

**Rule of Law Approach for Inclusive Participation in
Environmental, Social, and Governance (ESG)
Accountability Mechanisms for Climate-Resilient
Responses**

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Table of Contents

Abstract..... 3

1.0 Introduction 3

2.0 The Rule of Law and ESG 6

3.0 Embracing the Rule of Law Approach for Inclusive Participation in ESG Accountability
Mechanisms for Climate-Resilient Responses 10

4.0 Way Forward 16

5.0 Conclusion 19

References 20

Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses

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Abstract

The paper argues a case for the rule of law approach for inclusive participation in Environmental, Social, and Governance (ESG) accountability mechanisms for climate resilient responses. It defines the rule of law. The paper further critically examines how the rule of law advances inclusive participation in ESG accountability mechanisms for climate resilient responses. The paper also explores the challenges facing the rule of law towards this end and offers solutions towards strengthening the rule of law approach in enhancing ESG accountability mechanisms for Sustainable Development.

1.0 Introduction

Environmental, Social and Governance (ESG) is a concept that seeks to achieve sustainable, responsible and ethical investments by incorporating Environmental, Social and Governance concerns in corporate decision making¹. The rise of ESG has been necessitated by global problems including climate change, corporate corruption and financial inequality². In turn, corporations have faced growing calls to be more environmentally sustainable, socially responsible and culturally transparent in how they run business³. Companies are thus embracing the idea of ESG to measure their impact on

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¹ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889.

² CMS., 'Putting the 'S' in 'ESG'- a Corporate Guide.' Available at <https://cms.law/en/int/publication/social-aspect-of-esg-lexicon-of-most-important-terms-and-phrases> (Accessed on 31/08/2023)

³ Ibid

the environment, society, and the economy⁴. ESG incorporates Environmental factors such as climate change considerations, energy efficiency, carbon emissions, waste management and resource consumption⁵; Social factors including human rights, labour relations, employee welfare, community engagement, diversity and inclusion;⁶ and Governance issues such as board diversity, transparency and internal control systems⁷.

ESG factors are becoming increasingly important to investors and customers. It has been observed that investors are looking for companies that are socially responsible and have a positive impact on the environment and society while customers are also looking for companies that share their values and have a positive impact on the community⁸. Consequently, how companies handle environmental, social and governance issues has become a major concern especially for investors, customers and other key stakeholders⁹. Globally, the importance of Environmental, Social and Governance (ESG) issues is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders¹⁰. It has been observed that ESG factors now apply in many areas increasingly driving investment decisions and commercial contracts to company strategy and culture¹¹. The concept of ESG is pertinent since Environmental, Social and Governance concerns have become a societal focal point in light of the Sustainable Development agenda¹².

⁴ ESG., 'The Link Between ESG and Community Engagement: Building Stronger Relationships.' Available at <https://vakilsearch.com/blog/the-link-between-esg-and-community-engagement/> (Accessed on 31/08/2023)

⁵ Henisz. W, Koller. T, & Nuttall. R., 'Five Ways that ESG Creates Value.' *McKinsey Quarterly*, 2019

⁶ Ibid

⁷ Ibid

⁸ ESG., 'The Link Between ESG and Community Engagement: Building Stronger Relationships.' Op Cit

⁹ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (Accessed on 31/08/2023)

¹⁰ Ibid

¹¹ Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' *Business Strategy and the Environment*, No. 26 of 2017

¹² Ibid

The concept of ESG is very vital in the global response to the threat of climate change¹³. ESG in the context of climate change refers to environmentally sustainable practices undertaken by companies in order to mitigate their negative environmental impacts while continuing to make profit¹⁴. ESG practices can help companies to identify and address climate-related risks and opportunities¹⁵. For example, environmental metrics can help companies to track their greenhouse gas emissions and energy use, while social metrics can help them to assess the impact of climate change on their workforce and local communities¹⁶. Further, governance metrics can also play a critical role in addressing climate-related risks and opportunities, by ensuring that companies have the necessary oversight and accountability mechanisms in place to effectively manage climate-related risks¹⁷. ESG can therefore aid in designing climate-resilient responses¹⁸.

Despite the efficacy of the concept of ESG, it has been observed that some ESG tenets cannot be accurately assessed resulting in accountability challenges¹⁹. As a result, organizations tend to under-report or fail to report their ESG elements when required to do so²⁰. The phenomenon of greenwashing is growing whereby firms exhibit an appearance of transparency and disseminate substantial volumes of environmental, social, and governance (ESG) data, but demonstrate inadequate results in many dimensions of their ESG endeavours²¹. Further, it has been asserted that some ESG

¹³ Henisz. W, Koller. T, & Nuttall. R., 'Five Ways that ESG Creates Value.' Op Cit

¹⁴ Williams. C, & Nagy. D., 'ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure.' Available at <https://texaslawreview.org/wp-content/uploads/2021/07/Williams.Printer.Updated.pdf> (Accessed on 31/08/2023)

¹⁵ Vignesh. P., 'Climate Change and ESG: Challenges and Opportunities.' Available at <https://vakilsearch.com/blog/climate-change-and-esg-challenges-and-opportunities/#:~:text=In%20addition%20to%20mitigating%20risks,enhancing%20their%20reputation%20among%20stakeholders> (Accessed on 31/08/2023)

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Williams. C, & Nagy. D., 'ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure.' Op Cit

¹⁹ Perez. L et al., 'Does ESG Really Matter and why?.' Available at <https://www.mckinsey.com/capabilities/sustainability/our-insights/does-esg-really-matter-and-why> (Accessed on 31/08/2023)

²⁰ Ibid

²¹ Zhang D, 'Are Firms Motivated to Greenwash by Financial Constraints? Evidence from Global Firms' Data' *Journal of International Financial Management & Accounting*, No. 33 of 2022, (459)

designs fail to take an inclusive approach including participation and community engagement²². These concerns can result in inefficient ESG accountability mechanisms which could result in Environmental, Social and Governance problems such as climate change, abuse of poor rights, bad labour practices and poor corporate governance practices²³. On this basis, it has been argued that a rule of law approach can foster inclusive participation in Environmental, Social, and Governance (ESG) accountability mechanisms for Sustainable Development²⁴.

The paper argues a case for the rule of law approach for inclusive participation in Environmental, Social, and Governance (ESG) accountability mechanisms for climate resilient responses. It defines the rule of law. The paper further critically examines how the rule of law can advance inclusive participation in ESG accountability mechanisms for climate resilient responses. The paper also explores the challenges facing the rule of law towards this end and offers solutions towards strengthening the rule of law approach in enhancing ESG accountability mechanisms for Sustainable Development.

2.0 The Rule of Law and ESG

The rule of law is a phenomenon that comprises a number of principles of a formal and procedural character, addressing the way in which a society is governed²⁵. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society²⁶. The procedural principles on the other part concern the processes by which these norms are administered, and the institutions like courts and an independent judiciary that their administration requires²⁷. On some accounts, the rule of law also comprises certain substantive ideals like a presumption of liberty and respect

²² Henisz, W, Koller, T, & Nuttall, R., 'Five Ways that ESG Creates Value.' Op Cit

²³ Stuart, L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

²⁴ Leogrande, A., 'The Rule of Law in the ESG Framework in the World Economy.' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355016 (Accessed on 31/08/2023)

²⁵ Waldron, J., 'The Rule of Law.' Available at <https://plato.stanford.edu/Entries/rule-of-law/> (Accessed on 31/08/2023)

²⁶ Ibid

²⁷ Ibid

for private property rights²⁸. The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards²⁹. According to the United Nations, the rule of law requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency³⁰.

The idea of the rule of law encapsulates several principles including accessibility of the law in an intelligible, clear and predictable manner, equal application of the law to all persons, exercise of powers in a fair manner without arbitrariness, adequate protection of fundamental human rights, access to justice and legal remedies and compliance by the state with its obligations under international and national law³¹. The rule of law therefore essentially means that the law and regulation matters and that legal rights will have the backing of the state³². In addition, the rule of law infers that the state itself is constrained by law and cannot act unfairly or arbitrarily in relation to its own citizens and businesses³³. The International Development Law Organization (IDLO) asserts that the rule of law is an enabler of justice and development³⁴. According to IDLO, the rule of law is inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable. The IDLO further asserts that the rule of law

²⁸ Ibid

²⁹ United Nations., 'What is the Rule of Law.' Available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (Accessed on 31/08/2023)

³⁰ Ibid

³¹ Lee. P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Available at https://binghamcentre.biicl.org/documents/155_rule_of_law_and_investor_approaches_to_esg.pdf (Accessed on 31/08/2023)

³² Ibid

³³ Ibid

³⁴ International Development Law Organization (IDLO)., 'Rule of Law.' Available at <https://www.idlo.int/what-we-do/rule-law> (Accessed on 31/08/2023)

is crucial for the viability of communities and nations, and for the environment, that sustains them³⁵.

The rule of law is pertinent in ESG. It has been asserted that local regulation plays a key role in the standards applied with regard to Environmental (E) and Social (S) tenets such as environmental compliance, labour practices, human rights concerns, health and safety and occupational health issues, union relations and the right to association, relations with communities local to business operations among others³⁶. The rule of law therefore regulates ESG issues and the extent to which they are enforced in practice³⁷. It has also been argued that the rule of law and underlying legal systems also shape other areas that are seen as part of the G in ESG, including matters such as anti-bribery and corruption measures, and tax responsibility³⁸.

It has been argued that the growing field of ESG compliance encompasses many aspects from recruiting and supporting a diverse workforce to minimizing environmental impact and safeguarding against corruption and human rights abuses³⁹. Therefore, where the rule of law and governance are strong, the private sector benefits from state action on many fronts, from combating discrimination and corruption to protecting human rights, maintaining security, and enforcing environmental regulations⁴⁰. Good governance to this extent complements and reinforces corporate best practices and internal controls⁴¹. However, by contrast, contexts in which rule of law is weak present significant ESG challenges to which even the best compliance program is vulnerable⁴². Studies have shown that countries with low levels of rule of law systems are faced with problems such as corruption, poor governance, poor transparency and accountability mechanisms,

³⁵ Ibid

³⁶ Lee, P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Op Cit

³⁷ Ibid

³⁸ Ibid

³⁹ Andersen, E., 'Global Rule of Law Trends Pose Challenges for ESG Movement.' Available at <https://businesslawtoday.org/2021/11/global-rule-of-law-trends-challenges-for-esg-environmental-social-governance/> (Accessed on 31/08/2023)

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

abuse of human rights and depletion of natural resources which are issues that ESG seeks to address⁴³. The rule of law is therefore an element not only for economic growth, but also for environment sustainability and social justice⁴⁴. Strengthening the rule of law is therefore vital in realizing ESG factors.

From the foregoing, it is evident that the rule of law is vital in upholding ESG tenets by enhancing business confidence and institutional integrity, and therefore economic prosperity, sustainability initiatives and international trade⁴⁵. In business terms, in countries where the rule of law is not properly upheld and enforced, the legal risk of operating in the country increases, resulting in a higher cost of capital and a lower likelihood of investment, alongside risks of bribery and corruption and unjust institutions⁴⁶. In the context of climate change mitigation, the rule of law plays a significant part in investor confidence in the delivery of climate commitments, which will be crucial for investment institutions to feel the assurance necessary to make some climate-aware investments⁴⁷. The rule of law can thus aid in the adoption of climate resilient responses by investors and businesses⁴⁸. The United Nations Environment Programme (UNEP) asserts that environmental rule of law is central to Sustainable Development⁴⁹. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance⁵⁰. It further highlights environmental sustainability by connecting it with fundamental rights and

⁴³ Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Op Cit

⁴⁴ Ibid

⁴⁵ Environmental, Social and Governance., 'The Rule of Law and Access to Justice.' Available at https://www.hoganlovells.com/-/media/hogan-lovells/global/knowledge/topic-centers/esg/pdf-files/sustainability_rule-of-law-02-tw.pdf (Accessed on 31/08/2023)

⁴⁶ Ibid

⁴⁷ Lee. P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Op Cit

⁴⁸ Ibid

⁴⁹ United Nations Environment Programme., 'Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0#:~:text=Environmental%20rule%20of%20law%20is,with%20fundamental%20rights%20and%20obligations> (Accessed on 31/08/2023)

⁵⁰ Ibid

obligations⁵¹. It is thus imperative to embrace the rule of law in order to enhance enforcement of legal rights and obligations, environmental governance and realization of ESG tenets.

3.0 Embracing the Rule of Law Approach for Inclusive Participation in ESG Accountability Mechanisms for Climate-Resilient Responses

The evolving social, environmental, and economic challenges facing the world have fueled more complex issues such as climate change, environmental pollution, unemployment, and poverty⁵². As the idea that organizations have responsibilities for the well-being of society developed, an increasing number of corporations have shifted their focus towards Environmental, Social, and Governance (ESG) issues⁵³. ESG is regarded as one of the driving forces to realize the Sustainable Development Goals (SDGs) proposed by the United Nations (UN) General Assembly in 2015⁵⁴. The Sustainable Development Goals seek to achieve global development within the ESG framework by addressing social concerns such as poverty, hunger, health, education, gender equality, access to clean water and employment through investments in areas such as energy, industry, innovation and infrastructure while mitigating the effects of climate change⁵⁵. It has been argued that understanding public perceptions of ESG is paramount to gaining public support, advancing ESG actions, and creating a sustainable ESG policy system⁵⁶.

⁵¹ Ibid

⁵² Liu. M, Luo. X, & Lu. W., 'Public Perceptions of Environmental, Social, and Governance (ESG) Based on Social Media Data: Evidence from China.' Available at <https://www.sciencedirect.com/science/article/abs/pii/S0959652622054142#:~:text=Environmental%20and%20social%20challenges%20are,a%20sustainable%20ESG%20policy%20system> (Accessed on 02/09/2023)

⁵³ Ibid

⁵⁴ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 02/09/2023)

⁵⁵ Ibid

⁵⁶ Liu. M, Luo. X, & Lu. W., 'Public Perceptions of Environmental, Social, and Governance (ESG) Based on Social Media Data: Evidence from China.' Op Cit

Public participation plays a fundamental role in shaping environmental decision-making and can thus be vital in fostering ESG accountability mechanisms for climate-resilient responses⁵⁷. It has been observed that allowing impacted communities and other stakeholders to take part in decision-making is a basic component of democracy⁵⁸. Further, public participation can improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions⁵⁹. In addition, public participation can also improve policy implementation by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict⁶⁰. It has further been observed that effective citizen involvement in environmental decision making has been associated with several benefits which include: information and ideas on public issues; public support for planning decisions; avoidance of protracted conflicts and costly delays; reservoir of good will which can carry over to future decisions; and spirit of cooperation and trust between decision makers and the public⁶¹.

In terms of environmental concerns such as pollution, it has been asserted that the public has become the third force which assists in promoting environmental governance, together with local governments and polluting enterprises⁶². Since the public has no executive power, they can participate in environmental governance in an indirect way by lobbying local governments' environmental enforcement of polluting enterprises⁶³. Public participation can lead to the formulation of projects that deliver more social

⁵⁷ Stockholm Environment Institute., 'Making Space: How Public Participation Shapes Environmental Decision-Making.' Available at <https://www.sei.org/publications/how-public-participation-shapes-environmental-decision-making/> (Accessed on 02/09/2023)

⁵⁸ Cerezo, L, & Garcia, G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at <https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF> (Accessed on 02/09/2023)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Muigua, K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> (Accessed on 02/09/2023)

⁶² Guo, J, & Bai, J., 'The Role of Public Participation in Environmental Governance: Empirical Evidence from China.' *Sustainability*, Volume 11, No. 17 (2019)

⁶³ Ibid

benefits, fewer environmental costs, and greater economic and financial benefits⁶⁴. Public participation is also vital in enhancing the public's environmental awareness, mobilizing multiple forces to reconcile the conflicts among multiple interest groups, supervising corporate environmental behavior, and overcoming the shortcomings of government unilateral decision-making⁶⁵. Public participation is therefore essential in environmental governance.

Public participation is also vital within the ESG framework. The 'E' pillar of ESG encapsulates Environmental factors such as climate change considerations, energy efficiency, carbon emissions, waste management and resource consumption.⁶⁶ Embracing public participation towards this end can therefore enhance climate resilient responses, reduction of emissions, efficient waste management and effective management of natural resources⁶⁷. Organizations can therefore enhance their standards and policies on ESG through public advocacy and participation⁶⁸. In addition, regulators can also enhance the quality of regulatory frameworks on ESG through public advocacy and participation⁶⁹.

It has been observed that environmental and social challenges are intensifying globally including inequitable distribution of land, and conflict over land, high rates of deforestation, soil erosion, declining soil fertility, pollution of water bodies, ineffective disposal of solid waste and violent conflicts over resources⁷⁰. Further, climate change is having a devastating impact around the world especially in developing countries creating food insecurity, poverty, stressing water resources, depleting human health,

⁶⁴ Kanu, E.J, Tyonum, E.T, & Uchegbu, S.N., 'Public Participation in Environmental Impact Assessment (EIA): A critical analysis.' *Archit. Eng.* , Volume 3, No. 1, (2018)

⁶⁵ Ibid

⁶⁶ Henisz, W, Koller, T, & Nuttall, R., 'Five Ways that ESG Creates Value.' Op Cit

⁶⁷ Ibid

⁶⁸ Gilberg, S., 'Government and Public Sector Perspective: Aligning values and value through ESG.' Available at <https://www.pwc.com/ca/en/industries/government-and-public-services/aligning-values-and-value-through-esg.html> (Accessed on 02/09/2023)

⁶⁹ Ibid

⁷⁰ Muigua, K, Wamukoya, D, & Kariuki, F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

displacing populations and impeding socio-economic development⁷¹. Climate change is also putting pressure on natural resources such as land due to instances of depletion of natural resources, soil erosion, pollution and declining fertility⁷². This has resulted in an increase in conflicts over natural resources and displacement of people thus fueling climate injustices⁷³. In the wake of these challenges, there is a growing demand to deliver successful Environmental, Social, and Governance (ESG) outcomes in order to foster climate resilient development and foster efficient management of natural resources including land, forests and water resources⁷⁴. Understanding public perceptions of ESG is paramount to gaining public support, advancing ESG actions, and creating a sustainable ESG policy system geared towards combating climate change among other challenges⁷⁵. It has been argued that a rule of law approach can foster inclusive participation in ESG accountability mechanisms for climate resilient responses by improving governance of land and natural resources for the most climate vulnerable people through a combination of legal empowerment and institutional development approaches, and to promoting climate justice and climate-resilient development, especially in fragile contexts⁷⁶.

The importance of the rule of law in enhancing inclusive participation towards realizing Sustainable Development Goals such as combating climate change is recognized under the 2030 Agenda for Sustainable Development⁷⁷. Sustainable Development Goal 16 and 16.3 seeks to promote the rule of law at the national and international levels and ensure

⁷¹ Kimaro. Didas et al., 'Climate Change Mitigation and Adaptation in ECA/SADC/COMESA Region: Opportunities and Challenges.' Available at https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges (Accessed on 02/09/2023)

⁷² Ibid

⁷³ Ibid

⁷⁴ Guo. J, & Bai. J., 'The Role of Public Participation in Environmental Governance: Empirical Evidence from China.' Op Cit

⁷⁵ Ibid

⁷⁶ International Development Law Organization (IDLO), 'Rule of Law.' Op Cit

⁷⁷ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit

equal access to justice for all⁷⁸. Fostering this goal is vital in embracing a rule of law approach in climate change mitigation and adaptation.

In Kenya, the 2010 Constitution was enacted to protect the values of the rule of law, key among them being the idea of citizen participation in governance⁷⁹. The Constitution enshrines public participation as among the national values and principles of governance⁸⁰. The Constitution further stipulates the right of access to justice, which is very pertinent in protecting the rule of law⁸¹. The Constitution also envisages the role of public participation in environmental governance and to this extent it mandates the state to encourage public participation in the management, protection and conservation of the environment⁸². It further gives mandate to citizens to enforce environmental rights through courts⁸³. These provisions of the Constitution are vital in fostering a rule of law approach for inclusive participation in environmental governance in areas such as climate change mitigation through public participation and access to justice.

The role of inclusive participation in ESG sectors such as designing climate resilient responses is also recognized under the *Climate Change Act*⁸⁴ of Kenya. The Act requires national and county governments to facilitate capacity development for public participation in climate change responses through awareness creation, consultation, representation and access to information⁸⁵. It also enshrines the role of public consultation in the formulation of the National Climate Change Action Plan in Kenya⁸⁶. The Act further provides that public entities at each level of government shall, at all times when developing strategies, laws and policies relating to climate change, undertake

⁷⁸ Ibid

⁷⁹ Hao, C, Nyaranga, M, & Hongo, D., 'Enhancing Public Participation in Governance for Sustainable Development: Evidence From Bungoma County, Kenya.' Available at <https://journals.sagepub.com/doi/full/10.1177/21582440221088855> (Accessed on 02/09/2023)

⁸⁰ Constitution of Kenya, 2010., Article 10 (2) (a), Government Printer, Nairobi

⁸¹ Ibid, Article 48

⁸² Ibid, Article 69 (1) (d)

⁸³ Ibid, Article 70

⁸⁴ Climate Change Act., No. 11 of 2016, Government Printer, Nairobi,

⁸⁵ Ibid, S 3 (2) (h)

⁸⁶ Ibid, S 13 (1)

public awareness and conduct public consultations⁸⁷. Actualizing the provisions of the Climate Change Act is therefore imperative in fostering a rule of law approach for inclusive participation in ESG accountability mechanisms for climate-resilient responses.

The rule of law has also been embraced to foster inclusive participation in environmental governance through litigation. Courts in Kenya play an important role in safeguarding environmental rights and fostering environmental justice⁸⁸. The Constitution of Kenya also recognizes the role of litigation in enforcement of environmental rights⁸⁹. It allows a person alleging the denial, infringement or violation or of the right to a clean and healthy environment to apply to a court for redress in addition to any other legal remedies that are available⁹⁰. Courts have consistently held that public participation plays an important role in environmental governance including formulation of laws and designing and implementing projects⁹¹. Consequently, in instances where courts have found that projects fail to embrace public participation in adopting climate-resilient responses, such projects have been halted or orders made for fresh Environmental Impact Assessment (EIA) processes to be undertaken involving public participation⁹². Litigation is therefore vital in fostering a rule of law approach for inclusive participation in ESG accountability mechanisms for climate resilient responses.

The rule of law is therefore vital in fostering an inclusive approach in ESG accountability mechanisms for climate-resilient responses. The rule of law regulates ESG tenets such as

⁸⁷ Ibid, S 24 (1)

⁸⁸ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-Safeguarding-Environmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf> (Accessed on 02/09/2023)

⁸⁹ Constitution of Kenya, 2010., Article 70

⁹⁰ Ibid

⁹¹ See the cases of Friends of Lake Turkana Trust vs Attorney General & 2 others., ELC Suit No. 825 of 2012, (2014) eKLR; Mohamed Ali Baadi and others -vs- Attorney General & 11 Others, Petition No. 22 of 2012 (2018) eKLR and Mui Coal Basin Local Community & 15 others -vs- Permanent Secretary Ministry of Energy & 17 others, Constitutional Petition No. 305 of 2012, (2015) eKLR.

⁹² See the cases of Save Lamu & 5 others -vs- National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019)eKLR and Mohamed Ali Baadi and others -vs- Attorney General & 11 Others, Petition No. 22 of 2012 (2018) eKLR.

those related to climate change, and the extent to which they are enforced in practice⁹³. In Kenya, laws such as the Climate Change Act are vital in fostering climate-resilient responses. Further, courts play an important role in enforcing ESG matters such as climate change policies and requirements⁹⁴. The rule of law is also vital in promoting inclusive participation in ESG accountability mechanisms for climate-resilient responses as evidenced by the provisions of public participation in environmental governance in Kenya in areas such as climate change mitigation and adaptation⁹⁵. However, it has been shown that the rule of law in some countries is affected by problems such as corruption, poor governance, authoritarian leadership, poor transparency and accountability mechanisms, abuse of human rights and poor management of natural resources⁹⁶. There is need to address these problems in order to strengthen the rule of law across the world and enhance its role towards inclusive participation in ESG accountability mechanisms for climate-resilient responses.

4.0 Way Forward

There is need to strengthen the rule of law in order to enhance environment sustainability and social justice⁹⁷. It has been argued that the rule of law is an element not only for economic growth, but also for environment sustainability and social justice⁹⁸. Strengthening the rule of law is therefore vital in realization of ESG factors. It has been asserted that the rule of law can accelerate transformative climate action by empowering climate-vulnerable communities and people;⁹⁹ investing in people-centered laws and

⁹³ Lee. P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Op Cit

⁹⁴ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

⁹⁵ Constitution of Kenya, 2010, Articles 10 (2) (a) & 69 (1) (d); See also the provisions of the Climate Change Act, No. 11 of 2016

⁹⁶ Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Op Cit

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Available at

institutions to promote transformative climate action, championing feminist climate action and integrating gender-transformative approaches;¹⁰⁰ strengthening prospects for sustaining peace and stability by preventing and resolving climate-related disputes;¹⁰¹ engaging with customary, informal and indigenous justice systems to protect biodiversity and promote sustainable use of natural resources;¹⁰² harnessing the transformative potential of the rule of law to address the intersecting effects of climate change and mobilizing global multi-stakeholder coalitions to accelerate climate action¹⁰³. It is therefore imperative to strengthen the rule of law and embrace it in order to enhance inclusive participation in ESG accountability mechanisms for climate-resilient responses. One of the key ways of enhancing the rule of law towards this end is by strengthening the regulatory frameworks and institutional capacity for climate -resilient development and ensuring that justice institutions, both formal and informal, have the capacity to deliver on the promise of climate justice¹⁰⁴.

It is also essential to embrace public participation and inclusive governance in order to enhance sustainable management of land and other natural resources¹⁰⁵. 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-making¹⁰⁶. Local communities possess unique and valuable contextual knowledge of natural resources and have a vested interest in ensuring the sustainable use of land and

https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_paper_-_climate_action_-_final.pdf (Accessed on 02/09/2023)

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.'

Op Cit

¹⁰⁶ Ibid

resources¹⁰⁷. The rule of law has an important role to play towards achieving this goal. It has been pointed out that strengthening adherence to the rule of law principles and mainstreaming environmental law across public policy can lead to the effective implementation of nature-based solutions, giving greater agency to the communities that depend on the land the most¹⁰⁸. The rule of law improves inclusive governance of land and natural resources, increases climate-resilient development and empowers climate vulnerable people to actively participate in managing their natural environments, enabling the conditions for peace and development to flourish¹⁰⁹. The rule of law is therefore vital in fostering public participation for climate resilient responses within the ESG framework.

Finally, it is important to curb vices which hinder effectiveness of the rule of law such as corruption, poor governance, poor transparency and accountability mechanisms, abuse of human rights and poor governance of natural resources.¹¹⁰ These factors hinder the efficacy of the rule of law in bringing transformative action towards inclusive participation in ESG governance for climate resilient responses¹¹¹. It is important to address these problems in order to enhance the efficacy of the rule of law. The rule of law is positively associated with the other variables that are representative of the good governance such as regulatory quality, control of corruption, transparency and accountability, political stability and absence of violence/terrorism¹¹². Fostering good governance within the 'G' pillar of ESG is therefore vital in upholding the rule of law¹¹³. Through these measures, the role of the rule of law for inclusive participation in ESG accountability mechanisms for climate-resilient responses will be enhanced.

¹⁰⁷ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit

¹⁰⁸ International Union for Conservation of Nature., 'Nature-Based Solutions.' Available at <https://www.iucn.org/our-work/nature-based-solutions> (Accessed on 02/09/2023)

¹⁰⁹ Ibid

¹¹⁰ Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Op Cit

¹¹¹ International Development Law Organization (IDLO)., 'Rule of Law.' Op Cit

¹¹² Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Op Cit

¹¹³ Ibid

5.0 Conclusion

The rule of law is pertinent in Environmental, Social and Governance matters since it regulates ESG issues and the extent to which they are enforced in practice¹¹⁴. A rule of law approach has the ability to foster inclusive participation in ESG accountability mechanisms for climate resilient responses by improving governance of land and natural resources for the most climate vulnerable people through a combination of legal empowerment and institutional development approaches, and to promoting climate justice and climate-resilient development, especially in fragile contexts¹¹⁵. However, the efficacy of the rule of law in some countries is affected by problems such as corruption, poor governance, authoritarian leadership, poor transparency and accountability mechanisms, abuse of human rights and poor management of natural resources¹¹⁶. These challenges can be curbed by strengthening the rule of law, embracing public participation and inclusive governance and fostering good governance through measures such as regulatory quality, control of corruption, transparency and accountability, political stability and absence of violence/terrorism.¹¹⁷ Embracing a rule of law approach for inclusive participation in ESG accountability mechanisms for climate-resilient responses is a feasible reality.

¹¹⁴ Ibid

¹¹⁵ International Development Law Organization (IDLO), 'Rule of Law.' Op Cit

¹¹⁶ Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Op Cit

¹¹⁷ Ibid

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