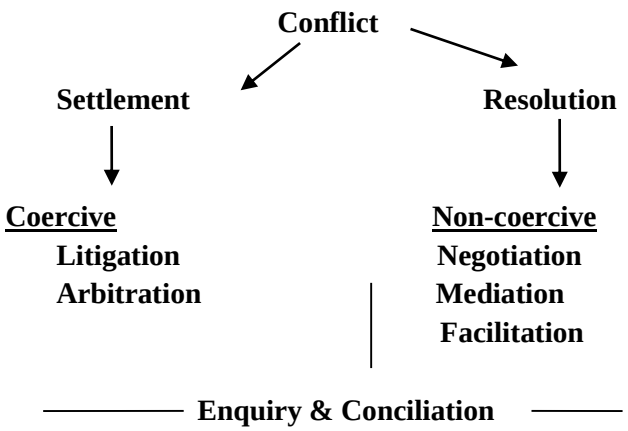
[8] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, available at *http://www.beyondintractability.org/bi-essay/culture-of-mediation* [Accessed on 08th March, 2014].

[9] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, *op cit,* p. 42.

[10] See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, *op cit.*

distinct advantages thus making them complementary of each other. For realisation of environmental justice and democracy, there is need to ensure that the two are engaged effectively where applicable.

Fig. 5.0: **Methods of Conflict Management**



*Source: Muigua, K., *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), p. 64.

16.4 Overview of ADR Mechanisms

16.4.1 Negotiation

Negotiation is the process where the parties to the conflict meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. Negotiation has been argued to be the most efficient ADR conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most conflicts.[11]Negotiation is also advantageous in that it focuses on the common interests of the parties rather than their relative power or position. It also shifts the focus on how the conflict arose and focuses on creating options that satisfy both the mutual and individual interests.[12]

[11] Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance for Government Departments and Agencies*, May, 2011, available at *http://www.justice.gov.uk/downloads/courts/mediation* [Accessed on 27/04/2013]; See also Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, p. 8, available at *http://www.chuitech.com/kmco/attachments/article/101/pdf*

[12] Muigua K., '*Resolving Conflicts Through Mediation in Kenya,'* 2012, p. 11, *op cit*.

Negotiation leads to mediation when the conflicting parties fail to resolve their differences and invite a neutral third party who facilitates the process.

16.4.2 Mediation

Mediation in the political process is a voluntary, informal, consensual, strictly confidential and non-binding conflict resolution process where a neutral third party helps the parties to reach a negotiated solution.

16.4.3 Problem solving facilitation

Problem solving facilitation is a process that focuses on improving the flow of information within a group or among disputing parties. The facilitator provides procedural direction to enable the group to effectively move through negotiation and finally reach an agreement.

16.4.4 Merits of ADR Mechanisms

Negotiation, problem solving facilitation and mediation processes have been associated with several advantages including voluntariness, cost effectiveness, informality, focus on interests and not rights, allowing for creative solutions, allowing for personal empowerment, enhancing party control, addressing the root causes of the conflict, non-coerciveness and enduring outcomes. These attributes make the above processes lead to a resolution as against to a settlement and thus desirable to resolve natural resource conflicts. Perhaps with the exception of arbitration, most of the other ADR mechanisms empower parties to the conflict to reach resolution resulting in win-win situations instead of the winner take all which is the prevalent feature of litigation. Arbitration as one of the dispute settlement mechanisms under ADR may not be very effective in the management of natural resource conflicts since it leads to a settlement rather than a resolution and this leaves a possibility of future recurrence of the disputes which may even come in higher magnitude and be of a more serious nature.

ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement.[13] Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.[14]In litigation the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or

[13] Muigua, K., *Resolving Conflicts Through Mediation in Kenya,* 2012, *op cit*, pp79- 88.
[14] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution," *op cit.*

even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve conflicts where relationships matter.

16.4.5 Demerits of ADR Mechanisms

Although the ADR mechanisms are lauded as having all the above advantages, they have also been associated with a number of disadvantages. ADR mechanisms have been criticised on the premises that: There is imbalance of power between the parties; There is absence of authority to consent (especially when dealing with aggrieved groups of people); ADR presupposes the lack of a foundation for continuing judicial involvement; and Adjudication promotes justice rather than peace, which is a key goal in ADR.[15]It is thus argued that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.[16]

Regardless of the type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it is arguable that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.[17] There is also the demerit that most of the mechanisms under ADR that are non-binding, voluntary in nature and mostly rely on the goodwill of the parties and any withdrawal of such goodwill might result in collapse of such a process.

Contrary to ADR, adjudication through court is usually based on law, rules and regulations provided for, which results in consistent decisions based on law and precedents; Parties are bound by the decision of the court, which can be enforced; Court decisions are appealable and errors can be corrected, reviewed or reversed by the appellate courts.[18] However, going by its advantages, there is a good and positive case for ADR mechanisms as to warrant their synergetic application alongside litigation, in management of natural resource based conflicts in Kenya.

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[15] Owen Fiss, 'Against Settlement', *Yale Law Journal*, Vol. 93, 1984, pp. 1073-1090, p. 1073,
[16] *Ibid.*
[17] Abadi, S.H., The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, *Effectius Newsletter*, Issue 13, (Effectius: Effective Justice Solutions, 2011), p. 3, available at
http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theroleofdisputeresolutionmechanisms
[18] Surridge & Beecheno, *Arbitration/ADR versus Litigation*, *op cit*.

16.5 Natural Resource-Based Conflicts

Natural resources form an integral part of society the world all over, as sources of income, industry, and identity. Developing countries tend to be more dependent on natural resources as their primary source of income, and many individuals depend on these resources for their livelihoods. It is estimated that half of the world's population remains directly tied to local natural resources; many rural communities depend upon agriculture, fisheries, minerals, and timber as their main sources of income.[19] Local communities also usually derive numerous benefits (both direct and indirect) from the natural resources found within their localities.

From the foregoing, it is important to note that conflicts related to natural resources are inevitable. Natural resource based conflicts have been defined as disagreements or disputes that arise with regard to the use, access and management of natural resources.[20] Natural resource conflicts have also been defined as situations where the allocation, management, or use of natural resources results in: violence; human rights abuses; or denial of access to natural resources to an extent that significantly diminishes human welfare.[21] This definition offers a wider scope and understanding of the effects of conflicts especially in relation to environmental justice. It is worth noting that these conflicts arise either directly or indirectly from the use of natural resources.[22]

These conflicts often arise from the different uses for such resources such as forests, water, pastures and land, or the desire to manage them in different ways. It has been observed that environmental factors are rarely, if ever, the sole cause of violent conflict. However, the exploitation of natural resources and related environmental stresses can be implicated in all phases of the conflict cycle, from contributing to the outbreak and perpetuation of violence to undermining prospects for peace.[23] The continued change in climatic conditions which in some areas is attributable to the natural resource extraction activities undertaken have in the recent past been a major source of conflicts among the

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[19] United States of Institute of Peace, 'Natural Resources, Conflict, and Conflict Resolution', *A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors*, Washington D.C, p. 6, available at *http://www.usip.org/sites/default/files/file/08sg.pdf[*Accessed on 10/08/2014].

[20] FAO, 'Conflict and Natural Resource Management,' p. 1, available at *http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf* [Accessed on 09/08/2014].

[21] United States Agency for International Development (USAID), 'Conflict Over Natural Resources at the Community Level in Nepal Including Its Relation to Armed Conflict,' May 2006, p. 1.Available at *pdf.usaid.gov/pdf_docs/PNADF990.pdf* [Accessed on 28/08/2014].

[22] In a United Nations report titled 'Linking Environment and Conflict Prevention: The Role of United Nations', three types of environmental related conflicts are identifiable. These are: indirect use 'resource curse' type; direct use 'local and regional resource' type; and complex conflict 'hot spots'.

[23] United Nations Environment Programme, 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment,' p. 5.
Available at *http://www.unep.org/Themes/Freshwater/PDF/FromConflict_to_Peacbuilding.pdf*[Accessed on 10/08/2014].

communities living in these areas. Disagreements also arise when these interests and needs are incompatible, or when the priorities of some user groups are not considered in policies, programmes and projects. Such conflicts of interest are often inevitable feature in most societies. It has been posited that four important conditions influence how access to resources could become contested. These are: the scarcity of a natural resource; the extent to which two or more groups share the supply; the relative power of those groups; the degree of dependence on this particular resource, or the ease of access to alternative sources. [24] Such conflicts are especially usually prevalent among pastoralist and agricultural communities who are usually faced with challenges which arise from the constant shrink in the land they use for these practices.

In the Northern parts of the country where majority of the communities are pastoralists; there is the problem of climatic problems of reduced rains leading to lack of water and enough pastures for all. The fight for control of the limited areas with little pastures and water for animals more often than not lead to natural resource-based conflicts amongst the communities living in the area. In fact, the pastoralist conflicts in Northern Kenya have been described as some of the world's first climate conflicts.[25] However, there is contention as to whether climate change is a conflict multiplier, rather than a major direct cause of conflict in itself, aggravating and extending the scope of existing conflicts, or triggering underlying and latent conflicts to break out into the open.[26] The argument put forward is that the aftermaths of drought in dry lands is almost, always manifested through increased cattle rustling because the little cattle herds still on their hooves in dry lands, have to be shared, and good rains that often follow after severe droughts become too attractive to pastoralists not to ignore and, hence the motivation to raid their neighbours and restock causing another devastation in human life through tribal conflicts.[27]

Resource-based conflicts usually form a threat to sustainable development of natural resources in Africa and usually has the result of undermining economic development and sustainability.[28] Conflicts usually make the exploitation of the natural resources to be difficult and as such there are usually no resulting benefits to the various

[24] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management' (FAO, Rome, 2005), p. 22.

[25] Funder, M., 'Addressing Climate Change and Conflict in Development Cooperation: Experiences from Natural Resource Management', p. 12, *Danish Institute for International Studies Report, 2012:04*. Available at *http://subweb.diis.dk/graphics/Publications/Reports2012/RP2012-04-Addressing-climate-change_web.jpg.pdf* [Accessed on 31/08/2014].

[26] *Ibid.*

[27] Musingi J.B.K., 'Who Stole the Rain? The Case Of Recent Severe Droughts In Kenya,' *European Scientific Journal*, vol.9(5), February 2013 edition, pp. 29-40, p. 30.

[28] Abba Kolo, A., 'Dispute settlement and sustainable development of natural resources in Africa,' in Botchway, F. (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar Publishing, 2011).

parties. Conflicts also scare away investors who would have potentially invested in the exploitation of the natural resources found within a certain area. It is important to note that overdependence on natural resources is also a potential source of conflicts among communities and in different countries especially when these resources get exhausted. It is thus imperative that countries diversify their economies in order to ensure that various sectors of the economy contribute to the well-being of the people and that other sectors of the economy are also given the importance deserved.

16.6 Types of Natural Resource-Based Conflicts

Natural resource conflict are divided into two broad types: Type I conflict encompasses situations where armed conflict is financed or sustained through the sale or extra-legal taxation of natural resources, and Type II conflict results from competition over resources among various groups.[29] The main interest of this chapter is the Type II conflict and although natural resource based conflicts have been reported in relation to exploitation of almost all types of conflicts, this chapters narrows down to exploring conflicts related to water, biological diversity, forests, minerals oil and gas and land due to the important role these play not only in the lives of people but also in the economic development agenda of a country. To this extent, the discussion focuses on the international, regional and national legal regime on these select natural resources.

16.6.1 Water-Based Conflicts

Fresh water is deemed to be an essential resource, central to all ecological and societal activities, including food and energy production, transportation, waste disposal, industrial development and human health.[30] However, those fresh water resources are unevenly and irregularly distributed, and some regions of the world are extremely water-short with some areas being water-scarce.[31] Countries are classified as water-scarce if they have less than 1000 cubic metres per person of renewable water resources.[32] It has been rightly asserted that water scarcity will not only affect people's livelihoods but may also increase the potential for local and international conflict.[33] Water scarcity and

[29] United States Agency for International Development (USAID), 'Conflict Over Natural Resources At The Community Level in Nepal Including Its Relation to Armed Conflict,' *op cit*, p. v.
[30] Gleick, P.H., "Water and Conflict: Fresh Water Resources and International Security," *International Security*, Vol. 18, No. 1, Summer, 1993, pp. 79-112, p. 79.
[31] *Ibid.*
[32] Population Action International, 'Why Population Matters to Water Resources,' available at *http://populationaction.org/wp-content/uploads/2012/04/PAI-1293-WATER-4PG.pdf* [Accessed on 28/08/2014].
[33] Leb, C., "The right to water in a transboundary context: emergence of seminal trends," *Water International*, Vol. 37, No.6, pp. 640-653, p. 640.

resultant competition for limited supplies can lead nations to treat access to water as a matter of national security.[34]

The *UN Convention on the Law of the Non-navigational Uses of International Watercourses*[35] outlines the general principles that must govern the use and access to international watercourses and these include: The principle of Equitable and reasonable utilization and participation;[36] taking appropriate measures to prevent the causing of significant harm to other watercourse States, mitigate or compensation[37]; Cooperation based on sovereign equality, territorial integrity, mutual benefit and good faith; establishment of joint mechanisms or commissions to facilitate cooperation[38];and regular exchange of readily available data and information on the condition of the watercourse.[39]

The Convention has further provided for the manner in which disputes relating to international watercourses are to be resolved. In this regard, in the case of conflict between different uses, the controversy needs to be resolved according to the criteria established by the principle of equitable and reasonable use and the obligation not to cause significant harm, while giving special attention to the basic water needs of individuals.[40] State parties to the Convention are also to resort to peaceful methods of dispute settlement where a dispute has arisen and the parties may also subject the dispute for determination before the International Court of Justice.[41]

The Convention thus provides for settlement of disputes under the Convention either through Alternative Dispute Resolution Mechanisms (ADR) or through submission to the International Court of Justice. 29 nations are parties to the Convention and 6 more ratifications are required for it to enter into force.[42] The Convention may therefore not be

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[34] Gleick, P.H., 'Water and Conflict: Fresh Water Resources and International Security,' op cit For instance, regarding the Jordan River Disputes, it has been observed that in the 1950s and 1960s, the animosity between Israel and its neighbors was heightened by disputes over the headwaters of the Jordan River. Occasionally, the friction led to armed clashes.

[35] Adopted by the General Assembly of the United Nations on 21 May 1997, not yet in force, See General Assembly resolution 51/229, annex, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49* (A/51/49). It applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters (Art. 1).

[36] Art. 5.

[37] Art. 7.

[38] Art. 8.

[39] Art. 9.

[40] Leb, C., "The right to water in a transboundary context: emergence of seminal trends," *op cit*, p. 648.

[41] Art. 33.

[42] United Nations, 'Promoting Water Cooperation Legal frameworks and institutional arrangements' *International Annual UN-Water Zaragoza Conference 2012/2013*, Preparing for the 2013 International Year Water Cooperation: Making it Happen, 8-10 January 2013, available at *http://www.un.org/waterforlifedecade/water_cooperation* [Accessed on 17/11/2013].

every effective in disputes settlement considering the small number of States that have ratified the same.

The *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (the Water Convention)[43] seeks to strengthen transboundary water cooperation and measures for the ecologically-sound management and protection of transboundary surface waters and ground waters. The Convention fosters the implementation of integrated water resources management, in particular the basin approach. The Convention's implementation contributes to the achievement of the Millennium Development Goals and other international commitments on water, environment and sustainable development.[44]

As a framework agreement, the Convention does not replace bilateral and multilateral agreements for specific basins or aquifers; instead, it fosters their establishment and implementation, as well as further development.[45]

The Convention basically deals with prevention, control and reduction of any transboundary impact. This is based on the realization that transboundary resources are at a risk of great harm since they are mostly considered as commons and there is usually little attention directed at their conservation. The Convention obliges Parties to prevent, control and reduce transboundary impact, use transboundary waters in a reasonable and equitable way and ensure their sustainable management. This is useful in averting any potential conflicts amongst Member States.[46]

Locally, the *Water Act*, 2002 [47] was enacted to provide *inter alia* for; the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water and; to provide for the regulation and management of

[43] Helsinki, 17 March 1992. *The United Nations Economic Commission for Europe*, Available at *http://www.unece.org/env/water/* [Accessed on 17/11/2013]. All the United Nations Member States amended the Water Convention, initially negotiated as a regional instrument, the Convention in 2003 to allow accession. The amendments entered into force on 6 February 2013, turning the Convention into a global legal framework for transboundary water cooperation. It is expected that non-ECE countries will be able to join the Convention as of end of 2013.

[44] United Nations Economic Commission for Europe, 'About the UNECE Water Convention' available at *http://www.unece.org/env/water/text/text.html* [Accessed on 23/08/2014].

[45] *Ibid.*

[46] Art. 22 provides for mechanisms of settling any disputes that may arise in the application of the Convention; negotiation or by any other means of dispute settlement acceptable to the parties to the dispute; or Submission of the dispute to the International Court of Justice; or Arbitration in accordance with the procedure set out in annex IV. The provisions on disputes settlement have also been echoed in Art. 20 of the *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, done in London, on 17 June 1999.

[47] No. 8 of 2002, Laws of Kenya.

water supply and sewerage services.[48] The Cabinet Secretary has been given authority to exercise control over every water resource and to ensure the conservation of the same. The Act also provides for the Water Appeal Board which hears appeals from any person who is dissatisfied with the preliminary allocation of permit for water use. The Water Appeal Board also determines the amount of compensation to be paid to a permit holder whose permit is cancelled or varied under the Act where there is default of agreement of such amount between the permit holder and the Authority.[49]

The growing completion for water has forced consumers to group together in order to enable better management of these resources. In this regard, user groups were established in various locations. The formulation of the Water Resources Management Rules in 2007 established mechanisms for ease in management of water resources by the public and members of communities. S. 15 (5) of the Water Act provides that '…the catchment management strategy shall encourage and facilitate the establishment and operation of water resources users associations (WRUAs) as for conflict resolution and co-operative management of water resources in catchment areas.' The Rules provide in details for the manner in which the user associations are to operate.

The user associations established under the Act are meant to ensure that local users take responsibility for the guardianship of their own resource.[50] WRUAs have in the past played a critical role in the resolution of disputes relating to access to water resources. This is particularly evident in relation to disputes relating to water use applications. Section 31 of the Rules particularly provides that the WRUA will participate in the determination of disputes relating to objection to permit applications.

The Water Bill 2014 seeks to introduce the Water Tribunal as a dispute resolution forum. This institution is established in accordance with Article 169 (1) (d) of the Constitution as a subordinate court. It is provided in section 119 of the Bill that the Tribunal shall have jurisdiction to hear and determine appeals by persons who have been affected by the decision of the Cabinet Secretary, the Regulatory Authority and the Water Resources Regulatory Authority. Disputes relating to water resources may thus be submitted before the Tribunal for determination and a person can appeal the decision of the Tribunal to the Land and Environment Court.[51]

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[48] S. 3.
[49] S. 37(3).
[50] 'Water Resource Users Associations," Around Mount Kenya-Establishment, Operation and Potential for Conflict Prevention" available at *http://www.disputeresolutionkenya.org/pdf/Establishment%20Operation%20and%20Potential%20for%20Conflict%20Prevention.pdf* [Accessed 5/03/ 2015].
[51] S. 4(2).

Administrative tribunals which have been introduced in various Acts of Parliament are important tools in the resolution of disputes. The Constitution has in Article 169 established that Parliament may establish tribunals which are to be considered as subordinate courts. Administrative tribunals are bodies that are given the powers of an administrative or quasi-judicial nature.[52] These bodies are considered to be faster than formal courts in the resolution of disputes and are seen to be more efficient in the determination of matters which are technical.[53] In this regard therefore, these tribunals are seen to be important in the resolution of disputes relating to natural resources which usually need to be addressed urgently and are also technical in nature hence requiring specialists to address them.

16.6.2 Biodiversity Conservation and Conflict

Forest protection through avoided deforestation may have either positive or negative social impacts with possible conflicts between the protection of forested ecosystems and ancillary negative effects, restrictions on the activities of local populations, reduced income, and/or reduced products from these forests. [54] Poor management of forest resources and the absence of an established set of equitable sharing principles among contending parties lead to shifts in resource access and control. Resulting tensions and grievances can lead to armed conflict and even war. Many governments have contributed to conflict by nationalizing their forests, so that traditional forest inhabitants have been disenfranchised while national governments sell trees to concessionaires to earn foreign exchange.[55]A good example in Kenya is the recent Mau Forest evictions in Rift Valley that generated major political and social impacts in the country.[56] Another example is the *Endorois* case, which involved violations resulting from the displacement of the Endorois people, an indigenous community, from their ancestral lands without adequate compensation from the Government. The African

[52] 'Strengthening Judicial Reforms in Kenya,' available at *http://pdf.usaid.gov/pdf_docs/pnacw009.pdf* [Accessed on 6/03/2015].
[53] *Ibid*, p.12.
[54] United Nations Environment Programme, Convention On Biological Diversity, 'Interlinkages Between Biological Diversity And Climate Change And Advice On The Integration Of Biodiversity Considerations Into The Implementation Of The United Nations Framework Convention On Climate Change And Its Kyoto Protocol' *Report prepared by the Ad Hoc Technical Expert Group on Biodiversity and Climate Change established under the Convention on Biological Diversity*, available at *https://unfccc.int/files/meetings/workshops/other_meetings/application/pdf/execsum.pdf* [01/09/2014].
[55] McNeely, J.A., 'Overview A – Biodiversity, Conflict and Tropical Forests', 2002, p. 33, available at *http://www.iisd.org/pdf/2002/envsec_conserving_overview.pdf[*Accessed on 27/07/2014].
[56] Kenya National Commission on Human Rights, *et al*, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya', *Briefing Paper*, April 2007, available at *http://www.knchr.org/Portals/0/GroupRightsReports/Mau%20Forest%20Evictions%20Report.pdf [*01/09/2014].

Commission on Human and People's Rights (ACHPR) ruled that the government of Kenya was in violation of the rights to freedom of religion, property, health, culture, and natural resources under the African Charter on Human and Peoples' Rights. The court further recommended restitution of Endorois ancestral land, recognition of the rights of ownership to the Endorois as well as compensation for the loss suffered.

Compensation schemes as provided have failed in achieving the desired results and this has been attributed to several factors. This is due to, *inter alia*: the continuing dominance of conservation goals over the livelihood needs of local people; and an emphasis on reducing the dependency of local people on resources of conservation value, rather than increasing their stake in sustainable resource management.[57] Indeed, as at 2011 the Government was yet to comply with the ACHPR Ruling.[58] The Convention on Biological Diversity (CBD)[59] is an international legally-binding treaty with three main goals: conservation of biodiversity; sustainable use of biodiversity; and the fair and equitable sharing of the benefits arising from the use of genetic resources.[60] Its main objective is to encourage actions which will lead to a sustainable future.[61] The Convention provides for examination, based on studies to be carried out,[62] the issue of liability and

[57] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Overseas Development Institute, Working Paper No. 135*, 2000, p. 10. available at *http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion -files/2738.pdf[*Accessed on 27/05/2014]; See also generally, Treves, A., *et al*, 'Co-Managing Human–Wildlife Conflicts: A Review,' *Human Dimensions of Wildlife*, Vol.11, 2006, pp.383–396, available at *http://faculty.nelson.wisc.edu/treves/pubs/Treves_etal_2006_comgmt.pdf*[Accessed on 27/07/2014].

[58] Mbote, P.K., & Migai, A., 'Kenya: Justice Sector and the Rule of Law,' *A review by AfriMAP and the Open Society Initiative for Eastern Africa*, March 2011, p. 6;

See also *Joseph Letuya & 21 others v. the Attorney General & 5 others*, (2004) eKLR, Environment and Land Court at Nairobi, ELC Civil Suit Number 821 of 2012 (OS) on Minority and indigenous communities' legal interests in forest land accruing from pre-colonial period. The case involved an application by representatives of the Ogiek Community, who were considered to be a minority and indigenous people as they mostly inhabited parts of the Mau Forest and depended on it for their livelihood. Their claim before the court was that the Respondents herein had infringed upon some of their constitutional rights and that as a result they had been forcibly evicted from their land in the Mau Forest. In addition, they have claimed that the government did not resettle any of them in alternative pieces of land yet this was the very purpose for the excision of the said forest land. Court held *inter alia*: Applicants' livelihood is directly dependent on forest resources and ecosystem and their right to life and socio-economic rights are defined and dependent upon their continued access to the Mau Forest and should be protected to this extent; Forest land is government land that cannot be subject to prescriptive rights arising from adverse possession.

[59] 1760 UNTS 79; 31 ILM 818 (1992).

[60] Convention on Biological Diversity, 2011-2020, United Nations Decade on Biodiversity: Living in Harmony with Nature, available at *http://www.cbd.int/undb/media/factsheets/undb-factsheets-en-web.pdf* [Accessed on 27/05/2014]. In 2010, Parties to the Convention on Biological Diversity (CBD) adopted the Strategic Plan for Biodiversity 2011–2020, a ten-year framework for action by all countries and stakeholders to safeguard biodiversity and the accruing benefits.

[61] *Ibid.*

[62] By Conference of the Parties as established under Art. 23 of the Convention.

redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.[63]

Article 27 thereof deals with settlement of disputes and provides that in the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned are to seek solution by negotiation,[64] or mediation by a third party.[65] The Act however contemplates submission of the dispute to the International Court of Justice,[66] or conciliation.[67] The Convention has been criticised that while there is an international dispute resolution mechanism contemplated under Article 27, there is no explicit enforcement mechanism or cause of action under the Convention against a government which destroys its own (domestic) biodiversity.[68] It is, therefore, arguably only fairly effective at the international level in state to state disputes but cannot be effective tool for use by local citizens for lobbying their own governments to protect community biodiversity especially as contemplated by the Constitution of Kenya 2010.[69]

16.6.3 Land-Based Conflicts

Land is considered to be one of the most important resources in the country. Given the status it enjoys in Kenya, land based conflicts are inevitable in the country and this majorly arises from the competing uses over land notwithstanding the fact that land is a finite resource. Land based conflicts also usually arise from the competing demands over the resources found on land where people seek to exploit such resources for their economic values.

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[63] Art. 14.2.
[64] Art. 27.1.
[65] Art. 27.2.
[66] Art. 27.3.
[67] Art. 27.4.
[68] Jenks, D.T., A Convention on Biological Diversity--An Efficient Framework for the Preservation of Life on Earth? 15 *Nw. J. Int'l L. & Bus.*, 636, 1994-1995, pp. 633-667, pp. 656-657.
[69] The Constitution of Kenya under Art. 11(3) thereof requires the Parliament to enact legislation to: ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya. It is important to address such matters as bio-prospecting and bio-piracy cases such as the Lake Bogoria Extremophile case, where Kenya Wildlife Service sought money from a multinational for taking, patenting, cloning and selling "extremophile" microorganisms collected from lakes in Kenya in the late 1980s, where scientists connected to Leicester University (UK) collected microorganisms living in the hot geysers of two of Kenya's lakes. The organisms produce enzymes that were found to be great fabric softeners and "faders" – giving fabrics a stone-washed appearance popular with consumers. With assistance from scientists at the International Centre of Insect Physiology and Ecology (ICIPE), KWS launched a claim for a share of the proceeds accruing to the US multinational giant Procter & Gamble and to Genencor International BV of the Netherlands with respect to the sales of Tide Alternative Bleach Detergent and "stonewashing" material. The Kenya Wildlife Service maintains that the collectors never had the proper permits to take the microorganisms for commercial use in the first place.

Most of the land based conflicts often arise from tenure challenges. In Kenya, it has been noted that a number of regions, land ownership and land use rights are often in dispute resulting into land disputes whose negative effects are on the certainty of land markets, tenure and food security, economic production and reduction of poverty.[70] Further, it has been argued that most of the land disputes in Kenya arise mainly from the failure of the authorities concerned to enforce and to comply with the law as it exists.[71] The multiplicity of laws that govern land has also been seen to be a factor that has fuelled the conflicts relating to land. The numerous laws have established many institutions which have failed in the administration of land hence resulting to many conflicts in land. It should be noted that a majority of the laws and institutions on land were simply superimposed on traditional structures without clear delineation of responsibilities and competencies and hence they lacked social legitimacy.[72]

It is important to note that land conflicts are perhaps one of the severest forms of natural resource based conflicts in Kenya considering agriculture plays a major role in the lives of most communities in Kenya and the national economy. According to the National Land Policy 2009, one of the contemporary manifestations and impacts of the land question in Kenya is inadequate environmental management and conflicts over land and land based resources. The most serious recent example – in the Tana River region of eastern Kenya –led to at least 100 deaths between early August and September 2012. Mombasa has also experienced growing tension between coastal Muslim communities, local political/religious groups and the state.[73]

The commercialization of agriculture has resulted into the scarcity of land and individualization of land has also resulted to the dispossession of certain groups like women and minority communities. The 1954 Swynnerton Plan[74]sought to ensure the security of land rights through registration. While registration might have increased tenure security for many land owners, it has also created new forms of disputes, such as

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[70] Kalande, W., 'Kenyan Land Disputes in the Context of Social Conflict Theories,' p. 1, *FIG Commission 7 Annual Meeting and Open Symposium on Environment and Land Administration 'Big Works for Defence of the Territory*, Verona-ITALY, 11-15 September 2008.
Available at *http://www.fig.net/commission7/verona_am_2008/papers/13_sept/kalande_paper.pdf* [Accessed on 27/08/2014].

[71] *Ibid*, p. 7.

[72] Yamano, T. & Deininger, K., 'Land Conflicts in Kenya: Causes, Impacts and Resolutions,' *FASID Discussion Paper 2005-12-002*, available at
http://www3.grips.ac.jp/~yamanota/Land%20Conflicts%20in%20Kenya%20(FASID%20DP).pdf [Accessed 6/03/2015].

[73] Somerville, K., 'Kenya: land and communal clashes increase as country gears up for elections,' Posted on September 20, 2012, by African Arguments Editor.
Available at *http://africanarguments.org/2012/09/20/kenya-land-and-communal-clashes-increase-as-country-gears-up-for-elections-by-keith-somerville/*[Acessed on 27/08/2014].

[74] R.J.M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya*, 1955.

challenges over registered land and conflicts over land sales.[75] There have been numerous irregularities when it comes to land sales and this has been perpetrated by corrupt land officials who have in certain instances been seen to issue title over the same piece of land to different individuals.[76]

Various dispute resolution mechanisms have been devised to resolve the disputes relating to land. Formal and informal institutions have thus been established to resolve the disputes arising from land. Formal institutions are those that have been granted statutory mandates while informal institutions are those that have been established within the various social units to resolve disputes. Informal institutions have been identified to be flexible in the manner in which they operate and they are more accessible. Informal dispute resolution institutions are common in rural areas and also in informal areas in urban areas and cities where a majority of the poor, who are not able to afford to pay for the formal dispute resolution mechanisms.

Formal methods of dispute resolution have also been established under the various laws in the country with the Constitution being key among them. The Constitution in Article 162 (2) (b) has provided for the establishment of courts with the status of the High Court which is to hear and determine matters relating to the use and occupation of, and title to, land. In this regard, the Environment and Land Court has been established. The Court is established as a specialized court and it has the same status as the High Court. This court is expected to deal with the numerous disputes relating to land. In this regard, the High Court was deprived of the jurisdiction to hear and determine matters relating to land and the environment.

Being a jurisdiction clause, Article 162 (2) (b) is to be followed to the later and jurisdictional issues were dealt with in the *locus classicus* case of *Owners of Motor Vehicle Lillians v Caltex Oil (Kenya) Ltd*,[77]at page 14 Justice Nyarangi stated as follows:

> *"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that opinion that it is without jurisdiction…"*

The Constitution is thus clear on the jurisdiction but despite this, the jurisdiction of the court has in certain instances been the subject of judicial determination. One such instance

[75] Shipton, 'The Kenya Land Tenure Reform: Misunderstandings in the Public Creation of Private Property,' in Downs, R.E. & Reyna, S.P. (eds), *Land and Society in Contemporary Africa*, (University Press of New England, Hanover and London, 1998).
[76] The case of *Athanas Wanyama & another v Land Registrar Kiambu District and another* [2012] eKLR is a clear representation of this.
[77] 1989, KLR 1.

was seen in *Edward Mwaniki Gaturu & another v Attorney General & 3 others,*[78] where the jurisdiction of the court to deal with environmental case was confirmed. In this regard, the court has been established as a specialized court dealing solely with matters to do with land an environment and its jurisdiction has further been affirmed by the Environment ad Land Court Act No. 19 of 2011.

Under the Environment and Land Court Act, the Chief Justice has been given authority to make rules and regulations to guide the manner in which the court is to operate. Further, the jurisdiction of the court has been provided for in Section 13 of the Act where it is provide that the Court has original and appellate jurisdiction to determine all disputes in accordance with Article 162 (2) of the Constitution. This therefore means that land disputes and also those relating to the management and administration of land are to be submitted to the court for determination. In order to give effect to section 13 of the Act, the Chief Justice issued practice directions titled 'Proceedings Relating to the Environment and use and Occupation of, and Title to Land'.

In line with the objectives of devolution stated in the Constitution which require, *inter alia,* that there shall be decentralization of State organs, functions and services from the capital,[79] the Environment and Land Court Act requires that the court is to ensure reasonable and equitable access to its services in every county.[80] This is further in recognition of the fact that numerous conflicts relating to land and the environment arise in the counties and hence the need to ensure that justice is expeditiously dispensed at the local levels.

Jurisdictional challenges have also arisen in relation to the jurisdiction of the Environment and Land Court and the Constitutional division of the High Court. The Constitution guarantees the right to a clean and healthy environment for all.[81] In this regard, the right to a clean and healthy environment has been enshrined in the Bill of Rights. The Constitution has further provided for the establishment of the High Court which shall have the jurisdiction of among others of determining questions in relation to whether a provision in the Bill of Rights had been violated, infringed or threatened.[82]

In this right, there is an imminent conflict in jurisdictional matters where a person is claiming that their environmental rights or property rights provided for in Article 42 and 40 respectively has been violated. It is thus possible that a person institutes proceedings before the Constitutional and Human Rights Division of the High Court and it is also possible for the same suit to be instituted in the Environment and Law Court.

[78] *Petition No. 72 of 2013.*
[79] Art. 174 (h).
[80] S. 4(3).
[81] Art. 42; See also Art. 69.
[82] Art.165 (3) (b).

This therefore provides a likelihood of forum shopping by a person seeking to institute proceedings and there is thus need for clarity on this matter.[83] This is despite the fact that the Constitution provides that the High Court shall not have jurisdiction in relation to matters provided for in, *inter alia,* Article 162 (2) which provides for the jurisdiction of the ELC. It should further be clarified whether the jurisdiction of the ELC is limited to civil matters or whether it also extends to criminal matters.

16.6.4 Minerals, Oil and Gas Conflicts

The East African region and Kenya in particular is endowed with deposits of minerals like gold, diamond, fluorspar, titanium, gemstones and iron ore. Coal, gas and oil deposits have also been recently been discovered in the region and people have high expectations that they will play a major role in the region's development.[84] For example, the oil discoveries in Turkana could be a source of conflict among communities and between communities and government arising from feelings of entitlement and equitable access to the proceeds of the exploitation.

According to the United States Agency for International Development (USAID), "valuable minerals become conflict minerals when their control, exploitation, trade, taxation or protection contributes to, or benefits from, armed conflict."[85] For instance, the Mui basin coal exploration project in Kitui Kenya has had problems in the past with the local leaders accusing the National Government of impropriety and corruption in tendering process. This slowed the whole process as even the locals are interested in knowing how they will benefit from the coal exploitation.[86]

Furthermore, it has been observed that conflicts over minerals do not necessarily stay within boundaries; neighboring countries sometimes compete for resource wealth and thus exacerbate conflict or preventpeace building.[87]

The two primary sources of fuel are oil (petroleum), a flammable liquid that can be refined into gasoline, and natural gas, a combustible gas used for fuel and lighting. Many

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[83] Odote, C., 'Kenya: The New Environmental and Land Court,' *IUCN Academy of Environmental Law*, E-Journal Issue, Vol.4, 2012(1), pp. 171-177.

[84] Heinrich Boll Stiftung, 'Roadmap to prosperity through sustainable Natural resources management in the East and Horn of Africa', *Essay of the East and Horn of African Delegates*, available at *https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/EHOA_HBS_Delegates_essay_final_1.pdf*[Accessed on 27/08/2014].

[85] USAID, 'Minerals & Conflict: A Toolkit for Programming.'
Available at *http://pdf.usaid.gov/pdf_docs/pnadb307.pdf [Accessed on 27/08/2014]*.

[86] *Daily Nation,* Saturday, July 21, 2012, 'Sh8.5bn coal mining project in danger,' *available at http://www.nation.co.ke/News/Sh8+5+bn+coal+mining+project+in+danger/-/1056/1460462/-/10rhk4iz/-/index.html* [Accessed on 29/08/2014].

[87] United States of Institute of Peace, 'Natural Resources, Conflict, and Conflict Resolution', *A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors*, *op cit,* p. 6.

of the world's largest petroleum reserves are located in areas suffering from political instability or conflict, such as Iran, Iraq, Nigeria, Venezuela, and Sudan. The developed world's increasing demand for oil, and its search for "supply security," can exacerbate existing conflicts.[88]It has been observed that even with international encouragement, however, it has been enormously difficult for the Iraqis to negotiate equitable arrangements for sharing oil and gas revenues among the regions after the fall of Saddam Hussein.

The *Petroleum (Exploration) Act*,[89] is the main An Act of Parliament that regulates the negotiation and conclusion by the Government of petroleum agreements relating to the exploration for, development, production and transportation of, petroleum and for connected purposes in Kenya and it came into force on 16th November, 1984. This Act is evidently out of touch with the reality in that Kenya recently discovered oil and gas and the Act has nothing in it to govern this. It is also not in conformity with the current Constitution of Kenya.[90] Further, it has no provisions on conflict management. The Closest the main Act comes to this is providing for compensation to private persons whose land has been tampered with in the course of exploration. Even then, the provisions are not effective.[91]It provides that the Cabinet Secretary may make regulations for or with respect to *inter alia*: the terms and conditions applicable to the grant of exploration permits; the procedures for the assignment of rights and obligations of a contractor under petroleum agreements; the conduct of petroleum operations, conservation of petroleum resources and measures relating to safety, environmental protection and the avoidance of waste, pollution and accidents; and procedures regarding the revocation or termination of petroleum agreements. It leaves out any provisions for the management of conflicts between the contractors and communities and does not even provide for any reference to the affected communities or persons. There are even no institutions that would deal with

[88] Dannreuther, R., 'China and global oil: vulnerability and opportunity', available at *http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/2011/87_6dannreuther.pdf [Accessed* on 27/08/2014].

[89] Cap. 308, Laws of Kenya.

[90] For instance, national values and principles of governance such as public participation are not reflected in the Act.

[91] S. 10(2) thereof provides that whenever, in the course of carrying out petroleum operations, any disturbance of the rights of the owner or occupier of private land, or damage to the land, or to any crops, trees, buildings, stock or works therein or thereon is caused, the contractor shall be liable on demand to pay to the owner or occupier such compensation as is fair and reasonable having regard to the extent of the disturbance or damage and to the interest of the owner or occupier in the land. If the contractor fails to pay compensation when demanded under ss. (2), or if the owner or occupier is dissatisfied with the amount of compensation offered to him, the owner or occupier may, within six months of the date on which the demand or offer is made, take proceedings before a court of competent jurisdiction for the determination and recovery of compensation (if any) properly payable under ss. (2).

any potential conflicts that may arise in the course of exploration. To this extent, the Act needs to be revisited to correct these.

16.7 Management of Natural Resource-Based Conflicts

Conflicts are an inescapable part of societal interaction since the inception of human settlement. However, if not well taken and resolved early, conflicts can degenerate to pose a threat to national security, peace and stability, which are the basic parameters to measure the development of a nation. Indeed, it has been observed that environmental conflicts have emerged as key issues challenging local, regional, national and global security.[92]As already noted conflicts and disputes are inevitable in the use, access and management of natural resources due to the differing needs and values of various persons and/or groups of persons in society in the wake of dwindling resources. The extraction of natural resources has in some instances triggered or fuelled violent conflict in some regions in Kenya. Inter-county disagreements may also arise with devolution in terms of who has access and control over certain trans-county natural resources. The conflicts, if unaddressed, can spiral into violence, cause environmental degradation, disrupt development projects and undermine livelihoods as recently witnessed in some parts of the country.[93] Empirical research shows that conflicts and more so the resource-based ones have caused tremendous harm to civilians in Kenya particularly women and children and increased the numbers of internally displaced persons in the country.[94] Further, it was observed that in areas where the conflicts prevail, development programmes have been interrupted. Deterioration in the quality of life and the weakening of political and economic institutions are also likely outcomes.[95]

16.8 Need for Management

Kenya has one of the fastest growing population rates in Africa and the effect of this has been that part of the population has moved to settle in ecologically sensitive areas, the most noteworthy one being the Mau forest. Apart from the use of the matter as a political tool, the result has been degradation of the affected areas due to the

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[92] Urmilla, B. and Bronkhorst, S., 'Environmental conflicts: Key issues and management implications', p. 9. Available at www.ajol.info/index.php/ajcr/article/download/63307/51191[Accessed on 16/08/2014].

[93] 'Tana River District: a showcase of conflict over natural resources' *Practical Action-EA Peace Bulletin* - September 2004, available *at http://practicalaction.org/energy/east-africa/peace5_tana* Accessed on 16th August, 2013. See also 'Tana River Delta clashes caused by conflict over resources, inquiry commission says,' available at *http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2013/05/23/newsbrief-03* [Accessed on 16/08/2014].

[94] Adan, M. *et al,* (ed.), 'Conflict Management in Kenya Towards Policy and Strategy Formulation,' July 2006, p. 5, *Practical Action,*
available at *http://practicalaction.org/region_east_africa_publications* [Accessed on 15/08/2013]

[95] *Ibid.*

indiscriminate harvesting of the resources therein such as firewood and charcoal, building materials and wildlife just to mention but a few. The need to achieve sustainable development calls for sustainable management of these resources through engaging all the relevant stakeholders.

As already pointed out, some of these conflicts can become very complex and polarizing in some cases. For instance, there have been complaints from some communities regarding the land issue as well as mineral resources, especially in the current era of devolved governments with communities wishing to get an equitable share of the resources found in their counties. It has been persuasively argued that in environmental conflicts where there is high level emotional intensity, several of the early casualties in verbal and non-verbal skirmishes are tolerance and communication with people stopping to listen to those espousing contrary views and begin associating exclusively with like-minded supporters.[96] Such emotions thus need to be managed effectively to avert full blown conflicts. People cannot meaningfully benefit from the exploitation of the natural resources in an atmosphere of unmanaged conflicts.

16.9 Approaches to Management of Natural Resource-Based Conflicts

It has been noted elsewhere in this chapter that the approach adopted in the management of any conflict or dispute largely depends on the nature of the conflict. The approaches are either formal or informal in nature.

There are basically two main approaches to natural resources conflict management which are formal and informal mechanisms. Formal approaches include the judicial approaches while informal mechanisms include the non-judicial forms of conflict management such as negotiation, conciliation, mediation and diplomatic initiatives and the traditional justice systems, which are either coercive or non-coercive respectively.

At the international level, Article 33 of the Charter of the United Nations outlines the conflict management mechanisms to include *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements, or other peaceful means of people's own choice*.[97] The national legal systems are usually grounded on legislation and/or policy statements which may include judicial and regulatory frameworks. This approach majorly uses the adjudication and arbitration processes to settle arising conflicts.

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[96] Fiske, E.P., 'Reconceptualising Environmental Conflict Resolution: The Developmental Facilitation Approach', p. 1. 2001,available at file*://A:\Reconceptualisingenvironmentalconflictresolution.htm* [Accessed on 16/08/2013].

[97] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: *http://www.refworld.org/docid/3ae6b3930.html*. [Accessed on 16/08/2013].

The use of alternative mechanisms of conflict management as an approach to conflict management aims to incorporate community members and all the involved parties in finding a lasting solution as well as empowering them to handle any future conflicts through community conflict building. To some, this approach is seen as an alternative to the formal judicial systems and hence the name alternative.

The other approach under informal mechanisms is the use of customary systems which relies on the traditional belief systems and/or values of the particular community where the conflict arises. This approach incorporates mediation and negotiation to resolve conflicts in an attempt to find a lasting solution to the disputes and conflicts. It is imperative to look at each of the approaches with an aim to identify their efficacy in managing natural resource conflicts and disputes.

16.9.1 Judicial Mechanisms

With the objective of settling disputes in a more justifiable manner, national governments and the constitutions of most nations establish institutions; judiciary organs of the government. It is the natural mandate of courts of law to entertain disputes. Litigation has however been criticized in many forums as one that does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the world have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.[98]

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.[99] Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation may be very slow and too expensive and it may at times lose the practical credibility necessary in the environmental matters.[100] Litigation is not a process of solving problems; it is a process of winning arguments.[101]

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[98] *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012, available at *http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf*

[99] Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *op cit*.

[100] *Ibid*, p. 7; See also Mbote, P.K. & Migai, A., 'Kenya: Justice Sector and the Rule of Law,' *op cit*.

[101] Advantages & Disadvantages of Traditional Adversarial Litigation,
available *at http://www.beckerlegalgroup.com/a-d-traditional-litigation* [Accessed on 27/04/2013].

Litigation should however not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious, for instance loss of lives due to natural resource based conflicts. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).[102] However, there are also many shortcomings associated with litigation as already highlighted, so that it should not be the only means of access to justice.

Courts in Kenya have successfully handled environmental matters. In the case of *Waweru v Republic*,[103] the Court reiterated the position of Section 3 of Environment (Management and Conservation) Act 1999 (EMCA) which requires that courts take into account certain universal principles when determining environment cases. It also went further to state that apart from the EMCA it was of the view that the principles set out in section 3 do constitute part of international customary law and the courts ought to take cognisance of them in all the relevant situations. It therefore had a role in promoting sustainable development. In this case, the Court was to deal with four principles which it considered directly relevant to the matter at hand which were: Sustainable development; Precautionary principle; Polluter pays; and Public trust (not spelt out in EMCA).[104] Regarding public trust, the Court stated that the essence of the public trust is that the state, as trustee, is under a fiduciary duty to deal with the trust property, being the common natural resources, in a manner that is in the interests of the general public.[105] The Court also stated that environmental crimes under the *Water Act*, *Public Health Act* and *EMCA* cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman. Courts thus play an important and indispensable role in achieving sustainable development which means conflicts must be dealt with effectively.

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[102] *Chartered Institute of Arbitrators, Litigation: Dispute Resolution, available* at *http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation* [Accessed on 27/04/2013].

[103] (2007) AHRLR 149 (KeHC 2006).

[104] *Ibid*, para. 25.

[105] *Ibid*, para. 31. The Court relied on the broad duty as contemplated in the Pakistani case of *General Secretary West Pakistan Salt Miners Labour Union v The Director of Industries and Mineral Development* 1994 s CMR 2061, where residents who were concerned that salt mining in their area would result in the contamination of the local watercourse, reservoir and pipeline. The residents petitioned the Supreme Court of Pakistan to enforce their right to have clean and unpolluted water and filed their claim as a human rights case under Art.184(1) of the Pakistan Constitution. The Supreme Court held that as Art. 9 of the Constitution provided that 'no person shall be deprived of life or liberty save in accordance with the law' the word 'life' should be given expansive definition, the right to have unpolluted water was a right to life itself.

Article 22(1) of the constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. This includes the right to clean and healthy environment as envisaged under Article 43 thereof. The role of Courts in environmental matters is further reinforced by the constitutionally recognised Environment and Land Court established under the *Environment and Land Court Act, 2011*[106] which Act was enacted to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.[107] The overriding objective this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.[108] The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.[109] Further, in exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court has 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 inland; and any other dispute relating to environment and land.[110] The Court is also empowered to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.[111] The Court may make any order and grant any relief as the Court deems fit and just, including, interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.[112] Where applicable, the Court is empowered to adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the

[106] No. 19 of 2011, Laws of Kenya. See S. 4 thereof.
[107] *Ibid*, Preamble.
[108] *Ibid*, S. 3(1).
[109] *Ibid*, S. 13(1).
[110] *Ibid*, S. 13(2).
[111] *Ibid*, S. 13(3).
[112] *Ibid*, S. 13(7).

Constitution. Indeed, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court must stay proceedings until such condition is fulfilled.[113]

This therefore means that we cannot dispense with the role of courts in environmental matters and all we can do is empower them while promoting synergetic application of judicial processes alongside the informal mechanisms. What is however not very clear is the Environment and Land Court's jurisdiction to handle matters that violate the right to environmental protection but are transboundary in nature. This came out clearly in the case of *Friends of Lake Turkana Trust v Attorney General & 2 others*[114] where one of the issues for determination was whether the Court had jurisdiction to intervene and address issues arising from any agreement entered into between the Kenyan Government and Ethiopian Government for the purchase of electricity from Ethiopia. This was due to the Respondents' argument that the issues arising in this Petition were outside of the court's jurisdiction, for reasons that the construction of Gibe III Dam was being undertaken by the Government of Ethiopia within its territory, which is outside the realm of Kenyan Courts. The Interested Party submitted that Gibe III Dam may raise a number of environmental concerns for Lake Turkana, but that this Court was not the proper forum for their resolution as it has no jurisdiction to rule on the actions of another state. It held that in this Petition, there was no foreign state or foreign and/or intergovernmental entity that was a party that would make this court incompetent to hear and determine this petition.[115] The Petitioner and the Respondents were all Kenyan entities and were resident within the Kenyan territory. In addition the subject matter of the petition before the court concerned the Petitioner's fundamental rights and freedoms, and alleged violations of the same by the Respondents.

The Court invoked section 13(3) of the *Environment and Land Act* of 2012, under which the Environment and Land Court is also given jurisdiction 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. The Court thus held that its jurisdiction to hear the petition was therefore with respect to the alleged violation of the Petitioner's constitutional rights by the Respondents and the Respondents' obligations if any in this regard, and the remedies if any, that the Petitioner was entitled to. The court also affirmed that in

[113] *Ibid*, S. 20.
[114] ELC Suit No. 825 of 2012, [2014] [eKLR]
[115]The Court however affirmed that national courts are incompetent to determine subject matters that are positively regulated by international law, and particularly transactions relating to the validity, meaning and implementation of intergovernmental agreements or treaties which create agencies, institutions or funds that are subject to the rules of public international law.

exercising its jurisdiction under the Environment and Land Court Act section 18, it is also obliged to take into account the principle of sustainable development including the principle of public participation in the development of policies, plans and processes for the management of the environment and land.[116]This case demonstrates instances where the Kenyan courts have taken the active role of promoting environmental protection and averting potential natural resource based conflicts.[117]

16.9.2 ADR and Informal Methods

a. Alternative Dispute Resolution Mechanisms Approach

Alternative dispute resolution (ADR) mechanisms is a phrase used to refer to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination and arbitration.[118] ADR mechanisms are used in management of a wide range of natural resource based conflicts and disputes. However, the choice of mechanism to be used depends on whether it is a conflict or a dispute that is to be managed. However, it noteworthy that these techniques are not essentially mutually exclusive in any particular conflict, but can be used successively or in a modified combination with other adjudicative methods for managing disputes.[119]

Conflicts are issues about values which are non-negotiable. They are needs and values that are shared by the parties, which values and needs are inherent in all human beings. The conflicts arise due to disagreement over distribution of resources that are perceived to be fundamental to the survival of each of the parties.

The choice of conflict management must therefore be informed by the desire to address the underlying psychological issues. Resolution mechanisms as against settlement mechanisms are the best placed to manage conflicts since they aim at satisfying the needs of each party through mutual construction of legitimate relationship. Conflict resolution mechanisms are interactive and participatory giving the parties a chance to come up with

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[116] *Ibid*, p. 14.

[117] The Court directed that the Government of Kenya, the Kenya Power and Lighting Company Limited, and the Kenya Electricity Transmission Company Limited should forthwith take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed, utilized and conserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia (including its parastatals) relating to the purchase of electricity.

[118] *Ibid*, p. 1.

[119] Hamilton, G., 'Rapporteur Report: Alternative Dispute Resolution (ADR) —Definitions, Types and Feasibility,' *International Investment and ADR.*
Available *at http://investmentadr.wlu.edu/deptimages/Symposium%202010/Rapparteur%20Report%20-%20ADR%20DEFINITION%20-%2019%20March.pdf* [Accessed on 16/08 2014].

mutually satisfying outcomes. The best placed mechanisms to achieve this are negotiation, mediation in the political process and problem solving facilitation.

b. Conflict Management through Negotiation

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It is also described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[120] The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation thus allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

The Ireland Law Reform Commission in their consultation paper on ADR posits four fundamental principles of what they call principled negotiation: Firstly, Separating the people from the problem; Secondly, Focusing on interests, not positions; Thirdly, Inventing options for mutual gain; and finally, insisting on objective criteria.[121]As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.

It has been said that negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others, and deciding whether to reach an agreement or end negotiations.[122]The argument is that if no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator who does not expect future interactions with the other person will use whatever principle-need, generosity, equality, or equity-produces the better result for them. Relationships apparently matter in negotiators' definitions of fair outcomes.[123]

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[120] Negotiations in Debt and Financial Management, 'Theoretical Introduction to Negotiation: What Is Negotiation?' *Document No.4*, December 1994, available at *http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm* [Accessed on 08th March, 2014]; See also Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, *op cit*, p. 2.

[121] Fisher, F. & Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in*, op cit., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008 p. 43.

[122] Welsh, N.A., 'Perceptions of Fairness in Negotiation,' *Marquette Law Review*, Vol. 87, pp. 753-767, p. 753.

[123] *Ibid*, p. 756.

It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.[124]Negotiation can be interest-based, rights-based or power-based and each can result in different outcomes.[125]However, the most common form of negotiation depends upon successfully taking and the giving up a sequence of positions.[126]

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.[127] This way, both parties do not feel discriminated in their efforts for the realization of the right of access to justice.

Parties may generate a number of options before settling on an agreement. However, there exist obstructions to this: parties may decide to take hardline positions without the willingness to consider alternatives; parties may be intent on narrowing their options to find the single answer; parties may define the problem in win-lose terms, assuming that the only options are for one side to win and the other to lose; or a party may decide that it is up to the other side to come up with a solution to the problem.[128] The assertion is that by focusing on criteria rather than what the parties are willing or unwilling to do, neither party needs to give in to the other; both can defer to a fair solution.[129]

In conclusion, negotiation can be used in facilitating the effective management of natural resources based conflicts. What needs to be done is ensuring that from the start, parties ought identify their interests and decide on the best way to reach a consensus.[130] The advantages therein defeat the few disadvantages of power imbalance in some

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[124] Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance For Government Departments And Agencies*, May, 2011, available at *http://www.justice.gov.uk/downloads/courts/mediation [Accessed on 08th March, 2014];* See also Muigua, K., 'Avoiding Litigation through the Employment of Alternative Dispute Resolution,' p. 8, available *at http://www.chuitech.com/kmco/attachments/article/101/pdf*

[125] 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*, [Accessed on 08th March, 2014].

[126] Fisher, R. and Ury, W., *Getting to Yes-Negotiating Agreement Without Giving in, op cit*, p. 4.

[127] UNESCO-IHP, 'Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building,' Abridged version of Yona Shamir, Alternative Dispute Resolution Approaches and their Application, available at *http://unesdoc.unesco.org/images/0013/001332/133287e.pdf* [Accessed on 9th March, 2014].

[128] *Ibid*, pp. 24-25.

[129] See generally, Dawson, R., '5 Basic Principles for Better Negotiating Skills,' Available at *http://www.creonline.com/principles-for-better-negotiation-skills.html* [Accessed on 19th March, 2014].

[130] See generally, Amendola, A.F., 'Combating Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches' *Nujs Law Review*, Vol. 4,July - September, 2011, pp. 347-370, available at *http://www.nujslawreview.org/pdf/articles/2011_3/andrew-f-amendola.pdf* [Accessed on 19/03/2014].

approaches to negotiation, as already discussed. However, where parties in a negotiation hit a deadlock in their talks, a third party can be called in to help them continue negotiating. This process now changes to what is called mediation. Mediation has been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.[131] It is also a mechanism worth exploring as it has been successfully used to achieve the right of access to justice for parties.

c. Mediation and Natural Resource –Based Conflicts

Mediation is defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.[132] Within this definition, mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.[133] Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

d. Mediation in the Political Process

Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.[134]

e. Mediation in the Legal Process

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or

[131] Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.
[132] Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 3rd ed., 1996), p. 14.
[133] *Ibid.*
[134] See generally Muigua, K., "Resolving Environmental Conflicts through Mediation in Kenya" Ph.D Thesis, 2011, (Unpublished), *op cit*.

no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.[135]

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.[136]In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.[137]

Rules have been defined as requiring, prohibiting or attaching specific consequences to acts and place them in the realm of adjudication. By contrast, mediation is seen as one concerned primarily with persons and relationships, and it deals with precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite 'role expectations. 'Mediation is conceived as one that has no role to play in the interpretation and enforcement of laws; that is the role of courts and the function of adjudication. Conflict resolution processes, in their focus on people and relationships, do not require impersonal, act-prescribing rules" and therefore are particularly well-suited for dealing with the kinds of "shifting contingencies" inherent in ongoing and complex relationships.[138]

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies (*emphasis ours), thus making mediation a viable process for the actualization of the right of access to justice.[139]

One criticism however is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to

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[135] *Ibid.* Chapter 4; See also sec.59A, B, C& D of the Civil Procedure Act on Court annexed mediation in Kenya.

[136] Fuller, L.L., *Mediation—Its Forms and Functions*, 44 S. *CAL. L. REV.*, 1971, p.305, [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,' *Utah Law Review,* (2009) [NO. 3] *op cit*, pp. 802-803.

[137] *Ibid.*

[138] *Ibid*, p. 803.

[139] See also generally Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished, op cit*.

unfavorably address his or her concerns or interests at the expense of the other.[140] Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.[141] Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information. Thus, mediation, especially mediation in the political process indeed broadens access to justice for parties, when effectively practised.

f. Conflict Management via Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes. Conciliation is recognised by a number of international legal instruments as a means to management of natural resource based conflicts.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.[142] This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.[143] A conciliator who is more knowledgeable than the parties can help parties achieve their interests by proposing solutions, based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

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[140] See generally, Fiss, O., "Against Settlement", *op cit*; See also Muigua, K., "*Court Annexed ADR in the Kenyan Context,*" p. 5,available at *http://www.chuitech.com/kmco/attachments/article/106/Court%20Annexed%20ADR.pdf*[Accessed on 8th March, 2014].

[141] Abadi, S.H., 'The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration,' *op cit*, p. 3,

[142] Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, *op cit*, p. 49.

[143] Art. 6 (4) of the Model law states that ―The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002),
available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration*[Accessed on 08th March, 2014].

g. Conflict Management through Arbitration

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.[144]

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the ADR mechanisms to facilitate access to justice.

h. Conflict Management through Med-Arb

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.[145] This is likely to make the process faster and cheaper for them thus facilitating access to justice.

Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.[146]

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[144] Khan, F., *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, Nairobi.

[145] Mediation-Arbitration (Med-Arb),
Available at *http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm*
[Accessed on 08th March, 2014].

[146] Sussman, E., Developing an Effective Med-Arb/Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1, p. 73.

i. Conflict Management through Arb-Med

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. Arb-med can be used to achieve justice where it emerges that the relationship between the parties needs to be preserved and that there are underlying issues that need to be addressed before any acceptable outcome can be achieved. Mediation, a resolution mechanism is better suited to achieve this as opposed to arbitration, a settlement process.

j. Adjudication and Conflict Management

Adjudication is defined under the Chartered Institute of Arbitrators (CIArb) (K) *Adjudication Rules*, as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction disputes that need to be settled within some very strict time schedules. Due to the limited time frames, adjudication can be an effective tool of actualizing access to justice for disputants who are in need of addressing the dispute in the shortest time possible and resuming business to mitigate any economic or business losses.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and that it does not enhance relationships between the parties.[147] However, in future it may be possible to have a framework within which to settle environmental disputes through adjudication.

16.9.3 Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems. The Kenyan communities and Africa in general, have engaged

[147] Chau, K. W., Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal of Professional Issues in Engineering Education and Practice,* ASCE / APRIL 2007, pp 143-147, p.143.

in informal negotiation and mediation since time immemorial in the management of conflicts. Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence. Inter-tribal conflicts were mediated and negotiated in informal settings, where they were presided over by Council of Elders who acted as 'mediators' or 'arbitrators'.[148]

Their inclusion in the Constitution of Kenya 2010 is a restatement of these traditional mechanisms.[149] However, before their application, they need to be checked against the Bill of Rights to ensure that they are used in a way that promotes access to justice rather than defeating the same as this would render them repugnant to justice or morality.[150] Effective application of traditional conflict resolution mechanisms in Kenya can indeed bolster access to justice for all including those communities whose areas of living poses a challenge to accessing courts of law, and whose conflicts may pose challenges to the court in addressing them.

However, the scope of application of these traditional mechanisms, especially in the area of criminal law is not yet settled. For instance, in the case of *Republic v Mohamed Abdow Mohamed,*[151] the accused was charged with murder but pleaded not guilty. On the hearing date, the court was informed that the family of the deceased had written to the Director of Public Prosecutions (DPP) requesting to have the murder charge withdrawn on grounds of a settlement reached between the families of the accused and the deceased respectively. Subsequently, counsel for the State on behalf of the DPP made an oral application to have the matter marked as settled, contending that the parties had submitted themselves to traditional and Islamic laws which provide as avenue for reconciliation. He cited Article 159 (1) of the Constitution which allowed the courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The issues were whether a murder charge can be withdrawn on account of a settlement reached between the families of an accused and the deceased; and whether alternative dispute resolution mechanisms as espoused by the Constitution of Kenya, 2010 extended to criminal matters. It was held that under article 157 of the Constitution of Kenya, 2010, the Director of Public Prosecutions is mandated to exercise state powers of prosecution and may discontinue at any stage criminal proceedings against any person; and that the ends of justice would be met by allowing rather than disallowing the application. The Application was thus allowed and the accused

[148] Muigua, K., *Resolving Conflicts Through Mediation in Kenya*, *op cit*, pp. 20-37; See also generally, Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).
[149]Art. 159 (2) (3) and 189(4), Constitution of Kenya, *op cit.*
[150] *Ibid.*
[151] Criminal Case No. 86 of 2011 (May, 2013), High Court at Nairobi.

person discharged. It is noteworthy that in some instances, environmental disputes have at worst resulted in deaths thus bringing the whole issue into the sphere of criminal justice.

This case has however drawn criticism and approval in equal measure and thus the legal position is far from settled.[152] The debate on the applicability of ADR mechanisms in criminal justice is a worldwide one. For instance, it has been observed that criminal justice may either be retributive or restorative. It has been argued that while retributive theory holds that the imposition of some form of pain will vindicate, most frequently deprivation of liberty and even loss of life in some cases, restorative theory argues that "what truly vindicates is acknowledgement of victims' harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior.".[153]Further, the conventional criminal justice system focuses upon three questions namely: What laws have been broken? Who did it?; and what do they deserve? From a restorative justice perspective, it is said that an entirely different set of questions are asked: Who has been hurt?; What are their needs?; and Whose obligations are these?[154]

The answers to the foregoing questions may have an impact on how the whole process is handled and further the decision on which one to use depends on such factors as other laws that may only provide for retributive justice in some of the criminal cases while at the same time limiting use of restorative justice. Whichever the case, what remains clear is that restorative justice in criminal matters considered serious, which may involve use of ADR more than use of litigation may have to wait a little longer.

Traditional justice system is an informal approach to managing natural resource conflicts. It seeks to incorporate mediation and negotiation to resolve conflicts in an attempt to find a lasting solution to the conflicts. This approach has been hailed as participatory as it involves representatives from the affected groups and hence wins the confidence of both sides as one capable of achieving justice for all.

This approach involves negotiation and mediation in the political process and these therefore come with all their advantages as discussed herein. This approach is capable of addressing some of the social, political and economic conflicts among the communities, including natural resource conflicts.[155] For instance, the Modagashe Declaration saw

[152] See Bowry, P., 'High Court opens Pandora's Box on criminality,' *Standard Newspaper*, Wednesday, June 12th 2013, available at *http://www.standardmedia.co.ke/?articleID=2000085732* [Accessed on 20/03/2014].
[153] Umbreit, M.S., *et al*, 'Restorative Justice In The Twenty first Century: A Social Movement Full Of Opportunities And Pitfalls,' *Marquette Law Review*, Vol.89, No.251, 2005, pp. 251-304, p. 257.
[154] *Ibid*, p. 258.
[155] Muigua, K., '*Resolving Conflicts Through Mediation in Kenya,'* 2012, pp. 20-21.

communities in Garissa, Mandera and Wajir districts agree to resolve the problems of, *inter alia*, banditry and unauthorized grazing.[156]

The concerned parties are sometimes better placed to address the disagreements and should only be empowered to negotiate their conflicts with the government officials only providing the conducive environment for the same. The only limitation to the application of these informal mechanisms is that they must not be used in a way that contravenes the Bill of Rights; or is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.[157]

16.10 International Legal and Institutional Framework

There are various legal instruments that address natural resource conflict at the international level. The various aspects of the environment are governed by different legal frameworks at the international, regional and even at the local levels.

They address conflict related to various resources such as water, atmosphere, biodiversity, sea and ocean resources, fauna and flora. They also relate to transboundary resource management and sustainable development.

The United Nations recommend pacific settlement of conflicts. The United Nations Charter[158] sets out the purpose of the United Nations in Article I thereof. The Charter states that one of its purposes is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[159]

Another purpose is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.[160] The third purpose is to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[161]

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[156] *Ibid*, p. 22.
[157] Art. 159(3)
[158] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
[159] *Ibid*, Art. 1.1.
[160] *Ibid*, Art. 1.2.
[161] *Ibid*, Art. 1.3.

Chapter VI of the Charter provides for Pacific Settlement of Disputes. Article 33.1 thereof provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, 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*. Article 37.1 provides that should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

In respect of the foregoing mandate and the realisation that natural resource use and management is a potential threat to world peace and stability, the United Nations has often spearheaded the formulation of legal framework to govern various natural resources.[162] These instruments govern the use and management of various resources including water-based resources and land-based resources and most importantly specify mechanisms for management of disputes arising either from their application or in the management of resources within their scope of governance.

There also exist such institutions that address international disputes, including environmental disputes such as the International Court of Justice (ICJ) which is basically the main judicial organ of the United Nations. The other institution is the International Tribunal for the Law of the Sea (ITLOS). The International Tribunal for the Law of the Sea (ITLOS), located in the German port city of Hamburg, was established as an international judicial body pursuant to Annex VI of the *United Nations Convention on the Law of the Sea* (UNCLOS III) 1982. ITLOS functions as one of four conflict resolution mechanisms in matters concerning the Convention's interpretation and application. If direct talks between parties to a dispute fail to produce a settlement, either party may submit the matter to the ITLOS or to one of the other three compulsory conflict resolution mechanisms set forth in Article 287 of the Convention.

The other three mechanisms under UNCLOS are the International Court of Justice, an arbitral tribunal for settling disputes of a general nature, and special arbitral procedures for disputes related to fisheries, the marine environment, scientific research, and vessel navigation and pollution. The *Statute of the international court of justice*, under Article 1, provides that the International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the Statute. Article 36.1 thereof provides that the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and

[162] Under Art. 1.4 of the Charter, the United Nations is also charged with harmonizing the actions of nations in the attainment of these common ends.

conventions in force. Under Article 26.1 the Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such request.[163]

The other institutions include the WTO Appellate Body, governed by the Marrakesh Agreement of 1994 [164] and the International Court of Environmental Arbitration and Conciliation, established in Mexico in November 1994 by 28 lawyers from 22 different countries.[165] The Court facilitates, through conciliation and arbitration, the settlement of international environmental disputes submitted by States, away from the UN structure.

The other Court is the European Court of Justice (ECJ). The Court of Justice of the European Union interprets European Union (EU) law to make sure it is applied in the same way in all EU countries. It also settles legal disputes between EU governments and EU institutions. Individuals, companies or organisations can also bring cases before the Court if they feel their rights have been infringed by an EU institution.[166] The Court gives rulings on the cases brought before it, and the five most common types of cases are: requests for a preliminary ruling – when national courts ask the Court of Justice to interpret a point of EU law; actions for failure to fulfill an obligation – brought against EU governments for not applying EU law; actions for annulment – against EU laws thought to violate the EU treaties or fundamental rights; actions for failure to act – against EU institutions for failing to make decisions required of them; and direct actions – brought by individuals, companies or organisations against EU decisions or actions.[167] It has handled numerous environmental cases touching on Environment Impact Assessment, air, water, Waste and nature. [168] Such cases include the *Commission of the European Communities (applicant) v Kingdom of Spain (defendant)*[169] and the *Commission of the*

[163] Art. 65.1.
[164] 33 ILM 1125(1994); Established the World Trade Organisation.
[165] The International Court of Environmental Arbitration and Conciliation, Statutes 2002, available at the International Court of Environmental Arbitration and Conciliation website, www.icea.sarenet.es [Accessed on 11/11/2013].
[166] European Union, 'Court of Justice of the European Union', available *at http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm* [Accessed on 29/08/2014].
[167] *Ibid*.
[168] 'Leading Cases of the European Court Of Justice; EC Environmental Law.'
[169] Case C-278/01 under Art. 228 EC Treaty: Council Directive 76/160/EEC of 8, December 1975 concerning the quality of bathing water. Where in its judgment, the Court of Justice declared that, by failing to take all necessary measures to ensure that the quality of inshore bathing water in Spain conforms to the limit values set in accordance with Art. 3 of the Directive, the Kingdom of Spain had failed to fulfill its obligations under Art. 4 thereof.

European Communities (applicant) v Hellenic Republic (defendant).[170]As such, the ECJ plays a vital role in handling the disputes arising amongst the European community Member States especially with regard to the use and management of shared resources.

United Nations Environment Programme**(**UNEP) has a rich history assisting governments in obtaining environmental information for decision-making, enhancing global and regional environmental cooperation, developing and applying national and international environmental law, advancing national and regional implementation of environmental objectives, and bridging major groups and governments in policy development and implementation processes.[171]

16.11 Regional Legal and Institutional Framework on Natural Resource Based Conflicts Management

16.11.1 The Africa Water Vision for 2025: Equitable and Sustainable Use of Water for Socio economic Development

Africa Vision 2025 is the shared vision is for an Africa where there is an equitable and sustainable use and management of water resources for poverty alleviation, socio-economic development, regional cooperation, and the environment. The Vision calls for a new way of thinking about water and a new form of regional cooperation. At the regional level, it calls for partnership and solidarity between countries that share common water basins. At the national level, it requires fundamental changes in policies, strategies and legal frameworks, as well as changes in institutional arrangements and management practices. The Vision further requires that a participatory approach to management of resources is adopted and also the need to ensure inclusion of marginalized groups such as women and the youth.

The Vision further identifies the inadequacies of international legal frameworks governing transboundary water resources and thus calls for international cooperation in management of shared water resources as the most viable model for achieving positive regional cooperation to avert any conflicts. Thus, the challenge is for immediate action to

[170] Case C-384/97 under Art. 169 of the Treaty (now Article 226 EC Treaty); Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community. The Court declared that, by failing to adopt pollution reduction programmes including quality objectives for the dangerous substances covered by the first indent of List II of the annex to Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, the Hellenic Republic had failed to fulfill its obligations under Art. 7(1) of that directive.

[171] United Nations Environmental Programme, Environmental Governance,
Available *http://www.unep.org/environmentalgovernance/* [Accessed on 29/12/2013].

create an enabling environment for joint management of international water basins to become the norm rather than the exception.[172]

16.11.2 SADC Protocol on Shared Watercourse Systems

The South African Development Community (SADC) Revised Protocol on Shared Water courses was set up in 2000 [173] and it sets the framework for utilization of watercourses shared by two or more SADC member states. The overall objective of this Protocol is to foster closer cooperation for judicious, sustainable and coordinated management, protection and utilisation of shared watercourses and advance the SADC agenda of regional integration and poverty alleviation.[174] With regard to settlement of disputes, the Protocol provides that State Parties shall strive to settle all disputes regarding the implementation, interpretation or application of the provisions of this Protocol amicably in accordance with the principles enshrined in Article 4 of the Treaty. The Disputes between State Parties regarding the interpretation or application of the provisions of this Protocol which are not settled amicably, shall be referred to the Tribunal. Further, if a dispute arises between SADC on the one hand and a State Party on the other, a request shall be made for an advisory opinion in accordance with Article 16(4) of the Treaty.[175]

16.11.3 The African Convention on the Conservation of Nature and Natural Resources

The *African Convention on the Conservation of Nature and Natural Resources*[176] applies to all areas which are within the limits of national jurisdiction of any Party; and to the activities carried out under the jurisdiction or control of any Party within the area of its national jurisdiction or beyond the limits of its national jurisdiction.[177] The objectives of the Convention are: to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.[178] This Convention takes cognizance of the fact that all States have a duty to ensure the protection of the environment and to ensure that environmental resources are utilized in a manner that is sustainable, fair and equitable.[179] Parties under the Convention are thus required to ensure

[172] *Ibid*, p. 10.
[173] Southern African Development Community Revised Protocol On Shared Watercourses.
[174] Art. 2.
[175] Art.7.
[176] OAU, *African Convention on the Conservation of Nature and Natural Resources*, CAB/LEG/24.1.
[177] Art. 1.
[178] Art. 2.
[179] Art. 3.

that they adopt all the requisite measures for the achievement of the objectives of the Convention.

16.11.4 The East African Community Treaty – 1999

The objectives of the Community are to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.[180]For these purposes, and as subsequently provided in the provisions of this Treaty, the Community is to ensure *inter alia*: the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States; and the promotion of peace, security, and stability within, and good neighborliness among, the Partner States.[181]

The fundamental principles that are to govern the achievement of the objectives of the Community by the Partner States include *inter alia*: mutual trust, political will and sovereign equality*;* peaceful co-existence and good neighborliness; and peaceful settlement of disputes.[182] The East African Court of Justice is established as the judicial organ to determine disputes arising from the treaty. The Court has decided on issues relating to natural resources, especially such resources that are shared by many countries.[183]

16.11.5 The Protocol on Environment and Natural resources Management

The Protocol on Environment and Natural Resources Management provides for the cooperation in Environment and natural resources management.[184] More specifically, on its article 13 related to the management of water resources, the protocol has these provisions: The partner States are to develop, harmonize and adopt common national policies, laws and programmes relating to the management and sustainable use of water resources and shall utilize water resources, including shared water resources, in an equitable and rational manner. In exploiting mineral resources, Article 18 of the Protocol requires states to adopt measures to ensure that both the present and future generations are able to benefit from these resources and that the exploitation of these resources do not leave negative social footprints among communities where the extractive industries operate.

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[180] Art. 5.
[181] Art. 5.3.
[182] Art. 6.
[183] See *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, Reference No. 9 of 2010.
[184] Chapter Three.

16.12 National Legal and Institutional framework

There are various legal instruments that govern the access, use and management of environment and natural resources in Kenya.[185] Administrative conflict management mechanisms, litigation and arbitration are the main strategies for addressing conflicts over environmental resources under the Kenyan law. They often overlap resulting in different legal bodies that can be complementary, competitive or clashing. Some of the laws set up arbitral tribunals that are tasked with settling natural resource conflicts arising under the particular laws. They set up reporting mechanisms that are mandated to handle complaints against alleged violation of the rights of persons to use, access or participate in the management of natural resources as an attempt to forestall any conflicts or disputes. However, some of them hardly provide a comprehensive framework on the management of conflict arising in use and management of such resources. There is therefore the need to look at these institutions so as to evaluate the effectiveness of each of these.

16.12.1 Constitution of Kenya 2010

The Constitution of Kenya 2010 has provisions that relates to the management of the environment and natural resources. Indeed, The Constitution directs how the natural resources within the territory of Kenya are to be managed. The State is charged with the obligation to, *inter alia*: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.[186]

One of the Principles of land policy as provided for under the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.[187] Further, some of the functions of the National Land Commission under the Constitution and the National Land Commission Act are to, *inter alia*: to initiate investigations, on its own initiative or on a

[185] See the various laws covering forests, wildlife, water, land, minerals (Land Act 2012, National Land Commission Act 2012, Water Act 2002, Forest Act 2005, Wildlife (Conservation and Management) Act 2013, Mining Act Cap. 306, etc.
[186] Art. 69(1).
[187] Art. 60(1) (g).

complaint, into present or historical land injustices, and recommend appropriate redress; and to encourage the application of traditional dispute resolution mechanisms in land conflicts.[188]

The Constitution allows courts to protect the right to clean and healthy environment by allowing persons to litigate on the same. Such persons do not necessarily have to demonstrate *locus standi*. It 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.[189]

Article 159(2) (c) of the Constitution of Kenya, 2010 provides for alternative forms of dispute resolution as one of the principles that will guide the courts and tribunals in the exercise of judicial authority. The formal recognition of ADR and traditional dispute resolution mechanisms is predicated on the cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora), disputes are resolved expeditiously and without undue regard to procedural hurdles that in the past bedeviled the court system as they are very informal. It was also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation.[190] It can therefore be argued that this is a positive step towards promoting public participation by communities in conflicts management.

Further, Article 189(4) thereof provides for cooperation between national and county governments. It requires that Government at each level, and different governments at the county level, co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.[191] Further, in any dispute between governments, the governments are to make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.[192] The national legislation is to provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.[193]

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[188] Art. 67(2); See also the *National Land Commission Act*, No. 5 of 2012, which echoes the Constitutional position under S. 5 thereof.
[189] Art. 70(1).
[190] Art. 11, Constitution of Kenya 2010; See generally Muigua, K., "Alternative Dispute Resolution and Article 159 of the Constitution," p. 28.
[191] Art. 189(2).
[192] Art.189(3).
[193] Art. 189(4). In this regard, the *Intergovernmental Relations Act*, No. 2 of 2012, was enacted to establish a framework for consultation and co-operation between the national and county governments and amongst

The Constitution of Kenya, 2010 heralds a new era of a more participatory conflict management approach as against command and control mechanisms that had previously characterized most of the legal instruments regulating the various natural resources management.

The Constitutional provisions offers hope of realising environmental justice which is 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 policies.[194]

Article 68 of the Constitution mandates Parliament to revise, consolidate and rationalize the existing land laws. In this regard, Parliament has enacted new laws that seek to guide the administration of land in the country and these are; The Land Act 2012, Land Registration Act 2012 and the National Land Commission Act 2012. Parliament is also in the process of developing a law to guide the administration of community land.

The Land Act provides in section 4 (2) (m) that one of the guiding principles of land management and administration shall be the adoption of alternative dispute resolution mechanisms in land dispute handling and management. In this regard, communities are encouraged to settle land disputes through recognized local community initiatives. This provision has further been taken into account by the National Land Commission Act where in section 5 (1) (f) it is provided that one of the functions of the Commission will be to encourage the application of traditional dispute resolution mechanisms in land conflicts.

From the foregoing, it is noteworthy that the new land laws have taken cognizance of the importance of adopting alternative methods of dispute resolution in solving land related disputes and this relates to the relative speed of these processes compared to the formal adjudication mechanisms. This is further meant to ensure that the land management and administrative mechanisms gain the trust of the communities.

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county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Art. 6 and 189 of the Constitution, and for connected purposes. Sec.31 thereof states that the national and county governments shall take all reasonable measures to—resolve disputes amicably; and apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Art. 189(3) and (4) of the Constitution. Also noteworthy, is S. 32(1) which states that any agreement between the national government and a county government or amongst county governments must—

Include a dispute resolution mechanism that is appropriate to the nature of the agreement; and provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.

[194] United States Environmental Protection Agency, 'Environmental Agency,'available at *http://www.epa.gov/environmentaljustice/*[Accessed on 06/09/2014].

16.12.2 Environment (Management and Co-Ordination) Act, 1999

The *Environmental Management and Co-Ordination Act*[195] (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.[196] EMCA provides the main overall legal framework and guidelines on the management of the environment and the natural resources.

The Act guarantees every person's entitlement to a clean and healthy environment and any person who alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress. Further, the Act requires that environmental audits are conducted before the person carries out a project that is likely to have negative effects on the environment.

The Act provides that in exercising the jurisdiction conferred upon it under the Act, the High Court is to be guided by the principles of sustainable development, *inter alia*: 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.[197] These came out clearly in the Kenyan case of *Waweru v Republic*, [198] where the applicants and the interested parties were charged with the twin offences of (1) discharging raw sewage into a public water source and the environment contrary to section 118(e) of the *Public Health Act*,[199] and (2) failure to comply with the statutory notice from the public health authority contrary to section 120(1) of the said *Public Health Act*.

EMCA attempts to provide an institutional framework on conflict resolution in matters of environment management which includes institutions mandated to settle disputes that arise therein. However, their effectiveness in achieving the same may be contended. One of the bodies under EMCA is the National Environment Council whose functions are *inter alia*: policy formulation and directions; setting national goals and

[195] No 8 of 1999.
[196] *Ibid*, Preamble.
[197] S. 3(5).
[198] (2007) AHRLR 149 (KeHC 2006).
[199] Chapter 242, Laws of Kenya.

objectives and determining policies and priorities for the protection of the environment; and promoting co-operation among public departments, local authorities, private sector, Non-Governmental Organisations and such other organisations engaged in environmental protection programmes.

The National Environment Management Authority (NEMA) also established under the Act is charged with *inter alia:* co-coordinating the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies.

16.12.3 The National Environment Tribunal (NET)

Part XII,[200] section 125 of EMCA establishes the National Environment Tribunal (NET) which is charged with settling disputes that arises in matters provided for under the Act.[201] NET is charged with hearing appeals arising from administrative decisions of committees mandated to enforce environmental standards.[202] However, its decision is not final and any dissatisfied party may appeal to superior courts. This tribunal is an arbitral tribunal hence offering a much formalized approach to settlement of a dispute. The dispute resolution process is also free of legal and procedural technicalities which bed evils courts.

The Tribunal has over time resolved numerous disputes relating to the environment and it has greatly contributed to the conservation of the environment. One such instance is seen in the case of *Peter Mugoya and another v Director General, National Environment Management Authority (NEMA) and 2 others,*[203]which concerned a dispute relating to the construction of a Church building on a community forest land. In this case, the Tribunal cancelled the EIA Licence that had been granted to the Church and also revoked NEMA's letter of development approval that had been issued to the Church. The Church was further directed to restore the land to the condition it was in before their entry.

16.12.4 The Public Complaints Committee

The Public Complaints Committee is established under section 31 of EMCA as a committee mandated to investigate: (i) any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya; (ii) on its own motion, any suspected case of environmental degradation, and to make a report of its findings together with its recommendation thereon to the Council, *inter alia.*

[200] SS. 125-136, No. 8 of 1999.
[201] S. 125, No. 8 of 1999.
[202] S. 126, No, 8 of 1999.
[203] Tribunal Appeal No. 99 of 2012.

This Committee does not also concern itself with the substantive rights and interests of persons in the enjoyment of the benefits accruing from natural resources. To this end, the committee does not involve itself in management of natural resource conflicts that arise from use, access and management of such resources.

16.12.5 Environment and Land Court

This Court, as discussed in the preceding section, is established under section 4 of the Environment and Land Court Act No. 19 of 2011 and also in accordance with Article 162(2) of the Constitution. The jurisdiction of this court is related to hearing of disputes relating to environment and land and this includes disputes relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rents, rates and issues relating to compulsory acquisition of interests in land. The court further has powers relating to the hearing disputes relating to land administration and management. The Court further has appellate jurisdiction over the decisions of subordinate courts or local tribunals in relation to matters falling within the jurisdiction of the Court.

16.12.6 Sectoral Policies Relevant to Conflict Management

These policies address issues that are fundamental to conflict management and peace building. They provide government guidelines on the interventions that should be undertaken to address possible and existing natural resource based conflicts.

a. National Environment Policy, 2012

The National Environment Policy[204] advocates for a market-based approach to environmental conflicts management rather than command and control approach by providing for partnerships between the state and non-state actors. The policy statement tasks the government with developing and implementing mechanisms for conflict resolution and management in the conservation of the environment and natural resources. It advocates for a wide representation from across the private sector and civil society organizations, as well as ensuring that community voices are brought forward due to their central role in environmental conservation and management.

The Policy further observes that the non-state actors have the advantage of being more independent of political pressures than governmental formal management agencies. Thus, they are well positioned to play an important leading role in the agenda setting and policy development processes. For instance, NGOs can mediate in the resolution of resource conflicts at the local level by bringing considerable expertise and resources.

[204] Revised Draft No. 4, April, 2012.

The Policy also calls for a framework for a harmonized and common approach to the conservation and management of such shared/transboundary resources to avert conflicts in the use, access and management of such resources.

b. Draft National Water Policy, 2012

Among the key guiding sectoral principles of the draft National water Policy are: to facilitate public participation in all matters relating to water resources management including conflict resolution; and the Integrated Water Resource Management (IWRM) approach. The Policy seeks to enhance the access and availability of water resources while at the same time reducing instances of conflicts. It seeks to ensure that there is collaboration between various sectors to avert and deal with conflicts.

To facilitate this, the Policy seeks to be guided by the Integrated Water Resource Management (IWRM) approach which approach is a process which promotes the coordinated development and management of water, land and related resources in order to maximize economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems and the environment.[205] The basis of IWRM is that the many different uses of finite water resources are interdependent. Such interdependence may easily generate conflict among the various groups of persons who may be using the water for various uses. For instance, two communities that live in the same area may have differing needs for water resources which may be a source of conflict. A pastoralist community may have disagreements with another one that are farmers and who may use the water for irrigation.

To avert such situations, Integrated Water Resources Management (IWRM) approach that has now been adopted internationally as the way forward for efficient, equitable and sustainable development and management of the world's limited water resources and for coping with such conflicting demands, has been incorporated under this Draft national water policy as one of the guiding principles therein.

c. The National Land Policy

The Sessional Paper No. 3 of 2009 on the National Land Policy laid the foundation for the enactment of the new legislations on land. The Policy noted that Kenya has numerous land laws some of which are inconsistent and incompatible. The result of this was seen to be a complex land administration system which was prone to conflicts. The Policy in its objectives thus sought to *inter alia* ensure that there are established efficient

[205] 'A Water Secure World-Global Water Partnership', Available at *http://www.gwp.org/The-Challenge/What-is-IWRM/*[15/08/2013].

and transparent dispute resolution mechanisms.[206] The dispute resolution mechanism to be adopted is to incorporate members of the community in the process and section 169 of the Policy further outlines the dispute resolution principles which are to be adopted.

The Policy in section 170 provides that the government is to undertake certain measures to ensure efficiency in land management and effective dispute resolution. The government is in this regard required to *inter alia* establish independent, accountable and democratic systems for adjudicating land disputes. The government is also required to encourage and facilitate the use of alternative dispute resolution mechanisms in order to facilitate access to justice especially by the poor.

d. The Forest Act 2005

This Act was enacted to provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country.[207] The Act applies to all forests and woodlands on state, local authority and private land.[208] The provisions of the *Environmental Management and Coordination Act*, regarding reference to the Tribunal established under that Act apply to the settlement of disputes arising under this Act.[209]

Under the Act, Community Forest Associations (CFAs) are established as tools to ensure that local communities participate in the co-management of the forest resources. Section 46 (1) of the Forest Act 2005 provides for the establishment of this Associations which are to apply to the Director of Forest Service for permission to participate in the conservation and management of the forests. In managing the forest resources, the CFAs play an important role in resolving conflicts emanating from the use of the forest resources and this is due to the management roles conferred upon them by Section 46 of the Forest Act.

16.13 Challenges

It has been pointed out that Conflict-sensitive natural resource management (NRM) systems are an important tool for preventing violence. A NRM system is conflict-sensitive if the power to make decisions about vital resources can be contested by different stakeholders without violence. This, in turn, requires a government that is capable, accountable, transparent and responsive to the wishes and needs of its population. In this way, natural resources have the potential to be turned from triggers for violence into a

[206] National Land Policy, S. 5 (e).
[207] Preamble.
[208] S. 1.
[209] S. 63(2), Forest Act, 2005.

tangible commitment on the part of the government to peace and development.[210] It also requires a civil society that is ready and able to engage with the government to manage resources in a sustainable, profitable and non-violent manner.[211]

Conflict becomes problematic when societal mechanisms and institutions for managing and resolving conflict break down, giving way to violence. Societies with weak institutions, fragile political systems, and diverse societal relations can be drawn into cycles of conflict and violence.

Natural resource conflicts arise when parties disagree about the management, distribution and protection of natural resources and related ecosystems. These conflicts can escalate into destructive relations and violence when the parties are unable or unwilling to engage in a constructive process of dialogue and conflict resolution.

Societies lacking the institutional arrangements that facilitate constructive conflict resolution can be drawn into intractable cycles of conflict and violence, particularly where political systems are fragile, and in situations where divisions between opposing parties are extreme.

16.14 Way Forward

There is a need to make more use of an integrated application of litigation, alternative dispute resolution mechanisms and traditional justice systems in the management of natural resource conflicts. Litigation is desirable in that it is able to secure compliance by bringing unwilling parties to the process and also giving binding outcome that is enforceable without further agreement. Such parties may have to live with such decisions making them harbour bitterness that may cause recurrence of the dispute in future with possibly worse effects as a way of seeking revenge. Litigation as a settlement process may therefore be the best placed mechanism to handle natural resource conflicts where there is the immediate need to quell warring factions or where there is an urgent need for an injunction to preserve the status quo in environmental matters.

The Constitution of Kenya, 2010 provides under Article 10(1) provides for the national values and principles of governance which include inter alia, democracy and participation of people, equity, social justice, inclusiveness, non-discrimination, protection of the marginalized, sustainable development and transparency. These values and principles should also be reflected in the processes that are chosen in the management of natural resource conflicts. Indeed, Article 10(1) of the Constitution provides that the

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[210] United Nations Environment Programme, 'Strengthening Capacity for Conflict-Sensitive Natural Resource Management,' *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict*, available at *http://postconflict.unep.ch/publications/GN_Capacity_Consultation_ES.pdf* [Accessed on 27/08/2014].

[211] *Ibid.*

foregoing principles should guide enactment, application or interpretation of any law as well as the making or implementation of public policy decisions.

The implication of this is that any mechanism used to resolve natural resource conflicts should be able to reflect the foregoing values and promote access to justice by persons. The national values and principles of governance should inform the application of ADR mechanisms, traditional justice systems or litigation in achieving satisfaction of the needs of the parties to a conflict thus leading to acceptance of the outcome by all as one that is just and applicable. The concept of justice is one that is abstract, its meaning varying from one person to the other and thus parties must have confidence in the whole process employed if they are to accept the outcome and feel satisfied. Any dissatisfaction is likely to lead to future disputes over the same issues. Where litigation fails to be effective in dealing with certain kinds of conflicts, other mechanisms should be explored considering that dissatisfied parties can only appeal to the highest court on land after which they have to deal with the outcome. In such situations, they may decide to resort to their own informal means of achieving 'justice' which 'means' may not necessarily be termed as legal. In such situations, ADR mechanisms and traditional justice systems may suffice in addressing the real issues in disputes and conflicts considering that they may give the parties a chance to participate in the process and speak their mind as they have control of the process. This essentially means that any agreement reached by parties will be a result of a consensual process and traditional justice system may come in to ensure that parties abide by the outcome.

The customs and belief systems of both parties may require them not to renege on the agreement to respect the decision. As recognition of this, Article 60(1) provides that one of the principles of land policy is the encouragement of communities to settle land disputes through recognized local community. This is a laudable constitutional move.

Article 159(2) (c) of the Constitution of Kenya, 2010 provides that employment of alternative dispute resolution mechanisms will be one of the guiding principles in the exercise of judicial authority by courts and tribunals. Courts may be required to refer some matters for ADR where it is deemed necessary. For instance, section 20(1) of the *Environment and Land Act* 2011 provides that nothing in the 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. Further, it 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. Thus, in dealing with land the Court also ought to consider ADR to manage disputes and/or conflicts.

There is need to move from the formal justice system in managing natural resource conflicts and incorporate other informal mechanisms as these will promote the spirit of the Constitution of Kenya, 2010 which seeks to adopt a more participatory and just approaches in management of conflicts. It will also go a long way in promoting the spirit of Article 48 of the Constitution which guarantees access to justice for all persons. This is more likely to be achieved where the informal processes and the formal system reinforce each other in promoting access to justice by all. For this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition*; *proportionality*; *equality of opportunity*; *fairness of process*; *party autonomy*; *cost-effectiveness*; *party satisfaction* and *effectiveness of remedies.*[212]

16.14.1 Community-Based Natural resource Management

Developing shared understandings of the resource and conflict context: Preventing violence over resources begins with an analysis of the role that resources can play in conflict. Ideally, the conflict analysis process should be inclusive and participatory. The proposed *Community Lands Act*, 2013 seeks to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection, management and administration of community land; to establish and define the powers of community land Boards and management committees, to provide for the powers of county governments in relation to unregistered community land and for connected matters.[213]The objects and purposes of the Act are to establish a legislative framework and procedures for—recognition, protection and registration of community land rights; vesting of community land in the communities identified on the basis of ethnicity, culture or similar community of interests; management and administration of community land by organs of the communities; and holding of unregistered community land in trust by county governments.[214]

This legislation, if passed, can go a long way in promoting effective management of natural resource based conflicts be it through organized community legal action or through ADR and traditional justice systems thus promoting the development agenda in the relevant areas.

[212] See generally, Maiese, M., "Principles of Justice and Fairness," *op cit*.
[213] Preamble.
[214] S. 3.

16.14.2 Institutionalized Cooperation

Regarding water resources management, it has rightly been pointed out that adequate institutional structures at the transboundary, national, and regional levels can play a crucial role in balancing competing interests over water resources and enabling sustainable water cooperation. This is believed to be possible through institutionalization of cooperation which can help to build trust and provide solutions for the challenges in shared waters. This is due to the finding that where institutional capacity for dialogue and the management of disputes is present, conflict is less likely.[215]

16.15 Conclusion

This chapter discusses natural resource conflicts and the various approaches to the management of such conflicts. It discusses the two major approaches which are the formal system and the informal system which incorporates traditional justice system and the alternative dispute resolution mechanism.

If environmental justice and democracy are to be achieved, then there is need to adopt an integrated approach to both conflict resolution and dispute settlement mechanisms in order to promote peace, coexistence, justice for all and participation by all the involved parties. Environmental justice entails promotion of equitable treatment of people of all races, incomes and cultures with respect to environmental laws, regulations, policies and decisions. One of the fundamental components of environmental justice is that it seeks to tackle social injustices and environmental problems through an integrated framework of policies.

Courts have played a useful role in promoting and securing the environmental rights of persons as well as in environmental conservation and are therefore useful in achievement of peace, sustainable development and environmental justice for all.

However, Alternative Dispute Resolution mechanisms such as negotiation, fact finding facilitation and mediation have the potential to enhance environmental justice for the Kenyan people since they allow parties to enjoy autonomy over the process and outcome; they are expeditious, cost-effective, flexible and employ non-complex procedures. They result in mutually satisfying outcomes which essentially resolves the conflict thus achieving lasting peace among the previously conflicting parties. These mechanisms are also useful in achieving environmental democracy in Kenya. There is a need to manage natural resource based conflicts for the sake of peace, prosperity and sustainable development.

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[215] UNW-DPAC 2012, Information brief: Promoting Water Cooperation Legal frameworks and institutional arrangements, p. 3. Available at*http://www.un.org/waterforlifedecade/water_cooperation* on 27/08/2014].

Chapter Seventeen

Towards Environmental Justice for All

17.1 Introduction

The previous chapters have extensively explored Kenya's policy, legal and institutional frameworks on natural resources in Kenya. The authors proffer an assessment of the paradigm shift that is expected in the management of these resources under the current Constitutional dispensation so as to promote the values of, *inter alia,* democracy and participation of the people, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, transparency and accountability and sustainable development as envisaged under the Constitution.[1] What stood out quite prominently, in this contribution is the fact that, the realization of the Bill of Rights under the Constitution 2010, must be accompanied by stronger emphasis on sustainability, productivity, efficiency and equity in the management of natural resources. To realize this goal, there is need for all persons including the State to work towards fulfilling their constitutional and statutory roles in the management of natural resources.

It is, noteworthy, that the Constitution calls for concerted efforts from all persons and State organs in realising the aspirations of all Kenyans, to create a society based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.[2] It is for this reason that the contribution has also tried to locate the role of the new governance structures under the Constitution including the judiciary, parliament and devolved Government structures and their ramification in natural resource management in Kenya. However, what stands out quite conspicuously is the prominent and bolder role of the State, and in this regard the national government, in protecting and managing natural resources under the law. The State must be in the forefront in respecting, protecting and promoting critical rights such as the right to food, water, housing and the right to a clean and healthy environment. In fulfilling this mandate, prudent management of natural resources cannot be an option on the part of the State.

The discourse has also shown that with globalization and increased investment in Africa, and Kenya in particular by foreign multinationals; there is a high likelihood that Africa is about or is experiencing plunder and mismanagement of natural resources reminiscent of mess orchestrated by colonialists during the colonial epoch. Although

[1] Constitution of Kenya, Art. 10.
[2] See Preamble; Art. 10, 19, 21, 23, 27, 69.

internationally, there are persistent calls and actual commitments from many States to control and possibly eliminate rampant pollution, depletion of resources and tackle climate change; ensuring a balance between economic development and sustainable development in the exploitation of shared international natural resources as well as those to be found in specific States remains a major global challenge.[3] In this connection, this work has assessed some of the issues touching on natural resources exploitation, legal and policy regimes for natural resource extraction, benefit sharing; granting of rights and concessions for exploitation, impact of resource extraction, natural resource contracts, and conflicts management amongst others. This contribution has emphasised that there is need for public participation, transparency and accountability in the management of the revenue and benefits accruing from such natural resource exploitation, as a means of fostering environmental justice.

Further, although the work has also proffered a number of recommendations on the way forward in the management of natural resources in line with international best practices, it has also been suggested that there is need to go beyond the law in finding answers to some of the challenges facing natural resources management in Kenya especially where there is reluctance by law-makers and law enforcers in doing their due roles.

17.2 Way Forward

Across the preceding chapters, the authors have identified the various challenges in the legal, policy and institutional frameworks hampering sound natural resources management in the country including the impact of a sectoral approach to NRM, a state-centric approach, lack of public participation, inadequate laws and policy frameworks, climate change, globalisation amongst others. It is quite evident from the discussion that some of the current laws in the country are archaic and have therefore proved inadequate, if not irrelevant, in addressing the challenges bedeviling natural resources management, especially in post-2010 epoch.

It is arguable that the current legal framework does not guarantee enjoyment of environmental justice, effective promotion and realisation of the principles of sustainable development, as well as efficient and effective resolution of conflicts in the natural resources sector in Kenya today. For instance, most of the incidents of cattle rustling and constant tribal wars in the northern parts of Kenya have been linked to natural resources. This shows that there is a gap that the law has failed to fill in the management of natural resources. Moreover, most of the sectoral laws already mentioned, are yet to be amended or reviewed to conform to the Constitution.

[3] See Sachs J.D., "From Millennium Development Goals to Sustainable Development Goals," *The Lancet*, Vol. 379(9832), 9–15 June 2012, pp. 2206–2211.

17.2.1 Public Participation and Inclusivity

The Constitution not only recognises the need for sound and efficient management of natural resources, and the environment in general, but also emphasizes the central role that people should play by way of participation in decision making and natural resources management.[4] This anthropocentric approach to natural resources management informed the drafting of many of the international legal instruments on natural resources, access, use and management.

As already highlighted, most of the sectoral laws were crafted in an era when control of natural resources was vested in State bodies while extending user rights to communities. The State authorities have enormous powers when it comes to appropriating such rights, often with public consultation provisions being a matter of formality. Many a time, communities have had to resort to court to have their interests safeguarded. This is so because public participation provisions are often ambiguous as to whether public participation should have actual participation by the affected persons or it would suffice to have the elected people's representatives in the decision-making process. The latter have failed to adequately protect and promote the interests of communities due to a number of reasons, including corruption which leads to compromise and accrual of benefits to fewer people at the expense of whole communities. Some of the justifications for actual public participation are arguably not effective. For instance, Environmental Impact Assessment (EIAs) exercises are arguably not efficient ways of involving the public in some of the development activities involving natural resources use. This is because, as a way of minimizing the costs on the project managers or owners, they are often carried out by way of calling for comments through the print media.

The end result is that only the elite section of a community gets to participate. Those who actually get affected either positively or negatively only learn of the project when it is already up and running. It is, therefore, important to ensure that the citizenry get to participate and play a role in the access, use and management of natural resources in the country through active participation in decision-making processes as well as ensuring that they have sufficient incentives to promote the constitutional principles of sustainable and productive management of available resources both for poverty eradication and sustainable development.

Environmental justice as a theme features prominently throughout the preceding chapters particularly in light of the current Constitutional provisions on environmental and resource governance.[5] The increased human rights awareness (as a result of the

[4] Art. 10 and 69 of the Constitution.

[5] See Art. 10, 35, 40, 42, 43, 48, 69, 70, 71 and 72 of the Constitution. These provisions touch on such issues as good governance and state regulation; public participation; Access to Information; Access to Justice amongst other principles of environmental governance.

explicit and comprehensive Bill of Rights) means that there is a high likelihood of increased demand by the citizenry, not only for more meaningful participation in governance matters, but also transparency and accountability in the management of the available natural resources. This is especially so, with the devolved governance structure where the locals are a bit more in touch with the government, as compared to the previous unitary government era when management of resources was state-centric with minimal or no regard to public participation, accountability and transparency. The Constitution 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.[6] Further, apart from the guarantee for enjoyment of the right to clean and healthy environment,[7] the current Constitution in fact goes further to place a duty on every person to cooperate with the State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[8]

Public participation in governance matters is therefore more than a right: it is a constitutional duty placed on all citizens. 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-making. [9] There is, therefore, a need to meaningful participation by all as a way of promoting inclusive, equitable and sustainable management of natural resources in the country.

17.2.2 Environmental Information and Education

As such, it is important that the citizenry get to access the relevant environmental information that would enable them participate meaningfully in the management, protection and conservation of the environment even as they exploit the natural resources.[10] The State and especially the relevant organs should therefore ensure that such information is readily available to the people in form and content that will enable them realise their rights.[11] Sustainable utilisation of the available resources and management of

[6] Art. 69(1) (a).
[7] Art. 42, 70.
[8] Art. 69(2).
[9] United Nations Human Settlements Programme, "Public Participation Tools,"available at *http://ww2.unhabitat.org/cdrom/TRANSPARENCY/html/2b_8.html* [Accessed on 18/06/2015]; See generally, Muigua, K., "Towards Meaningful Public Participation in Natural Resource Management in Kenya," available at *http://www.kmco.co.ke/attachments/article/126/TOWARDS%20MEANINGFUL%20PUBLIC%20PARTICIPATION%20IN%20NATURAL%20RESOURCE%20MANAGEMENT%20IN%20KENYA.pdf.*
[10] Art. 35.
[11] Art. 35(3).

the environment requires the combined efforts of all the relevant stakeholders, backed by a strong and effective legal and institutional framework. The Rio+20 outcome document records that member States agreed that sustainable development goals (SDGs) must, *inter alia*, include active involvement of all relevant stakeholders, as appropriate, in the process.[12] No meaningful and quality participation can be realised without access to the relevant information by the concerned stakeholders. For the public to appreciate such information, education thus becomes a necessary empowerment tool.

Apart from the foregoing, education is also useful in empowering communities for economic and social development, both of which can arguably play a huge role in the promotion of environmental sustainability. Education actually features prominently in the SDGs as a tool for eradication of poverty.[13] RIO+20 Conference participants reaffirmed the need to achieve economic stability, sustained economic growth, the promotion of social equity and the protection of the environment, while enhancing gender equality, women's empowerment and equal opportunities for all, and the protection, survival and development of children to their full potential, *including through education* (emphasis added).[14] It is, therefore, important that measures be put in place to facilitate acquisition of education in all its relevant forms by all persons, as a way of promoting environmental sustainability and sound management of natural resources in the country for economic and social development.

17.2.3 Poverty Eradication

The RIO+20 Outcome document: The Future We want, states that poverty eradication is the greatest global challenge facing the world today and an indispensable requirement for sustainable development.[15] The current Constitution of Kenya contemplates a situation where the citizenry get to participate meaningfully and also get to appreciate the pros and cons of the exploitation of any resource in an area. It is important that the State addresses poverty in the country as way of promoting environmental sustainability and conservation. As already pointed out elsewhere, poor people are most likely to circumvent environmental restrictions in their desperation for land, food, and sustenance.[16] These are issues that should therefore be addressed if any substantial progress is to be realised in the country.

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[12] United Nations, *Rio+20 Outcome Document: "The Future We Want,"* The UN Conference on Sustainable Development's Rio+20 conference on June 22, 2012, A/RES/66/288. Resolution adopted by the General Assembly on 27 July 2012.
[13] *Ibid*, Clause 62.
[14] *Ibid*, Clause 11.
[15] *Ibid*, Clause 1.
[16] Sachs, J.D. & Reid, W.V., "Investments toward Sustainable Development," *Science*, 19 May 2006, Vol. 312, p. 1002, available at

The scourge of poverty can arguably be addressed through such means as investment in the education sector, improved agricultural practices, especially for the rural communities, economic empowerment of communities through efficient marketing of produce (both agricultural and industrial) and dissemination of relevant information, as well as efficient management of state resources to facilitate infrastructural development, amongst other strategies. Arguably, more coherent and bolder poverty reduction strategies could ease environmental stresses by slowing population growth and enabling the poor to invest long term in their environment.[17]

It is, therefore, imperative that the laws that were enacted prior to the promulgation of the current Constitution of Kenya 2010 be reviewed or amended in line with the constitutional provisions so as to reflect and promote the spirit of the Constitution on natural resources access, use and management. In order to promote sound natural resource governance, the sectoral and where applicable framework laws, should reflect the principles of democracy and participation of the people, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, transparency and accountability and sustainable development as envisaged under the Constitution.[18] These principles should inform any measures that are taken in fighting poverty, promoting economic development and the sustainable development agenda in the country. With everyone on board, it is arguably also easy for the country to achieve the economic blueprint, Vision 2030. Sound management and utilisation of natural resources is an imperative whose time is now. The push towards environmental justice for all is on. It is an achievable ideal that is worth pursuing.

http://earthinstitute.columbia.edu/sitefiles/file/about/director/documents/ScienceMay192006withReid-InvestmentsTowardSustainableDevelopment.pdf [Accessed on 20/06/2015].

[17] *Ibid.*

[18] Constitution of Kenya, Art. 10.

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