Promoting the Rule of Law for Sustainable Development

Kariuki Muigua

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Dedication

Dedicated to the idea
that there is value
In promoting the Rule of Law
for Sustainable Development

And that it is an idea
whose time is now

This work is for those
who agree with the sages:

That there is need for
Accountability
That we must have just Law
That the Government must be
Open
and Transparent
That there must be
Justice
That is fair, open
and impartial

To those who value
Human dignity
And respect for Human Rights

This work is for those
who believe in taking
care of
the Environment
To those who support the
ideal
of Sustainable Development.

Dedicated to those
who care about
Sustainability –
That we must take care
of the resources of
Mother Earth
In order to survive
and live to see a green tomorrow

Dedicated to those
who lead communities
Ethically
To those who allow
participatory governance
And access to Justice

To those who promote
Good governance
Where all are equal before
the Law

A law that is fair
Equally enforced
and efficient

This work is for those
who nurture peace
and respect for the
Rights of Nature

To those who promote harmony
and work to create
Inclusive Societies
Societies that have
Inclusive institutions
at all levels
And respect for the
voices of all.

Dedicated to those
who work hard
to lower mortality rates
And ensure human beings
Live a good quality of
Life

To those who take care
of children
So that they can realize
Environmental Security
Have adequate and
nutritious diets
And be free from
violence
and exploitation

This work is for those
who believe that
Environmental resources
Can be accessed
by all
And that conflicts
should be resolved
expeditiously, fairly
and effectively

Dedicated to those
who know that
poverty can be eradicated
And that 'developing countries'
Can take part
in global Governance
In an effective manner
for the sake of
Today
And tomorrow

This work is for those

who fight for the right
To access information
and make sure
it is a reality
that can be lived.

Dedicated to those
who work hard to
ensure
that laws are not
Discriminatory

And that policies
that are employed
Actually lead to
Sustainable Development

Dedicated to
Gender equality
And respect for all
And to the idea
that we can live in
a society that is
guided by the rule of Law
Respect for race
and cultural diversity

This book is dedicated
to those who share
the ideals envisaged
In the Development Goals
That it is possible to create
a world free of poverty, hunger,
disease and want.

This book is for those
who have big dreams

Those who never ever
give up

To those who subscribe to
the ideal that what can be
conceived in the mind
can be achieved

And that
Promoting the Rule of Law
for Sustainable Development
is an imperative that is
Realisable.

Acknowledgements

Author's Note

This book brings together a collection of papers touching on the theme: Promoting Rule of Law for Sustainable Development.

The notion of the Rule of Law is essentially an ideal where all citizens and institutions within a country, state or community are accountable to the same laws - No one is above the law.

Power must be exercised in accordance with the law rather than the arbitrary will of officials.

According to the United Nations, the Rule of Law is a principle of Governance in which all persons, institutions and entities, public and private, including the state itself are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with International Human Rights, norms and standards.[1]

Sustainable Development proponents suggest that there is a link between the Rule of Law and Sustainable Development. It is arguable that Development thrives well in an atmosphere of effective application of the rule of law.

At the global level, Sustainable Development Goals represent a shared blueprint towards achieving sustainability through measures such as combating climate change, promoting access to affordable clean energy, clean water and sanitation. Goal number 16.3 deals with the promotion of the Rule of Law at the national and international levels.[2]

The papers covered in this volume mainly focus on sustainability, access to justice, Environmental Governance, Climate Justice against the backdrop of the theme Promoting the Rule of Law for Sustainable Development.

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[1] United Nations website https://monusco.unmissions.org/
Accessed on 19/1/2024
[2] United Nations Development Programme 'Sustainable Development Goals' Available at https.undp.org/sustainable development Accessed on 20/1/2024

This book is aimed at researchers, students and academics who have an interest in Sustainable Development and the Rule of Law discourse.

Hon. Prof. Kariuki Muigua, PhD; OGW; Ch.Arb
January 20th 2024

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List of Statutes/Legislation/Official Government Documents

Arbitration Act, No.4 of 1995, Laws of Kenya

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

Community Land Act., No. 27 of 2016., Government Printer, Nairobi

Constitution of Kenya, 2010, Government Printer, Nairobi

Energy Act., No. 1 of 2019., Laws of Kenya., Government Printer, Nairobi

Environment and Land Court Act., No. 19 of 2011, Government Printer, Nairobi

Environmental Management and Coordination Act, No. 8 of 1999, Government Printer, Nairobi

Health Act, No. 21 of 2017, Laws of Kenya

Judicature Act, Cap. 8, Laws of Kenya

Kigali International Arbitration Centre., 'Arbitration Rules, 2012.

Public Health Act, Cap 242, Laws of Kenya

Public Procurement and Asset Disposal Act, No. 33 of 2015, Laws of Kenya

Republic of Kenya., National Food and Nutritional Security Policy, 2011., Government Printer, Nairobi

List of Abbreviations

ABA	American Bar Association
ADR	Alternative Dispute Resolution
AfCFTA	Agreement Establishing the African Continental Free Trade
AfDB	Africa Development Bank
AFSA	Arbitration Foundation of Southern Africa
	Area
CAADP	Comprehensive Africa Agriculture Development Programme
CEN	SAD Community of Sahel-Saharan States
CERs	Certified Emission Reductions
CIMAC	Mauritius, and the Casablanca International Mediation and
	Arbitration Centre
COMESA	Common Market for Eastern and Southern Africa) Treaty
	(1993)
CRCICA	Cairo Regional Centre for International Commercial
CSR	Corporate Social Responsibility
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of the Western African States
EMCA	Environmental Management and Co-ordination Act
ESG	Environmental, Social, and Governance
GDP	Gross Domestic Product
GGA	Global Goal on Adaptation
GHG	Greenhouse Gas
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communications Technology
IGAD	Intergovernmental Authority on Development
ILO	International Labour Organization
KIAC	Kigali International Arbitration Centre
LCA	Lagos Court of Arbitration
LPG	Liquefied Petroleum Gas
MARC	Mediation and Arbitration Centre
MNCs	Multinational Corporations (
MSMEs	Micro, Small and Medium-Sized enterprises
NCIA	Nairobi Centre for International Arbitration
NDCs	National Determined Contributions
NDCs	Nationally Determined Contributions

NET	National Environment Tribunal –
NHIF	National Health Insurance Fund
OHCHR	United Nations High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation) Investment Agreement (1981)
PAPSS	Pan African Payment System
RECs	Regional Economic Communities –
SDGs	Sustainable Development Goals
STAJ	Social Transformation through Access to Justice
UHHC	Universal Health Coverage
UMA	Arab Maghreb Union
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change

Embracing the Rule of Law for Sustainability

Abstract

The rule of law envisages an ideal society where no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all persons. It has been identified as an essential component of good governance and Sustainable Development. This paper critically discusses the role of the rule of law in Sustainable Development. It posits that the rule of law is a critical enabler of Sustainable Development. The paper highlights ways through which the rule of law can foster Sustainable Development. It also examines some of the challenges facing the rule of law in the quest towards Sustainable Development. The paper further proposes reforms towards embracing the rule of law for sustainability.

1.0 Introduction

The rule of law has been defined as a principle of governance in which all persons, institutions and entities, both public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards[1]. It has been asserted that 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 transparency[2]. The rule of law has also been defined as set of principles, or ideals, for ensuring an orderly and just society[3]. The rule of law envisages an ideal society where no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair

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[1] United Nations., 'What is the Rule of Law.' Available at
https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (Accessed on 06/01/2024)
[2] Ibid
[3] American Bar Association., 'Rule of Law.' Available at
 https://www.americanbar.org/groups/public_education/resources/rule-of-law/ (Accessed on 06/01/2024)

processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all persons[4].

It has been pointed out that the rule of law comprises a number of principles of a formal and procedural character, addressing the way in which a society is governed[5]. The formal principles entail the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society[6]. The procedural principles on the other hand entail the processes by which these norms are administered, and the institutions like courts and an independent judiciary that their administration requires[7]. In addition, it has also been argued that the rule of law also comprises certain substantive ideals like a presumption of liberty and respect for private property rights[8]. Respect for the rule of law in a society is characterized by certain factors which include separation of powers in the executive, legislature, and judiciary; regular, free, and fair elections; an independent and impartial judiciary; free and independent media institutions; and equality of the people before the law[9].

The International Development Law Organization (IDLO) posits that the rule of law is an enabler of justice and development[10]. In addition, IDLO asserts that 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[11]. It also points out that the rule of law is crucial for the viability of communities

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[4] Ibid

[5] Waldron. J., 'The Rule of Law.' Available at *https://plato.stanford.edu/Entries/rule-of-law/* (Accessed on 06/01/2024)

[6] Ibid

[7] Ibid

[8] Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Available at *http://kmco.co.ke/wp-content/uploads/2023/09/Rule-of-Law-Approach-for-Inclusive-Participation-inEnvironmental-Social-and-Governance-ESG-Accountability-Mechanisms-for-Climate-ResilientResponses-1.pdf* (Accessed on 06/01/2024)

[9] International Commission of Jurists., 'Democratic Governance & Rule of Law.' Available at *https://icjkenya.org/what-we-do/democratic-governance-rule-of-law/* (Accessed on 06/01/2024)

[10] International Development Law Organization (IDLO)., 'Rule of Law.' Available at *https://www.idlo.int/what-we-do/rule-law* (Accessed on 06/01/2024)

[11] Ibid

and nations, and for the environment, that sustains them[12]. On this basis, it has been argued that the rule of law is an essential component of good governance and Sustainable Development[13].

This paper critically discusses the role of the rule of law in Sustainable Development. It posits that the rule of law is a critical enabler of Sustainable Development. The paper highlights ways through which the rule of law can foster Sustainable Development. It also examines some of the challenges facing the rule of law in the quest towards Sustainable Development. The paper further proposes reforms towards embracing the rule of law for sustainability.

2.0 The Rule of Law and Sustainable Development

The rule of law is central to the achievement of Sustainable Development. It has rightly been asserted that the idea of Sustainable Development is, at its core, a call for all countries to address imbalances and injustices created by global problems including extreme poverty, growing inequalities and environmental damage[14]. Sustainable Development can therefore be understood as a moral concept that seeks to define a fair and just development which are ideals embedded in the concept of the rule of law[15]. It is driven by a conviction that the present generation must not deprive future generations of their right to thriving ecosystems, robust economies and stable societies[16]. As a result, it has been argued that Sustainable Development advocates for intra-generational justice: a demand that the present generation address the needs of the poor and marginalized today, as a matter of equity and moral certainty[17]. Therefore, Sustainable Development provides an ethical framework that could enable national societies, and indeed the global human society, to respond to

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[12] Ibid

[13] Centre for Strategic & International Studies., 'The Rule of Law and Sustainable Development.' Available at *https://www.csis.org/analysis/rule-law-and-sustainable-development* (Accessed on 06/01/2024)

[14] International Development Law Organization., 'Doing Justice to Sustainable Development: Integrating the Rule of Law into The Post-2015 Development Agenda.' Available at *https://www.idlo.int/sites/default/files/pdfs/publications/Doing%20Justice%20to%20Sustainable%20Development.pdf* (Accessed on 06/01/2023)

[15] Ibid

[16] Ibid

[17] Ibid

emerging environmental and developmental problems in an equitable manner within the confines of the rule of law[18].

The concept of Sustainable Development seeks to strike a balance between various facets of development by fostering environmental protection, economic development and social progress[19]. It has been argued that the rule of law is relevant to all three dimensions of sustainable development: economic, social and environmental[20]. For example, by providing stable and transparent legal regimes, the rule of law encourages economic development[21]. In addition, by ensuring equal opportunity and equitable access to basic services, the rule of law promotes social development[22]. Further, by strengthening the laws to protect the environment and ensure proper management of natural resources, the rule of law ensures environmental sustainability[23].

According to the United Nations, the ideas of the rule of law and development are strongly linked and mutually reinforcing, that the advancement of the rule of law at the local, national, continental and international levels is essential for sustained and inclusive economic growth, Sustainable Development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law[24]. The rule of law fosters social progress by creating an environment for providing sustainable livelihoods and eradicating poverty[25]. In addition, the United Nations asserts that the rule of law fosters

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[18] Ibid

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

[20] International Development Law Organization., 'IDLO and the United Nations' 2030 Agenda for Sustainable Development.' Available at *https://www.idlo.int/what-we-do/rule-of-law/2030agenda#:~:text=The%20rule%20of%20law%20is,of%20law%20encourages%20economic%20development*. (Accessed on 06/01/2024)

[21] Ibid

[22] Ibid

[23] Ibid

[24] United Nations., 'Rule of Law and Development.' Available at *https://www.un.org/ruleoflaw/rule-of-law-and-development/* (Accessed on 06/01/2023)

[25] Ibid

development through strengthening the voices of individuals and communities, by providing <u>access to justice</u>, ensuring that due processes are followed and establishing <u>remedies for the violation of human rights</u> and freedoms[26].

In addition, it has been argued that the rule of law, properly understood and implemented, advances the three pillars of sustainable development—economic, social, and environmental—and reinforces their interlinkage through legal and institutional reforms, protection of fundamental rights and freedoms, ensuring access to justice, and fostering legal empowerment strategies[27]. As a result, it has been argued that the rule of law is a direct avenue toward Sustainable Development and the achievement of the Sustainable Development Goals (SDGs), and a bedrock of progress, justice and a better functioning society[28]. The rule of law is therefore central to the attainment of Sustainable Development since it recognizes that the balancing of competing inter-generational and intra-generational interests, the eradication of poverty today and the preservation of the planet for the future requires transparent, inclusively developed, rule-based processes and mechanisms that can ensure equity for all persons[29].

3.0 Embracing the Rule of Law for Sustainability: Progress and Challenges
There have been global, continental and national developments towards embracing the rule of law for sustainability. The need to embrace the rule of law for sustainability at the global level was affirmed at the 2005 World Summit[30]. The outcome of the World Summit acknowledges that good

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[26] Ibid

[27] Khan. I., 'Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development.' Available at https://elibrary.worldbank.org/doi/10.1596/978-1-4648-0545-5_ch11 (Accessed on 06/01/2023)

[28] United Nations Office on Drugs and Crime., 'Rule of Law.' Available at *https://www.act4ruleoflaw.org/en/news/development* (Accessed on 06/01/2023)

[29] Khan. I., 'How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?' Available at *https://www.cisdl.org/wp-content/uploads/2018/05/How-Can-the-Rule-of-Law-Advance-Sustainable-Development-in-a-Troubled-and-Turbulent-World-I-Khan.pdf* (Accessed on 06/01/2024)

[30] United Nations General Assembly., 'Resolution Adopted by the General Assembly on 16 September 2005: 60/1. 2005 World Summit Outcome., A/RES/60/1.' Available at

governance and *the rule of law* at the national and international levels are essential for sustained economic growth, Sustainable Development and the eradication of poverty and hunger(Emphasis added)[31]. It further states that in order to achieve Sustainable Development, there is need for universal adherence to and implementation of the rule of law at both the national and international levels[32]. It also requires countries to cooperate in order to strengthen activities to promote the rule of law, including through technical assistance and capacity-building in order to achieve Sustainable Development[33].

The importance of the rule of law in Sustainable Development was also upheld in the outcome document of the *Rio +20 Conference[34]*. The document reaffirms the importance of the rule of law to just and democratic societies for development[35]. The document acknowledges that democracy, good governance and the *rule of law*, at the national and international levels, as well as an enabling environment, are essential for Sustainable Development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger[36]. The document requires all countries to embrace the rule of law as a means of implementing the Sustainable Development agenda[37].

The rule of law is also embraced as an important component of Sustainable Development in the *United Nation's 2030 Agenda for Sustainable Development[38]*.

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https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalc ompact/A_RES_60_1.pdf (Accessed on 07/01/2023)

[31] Ibid

[32] Ibid

[33] Ibid

[34] United Nations General Assembly., 'United Nations Conference on Sustainable Development': Rio de Janeiro, Brazil 20-22 June 2012.' A/CONF.216/L.1., Available at *https://wedocs.unep.org/bitstream/handle/20.500.11822/13662/N1238164.pdf?sequence=1& %3Bis Allowed=* (Accessed on 07/01/2023)

[35] Ibid

[36] Ibid

[37] Ibid

[38] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pdf* (Accessed on 07/01/2023)

SDG 16 seeks to foster peace, justice and strong institutions and calls for the promotion of peaceful and inclusive societies for Sustainable Development, the provision of access to justice for all and for the building of effective, accountable and inclusive institutions at all levels[39]. Among the targets under SDG 16 is promoting the rule of law at the national and international levels and ensuring equal access to justice for all[40]. It has been argued that SDG 16 is an enabler for all other SDGs since the rule of law is a necessary prerequisite to translate commitments, such as the SDGs as well as other global, regional or national development goals into reality. [41] The rule of law ensures that governance is not arbitrary, opaque, unpredictable or weak[42]. Rather, it calls for transparency, accountability, effectiveness and inclusiveness in all public processes and efforts, as well as effective regulation in the private sector[43]. In addition, it ensures respect for fundamental rights and freedoms, and guarantees that no actions in society are taken at the expense of the human rights of the people that live in it, and that justice is available to all persons[44]. Actualizing SDG 16 is therefore necessary in strengthening the rule of law at the global, continental and national levels for sustainability.

At the continental level, *Agenda 2063*[45] acknowledges the need to embrace the rule of law for Sustainable Development in Africa. Agenda 2063 seeks to achieve the aspiration of a continent characterized by good governance, respect for human rights, justice and the rule of law[46]. It further states that realizing the ideal of a continent based on good governance, democracy, and respect for human rights, justice and the *rule of law* are the necessary pre-conditions for a peaceful and conflict-free Africa towards sustainability[47]. Agenda 2063 seeks to strengthen respect for human rights and adherence to

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[39] Ibid, SDG 16
[40] Ibid, SDG 16.3
[41] United Nations Office on Drugs and Crime., 'Rule of Law.' Op Cit
[42] Ibid
[43] Ibid
[44] Ibid
[45] Africa Union., 'Agenda 2063: The Africa we Want.' Available at *https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf* (Accessed on 07/01/2024)
[46] Ibid
[47] Ibid

the rule of law in order to achieve Sustainable Development in Africa[48]. Actualizing Agenda 2063 can strengthen the rule of law for sustainability in Africa.

Further, at the national level, the Constitution of Kenya embraces the rule of law as one of the national values and principles of governance[49]. The Constitution further enshrines other values and principles that are integral in fostering adherence to the rule of law including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability[50]. The Constitution further enshrines Sustainable Development as one the values and principles that is to be fostered alongside other values and principles including the rule of law[51]. Embracing the rule of law is thus vital for sustainability in Kenya.

As a result of the foregoing efforts, there has been progress towards embracing the rule of law for sustainability across all spheres of Sustainable Development including economic development, social progress and environmental protection[52]. It has been argued that as a driver of inclusive economic development, the rule of law enables the design and implementation of legal and policy frameworks that are fair, transparent, coherent, and supported by predictable enforcement mechanisms[53]. It has also been argued that there are strong correlations between economic development in aspects such as incomes and rule of law[54]. For example, most of the Organisation for Economic

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[48] Ibid

[49] Constitution of Kenya., 2010., Article 10 (2) (a), Government Printer, Nairobi

[50] Ibid, Article 10

[51] Ibid, Article 10 (2) (d)

[52] International Development Law Organization., 'IDLO and the United Nations' 2030 Agenda for Sustainable Development.' Op Cit

[53] International Development Law Organization., 'A Rule of Law Approach to Inclusive Economic Development: Supporting Fair and Equitable International Investment Agreements in Least Developed Countries.' Available at *https://www.idlo.int/publications/rule-law-approach-inclusive-economic-development-supporting-fair-andequitable#:~:text=About%20This%20Publication%3A,supported%20by%20predictable%20enforcement%20mechanisms*. (Accessed on 07/01/2023)

[54] Wa-Kyendo. E., & Kemboi. L., 'Rule of Law and Economic Freedoms as the Key to Improve National Welfare.' Available at https://ieakenya.or.ke/blog/rule-of-law-

Cooperation and Development (OECD) countries which have a higher rule of law index have higher incomes in comparison with the countries with a lower ranking in the rule of law index which are mostly from Sub-Saharan Africa[55]. It is therefore evident that how a country adheres to the rule of law predetermines the constancy and predictability of the economy[56].

In addition, in terms of social progress it has been observed that the security of livelihoods, shelter, tenure and contracts can enable and empower the poor to defend themselves against violations of their rights[57]. In addition, it has been asserted that improved security of tenure for <u>land and property</u> can make a critical contribution to ensuring social and economic progress in rural and urban settings, supporting poverty reduction and furthering gender equality and peace and security[58]. Embracing the rule of law can therefore foster social sustainability.

In addition, there has been progress towards embracing environmental rule of law. This progress is evidenced through the adoption of treaties, conventions and other legal and regulatory instruments geared towards promoting environmental sustainability and Sustainable Development, in general[59]. Among the notable instruments include the *Rio Declaration on Environment and Development[60]* which seeks to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development. The Rio Declaration upholds key environmental principles that are vital in strengthening environmental rule of

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and-economic-freedoms-as-the-key-to-improve-national-welfare/#:~:text=The%20rule%20of%20law%20is%20part%20of%20the%20Sustainable%20Development,at%20all%20levels%5B2%5D. (Accessed on 07/01/2023)

[55] Ibid

[56] Ibid

[57] United Nations., 'Rule of Law and Development.' Op Cit

[58] Ibid

[59] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/43943/Environmental_rule_of_law_progress.pdf?sequence=3 (Accessed on 07/01/2023)

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

law including the principle of inter and intra generational equity, the principle of public participation, the precautionary principle and the principle of international cooperation[61]. At the national level, the Constitution of Kenya recognizes the right to a clean and heathy environment as a fundamental human right[62]. The Constitution further stipulates several obligations by the state in respect of the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits, the need to encourage public participation in the management, protection and conservation of the environment, the obligation to protect genetic resources and biological diversity and the obligation to eliminate processes and activities that are likely to endanger the environment[63]. In addition, the *Environmental Management and Co-ordination Act (EMCA)[64]* establishes the legal and institutional framework for the management of the environment in Kenya. The Act upholds the right of every Kenyan to a clean and healthy environment and sets out various measures towards upholding this right including environmental planning, protection and conservation of the environment, Environmental Impact Assessment, Environmental Audit and Monitoring, environmental restoration and conservation orders and enforcement of environmental rights through courts and tribunals[65]. It also establishes the National Environment Management Authority which has the mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment[66]. Implementing EMCA is therefore vital in embracing environmental rule of law for sustainability in Kenya.

Despite these efforts, it has been pointed out that advancing the rule of law for sustainability faces several challenges including a culture of non-compliance with laws in some countries, poor implementation mechanisms, bad

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[61] Ibid

[62] Constitution of Kenya, 2010., Article 42., Government Printer, Nairobi

[63] Ibid, Article 69

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

[65] Ibid

[66] Ibid, S 7 & 9

governance, and weak legal and institutional structures[67]. It is imperative to address these among other challenges in order to effectively embrace the rule of law for sustainability.

4.0 Way Forward

It has been pointed out that in order for the rule of law to further Sustainable Development outcomes, it must ensure protection for all human rights, including economic, social and cultural rights and the right to development[68]. It has been argued that the rule of law is an element not only for economic growth, but also for environment sustainability and social justice[69]. One of the key ways of embracing the rule of sustainability is by enacting and implementing clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to in order to foster economic development, social justice and achieve the highest standards of environmental quality; and respect for human rights, including the right to a safe, clean, healthy, and sustainable environment[70].

It is also imperative to build strong, inclusive and accountable institutions including the judiciary in order to embrace the rule of law for sustainability[71]. SDG 16 calls for the promotion of peaceful and inclusive societies for Sustainable Development, the provision of access to justice for all and for the building of effective, accountable and inclusive institutions at all levels[72]. It has been argued that strong, inclusive and accountable state institutions, as envisaged in SDG 16, are essential to the building of public trust and the promotion of the rule of law for sustainability[73]. For example a strong, independent and accountable judiciary can advance the rule of law for sustainability by ensuring a more effective and responsive justice system that

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[67] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[68] United Nations., 'Rule of Law and Development.' Op Cit

[69] 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 07/01/2023)

[70] Ibid

[71] United Nations Office on Drugs and Crime., 'Rule of Law.' Op Cit

[72] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1.,' Op Cit

[73] United Nations Office on Drugs and Crime., 'Rule of Law.' Op Cit

promotes a culture of respect for laws and which increases access to justice for all, particularly population groups who are marginalized and disadvantaged[74]. Building strong, inclusive and accountable institutions is therefore necessary in order to embrace the rule of law for sustainability.

In addition, it is necessary for countries to foster a culture of respect for laws by all entities including the state, state entities, the private sector and the public in order to embrace the rule of law for sustainability[75]. It has been observed that respect for the rule of law and property rights and the pursuit of appropriate policy and regulatory frameworks can foster economic development by encouraging business formation, including entrepreneurship, and contribute to poverty eradication[76]. In addition, improved and respect for security of tenure for land and property can make a critical contribution to ensuring social and economic progress in rural and urban settings, supporting poverty reduction and furthering gender equality and peace and security[77]. Further, it has been observed that ensuring the rule of law in the exploitation of natural resources is essential to ensuring inclusive and sustainable economic growth and development and in respecting, protecting and fulfilling human rights for all persons[78].

Finally, there is need to foster capacity building in order to embrace the rule of law for sustainability[79]. Capacity building is critical to creating strong and accountable government institutions and agencies and continuously strengthening their effectiveness in advancing the rule of law for

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[74] United Nations Development Progarame., 'Advancing Inclusive Decision-Making for Sustainable Development: Representation in the Judiciary through SDG 16.7.1c' Available at *https://www.undp.org/publications/advancing-inclusive-decision-making-sustainable-development-representation-judiciary-through-sdg-1671c* (Accessed on 07/01/2023)

[75] Michel. R., 'The Rule of Law and Sustainable Development.' Available at *https://www.researchgate.net/profile/James-Michel-3/publication/342881527_The_Rule_of_Law_and_Sustainable_Development/links/5f0b37be299bf1881616f125/The-Rule-of-Law-and-Sustainable-Development.pdf* (Accessed on 07/01/2024)

[76] United Nations Office on Drugs and Crime., 'Rule of Law.' Op Cit

[77] Ibid

[78] Ibid

[79] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

sustainability[80]. Capacity building can also enhance the ability of law and policy-makers to produce clear, effective and transparent primary and secondary legislation that promotes sustainability[81]. Capacity building is therefore important in embracing the rule of law for sustainability. It is therefore necessary to uphold the foregoing among other measures in order to embrace the rule of law for sustainability.

5.0 Conclusion

The rule of law is integral in promoting sustainability. It is relevant to all three dimensions of sustainable development: economic, social and environmental[82].The importance of the rule of law in the Sustainable Development agenda is acknowledged under the 2030 Agenda for Sustainable Development whose targets under SDG 16 include promoting the rule of law at the national and international levels and ensuring equal access to justice for all[83]. Despite progress made towards promoting the rule of law at global, continental and national levels, advancing the rule of law for sustainability faces several challenges including a culture of non-compliance with laws in some countries, poor implementation mechanisms, bad governance, and weak legal and institutional structures[84]. It is imperative to address these challenges in order to embrace the rule of law for sustainability. This can be achieved through enacting and implementing clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes[85]; building strong, inclusive and accountable institutions including the judiciary[86]; fostering a culture of respect for laws by all entities including the state, state entities, the private sector and the

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[80] Ibid

[81] Organisation for Economic Co-operation and Development., 'Capacity-Building Programme on Policy and Legislative Development.' Available at *https://www.oecd.org/mena/governance/eu-pa-rule-of-law/Agenda-Trainings-PA-March-2022.pdf* (Accessed on 07/01/2024)

[82] International Development Law Organization., 'IDLO and the United Nations' 2030 Agenda for Sustainable Development.' Op Cit

[83] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., SDG 16.3

[84] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[85] United Nations., 'Rule of Law and Development.' Op Cit

[86] United Nations Office on Drugs and Crime., 'Rule of Law.' Op Cit

public[87];and fostering capacity building[88]. Embracing the rule of law for Sustainability is an ideal that needs to be pursued at all levels.

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[87] Michel. R., 'The Rule of Law and Sustainable Development.' Op Cit
[88] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

Enhancing Access to Justice for Sustainable Development in Kenya

Abstract
This paper critically discusses the role of access to justice in the Sustainable Development agenda. It argues that access to justice is vital in achieving Sustainable Development. The paper explores how access justice can foster the Sustainable Development agenda in Kenya. It highlights some of the challenges facing the attainment of access to justice and offers suggestions towards enhancing access to justice for Sustainable Development in Kenya.

1.0 Introduction

Access to justice has been described as a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favor and a greater role for Alternative Dispute Resolution[1]. It can also refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice[2]. Access to Justice has also been defined as judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue[3]. In addition, access to justice may also be understood as the ability of an individual who seeks justice to access legal information, legal advice, legal assistance and legal representation[4].

Access to Justice is a Constitutional right in Kenya[5]. The Constitution of Kenya provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice[6].

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[1] Ladan, M. T., 'Access to Justice as a Human Right Under the ECOWAS Community Law.'
https://www.researchgate.net/publication/272246292_Access_to_Justice_as_a_Human_Right_Under_the_Ecowas_Community_Law (Accessed on 04/01/2024)
[2] Ibid
[3] Muigua. K., 'Alternative Dispute Resolution and Access to Justice.' Glenwood Publishers Limited, 2015
[4] Dereymaeker, G.,'Formalising the Role of Paralegals in Africa: A Review of Legislative and Policy Developments. Cape Town: Dullah Omar Institute (CSPRI), *Open Society Justice Initiative and Paralegal Advisory Service Institute*, (2016) pp.1-32.
[5] Constitution of Kenya, 2010., Article 48, Government Printer, Nairobi
[6] Ibid

The United Nations points out that access to justice is a basic principle of the rule of law[7]. It further points out that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable[8].

Realizing access to justice is vital in achieving Sustainable Development. According to the International Development Law Organization (IDLO), access to justice is a critical pillar for poverty reduction and Sustainable Development[9].

This paper critically discusses the role of access to justice in the Sustainable Development agenda. It argues that access to justice is vital in achieving Sustainable Development. The paper explores how access justice can foster the Sustainable Development agenda in Kenya. It highlights some of the challenges facing the attainment of access to justice and offers suggestions towards enhancing access to justice for Sustainable Development in Kenya.

2.0 Access to Justice and the Sustainable Development Agenda

It has correctly been observed that access to justice is a fundamental component of the Sustainable Development Agenda[10]. Access to justice ensures that legal systems are equitable, responsive, and accessible to all, therefore playing a critical role in achieving various aspects of Sustainable Development[11]. This could be in the context of gender equality, reducing inequalities, labour rights, or environmental protection among other various targets envisaged under the Sustainable Development Goals (SDGs)[12].

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[7] United Nations., 'Access to Justice.' Available at
https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ (Accessed on 04/01/2024)
[8] Ibid
[9] International Development Law Organization., 'Access to Justice in Kenya.' Available at *https://www.idlo.int/what-we-do/initiatives/access-justice-kenya* (Accessed on 04/01/2024)
[10] SDG Resource Centre., 'Access to Justice.' Available at
https://sdgresources.relx.com/tags/access-justice (Accessed on 04/01/2023)
[11] Ibid
[12] Ibid

Access to Justice is at the heart of the United Nation's 2030 Agenda for Sustainable Development[13]. The Agenda envisages a world of universal respect for human rights and human dignity, the rule of law, justice, equality and nondiscrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity[14]. SDG 16 seeks to promote peaceful and inclusive societies for Sustainable Development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels[15]. Among the targets under SDG 16 is to promote the rule of law at the national and international levels and ensure equal access to justice for all; develop effective, accountable and transparent institutions at all levels; and ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements[16]. Realizing the targets under SDG 16 is vital in enhancing access to justice for Sustainable Development. It has been argued that SDG 16's emphasis on access to justice is critical in ensuring fairness and legal protection for all persons, and especially the most vulnerable since it calls for the establishment and strengthening of institutions at all levels to deliver justice effectively, transparently, and without undue delay[17].

In addition, access to justice is vital in realizing other SDGs including SDG 5, which focuses on gender equality since it plays a crucial role in addressing issues like gender-based violence, discrimination, and unequal power dynamics; SDG 8 which aims to foster decent work and economic growth by upholding labour rights including fair treatment in the workplace, protecting workers' rights, and providing avenues for redress in cases of labor violations; SDG 10, which aims at reducing inequalities within and among nations by

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[13] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pdf* (Accessed on 04/01/2023)
[14] Ibid
[15] Ibid
[16] Ibid
[17] SDG Resource Centre., 'Access to Justice.' Op Cit

protecting marginalized and disadvantaged communities; and SDG 13 on climate action by enforcing environmental rights[18].

According to the Organisation for Economic Co-operation and Development (OECD), access to justice is integral to achieving the SDGs and inclusive growth[19]. It asserts that access to justice is an important tool for implementing most of the SDGs, such as eradicating poverty and hunger (SDG 1 and SDG 2) by giving farmers and other agrarian communities the tools they need to improve their tenure security; SDG 5 by helping to translate legal guarantees of gender equality into real improvements in the daily lives of women and supporting women in protecting themselves from domestic violence; and helping preserve the environment as envisaged under SDGs 14 and SDG 15[20]. Further, OECD points out that providing access to justice enables traditionally marginalized populations including the youth, the elderly, women, migrants to participate in legal processes that promote inclusive growth in sectors such as health, employment, education, housing, and entrepreneurship towards Sustainable Development[21]. Access to Justice is therefore integral in realizing the Sustainable Development agenda.

3.0 Access to Justice and Sustainable Development in Kenya

Access to justice is a fundamental pillar for poverty reduction and Sustainable Development, and the Constitution of Kenya makes it the responsibility of the government to facilitate access to justice for its citizens[22]. It has been argued that enhancing access to justice in Kenya can ensure strong legal frameworks and effective institutions, coupled with greater levels of legal empowerment for the poor and marginalized, which ensures that the Sustainable Development objectives are achieved[23]. Access to justice is at the core of the

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[18] Ibid

[19] Organisation for Economic Co-operation and Development., 'Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All.' Available at *https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf* (Accessed on 04/01/2023)

[20] Ibid

[21] Ibid

[22] International Development Law Organization., 'Access to Justice in Kenya.' Op Cit

[23] International Development Law Organization., 'Doing Justice to Sustainable Development: Integrating The Rule of Law into the Post-2015 Development Agenda.' Available at

Sustainable Development paradigm, driving efforts to correct artificial and harmful imbalances in economic growth, to remedy the miseries of lives lived in extreme poverty, and to ensure that natural resources and habitats are preserved for present and future generations[24].

Enhancing access to justice in Kenya can foster the realization of all three dimensions of Sustainable Development being economic growth, social progress and environmental protection[25]. Access to justice ensures effective legislative frameworks and enhanced institutional capacity to adjudicate commercial disputes which is vital in helping to level the playing field for economic actors, and promote the growth of entrepreneurship, small and medium sized enterprises, and innovation therefore promoting economic growth[26]. In addition, access to justice can foster social progress by ensuring the presence of transparent and participatory dispute resolution mechanisms that allow individuals and groups to claim their rights to equal opportunity, education, health, land and other economic and social rights towards combating poverty and marginalization[27]. Further, access to justice ensures environmental protection through initiatives such as public participation and access to information in environmental and sustainability decision-making and legal redress in case of breach of environmental rights[28].

The Constitution of Kenya sets out constitutional safeguards that are important in realizing the right of access to justice in Kenya[29]. In addition to article 48 which sets out the right of access to justice in Kenya, 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[30]. The Constitution also embraces the right of equality and freedom from discrimination which is vital

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https://www.idlo.int/sites/default/files/pdfs/publications/Doing%20Justice%20to%20Sustainable%20Development.pdf (Accessed on 05/01/2023)

[24] Ibid
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid
[29] Constitution of Kenya, 2010., Government Printer, Nairobi
[30] Ibid, Article 22 (1)

in realizing access to justice and provides that every person is equal before the law and has the right to equal protection and equal benefit of the law[31]. In addition, the Constitution of Kenya envisages access to justice in environmental matters and stipulates 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[32]. Another fundamental provision of the Constitution geared towards enhancing access to justice is chapter ten which sets out judicial authority[33]. Article 159 sets out several principles that are supposed to guide the administration of justice in Kenya. These principles are to the effect that justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted; justice shall be administered without undue regard to procedural technicalities; and that the purpose and principles of the Constitution shall be protected and promoted[34].

There have been efforts towards enhancing access to Kenya as envisaged by the foregoing provisions of the Constitution towards fostering Sustainable Development. The Judiciary notes that access to justice is vital for Sustainable Development since it is essential in realizing the Social Transformation through Access to Justice (STAJ) vision particularly for the poor, marginalized, and vulnerable[35]. According to the Judiciary, several initiatives have been undertaken towards promoting access to justice in Kenya for Sustainable Development[36]. These include improving physical access through construction of more court infrastructure, operationalizing mobile courts in remote areas to enhance access to justice for the marginalized and vulnerable groups, embracing court circuits aimed at deploying judges and judicial officers to

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[31] Ibid, article 27 (1)
[32] Ibid, article 70 (1)
[33] Ibid, Chapter ten
[34] Ibid, Article 159 (2)
[35] Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' Available at https://judiciary.go.ke/sojar-2022-2023-2/ (Accessed on 05/01/2023)
[36] Ibid

specific court stations with high caseloads in order to accelerate the determination of disputes, administration of pro-bono schemes, simplification of court procedures, embracing electronic filing (e-filing) of court documents, and the establishment of specialized courts including tribunals and small claims courts[37].

In addition, enhancing access to justice for Sustainable Development in Kenya is being realized through Alternative Justice Systems(AJS)[38]. Alternative Justice Systems refer to the administration of justice by the people using their culture, customary law, practices and beliefs to resolve disputes[39]. They are a form of restorative justice that aims to ensure social inclusion, and are generally more affordable, participatory and more expeditious than court processes[40]. They have been described as a useful avenue of responding to the challenge of backlog of court cases[41]. The idea of Alternative Justice Systems embraces Alternative Dispute Resolution (ADR) mechanisms in the quest towards access to justice[42]. ADR denotes a wide range of dispute management techniques that function outside but may be linked to formal court processes[43]. ADR has also been defined as a set of processes that are used to manage conflicts without resort to courts[44]. The term ADR encompasses many dispute resolution techniques including negotiation, mediation, arbitration,

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[37] Ibid

[38] Muigua. K., 'Mainstreaming Alternative Justice Systems in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2023/11/Mainstreaming-Alternative-Justice-Systems-in-Africa.pd*f (Accessed on 05/01/2023)

[39] United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Available at *https://www.unodc.org/easternafrica/en/Stories/partnerswelcome-move-to-mainstream-alternative-justice-systems-inkenya.html#:~:text=AJS%20may%20be%20defined%20as,more%20expeditious%20than%20court%20proc esses* (Accessed on 05/01/2024)

[40] Ibid

[41] Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Available at *https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/* (Accessed on 05/01/2024)

[42] Muigua. K., 'Mainstreaming Alternative Justice Systems in Africa.' Op Cit

[43] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[44] Muigua. K., 'Alternative Dispute Resolution and Access to Justice.' Op Cit

conciliation, adjudication, early neutral evaluation, expert determination, minitrials, traditional justice systems among others[45].

ADR mechanisms play a fundamental role in enhancing access to justice for Sustainable Development[46]. These mechanisms are rooted in the culture and values of Kenyan people and emphasize harmony, humanness and togetherness over individual interests therefore creating a conducive environment for economic, social, cultural and political development towards realizing the Sustainable Development agenda[47]. Promoting ADR mechanisms is therefore necessary in enhancing access to justice for Sustainable Development in Kenya. The Constitution of Kenya requires the Judiciary to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[48]. The Judiciary notes that progress has been made towards embracing Alterative Justice Systems and ADR mechanisms in Kenya through measures such as the adoption of the Alternative Justice Systems Policy, capacity building on Alternative Justice Systems through training, and the continued implementation of the Court-Annexed Mediation programme[49]. There is need to widely embrace Alternative Justice Systems in Kenya in order to enhance access to justice for Sustainable Development in Kenya.

Further, progress has been made towards enhancing access to justice for Sustainable Development in Kenya by promoting Environmental Justice[50]. 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

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[45] Ibid

[46] Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf* (Accessed on 05/01/2023)

[47] Ibid

[48] Constitution of Kenya., 2010., Article 159 (2) (c)

[49] Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' Op Cit

[50] Muigua. K., Kariuki. F., 'Towards Environmental Justice in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-January-2015.pdf* (Accessed on 05/01/2023)

involvement in decision-making[51]. Environmental justice can be fostered through measures such as public participation, access to information and access to justice[52]. Courts and tribunals including the Environment and Land Court and the National Environment Tribunal are playing a pivotal role in enhancing access to justice in environmental matters for Sustainable Development in Kenya[53]. It has rightly been pointed out that the Environment and Land Court and the National Environment Tribunal are key actors in the Sustainable Development discourse in terms of developing environmental jurisprudence geared towards environmental protection and conservation[54]. These judicial entities have discharged this mandate through orders aimed at enhancing Sustainable Development and promoting environmental conservation in Kenya[55]. In particular, it has been pointed out that the National Environment Tribunal (NET) facilitates both distributive and procedural justice by providing a framework through which the right to a clean and healthy environment can be enforced[56]. Through some of its decisions, the Tribunal has ensured that the state's obligations in respect of the environment enshrined under the Constitution have been undertaken[57]. The tribunal further promotes access to justice by providing an avenue through which persons who are aggrieved by some of the decisions of the National Environment Management Authority (NEMA) can seek recourse[58]. NET and the

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[51] Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience, 'in F.N. Botchway (ed), Natural Resource Investment and Africa's Development, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74- 76.

[52] Muigua. K., Kariuki. F., 'Towards Environmental Justice in Kenya.' Op Cit

[53] Muigua. K., 'National Environment Tribunal, Sustainable Development and Access to Justice in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2020/03/National-Environment-Tribunal-Sustainable-Development-and-Access-to-Justice-in-Kenya-1.pdf* (Accessed on 05/01/2023)

[54] Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya' Glenwood Publishers Ltd, 2015;

[55] Muigua. K., 'National Environment Tribunal, Sustainable Development and Access to Justice in Kenya.' Op Cit

[56] Ibid

[57] See for example the cases of Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019) *eKLR,*

[58] Environmental Management and Coordination Act, No. 8 of 1999, S 129 (1), Government Printer, Nairobi

Environment and Land Court therefore play an important role in enhancing access to justice in environmental matters for Sustainable Development.

Despite the progress made towards enhancing access to justice for Sustainable Development in Kenya, realizing this ideal is hindered by several challenges. The right of access to justice in Kenya has hitherto been hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow[59]. In addition, it has been pointed out that access to justice in Kenya, especially by the marginalized, poor, uneducated and underprivileged in the society, is hindered by several factors including lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long durations of time it takes to resolve disputes in courts[60]. It is vital to address these concerns in order to enhance access to justice for Sustainable Development in Kenya.

4.0 Way Forward

In order to enhance access to justice for Sustainable Development in Kenya, it is imperative to promote access to information. Access to information has been described as pivotal component in the quest towards access to justice[61]. It has rightly been informed that access to information is critical for the achievement of the SDGs[62]. Through access to information, the public is empowered to make informed choices, to effectively monitor and hold their government to

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[59] Ojwang. J.B, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

[60] Muigua. K., 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' Available at *https://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf* (Accessed on 05/01/2023)

[61] United Nations Development Programme., 'Strengthening Judicial Integrity through Enhanced Access to Justice.' Available at *https://www.undp.org/sites/g/files/zskgke326/files/migration/eurasia/Access-to-justice.pdf* (Accessed on 05/01/2023)

[62] The United Nations Educational, Scientific and Cultural Organization (UNESCO)., 'From Promise to Practice: Access to Information for Sustainable Development.' Available at *https://www.unesco.org/en/articles/promise-practice-access-information-sustainabledevelopment#:~:text=Access%20to%20information%20(ATI)%20is,about%20decisions%20affecting%20their%20lives*. (Accessed on 05/01/2023)

account, and to be able to know about decisions affecting their lives[63]. It has been argued that Sustainable Development is undermined when people are unable to access information, express their views and participate freely in decisions that affect their lives and livelihoods[64]. Access to information for citizens, civil society and private sector groups is critical to ensuring effective use of government resources towards sustainable growth[65]. It is also vital for strengthening access to justice making citizens informed about their environmental, economic and social rights and the available legal and administrative remedies for fulfilling these rights towards Sustainable Development[66]. Making information available and accessible to any person in an affordable, effective and timely manner without proving a legal or other interest is also key[67].. *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[68]* recognizes the importance of access to information in environmental matters towards realizing access to justice and Sustainable Development and urges all countries to promote access to information. It is therefore necessary to promote access to information in order to enhance access to justice for Sustainable Development in Kenya.

In addition, it is essential to enhance public participation in order to enhance access to justice for Sustainable Development in Kenya. Public participation has been identified as key pillar of access to justice across all dimensions including environmental justice[69]. This is succinctly captured in the Rio Declaration on Environment and Development which stipulates that:

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[63] Ibid

[64] International Development Law Organization., 'Doing Justice to Sustainable Development: Integrating The Rule of Law into the Post-2015 Development Agenda.' Op Cit

[65] Ibid

[66] Ibid

[67] Ibid

[68] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters., Available at *https://unece.org/DAM/env/pp/documents/cep43e.pdf* (Accessed on 05/01/2023)

[69] Muigua. K., 'Realizing Environmental Justice through Litigation.' Available at *https://kmco.co.ke/wp-content/uploads/2023/07/Realizing-Environmental-Justice-through-Litigation.pdf* (Accessed on 05/01/2023)

'*Environmental issues are best handled with the <u>participation of all concerned citizens, at the relevant level.</u> 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 <u>participate in decision-making processes.</u> <u>States shall facilitate and encourage public awareness and participation</u> by making information widely available. <u>Effective access to judicial and administrative proceedings,</u> including <u>redress and remedy, shall be provided</u> (Emphasis added))*[70].

Public participation can promote Sustainable Development and improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions in the context of social, environmental and economic decision making[71]. In addition, public participation can also improve policy implementation and foster peace and sustainability by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict[72]. It has been asserted that 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 public[73]. In addition, public participation strengthens procedural access to justice across various facets including environmental justice[74]. It has been pointed out that public participation in environmental and sustainability decision-making often needs

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[70] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1), Principle 10

[71] 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 05/01/2023)

[72] Ibid

[73] Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDSMEANINGFUL-PUBLICPARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf* (Accessed on 05/01/2023)

[74] Muigua. K., 'Realizing Environmental Justice through Litigation.' Op Cit

to be supported by legally protected access to information and access to justice measures[75]. It is therefore imperative to embrace public participation in order to enhance access to justice for Sustainable Development in Kenya.

Further, it is necessary to address the challenges facing access to justice through courts in Kenya. It has correctly been pointed out that the right of access to justice in Kenya has hitherto been hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow[76]. Addressing these challenges calls for the adoption of measures such as making court fees affordable for all persons, enhanced legal aid and awareness programmes, improving physical access to courts through construction of more court infrastructure, operationalizing mobile courts in remote areas to enhance access to justice for the marginalized and vulnerable groups, embracing court circuits aimed at deploying judges and judicial officers to specific court stations with high caseloads in order to accelerate the determination of disputes, promoting pro-bono schemes, simplification of court procedures, embracing electronic filing (e-filing) of court documents and virtual court sessions to reduce the need of physically accessing courts, and the establishment of specialized courts including tribunals and small claims courts to improve the ease of managing disputes[77]. These measures will improve access to justice and enable citizens exercise their economic, social and environmental rights towards Sustainable Development in Kenya.

Finally, there is need to embrace Alternative Justice Systems including ADR mechanisms in order to enhance access to justice for Sustainable Development in Kenya. ADR mechanisms contain certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes which

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[75] International Development Law Organization., 'Doing Justice to Sustainable Development: Integrating The Rule of Law into the Post-2015 Development Agenda.' Op Cit

[76] Ojwang. J.B, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development'' Op Cit

[77] Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' Op Cit

makes them viable in enhancing access to justice[78]. In addition, ADR mechanisms have been practiced in Africa for many centuries and are well embedded in the culture and customary practices of the Kenyan people[79]. These mechanisms emphasize harmony, humanness and togetherness over individual interests therefore creating a conducive environment for economic, social, cultural and political development towards realizing the Sustainable Development agenda[80]. Promoting ADR mechanisms is therefore necessary in enhancing access to justice for Sustainable Development in Kenya. Through the foregoing among other approaches, enhancing access to justice for Sustainable Development in Kenya will become a reality.

5.0 Conclusion

Access to justice is a fundamental component of the Sustainable Development Agenda[81]. Access to justice ensures that legal systems are equitable, responsive, and accessible to all, therefore playing a critical role in achieving various aspects of Sustainable Development[82]. SDG 16 seeks to promote the rule of law at the national and international levels and ensure equal access to justice for all towards Sustainable Development[83]. There has been some progress towards promoting access to justice for Sustainable Development in Kenya. However, the right of access to justice in Kenya continues to be hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow[84]. It is imperative to address these challenges in order to enhance access to justice for Sustainable Development in Kenya. This can be achieved through promoting access to information, embracing public participation, addressing the physical, structural, capacity and technical challenges hindering access to justice

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[78] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[79] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017
[80] Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit
[81] SDG Resource Centre., 'Access to Justice.' Op Cit
[82] Ibid
[83] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1' Op Cit
[84] Ojwang. J.B, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op Cit

through courts in Kenya and embracing Alternative Justice Systems including ADR mechanisms[85]. Enhancing Access to Justice for Sustainable Development in Kenya is an ideal that needs to be realized.

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[85] Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' Op Cit

Implementing Circular Economy for Sustainability

Abstract

Achieving sustainability has become pertinent concern in the wake of problems facing the planet from the environmental, social and economic spheres. Environmental problems including climate change and depletion of natural resources; social concerns such as poverty and inequalities; and economic challenges including recessions and underdevelopment in some countries and regions are a major hindrance to sustainability. Various initiatives are being embraced at local, national, regional and global levels towards achieving sustainability as envisioned under the United Nation's 2030 Agenda for Sustainable Development. The circular economy has been advocated as one of the key approaches towards sustainability with benefits for people and the planet, including reducing greenhouse gas emissions and other forms of pollution, biodiversity loss, and environmental degradation. The paper critically examines the role of circular economy in the Sustainable Development agenda. It defines circular economy and identifies its key elements. It further discusses the progress made towards embracing circular economy at the global, regional and national levels. The paper also explores the challenges facing realization of circular economy and suggests reforms towards implementing it for sustainability.

1.0 Introduction

Sustainability has been defined as creating and maintaining the conditions under which humans and nature can exist in productive harmony to support present and future generations[1]. Sustainability is often thought of as composed of three overlapping, mutually dependent goals: to live in a way that is environmentally sustainable, or viable over the very long-term; to live in a way that is economically sustainable, maintaining living standards over the long-term; and to live in a way that is socially sustainable, now and in the future[2]. The need for sustainability has become a global concern in recent decades in light of the growing environmental challenges and climate change, together with issues of poverty, increasing disparity between societies and the tensions

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[1] United States Environmental Protection Agency., 'What is Sustainability.' Available at https://www.epa.gov/sustainability/learn-about-sustainability (Accessed on 30/11/2023)

[2] Heinberg. R., 'What Is Sustainability?' Available at
https://cdn.auckland.ac.nz/assets/arts/documents/What%20is%20Sustainability.pdf
(Accessed on 30/11/2023)

brought by social inequalities[3]. The need to strike a balance between the environmental, social and economic facets of development towards sustainability gave rise to the concept of Sustainable Development.

Sustainable Development requires an integrated approach that takes into consideration environmental protection along with economic development and social progress[4]. The concept of Sustainable Development was defined by the World Commission on Environment and Development ('*Brundtland Commission*') as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs[5].' Sustainable Development seeks to foster sustainability by ensuring environmental protection, economic development and addressing social concerns[6]. It has been asserted that Sustainable Development seeks to improve the quality of life on earth in a comprehensive manner by fostering economic prosperity, social equity and environmental protection[7].

The need for sustainability has led to the adoption of the concept of Sustainable Development as the global blueprint for development as set out in the United Nation's 2030 Agenda for Sustainable Development[8]. The Agenda represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development[9]. The Agenda envisions attainment of the ideal of Sustainable Development through

[3] Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) Integrated Reporting. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 30/11/2023)

[4] United Nations., 'Sustainability.' Available at https://www.un.org/en/academic-impact/sustainability (Accessed on 30/11/2023)

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

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

[7] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

[8] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pdf* (Accessed on 30/11/2023)

[9] Ibid

17 Sustainable Development Goals (SDGs) which seek to strike a balance between social economic and environmental aspects of sustainability[10].

Various initiatives have been undertaken at local, national, regional and global levels towards achieving sustainability as envisioned under the 2030 Agenda for Sustainable Development. The circular economy has been advocated as one of the key approaches towards sustainability with benefits for people and the planet, including reducing greenhouse gas emissions and other forms of pollution, biodiversity loss, and environmental degradation[11].

The paper critically examines the role of circular economy in the Sustainable Development agenda. It defines circular economy and identifies its key elements. It further discusses the progress made towards embracing circular economy at the global, regional and national levels. The paper also explores the challenges facing realization of circular economy and suggests reforms towards implementing it for sustainability.

2.0 Interpreting Circular Economy

The circular economy has been defined as a model of production and consumption, which involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible[12]. It has also been defined as a system where materials never become waste and nature is regenerated[13]. In a circular economy, products and materials are kept in circulation through processes like maintenance, reuse, refurbishment,

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[10] Ibid

[11] United Nations Development Programme., 'Circular Economy.' Available at https://climatepromise.undp.org/what-we-do/areas-of-work/circular-economy (Accessed on 30/11/2023)

[12] European Parliament., 'Circular Economy: Definition, Importance and Benefits.' Available at https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO0560 3/circular-economy-definition-importance-and-benefits#:~:text=The%20circular%20economy%20is%20a,cycle%20of%20products%2 0is%20extended (Accessed on 30/11/2023)

[13] Ellen MacArthur Foundation.,' What is a Circular Economy?.' Available at https://www.ellenmacarthurfoundation.org/topics/circular-economy-introduction/overview#:~:text=The%20circular%20economy%20is%20a,remanufact ure%2C%20recycling%2C%20and%20composting (Accessed on 30/11/2023)

remanufacture, recycling, and composting[14]. In addition circular economy can also be understood as a tri-generation system in which input resources are conserved and waste, emissions, and energy leakage are reduced through the gradual closing and contraction of material and energy loops[15].

Circular economy accomplishes these goals through measures such as durability-enhancing construction, servicing, repair, reuse, re-manufacturing, refurbishment, and recycling[16]. According to the United Nations Development Programme (UNDP), circular economy aims to minimize waste and promote a sustainable use of natural resources, through smarter product design, longer use, recycling and more, as well as regenerate nature[17].

Circular economy is therefore essentially about fostering sustainable production and consumption of goods as well as services[18]. This is in line with SDG 12 which seeks to ensure sustainable consumption and production patterns[19]. Among the targets under SDG 12 is to substantially reduce waste generation through prevention, reduction, recycling and reuse[20]. According to UNDP, encouraging industries, businesses and consumers to recycle and reduce waste is important in achieving the targets of SDG 12[21]. Circular economy is therefore an integral part of the Sustainable Development agenda.

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[14] Ibid

[15] Muriithi. J., & Ngare. I., 'Transitioning Circular Economy from Policy to Practice in Kenya.' Available at *https://www.frontiersin.org/articles/10.3389/frsus.2023.1190470/full#:~:text=Kenya%20has%20been%20working%20toward,new%20avenues%20for%20financial%20growth* (Accessed on 30/11/2023)

[16] Ibid

[17] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Available at https://climatepromise.undp.org/news-and-stories/what-is-circular-economy-and-how-it-helps-fight-climate-change (Accessed on 30/11/2023)

[18] Gendre. I., 'Circular Economy: Definition and Principles.' Available at *https://greenly.earth/en-us/blog/company-guide/circular-economy-definition-and-principles* (Accessed on 30/11/2023)

[19] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' SDG 12

[20] Ibid, SDG 12.5

[21] United Nations Development Programme., 'Goal 12: Responsible Consumption and Production.' Available at *https://www.undp.org/sustainable-development-goals/responsible-consumption-and-production* (Accessed on 30/11/2023)

The idea of circular economy is premised on certain fundamental principles such as *refuse*, which seeks to foster solutions that maximize the usage of fewer goods in order to avoid unnecessary and unsustainable products; *rethink*, a principle that asserts that every product and every system needs to be rethought with a focus on how to reduce its environmental impact; *reduce*, a principle whose central idea is dematerialisation or 'doing more with less'; *reuse*, that entails using products more than once in order to minimize waste; *repair*, which aims to extend product life cycles and to preserve rather than discard them; *refurbish*, a concept that aims at restoring old or discarded products and bringing them up to date to serve their initial function; *remanufacture*, which entails refurbishing and re-using parts of a discarded product in a new product with the same function; *repurpose*, a principle that seeks to foster the remodeling of discarded products into a new ones with different functions; *recycle* which entails using old products in new ways; and *recover*, a process that aims at sustainably sourcing bio-waste into uses such as energy generation[22].

The principles of circular economy aims to achieve certain objectives which include preservation and optimization of natural resources, reducing the consumption of non-renewable resources, achieving eco-design, reducing the impact of human activities on the environment and on health by minimizing carbon emissions and implementing the use of renewable energy, limiting consumption, and fostering efficient management of waste through reducing, reusing, recycling among other measures[23].

Circular economy is integral in achieving sustainability. It has been argued that the adoption of circular economy principles enhances increased attention to environmental sustainability concerns, therefore, creating more benefits such as improved productivity and resource utilization[24]. Circular economy ensures that resources, energy and waste volumes are minimized at every stage of a product lifecycle, as well as greenhouse gas emissions, pollution and

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[22] The 10 Principles of a Circular Economy., Available at
 https://www.lombardodier.com/contents/corporate-news/responsible-capital/2020/september/the-10-steps-to-a-circular-econo.html (Accessed on 30/11/2023)
[23] Gendre. I., 'Circular Economy: Definition and Principles.' Op Cit
[24] Muriithi. J., & Ngare. I., 'Transitioning Circular Economy from Policy to Practice in Kenya.' Op Cit

public health risks[25]. It has also been pointed out that circular economy has numerous benefits including protecting the environment since reusing and recycling products would slow down the use of natural resources, reduce landscape and habitat disruption and help to limit biodiversity loss, reducing the dependence on raw materials and creating jobs since redesigning materials and products for circular use would boost innovation across different sectors of the economy[26].

In addition, it has been argued that apart from helping tackle the problem of pollution, circular economy can play an important role in solving other complex challenges such as climate change and biodiversity loss[27]. Circular economy can address climate change by reducing greenhouse gas emissions[28]. It has been argued that through efficient and more circular use of materials in key industrial materials such as cement, steel, plastics, and aluminum, circular economy strategies can help reduce global greenhouse gas emissions by up to 40 percent by 2050[29].

It is therefore important for countries to embrace and transition towards circular economy. It has been argued that a transition to a green and circular economy is an opportunity to promote social inclusion, poverty eradication and sustained economic and employment growth, while simultaneously maintaining a healthy ecosystem[30]. It has further been asserted that transitioning to circular economy is key for climate change adaptation and

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[25] United Nations Development Programme., 'Why the Green, Circular Economy is Key to Beating the Triple Planetary Crisis.' Available at *https://www.undp.org/blog/why-green-circular-economy-key-beating-triple-planetary-crisi*s (Accessed on 30/11/2023)

[26] European Parliament., 'Circular Economy: Definition, Importance and Benefits.' Op Cit

[27] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

[28] Ibid

[29] Ellen McArthur Foundation., 'Completing the Picture: How the Circular Economy Tackles Climate Change.' Available at https://www.ellenmacarthurfoundation.org/completing-the-picture (Accessed on 30/11/2023)

[30] Fwangkwal. B., Luotonen. E., & Jarvinen. L., 'Africa's Circular Economy Needs Support from Policymakers.' Available at *https://www.sitra.fi/en/articles/africas-circular-economy-needs-support-from-policymakers/* (Accessed on 30/11/2023)

mitigation, and has vast potential to create jobs, improve productivity and strengthen the economic competitiveness of countries[31].

Transitioning to a green, circular economy involves several elements which include promoting sustainable production through material and energy efficiency, eco-friendly materials and clean, renewable energy, such as solar and wind energy; fostering ecosystems and biodiversity conservation through sustainable management of natural resources; transitioning to sustainable and green transport based on e-mobility and energy efficiency; encouraging sustainable consumption by avoiding single-use items and keeping products in use for as long as possible; and encouraging waste reduction, reuse, repair and recycling to in order to recover valuable materials and minimize waste[32]. It is therefore necessary for all countries to implement a green, circular economy for sustainability.

3.0 Implementing Circular Economy: Opportunities and Challenges

It has been observed that many countries especially those that are mainly industrialized, newly industrialized and emerging economies partially apply the 3R principles of circular economy(reduce, reuse and recycling of material)[33]. It has been observed that the reduce component is mostly practiced in production as a result of competition and the necessity of achieving high input use efficiency[34]. Further, it has been pointed out that in developed nations' households, recycling of certain materials including glass, plastic, paper, metal and burnable solid waste is becoming more common[35]. On the other hand, municipalities take the responsibility of treating and reusing waste water from households as well as solid waste and recycling auto and household appliances[36].

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[31] Lewis. I., 'AfDB's Donor-Funded Facility Supports Africa's Circular Economy.' Available at https://impact-investor.com/afdbs-donor-funded-facility-supports-africas-circular-economy/ (Accessed on 30/11/2023)

[32] United Nations Development Programme., 'Why the Green, Circular Economy is Key to Beating the Triple Planetary Crisis.' Op Cit

[33] Heshmati. A., 'A Review of the Circular Economy and its Implementation.' Available at https://docs.iza.org/dp9611.pdf (Accessed on 01/12/2023)

[34] Ibid

[35] Ibid

[36] Ibid

It has been pointed out that there are many opportunities to implement circular economy in different sectors including textiles, buildings and construction, and at various stages of a product's lifecycle, including design, manufacturing, distribution, and disposal[37]. For example, it has been pointed out that in the textiles and fashion sector, there are initiatives that employ regenerative agriculture to produce organic cotton and other natural fibres, through the use of natural colorings and dye, thus ensuring higher quality and safer garments for the health of consumers and the environment[38]. Such an approach ensures that clothing can last longer, be repaired, thrifted, and recycled[39].

In the building and construction sector, initiatives being undertaken to implement circular economy include reducing raw material use, re-using existing materials in circulation, substituting carbon-intensive materials for regenerative alternatives such as timber, promoting energy efficiency in buildings, recycling, waste management and the use of alternative construction materials, and embracing green buildings and green supply chains within the construction industry[40]. Implementation of circular economy principles in the construction industry promotes the use of sustainable materials, maximizing material recovery, and avoiding unnecessary waste generation and waste disposed to landfill[41].

In addition, there are numerous opportunities for the private sector to implement circular economy. It has been observed that ensuring the success of circular economy requires the active engagement of the private sector, which brings with it innovation and investment, to identify new green circular business models[42]. For example, circular economy offers the hospitality sector an opportunity to move away from single-use plastic items and the transport

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[37] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

[38] Ibid

[39] Ibid

[40] Norouzi. M., 'Circular Economy in the Building and Construction Sector: A Scientific Evolution Analysis.' *Journal of Building Engineering*, Volume 44, 2021

[41] Ibid

[42] United Nations Development Programme., 'Why the Green, Circular Economy is Key to Beating the Triple Planetary Crisis.' Op Cit

sector to unlock opportunities for e-mobility[43]. By implementing circular economy, the hospitality sector can address the problem of plastic through elimination of problematic or unnecessary plastic packaging through redesign, innovation, and new delivery models; applying reuse models where relevant therefore reducing the need for single-use packaging; ensuring that plastic packaging is 100% reusable, recyclable, or compostable; ensuring that the use of plastic is fully decoupled from the consumption of finite resources; and making sure that plastic packaging is free of hazardous chemicals, and the health, safety, and rights of all people involved are respected and protected[44].

The transport sector can also implement circular economy through approaches such as promoting public transport in order to reduce carbon emissions, encouraging active transport such as walking and cycling, embracing hybrid vehicles, adopting a shared economy approach, and encouraging the use of sustainable fuels including biofuels and hydrogen among others[45]. It has also been argued that there is need for circular economy approaches in the transport sector such as designing vehicles to be more lightweight so that fewer materials are needed to make them, and less energy is needed to power them and recycling end-of-life tyres[46]. It has been pointed out that by transitioning toward a circular economy and making efforts to reduce waste, emissions from the materials used in manufacturing vehicles could be reduced by up to 70 per cent by the year 2050 or an equivalent of 250 million tons of carbon dioxide[47].

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[43] Ibid

[44] Ellen McArthur Foundation., 'Plastics and the Circular Economy -Deep Dive.' Available at https://www.ellenmacarthurfoundation.org/plastics-and-the-circular-economy-deep-dive#:~:text=The%20vision%20for%20a%20circular%20economy%20for%20plastic%20has%20six,need%20for%20single%2Duse%20packaging (Accessed on 01/11/2023)

[45] Africa Circular Business Alliance., 'Circular Economy Implementation Strategies for Sustainable Transportation.' Available at https://www.linkedin.com/pulse/circular-economy-implementation-strategies/ (Accessed on 01/12/2023)

[46] Vandycke. N et al., 'Defining the Role of Transport in the Circular Economy.' Available at https://blogs.worldbank.org/transport/defining-role-transport-circular-economy (Accessed on 01/12/2023)

[47] Ibid

It is therefore evident that there are numerous opportunities to implement circular economy. The private sector therefore has a vital role to play in implementing circular economy. It has also been pointed out that the public can implement circular economy by demanding environmentally friendly products and services and actively minimizing waste by embracing practices such as reducing, reusing and recycling of materials[48].

Circular economy is being implemented in Europe through the *European Union Circular Economy Action Plan[49]*. The action plans seeks to ensure that products within the European Union are fit for a climate-neutral, resource-efficient and circular economy, reduce waste and ensure that the performance of front-runners in sustainability progressively becomes the norm[50]. The Action plan embraces the sustainability principles of circular economy and seeks to achieve various targets which include improving product durability, reusability, upgradability and reparability, addressing the presence of hazardous chemicals in products, and increasing their energy and resource efficiency; increasing recycled content in products, while ensuring their performance and safety; enabling remanufacturing and high-quality recycling; restricting single-use and countering premature obsolescence; introducing a ban on the destruction of unsold durable goods; incentivising product-as-a-service or other models where producers keep the ownership of the product or the responsibility for its performance throughout its lifecycle; mobilising the potential of digitalisation of product information, including solutions such as digital passports, tagging and watermarks; and rewarding products based on their different sustainability performance, including by linking high performance levels to incentives[51]. The Action Plan acknowledges that circular economy is an essential part of a wider transformation of industry towards climate neutrality and long-term competitiveness[52]. It further points out that

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[48] United Nations Development Programme., 'Why the Green, Circular Economy is Key to Beating the Triple Planetary Crisis.' Op Cit

[49] European Commission., 'A new Circular Economy Action Plan For a Cleaner and More Competitive Europe.' Available at *https://eur-lex.europa.eu/resource.html?uri=cellar:9903b325-6388-11ea-b735-01aa75ed71a1.0017.02/DOC_1&format=PDF* (Accessed on 01/12/2023)

[50] Ibid

[51] Ibid

[52] Ibid

circular economy can deliver substantial material savings throughout value chains and production processes, generate extra value and unlock economic opportunities[53]. The Action Plan envisages implementation of circular economy across key products and value chains including electronics and Information and Communications Technology (ICT), batteries and vehicles, packaging, plastics, textiles, construction and buildings, and food, water and nutrients[54]. Actualizing the European Union Circular Economy Action Plan can accelerate the transition to circular economy in the European Union and beyond.

Circular economy is also being implemented in Africa. It has been asserted that circular economy is particularly relevant for African countries, whose economies remain largely resource dependent and under sustained pressure from rapid population growth[55]. It has been observed that circular practices are embedded in many of the Continent's cultures and activities, particularly within Micro, Small and Medium-Sized enterprises (MSMEs)[56]. There is increased emergence of economic activities centred around repairing, refurbishing and recycling end-of-life products as well as growing access to renewable energy contributing to expanding circular systems in Africa[57]. There has been growth of circular economy initiatives in Africa such as the *Africa Circular Economy Network*[58] which seeks to build a restorative African economy that generates well-being and prosperity, inclusive of all its people, through new forms of economic production and consumption which maintain and regenerate its environmental resources; The *Africa Circular Economy Alliance*[59] which seeks to spur Africa's transition to a Circular Economy at the country, regional and continental levels by operating as a collaborative

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[53] Ibid

[54] Ibid

[55] Fwangkwal. B., Luotonen. E., & Jarvinen. L., 'Africa's Circular Economy Needs Support from Policymakers.' Op Cit

[56] Ibid

[57] Ibid

[58] Africa Circular Economy Network., Available at https://www.acen.africa/ (Accessed on 01/12/2023)

[59] Africa Development Bank Group., 'The African Circular Economy Alliance (ACEA).' Available at https://www.afdb.org/en/topics-and-sectors/topics/circular-economy/african-circular-economy-alliance-acea (Accessed on 01/12/2023)

platform to coordinate and link the various initiatives on the continent and harness immediate opportunities in Africa for increased circularity in sectors that will support the economy, jobs, and the environment on the continent in the long-term; *Greenovations-Africa*[60] which seeks to enhance circular economy in Africa by promoting green practices in areas such as smart agriculture, renewable energy, waste management, water management and climate action; and the *Afri-Plastics Challenges Initiative*[61] which aims to reduce amount of plastic waste both on land and in the ocean in and around the African continent by providing funding for African recycling businesses, new bioplastics, waste conversion processes among others.

There has also been growth of businesses and start-ups in Africa geared towards implementing circular economy through approaches such as technology-driven waste collection and management and recycling of waste[62]. The African Development Bank Group is also supporting the implementation of circular economy in Africa by channeling finance to businesses and supporting the country-led African Circular Economy Alliance in integrating the circular economy into African green growth strategies such as renewable energy, climate-smart agriculture and green manufacturing sectors[63]. It acknowledges that this will create new value-chains that generate new green jobs for the African youth[64].

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[60]Greenovations-Africa., Available at https://vc4a.com/greenovations-africa/greenovations-africa-2023/ (Accessed on 01/12/2023)

[61] Packaging Europe., 'Afri-Plastics Challenge Provides Funding for African Recycling Businesses, New Bioplastics, Waste Conversion Processes, and more.' Available at https://packagingeurope.com/news/afri-plastics-challenge-provides-funding-for-african-recycling-businesses-new-bioplastics-waste-conversion-processes-and-more/9548.article#:~:text=Afri%2DPlastics%20Challenge%20provides%20funding,and%20more%20%7C%20Article%20%7C%20Packaging%20Europe (Accessed on 01/12/2023)

[62] Nairobi Garage., 'Mr Green Africa // Kenyan Recycling Startup Secures Round of Funding.' Available at https://nairobigarage.com/mr-green-africa-secures-round-of-funding/ (Accessed on 01/12/2023)

[63] African Development Bank Group., 'African Development Bank Group Launches Dedicated Trust Fund for Circular Economy.' Available at https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-group-launches-dedicated-trust-fund-circular-economy-51948 (Accessed on 01/12/2023)

[64] Ibid

Africa therefore has immense opportunities to implement circular economy. The East African Community recently launched its *Regional Bioeconomy Strategy*[65] which seeks to make use of the region's abundant natural resources, including underutilized agricultural waste materials, to produce value-added products with applications in many sectors including food, health, energy and industrial goods. The strategy seeks to implement circular economy within the East African Community through approaches such as the creation of new forms of sustainable bioenergy, and the conversion of waste materials to useful products[66].The strategy further seeks to ensure the transformation of economies and place innovation in bio-based products and processes at the centre, with a bio-based circular economy as the organising framework[67].

The strategy has the potential to spur Sustainable Development within the East African region through effective, efficient and sustainable production and use of bio-based materials, products, processes and business models[68]. It has been asserted that moving towards circular economy within the East African region and Africa at large can help the Continent address the problem of waste management by adopting sustainable waste management models and further contribute towards creating green jobs and fostering entrepreneurship[69].

From the foregoing, it is evident that there are immense opportunities to implement circular economy in Africa and other regions. However, it has been pointed out that implementing circular economy is threatened by challenges such as limited knowledge in some countries and regions about the potential of circular economy, lack of effective strategies for implementing circular economy, inadequate financing for businesses especially MSMEs to transition to circular economy, and lack of transparency in supply chains[70]. Other key

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[65] East African Community., 'Regional Bioeconomy Strategy 2021/22-2031/32.' Available at https://www.eac.int/press-releases/2515-eac-unveils-regional-bioeconomy-strategy-2021-22-2031-32 (Accessed on 01/12/2023)

[66] Ibid

[67] Ibid

[68] Ibid

[69] Mwita. M., 'East Africa Mulls Shifting from Linear to Circular Economy.' Available at *https://theexchange.africa/investing/africas-development/east-africa-mulls-shifting-from-linear-to-circular-economy/* (Accessed on 01/12/2023)

[70] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

challenges include shortage of advanced technology to implement circular economy in some countries, inadequate capacity, poor enforcement of legislations, weak economic incentives, lack of clear, standardized quantitative measurements and goals, poor leadership and management and lack of public awareness on circular economy and its benefits[71]. It is imperative to address these challenges in order to effectively implement circular economy and enhance its role in addressing key environmental challenges including pollution, resource security, climate change and biodiversity loss.

4.0 Way Forward

In order to implement a circular economy, there is need for governments to develop and implement policies on circular economy while also aligning circular economy principles with national climate goals[72]. Such policies should focus on key areas of circular economy such as minimizing single-use plastics and the promotion of environmentally friendly products and on mainstreaming energy efficiency, clean energy and e-mobility in multiple sectors[73]. Governments also have role in implementing circular economy through designing new financing instruments, such as green bonds and blended financing, to raise funds to achieve widespread transformational change towards green economies[74]. In addition, it has been pointed out that by ensuring circular economy approaches are embedded into national climate goals such as Nationally Determined Contributions (NDCs), countries can accelerate the transition to a low-carbon economies, protect the natural environment, and create green, decent, and dignified jobs as well[75]. Circular economy can aid countries in meeting their climate targets by cutting greenhouse gas emissions associated with industry, agriculture, and land use that the energy transition cannot address due to its potential to eliminate waste and pollution therefore reducing greenhouse gas emissions across value chains, circulate products and materials therefore retaining their embodied

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[71] Heshmati. A., 'A Review of the Circular Economy and its Implementation.' Op Cit

[72] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

[73] United Nations Development Programme., 'Why the Green, Circular Economy is Key to Beating the Triple Planetary Crisis.' Op Cit

[74] Ibid

[75] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

energy, and regenerate nature thus sequestering carbon in soil and products[76]. It is therefore pertinent for governments to implement policies on circular economy and align circular economy approaches with national climate goals. There is also need to enhance financing for businesses, startups, organizations and individuals undertaking initiatives to implement circular economy. One of the key challenges facing the implementation of circular economy especially in developing countries has been identified to be inadequate financing for businesses especially MSMEs to transition to circular economy[77]. Access to finance in developing countries remains a barrier, especially for small businesses in the circular economy and for businesses in general, in part due to unfavourable factors such as high interest rates[78]. It is therefore important for developing countries including those in Africa to enable access to finance in order to unlock circular economy through initiatives such as grant financing, lowering risks, removing policy barriers in order to foster investments, and investing in circular infrastructure[79]. Enhancing access to finance and investments in circular businesses can enable an inclusive development approach that creates opportunities for marginalised people including the youth and women[80].

It is also imperative for countries to strengthen their laws and policies on waste management in support of waste prevention and circular economy. It has been argued that countries need to modernize their laws and policies on waste management on an ongoing basis to make them fit for the circular economy and the digital age[81]. Countries should therefore improve their legislation on

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[76] Ellen McArthur Foundation., 'Fixing the Economy to Fix Climate Change.' Available at
*https://www.ellenmacarthurfoundation.org/topics/climate/overview#:~:text=How%20a%20circular%20economy%20cuts,value)%2C%20and%20regenerate%20natur*e. (Accessed on 01/12/2023)

[77] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

[78] Milenge. D., Luotonen. E., & Korja. M., 'Enabling Access to Finance will Unlock Africa's Circular Economy.' Available at *https://www.sitra.fi/en/articles/enabling-access-to-finance-will-unlock-africas-circular-economy/* (Accessed on 01/12/2023)

[79] Ellen McArthur Foundation., 'Fixing the Economy to Fix Climate Change.' Op Cit

[80] Ibid

[81] European Commission., 'A New Circular Economy Action Plan for a Cleaner and More Competitive Europe.' Op Cit

waste management in aspects such as batteries, packaging, end-of-life vehicles, and hazardous substances in electronic equipment in order to align them with circular economy principles through approaches such as preventing waste, increasing recycled content, promoting safer and cleaner waste streams, and ensuring high-quality recycling[82].

Organizations and businesses should also be encouraged to embrace and implement principles of circular economy. It has been rightly pointed out that businesses sit at the heart of the transition to a circular economy by inspiring innovations and implementing circular economy solutions at scale[83]. Throughout the world, businesses have been at the forefront of transitioning to circular economy through measures which include refurbishing electronic goods, fostering green transport based on e-mobility and energy efficiency, promoting water-soluble, recyclable and biodegradable packaging, embracing sound waste management practices and processing animal waste into fertilizers and biogas for cooking, heating and lighting[84].

According to the United Nations Environment Programme (UNEP), moving to a more circular approach represents a huge opportunity for businesses, opening doors to new markets and the opportunity of increasing market share; reducing costs and risks for business; driving innovation, attracting talent and aligning business performance with public expectations[85].

To do this, businesses can use a value-chain approach to prioritize where they should take action to have the biggest impact on greenhouse gas emissions, biodiversity loss and pollution while making 'transformational sprints'

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[82] Ibid

[83] Ellen McArthur Foundation., 'Business and the Circular Economy.' Available at https://www.ellenmacarthurfoundation.org/resources/business/overview#:~:text =Business%20sits%20at%20the%20heart,create%20resilience%20and%20grow%20pr osperity. (Accessed on 01/12/2023)

[84] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

[85] United Nations Environment Programme., 'The Role of Business in Moving from Linear to Circular Economies.' Available at *https://www.unep.org/resources/publication/role-business-moving-linear-circular-economies* (Accessed o 01/12/2023)

towards circularity[86]. It is also imperative for organizations and businesses to integrate sustainability criteria into business strategies by improving their corporate governance framework and enhance disclosure of environmental data in order to effectively implement circular economy[87].

There is also need for developed countries to support developing countries in areas such technology development and transfer in order to accelerate the adoption of clean and green technologies necessary to implement circular economy[88]. Developing countries often face barriers in embracing technology and innovation necessary to implement circular economy in areas such as renewable energy, sustainable agriculture, waste management, and recycling[89]. It has correctly been argued that technology in its advanced stages along with technological capabilities are key factors in the successful implementation of circular economy principles at different levels and in different areas[90].

Technology development and transfer is envisioned under the *Paris Agreement[91]* which urges countries to promote and facilitate enhanced action on technology development and transfer in order to support the implementation of the Agreement[92]. It is therefore important for countries to cooperate in technology development and transfer in order to implement circular economy while also achieving climate targets envisioned under the Paris Agreement.

Finally, it is necessary to enhance public awareness on circular economy. It has been pointed out that the public can play an important role in implementing circular economy by demanding environmentally friendly products and

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[86] Ibid

[87] European Commission., 'A New Circular Economy Action Plan for a Cleaner and More Competitive Europe.' Op Cit

[88] Muriithi. J., & Ngare. I., 'Transitioning Circular Economy from Policy to Practice in Kenya.' Op Cit

[89] Ibid

[90] Heshmati. A., 'A Review of the Circular Economy and its Implementation.' Op Cit

[91] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 01/12/2023)

[92] Ibid, Article 10

services and actively minimizing waste by embracing practices such as reducing, reusing and recycling of materials[93]. Countries should therefore enhance public awareness by facilitating investments in education, providing information and active public participation to increase environmental awareness and the benefits of circular economy[94]. It has been suggested that improving community awareness about environmental protection and resource conservation, and environmental certification of products can accelerate the transition to circular economy[95].

Public awareness can encourage the public to embrace the principles of circular economy including reducing, reusing and recycling of materials. In addition to public awareness, countries should also embrace public participation in implementing circular economy[96]. It has been argued that many reviews of the various circular economy-related policies show that the huge public support for policies such those relating to the ban on the use, manufacture, and importation of single-use plastic bags in Kenya demonstrates the importance of public participation in the enforcement of public policies that support circular economy principles[97]. Public participation is a key principle of environmental governance that has been recognized in various countries including Kenya[98].

The Constitution of Kenya enshrines public participation as one of the national values and principles of governance[99]. The Constitution also obligates the state to encourage public participation in the management, protection and conservation of the environment[100]. Countries should therefore embrace public

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[93] United Nations Development Programme., 'Why the Green, Circular Economy is Key to Beating the Triple Planetary Crisis.' Op Cit

[94] Heshmati. A., 'A Review of the Circular Economy and its Implementation.' Op Cit

[95] Ibid

[96] Muriithi. J., & Ngare. I., 'Transitioning Circular Economy from Policy to Practice in Kenya.' Op Cit

[97] Ibid

[98] Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf* (Accessed on 01/12/2023)

[99] Constitution of Kenya., 2010., Article 10 (2) (a)

[100] Ibid, Article 69 (1) (d)

participation in order to effectively implement circular economy for sustainability.

5.0 Conclusion

Circular economy is pivotal in achieving sustainability since it aims to minimize waste and promote a sustainable use of natural resources, through smarter product design, longer use, recycling and more, as well as regenerate nature[101].Adoption of circular economy principles enhances increased attention to environmental sustainability concerns, therefore, creating more benefits such as improved productivity and resource utilization[102]. It also plays an important role in tackling global environmental challenges such as pollution, climate change and biodiversity loss[103].

Despite efforts towards embracing circular economy, its effective implementation is hindered by challenges such as lack of effective strategies for implementing circular economy, inadequate financing for businesses especially MSMEs to transition to circular economy, lack of transparency in supply chains, shortage of advanced technology to implement circular economy in some countries, inadequate capacity, poor enforcement of legislations, weak economic incentives, lack of clear, standardized quantitative measurements and goals, poor leadership and management and lack of public awareness on circular economy and its benefits[104].

Addressing these challenges is necessary in order to effectively implement circular economy. Circular economy can be effectively implemented through approaches such as developing and implementing policies on circular economy while also aligning circular economy principles with national climate goals, enhancing financing for businesses, startups, organizations and individuals undertaking initiatives to implement circular economy, strengthening laws and policies on waste management in support of waste

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[101] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

[102] Muriithi. J., & Ngare. I., 'Transitioning Circular Economy from Policy to Practice in Kenya.' Op Cit

[103] United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit

[104] Heshmati. A., 'A Review of the Circular Economy and its Implementation.' Op Cit

prevention and circular economy, embracing and implementing principles of circular economy by organizations and businesses, technology development and transfer, and enhancing public awareness on circular economy and embracing public participation in implementing circular economy[105]. Implementing circular economy for sustainability is an ideal that needs to be fast-tracked.

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[105] Ibid; United Nations Development Programme., 'Why the Green, Circular Economy is Key to Beating the Triple Planetary Crisis.' Op Cit; United Nations Development Programme., 'What is Circular Economy and Why Does it Matter?.' Op Cit; and Muriithi. J., & Ngare. I., 'Transitioning Circular Economy from Policy to Practice in Kenya.' Op Cit

Strengthening Intra African Trade for Sustainable Development

Abstract

Trade plays a vital role in shaping economic and social performance and prospects of countries around the world, especially those of developing countries. It is also a vital tool in the realization of Sustainable Development. The United Nation's 2030 Agenda for Sustainable Development recognizes international trade as an engine for inclusive economic growth and poverty reduction, and an important means to achieve the Sustainable Development Goal. This paper critically discusses the role of Intra African trade in the Sustainable Development agenda. It defines Intra African Trade and examines progress made towards strengthening it. The paper further explores the challenges facing Intra African trade. It also suggests reforms towards strengthening Intra African trade for Sustainable Development.

1.0 Introduction

Trade has been defined as an exchange, voluntary in nature between two parties in requirement of each other's resources being goods and services[1]. Trade is considered as one of the driving forces of economic development for all countries, usually aimed at development and the eradication of poverty[2]. Trade plays a vital role in shaping economic and social performance and prospects of countries around the world, especially those of developing countries[3]. It has been pointed out that no country has grown without trade[4]. According to the World Trade Organization (WTO), international trade accounts for over 50 per cent of low-income countries' Gross Domestic Product (GDP) and is an important source of income for both the private and public sectors in developing countries[5].

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[1] The Economic Times., 'What is Trade.' Available at
https://economictimes.indiatimes.com/definition/trade (Accessed on 13/12/2023)

[2] Muigua. K., 'Balancing Trade, Environment and Development for Sustainability.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/Balancing-Trade-Environment-and-Development-for-Sustainability-Kariuki-Muigua-August-2018.pdf* (Accessed on 13/12/2023)

[3] United Nations Conference on Trade and Development., 'Trade and Development Index.' Available at *https://unctad.org/system/files/official-document/ditctab20051ch1_en.pdf* (Accessed on 13/12/2023)

[4] Ibid

[5] World Trade Organization., 'The WTO's Contribution to Achieving the SDGs.' Available at

Trade is a vital tool in the realization of Sustainable Development. The United Nation's 2030 Agenda for Sustainable Development recognizes international trade as an engine for inclusive economic growth and poverty reduction, and an important means to achieve the Sustainable Development Goals (SDGs)[6]. SDG 17 seeks to strengthen the means of implementation of the 2030 Agenda and revilitalize the global partnership for Sustainable Development and identifies trade as a key measure towards achieving this aim[7]. It seeks to enhance the role of trade in Sustainable Development by achieving several targets including promoting a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda; significantly increasing the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports; and realizing timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access[8].

It has been posited that equitable international trade can enable countries to realize the SDGs by achieving food security, generating decent employment opportunities for the poor, promoting technology transfer, ensuring national economic security and supporting infrastructure development, not only for moving goods to and from ports, but also for basic services such as health, education, water, sanitation and energy[9]. As such, it is suggested that equitable

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https://www.wto.org/english/thewto_e/coher_e/sdgs_e/wtoachsdgs_e.htm (Accessed on 13/12/2023)

[6] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pdf* (Accessed on 13/12/2023)

[7] Ibid, SDG 17

[8] Ibid

[9] Galmés, G.V., 'Trade as an enabler of sustainable development and poverty eradication,' in United Nations, The Road from Rio+20: Towards Sustainable Development Goals, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1

trade may be more effectively harnessed in delivering sustainable development when integrated into the SDG framework as an SDG enabler, where it would serve as a promoter for potential goals such as poverty eradication, job creation, universal healthcare and education, and a healthy environment[10]. According to the United Nations Conference on Trade and Development (UNCTAD), international trade, supported by strong international cooperation, embodied in the multilateral trading system, can be a powerful force for creating jobs (SDG 8; Decent Work and Economic Growth); fostering efficient use of resources, stimulating entrepreneurship and ultimately lifting people out of poverty (SDG 1; No Poverty)[11]. This results in industrialization and development, helping to achieve SDG 9 (Industry, Innovation and Infrastructure)[12]. Further, WTO rules try to reduce the impact of existing inequalities through the principle of Special and Differential Treatment for Developing Countries, which helps in attaining SDG 10 (Reduced Inequalities within and among nations)[13]. UNCTAT further opines that trade plays a critical role in addressing hunger, food security, nutrition and sustainable agriculture (SDG 2; Zero Hunger), contributing to healthy lives and wellbeing (SDG 3; Good Health and Well-Being), among others[14]. In addition, WTO posits that trade enhances a country's income-generating capacity, an essential prerequisite for achieving Sustainable Development[15]. Trade is therefore key in realizing the Sustainable Development agenda.

The paper critically discusses the role of Intra African trade in the Sustainable Development agenda. It defines Intra African Trade and examines progress made towards strengthening it. The paper further explores the challenges facing Intra African trade. It also suggests reforms towards strengthening Intra African trade for Sustainable Development.

Available at http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.pdf (Accessed on 13/12/2023)

[10] Ibid

[11] United Nations Conference on Trade and Development., 'Better Trade for Sustainable Development: The Role of Voluntary Sustainability Standards.' Available at *https://unctad.org/system/files/official-document/ditctab2021d2_en.pdf* (Accessed on 13/12/2023)

[12] Ibid

[13] Ibid

[14] Ibid

[15] World Trade Organization., 'The WTO's Contribution to Achieving the SDGs.'

2.0 Intra African Trade and the Sustainable Development Agenda: Progress and Challenges

Intra African trade refers to all those transactions that take place between and among African States, their institutions and individuals within totality of the African region[16]. Intra African trade is therefore trade between and among African countries[17]. It has been argued that Intra African trade holds immense potential for building sustainable economic development and regional integration in Africa[18]. Further, it has been pointed out that Intra-African trade presents opportunities for sustained growth and development in Africa[19]. It has the potential to reduce vulnerability to global shocks, contribute to economic diversification in Africa, enhance export competitiveness and create employment opportunities[20].

According to the African Union, Intra African trade creates linkages that are essential to the African integration agenda[21]. The African Union further posits that trade incentivises and spurs infrastructure development and attracts Foreign Direct Investment which is key to accelerating economic growth on the continent[22]. It has further been asserted that Intra-regional and intra-African trade with fast-growing economies, together with geographically diversified trade links, can strengthen the capacity of African countries to

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[16] United Nations Economic Commission for Africa., 'Intra-African Trade: A Pillar of Development.' Available at https://repository.uneca.org/handle/10855/6028 (Accessed on 14/12/2023)

[17] African Development Bank Group., 'Intra-African Trade is Key to Sustainable Development – African Economic Outlook.' Available at *https://www.afdb.org/fr/news-and-events/intra-african-trade-is-key-to-sustainable-development-african-economic-outlook-17022* (Accessed on 14/12/2023)

[18] Ibid

[19] United Nations Conference on Trade and Development., 'Intra-African Trade: Unlocking Private Sector Dynamism.' Available at *https://unctad.org/system/files/official-document/tdb60d4_en.pdf* (Accessed on 14/12/2023)

[20] Ibid

[21] African Union., 'Expanding Opportunities for Intra African Trade.' Available at *https://au.int/sites/default/files/newsevents/workingdocuments/31884-wd-aep_brochure_theme_2_trade.pdf* (Accessed on 14/12/2023)

[22] Ibid

absorb global output shocks[23]. For example the benefits of intra-African trade within the East African Community (EAC) suggests that deeper intra-regional, and in particular intra-industry, trade ties have contributed to the EAC's resilience to external output shocks[24]. In addition, besides helping shield countries from external shocks, intra-regional and intra-African trade also supports economic diversification and participation in regional value chains[25].

According to the *African Economic Outlook*[26], boosting regional trade would enhance Africa's resilience to spillovers from global economic slowdown and reduce persistent trade deficits[27]. The Report highlights opportunities for intra-African trade and asserts that a combined population of 1.4 billion, equivalent to 16.7 percent of the world population and GDP of about $3 trillion, could underpin a competitive continental market to expand intra-African trade to cushion economies from multiple shocks[28].Africa therefore has a big domestic market that possesses significant opportunities for intra-Africa trade[29].

There has been progress towards strengthening intra-African trade. The African Union *Action Plan for Boosting Intra-African Trade[30]* aims at deepening Africa's market integration and significantly increasing the volume of trade that African countries undertake among themselves. It identifies the key obstacles to the growth of intra-African trade and outlines the programme of activities required to address each of the constraints[31]. The Action Plan

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[23] Brixiova. Z., Meng. Q., & Ncube. M., 'Can Intra-Regional Trade Act as a Global Shock Absorber in Africa?' Available at https://docs.iza.org/dp9205.pdf (Accessed on 14/12/2023)

[24] Ibid

[25] Ibid

[26] African Economic Outlook 2023., 'Mobilizing Private Sector Financing for Climate and Green Growth in Africa.' Available at *https://www.afdb.org/sites/default/files/documents/publications/afdb23-01_aeo_main_english_0602.pdf* (Accessed on 14/12/2023)

[27] Ibid

[28] Ibid

[29] Ibid

[30] Africa Union., 'Action Plan for Boosting Intra-African Trade.' Available at https://au.int/web/sites/default/files/newsevents/pressreleases/26498-pr-action_plan_for_boosting_intra-african_trade_f-english.pdf (Accessed on 14/12/2023)

[31] Ibid

identifies priority measures towards strengthening Intra-African trade including the adoption and implementation of coherent and efficient trade policies at the national, regional and continental levels; removal of trade facilitation constraints; enhancement of productive capacity in Africa; trade-related infrastructure development; unlocking trade finance; fostering access to trade information in Africa; and harmonisation of labour, business and investment laws[32]. Implementing the targets of the Action Plan is necessary in strengthening intra-African trade.

In addition, the *Agreement Establishing the African Continental Free Trade Area*[33], establishes the African Continental Free Trade Area (AfCFTA) whose objectives include to create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063; to create a liberalised market for goods and services through successive rounds of negotiations; to contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and Regional Economic Communities; to enhance the competitiveness of the economies of State Parties within the continent and the global market; to promote industrial development through diversification and regional value chain development, agricultural development and food security; and to resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes[34].

The Agreement establishing the AfCFTA requires African countries to undertake certain actions towards strengthening intra-African trade which include progressively eliminating tariffs and non-tariff barriers to trade in goods; progressively liberalizing trade in services; cooperating on investment, intellectual property rights and competition policy; cooperating on all trade-

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[32] Ibid

[33] African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at *https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pd*f (Accessed on 14/12/2023)

[34] Ibid, Article 3

related areas; cooperating on customs matters and the implementation of trade facilitation measures; establishing a mechanism for the settlement of disputes concerning their rights and obligation; and establishing and maintaining an institutional framework for the implementation and administration of the AfCFTA[35]. It covers trade in goods, trade in services, investment, intellectual property rights and competition policy[36].

The Agreement also contains a *Protocol on Trade in Goods*[37] which aims to create a liberalised market for trade in goods in accordance with Article 3 of the Agreement. The Protocol seeks to boost Intra-African trade through progressive elimination of tariffs; progressive elimination of non-tariff barriers; enhanced efficiency of customs procedures, trade facilitation and transit; enhanced cooperation in the areas of technical barriers to trade and sanitary and phytosanitary measures; development and promotion of regional and continental value chains; and enhanced socio-economic development, diversification and industrialisation across Africa[38].

It also contains a *Protocol on Trade in Services*[39] which seeks to support the objectives of the AfCFTA, as set out in Article 3 of the Agreement particularly to create a single liberalised market for trade in service through measures such as enhancing competitiveness of services through: economies of scale, reduced business costs, enhanced continental market access, and an improved allocation of resources including the development of trade-related infrastructure; promoting sustainable development in accordance with the Sustainable Development Goals (SDGs); fostering domestic and foreign investment; accelerating efforts on industrial development to promote the development of regional value chains; progressively liberalizing trade in services across the African continent on the basis of equity, balance and mutual benefit, by eliminating barriers to trade in services; and promoting research and technological advancement in the field of services to accelerate economic and social development in Africa[40].

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[35] Ibid, Article 4
[36] Ibid, Article 6
[37] Ibid, Protocol on Trade in Goods
[38] Ibid, Article 2
[39] Ibid, Protocol on Trade in Services
[40] Ibid, Article 3

It has been argued that the AfCFTA will be a game changer, creating the world's largest free trade area and a single market for goods and services worth $3.4 trillion for more than 1.3 billion Africans[41]. The United Nations opines that AfCFTA is appropriately designed to deepen integration, foster trade and investment, enhance the mobility of capital and labour, support industrialization, and the development of a dynamic services sector[42]. It further asserts that AfCFTA provides Africa with a renewed opportunity to steer its economic relations away from a reliance on external donors, foreign creditors and excessive commodity dependence, ushering in a new economic era focused on self-reliant cooperation, deeper integration and higher levels of intra-African trade[43]. The projected $3 trillion borderless market established by the AfCFTA could be instrumental in reversing current trends in poverty, inequality and growth on the continent, and help place Africa on an inclusive and sustainable growth path towards Sustainable Development[44]. The World Bank further argues that the AfCFTA presents a major opportunity for African countries to bring 30 million people out of extreme poverty and to raise the incomes of 68 million others who live on less than $5.50 per day. It further points out that full implementation of AfCFTA would reshape markets and economies across the region and boost output in the services, manufacturing and natural resources sectors[45]. The AfCFTA also has the potential to increase employment opportunities and incomes, helping to expand opportunities for all Africans[46]. It is therefore vital for the African Union and all African countries to ensure that the AfCFTA is implemented in order to strengthen intra-African trade and unlock the immense opportunities presented by the AfCFTA.

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[41] African Economic Outlook 2023., Op Cit

[42] United Nations., 'Africa's Free Trade on Track, More Efforts Needed.' Available at https://www.un.org/africarenewal/magazine/january-2023/africa%E2%80%99s-free-trade-track-more-efforts-needed#:~:text=lies%20ahead%2C%20though.-,Presently%2C%20intra%20Africa%20trade%20stands%20low%20at%20just%2014.4%25%20of,day)%2C%20according%20to%20UNCTAD (Accessed on 14/12/2023)

[43] Ibid

[44] Ibid

[45] The World Bank., 'The African Continental Free Trade Area.' Available at https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area (Accessed on 14/12/2023)

[46] Ibid

In addition to the AfCFTA, Regional Economic Communities (RECs) regional inter-governmental organizations in Africa have played a pivotal role in strengthening intra-African trade. Africa boasts several RECs and inter-governmental organizations including the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC)[47]. According to the African Union, the purpose of the RECs is to facilitate regional economic integration between members of the individual regions and the wider African continent[48].

RECs have played a major role in strengthening intra-African trade. For example, COMESA established a Free Trade Area in 2000, setting the stage for the reduction of tariffs amongst member states[49]. As a result, intra COMESA trade has grown at an average of seven per cent with higher increases reflected between intra-Free Trade Area States[50]. It has also been pointed out that SADC has made tremendous achievements in a number of areas of regional cooperation and integration notably, in the areas of governance, democracy, peace and security; infrastructure and services; trade, industry, finance and investment; food, agriculture and natural resources; and social and human development[51]. The EAC has also seen a growth of regional trade with EAC trade value being recorded at $10.17 billion representing a 20% share of Intra-

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[47] Africa Union., 'Regional Economic Communities.' Available at *https://au.int/en/recs#:~:text=The%20purpose%20of%20the%20RECs,the%20Abuja%20Tr eaty%20(1991).* (Accessed on 14/12/2023)

[48] Ibid

[49] Common Market for Eastern and Southern Africa., Available at *https://www.comesa.int/our-success stories/#:~:text=COMESA%20established%20a%20Free%20Trade,intra%2DFree%20Trad e%20Area%20States.&text=By%202018%2C%2098%25%20of%20NTBs,since%202008% 20had%20been%20resolved.* (Accessed on 14/12/2023)

[50] Ibid

[51] South African Development Community., 'SADC Major Achievements and Challenges.' Available at *https://www.sadc.int/sites/default/files/2021-12/Achievements_booklet.pdf* (Accessed on 14/12/2023)

trade to global trade[52]. According to the EAC, imports of locally available goods into the region; such as meat, furniture and textiles, have been attracting a tariff of 35 percent a move which aims at promoting local production, value addition and industrialization[53].

It is therefore evident that there has been some progress towards strengthening intra-African trade. However, despite this progress, it has been pointed out that presently, intra-Africa trade stands low at just approximately 14.4% of total African exports[54]. Reports further indicate that intra-continental trade constitutes less than 14% of Africa's total trade, in comparison to 66.9% in Europe, 63.8% in Asia & Oceania, and 44.4% in the Americas[55]. It has been argued that the dependence on external markets leaves the continent highly exposed to crises and shocks in other parts of the world, as showcased by the impact of COVID-19 and the ongoing Russia-Ukraine war[56]. In addition, it has been asserted that while there is huge potential to increase intra-Africa trade, the composition of Africa's world imports and exports does not match sufficiently to trigger a process of import substitution away from the rest of the world[57]. Further, it has been asserted that efforts to promote regional integration have reduced tariff protections, but despite significant progress, intraregional traders still face high tariffs[58]. It has further been argued that non-tariff measures are potentially more trade restrictive than tariffs therefore hindering the growth of intra-African trade[59]. In addition, it has been

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[52] East African Community., 'Intra-EAC Trade Hits the US$10 billion Mark as EAC Readies to Send out Verification Mission Team to Assess Somalia's Readiness to Join the Bloc.' Available at *https://www.eac.int/press-releases/2706-intra-eac-trade-hits-the-$10-billion-mark-as-eac-readies-to-send-out-verification-mission-team-to-assess-somalia-s-readiness-to-join-the-bloc* (Accessed on 14/12/2023)

[53] Ibid

[54] United Nations., 'Africa's Free Trade on Track, More Efforts Needed.' Op Cit

[55] Mo Ibrahim Foundation., 'African Continental Free Trade Area (AfCFTA): Intra-Continental Trade still the Lowest Globally.' Available at *https://mo.ibrahim.foundation/news/2023/african-continental-free-trade-area-afcfta-intra-continental-trade-still-lowest-globally* (Accessed on 14/12/2023)

[56] Ibid

[57] Njuki. J., 'Intra-Africa Trade: Status and Growth Prospects.' Available at *https://agriculture.ec.europa.eu/system/files/2021-06/fourth-au-eu-conference-intra-africa-trade_en_0.pdf* (Accessed on 14/12/2023)

[58] Ibid

[59] Ibid

contended that low performance in trade facilitation indicators is also hampering the development of trade and the economy in the region[60]. For example, it has been pointed out that many African countries score low in e-commerce, linear shipping connectivity and doing business indicators[61]. This has been attributed to several causes including small, fractured and partly isolated markets in the Continent[62]. UNCTAD posits that many African countries resorted to development strategies after gaining independence that included the establishment of RECs[63]. However, several RECs have overlapping memberships and seem to complicate instead of facilitating trade relationships among the African countries.[64]

The African Union Action Plan for Boosting Intra-African Trade further notes that the growth of intra-African trade is constrained by a number of factors including differences in trade regimes; restrictive customs procedures, administrative and technical barriers; limitations of productive capacity; inadequacies of trade-related infrastructure, trade finance, and trade information; lack of factor market integration; and inadequate focus on internal market issues[65]. It is important to address these challenges in order to strengthen intra-African trade.

3.0 Way Forward

In order to strengthen intra-African trade, there is need to accelerate implementation of the AfCFTA and the Action Plan on Boosting Intra-African Trade. It has been argued that accelerating implementation of the AfCFTA presents an opportunity to create a borderless Africa a situation that will unlock trade and development in the continent[66]. According to the African Union, the establishment of the AfCFTA and the implementation of the Action Plan on Boosting Intra-African Trade provide a comprehensive framework to

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[60] United Nations Conference on Trade and Development., 'Key Statistics and Trends in Regional Trade in Africa.' Available at *https://unctad.org/publication/key-statistics-and-trends-regional-trade-africa* (Accessed on 14/12/2023)
[61] Ibid
[62] Ibid
[63] Ibid
[64] Ibid
[65] Africa Union., 'Action Plan for Boosting Intra-African Trade.' Op Cit
[66] African Economic Outlook 2023., Op Cit

pursue a developmental regionalism strategy[67]. It is therefore imperative for all stakeholders to accelerate the implementation and advanced usage of the existing operational tools that facilitate the realization of commercially meaningful trading under the AfCFTA through the conclusion of the AfCFTA Phase One and two Protocols which provide a legal basis to advance the operationalization of the trading system under the agreement, development of the AfCFTA guided trade initiative, operationalization of the AfCFTA adjustment fund among other measures[68]. The implementation of the AfCFTA and the Action Plan on Boosting Intra-African Trade will strengthen intra-African trade for Sustainable Development.

In addition, it is necessary to dismantle trade barriers including tariff and non-tariff barriers in Africa in order to strengthen intra-African trade[69]. It has been observed that the growth of intra-African trade is hindered by non-tariff barriers including costly non-tariff measures, infrastructure gaps, and market information gaps[70]. There are disproportionately high barriers to African goods travelling to other countries within the continent which take the form of physical barriers, tariffs, product regulations, quotas, among other restrictions[71]. There is need for sound policies to eliminate these barriers in order to foster greater integration of supply chains within Africa and allow goods to travel more freely[72]. It has rightly been asserted that cross-border trade in Africa can be promoted through appropriate trade policy towards the elimination of intra-regional trade and non-trade barriers[73].

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[67] African Union., 'CFTA - Continental Free Trade Area.' Available at https://au.int/en/ti/cfta/about (Accessed on 15/12/2023)

[68] Africa Union., 'Theme of The Year 2023: "Acceleration Of AfCFTA Implementation' Available at https://au.int/en/theme/2023/acceleration-of-afcfta-implementation (Accessed on 15/12/2023)

[69] United Nations Conference on Trade and Development., 'Intra-African Trade: Unlocking Private Sector Dynamism.' Op Cit

[70] United Nations., 'Africa's Free Trade on Track, More Efforts Needed.' Op Cit

[71] Global Development., 'Trade in Africa: Formal Barriers, Informal Networks, and Global Prospects.' Available at *https://globaldev.blog/trade-africa-formal-barriers-informal-networks-andglobalprospects/#:~:text=These%20can%20take%20the%20form,goods%20to%20travel%20more%20freely*. (Accessed on 15/12/2023)

[72] Ibid

[73] Njinkeu. D., & Fosso. B., 'Intra-African Trade and Regional Integration.' Available at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/09484259-EN-*

Further, there is need to ease cross-border payments in order to boost intra-African trade[74]. It has been argued that the expense and difficulty of making payments across borders is among the major reasons that trade among Africa's 55 countries amounts to only about 15 percent of their total imports and exports compared to an estimated 60 percent in Asia and 70 percent within the European Union[75]. Further, it has been pointed out that since African countries' currencies mostly can't be directly exchanged in international transactions, the dollar remains the most widely used currency in trade, even between African countries therefore exposing African countries to currency shocks among other challenges in the international currency market a situation that threatens trade in the Continent [76]. Easing cross-border payments and embracing local currencies is therefore key in strengthening intra-African trade[77]. The AfCFTA seeks to establish the Pan African Payment System (PAPSS), a centralised Financial Market Infrastructure enabling the efficient and secure flow of money across African borders[78]. The system aims to link African central banks, commercial banks, and fintechs into a network that would enable quick and inexpensive transactions among any of the Continent's 42 currencies[79]. It is therefore necessary to actualize the PAPSS in order to ease cross-border payments a move that will strengthen intra-African trade.

Another key measures towards strengthening intra-African trade involves embracing local content policies. Local content has been defined as a policy framework aimed at optimizing the economic value to be derived from the development of natural resources through domestic linkages while giving

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INTRA-AFRICAN-TRADE-AND-REGIONLA-INTEGRATION.PDF (Accessed on 15/12/2023)

[74] Wellisz. C., 'Freeing Foreign Exchange in Africa.' Available at *https://www.imf.org/-/media/Files/Publications/Fandd/Article/2022/September/digital-journey-africa.ashx* (Accessed on 15/12/2023)

[75] Ibid

[76] World Economic Forum., 'Africa Embraces Local Currencies for Cross-Border Payments.' Available at *https://www.weforum.org/agenda/2023/12/africa-local-curencies-cross-border-payments/* (Accessed on 15/12/2023)

[77] Ibid

[78] Africa Union., 'Theme of The Year 2023: "Acceleration of AfCFTA Implementation' Op Cit

[79] Ibid

regard to the country's development goals, vision for a given sector, trade competitiveness and the financial viability of the natural resource being leveraged[80]. The objective of a local content policy is to ensure that a high proportion of project inputs are sourced from the host country without compromising the economics of the project or sector being leveraged[81]. It has been argued that local content clauses in contracts assure that the exploitation of local natural resources has a trickle-down effect on the local economy, through job-creation and training[82]. Furthermore, it has been pointed out that local content policies can accelerate the growth of African natural resources sectors including the oil and gas and renewable energy sectors a move which can strengthen intra-African trade in these sectors[83]. African countries should therefore adopt the right local content policies in order to add value to their products and boost the competitiveness of Africa's commodity exports towards strengthening intra-African trade[84].

It is also important for African countries to curb illicit trade which is a major hindrance to intra-African trade and financial flows. According to the African Economic Outlook, Africa has lost more than $1 trillion in illicit flows over the last 50 years, and it is likely that Africa will still lose about $89 billion annually, if corrective action is not taken[85]. It points out that illicit financial flows typically originate from corporate resource leakages, organized crimes, corruption, and bribery[86]. Drivers of illicit financial flows in Africa include high tax rates on natural resources, low institutional capabilities, political instability, and poor regulatory quality[87]. The African Development Bank

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[80] African Natural Resources Centre., 'An ANRC Step-by-Step Guide for Local Content Policy Formulation and Implementation.' Available at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/ANRC_A_step-bystep_guide_for_local_content_policy_formulation_and_implementation.pdf* (Accessed on 15/12/2023)
[81] Ibid
[82] Africa Oil Week., 'The Role of Local Content in Building Africa's Oil, Gas and Renewables Energy Mix.' Available at https://africa-oilweek.com/Articles/the-role-of-local-content-in-building-africas (Accessed on 15/12/2023)
[83] Ibid
[84] African Economic Outlook 2023., Op Cit
[85] Ibid
[86] Ibid
[87] Ibid

further asserts that illicit trading in natural resources erodes the economic benefits accruing to the larger African society[88]. It asserts that there is high incidence of illicit trade in Africa's natural resources including minerals, fisheries, forestry, oil, and wildlife resulting in economic loss and social challenges therefore threatening intra-African trade in these sectors[89]. UNCTAD further opines that Africa is estimated to lose substantial resources through illicit financial flows[90]. It points out that these flows originate from several sources such as revenues from illegal activities, tax avoidance, abusive profit-shifting, trade mis-invoicing, corruption, and others[91]. It is important to combat illicit financial flows and illicit trade in Africa in order to strengthen economic development and accelerate intra-African trade.

Finally, there is need to strengthen regional integration in order to boost intra-African trade. RECs in Africa including the COMESA, ECOWAS, SADC, and EAC have been vital in fostering economic integration, trade and development in Africa[92]. It has been pointed out that African countries will trade more with each other if they upgrade their productive capacities in dynamic sectors of the economy and support the development of regional enterprises and value chains[93]. The AU Action Plan for Boosting Intra-African Trade urges African countries to create regional and continental value chains in order to increase local production and trade in goods produced in Africa[94]. Regional economic integration in Africa is an important driver for building productive capacities and achieving structural transformation for sustained development[95]. African

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[88] African Development Bank., 'Illicit Trade in Natural Resources in Africa.' Available at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Events/IFF/Documents_IFF/ANRC_ILLICIT_TRADE_IN_NATURAL_RESOURCES.pdf* (Accessed on 15/12/2023)

[89] Ibid

[90] United Nations Conference on Trade and Development., 'Defining, Estimating and Disseminating statistics on Illicit Financial Flows in Africa.' Available at *https://unctad.org/project/defining-estimating-and-disseminating-statistics-illicit-financial-flows-africa* (Accessed on 15/12/2023)

[91] Ibid

[92] Africa Union., 'Regional Economic Communities.' Op Cit

[93] Africa Union., 'Action Plan for Boosting Intra-African Trade.' Op Cit

[94] Ibid

[95] The World Bank., 'Regional Integration Removes Barriers to Development in Africa.' Available at *https://www.worldbank.org/en/results/2023/12/08/regional-integration-removes-barriers-to-development-in-africa* (Accessed on 15/12/2023)

countries have been urged to pursue stronger regional integration in order to reap the benefits of larger markets and take advantage of economies of scale; and to tackle regional and global challenges such as climate change, pandemics, and fragility[96]. It is therefore necessary for African countries to enhance regional integration in order to strengthen intra-African trade.

Through the following among other measures, intra-African trade will be strengthened for Sustainable Development.

4.0 Conclusion

Trade is a vital tool in the realization of Sustainable Development. The United Nation's 2030 Agenda for Sustainable Development recognizes international trade as an engine for inclusive economic growth and poverty reduction, and an important means to achieve the Sustainable Development Goals (SDGs)[97]. Trade can enable countries to realize the SDGs by achieving food security, generating decent employment opportunities for the poor, promoting technology transfer, ensuring national economic security and supporting infrastructure development, not only for moving goods to and from ports, but also for basic services such as health, education, water, sanitation and energy[98]. Intra African trade has been advocated as a tool for building sustainable economic development and regional integration in Africa[99]. There has been progress towards strengthening intra-African trade including the adoption of the AfCFTA[100]. However, intra-African trade is still threatened by challenges including differences in trade regimes; restrictive customs procedures, administrative and technical barriers; limitations of productive capacity; inadequacies of trade-related infrastructure, trade finance, and trade information; lack of factor market integration; and inadequate focus on

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[96] Ibid

[97] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

[98] Galmés, G.V., 'Trade as an enabler of sustainable development and poverty eradication,' in United Nations, The Road from Rio+20: Towards Sustainable Development Goals, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1., Op Cit

[99] African Development Bank Group., 'Intra-African Trade is Key to Sustainable Development – African Economic Outlook.' Op Cit

[100] African Union., 'Agreement Establishing the African Continental Free Trade Area.' Op Cit

internal market issues.[101] There is need to address these challenges in order to strengthen intra-African trade. This can be achieved through accelerating implementation of the AfCFTA and the Action Plan on Boosting Intra-African Trade; dismantling trade barriers including tariff and non-tariff barriers; easing cross-border payments in Africa; embracing local content policies; curbing illicit trade; and strengthening regional integration[102]. Strengthening intra-African trade for Sustainable Development is a noble continental agenda that can be realized.

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[101] Africa Union., 'Action Plan for Boosting Intra-African Trade.' Op Cit

[102] Ibid; Africa Union., 'Theme of The Year 2023: "Acceleration Of AfCFTA Implementation' Op Cit; Njinkeu. D., & Fosso. B., 'Intra-African Trade and Regional Integration.'; and United Nations Conference on Trade and Development., 'Intra-African Trade: Unlocking Private Sector Dynamism.' Op Cit

Mediating Natural Resource Based- Conflicts for Peace and Prosperity

Abstract

This paper critically explores the role of mediation in managing natural resource-based conflicts. It argues that mediation is an effective mechanism for managing natural resource- based conflicts. The paper discusses some of the salient attributes of mediation that makes it ideal in managing natural resource based conflicts. It also examines the progress made towards mediating natural resource- based conflicts and challenges thereof. The paper further puts forward suggestions towards enhancing the role of mediation in managing natural resource- based conflicts for peace and prosperity.

1.0 Introduction

Mediation has been described as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information, and thus aiding in the process of reaching an agreement[1]. Mediation has also been defined as a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences[2]. The United Nations describes mediation as a voluntary process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements[3].

Mediation is normally a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock[4]. Parties therefore involve a third party known as a mediator to assist

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[1] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

[2] JAMS Mediation Services., 'Mediation Defined: What is Mediation?' Available at *https://www.jamsadr.com/mediation-defined/* (Accessed on 20/01/2024)

[3] United Nations., 'Basics of Mediation: Concepts and Definitions.' Available at *https://peacemaker.un.org/sites/peacemaker.un.org/files/Basics%20of%20Mediation.pdf* (Accessed on 20/01/2024)

[4] Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

them continue with the negotiations and ultimately break the deadlock[5]. A mediator does not have the power to impose a resolution, but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own agreement[6].

Mediation is one of the processes that are commonly referred to as Alternative Dispute Resolution (ADR)[7]. These are mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes[8]. They include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[9]. Mediation alongside other ADR mechanisms are recognized at both global and national levels. At the global level, the *Charter of the United Nations[10]* encourages parties to disputes to seek solutions by negotiation, enquiry, *mediation*, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (Emphasis added)[11]. At a national level, the Constitution of Kenya requires courts and tribunals to promote ADR mechanisms including reconciliation, *mediation*, arbitration and TDRMs (Emphasis added)[12].

ADR mechanisms including mediation are viewed as ideal in enhancing access to justice due to their key attributes[13]. It has been argued that mediation has certain advantages which makes the process viable in managing disputes[14]. Its key features towards this end include informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and

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[5] Ibid

[6] Ibid

[7] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[8] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief,* No. 16 of 2011

[9] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[10] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[11] Ibid, Article 33 (1)

[12] Constitution of Kenya, 2010., Article 159 (2) (c) Government Printer, Nairobi

[13] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[14] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

cost effective management of disputes[15]. It has also the ability to preserve relationships due to its potential to address the root causes of the conflict thus negating the need for future conflict or conflict management[16]. In light of these advantages, it has been argued that mediation is a viable tool for managing natural resource- based conflicts for peace and prosperity[17].

This paper critically explores the role of mediation in managing natural resource- based conflicts. It argues that mediation is an effective mechanism for managing natural resource based conflicts. The paper discusses some of the salient attributes of mediation that makes it ideal in managing natural resource based conflicts. It also examines the progress made towards mediating natural resource- based conflicts and challenges thereof. The paper further puts forward suggestions towards enhancing the role of mediation in managing natural resource- based conflicts for peace and prosperity.

2.0 Role of Mediation in Managing Natural Resource Based Conflicts

It has been argued that natural resource- based conflicts are prevalent all over the world as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests[18]. Natural resources such as land, water, forests, minerals, and oil are important sources of livelihoods, income and influence for countries and communities around the world[19]. However, when these resources are poorly managed or inequitably shared, or when business operations are implemented without due consideration for context and communities, they can contribute to

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[15] Ibid

[16] Ibid

[17] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/9294/-Natural_resources_and_conflic.pdf?sequence=2&amp%3BisAllowed (Accessed on 20/01/2024)

[18] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Available at *https://kmco.co.ke/wp-content/uploads/2022/09/EnvironmentalConflict-Management-Institutions-and-Approaches.pdf* (Accessed on 21/01/2024)

[19] ReliefWeb., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at *https://reliefweb.int/report/world/natural-resources-and-conflict-guide-mediation-practitioners-0#:~:text=One%20of%20the%20prerequisites%20to,by%20an%20independent%20third%20party* (Accessed on 21/01/2024)

tensions that can escalate into violent conflict, or worsen pre-existing conflict dynamics[20]. According to the United Nations Environment Programme (UNEP), while natural resources are key to achieving Sustainable Development, they are also increasingly acting as drivers of fragility, conflict and violence[21]. It further asserts that as the global population continues to rise, the global demand for natural resources continues to grow, and the impacts of climate change begin to materialize, and therefore competition over natural resources is set to intensify, a situation that could spiral into more natural resource based conflicts[22]. It has been asserted that population growth and environmental degradation are intensifying competition over already scarce resources, such as land and water, and climate change threatens to increase such competition even further[23]. As a result, it has been contended that natural resources will increasingly become key drivers in a growing number of disputes, with potentially significant consequences for international, regional, and national peace and security[24]. In addition, it has been contended that natural resource- based conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development[25]. It has been argued that natural resources have been at the heart of many international conflicts over the past decades and this situation is likely to continue in the coming years[26]. As a result, it is imperative

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[20] Ibid

[21] United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' Available at *https://www.unep.org/topics/fresh-water/disasters-and-climatechange/environment-security/environmental-cooperationand#:~:text=International%20law%2C%20environment%20and%20conflict,and%20reliance%20on%2 0conflict%20resources* (Accessed on 21/01/2024)

[22] Ibid

[23] ReliefWeb., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

[24] Ibid

[25] Muigua. K., 'Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/ManagingEnvironmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-KenyaKariuki-Muigua-August-2018.pdf* *(*Accessed on 21/01/2024)

[26] International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Available at *https://www.interpeace.org/2015/11/natural-resources-and-conflict-a-path-to-mediation/* (Accessed on 22/01/2024)

to embrace effective management of natural resource based- conflicts in order to promote Sustainable Development.

Mediation has been advanced as an ideal mechanism in managing natural resource- based conflicts[27]. It has been argued that mediation processes which are voluntary and consensus-based tend to lead to resolution and outcomes that are longer lasting and more sustainable than adversarial processes or otherwise imposed outcomes[28]. In natural resource- based conflicts, sustainable outcomes are more desirable because the shared benefits of these resources often cross tribal, societal, communal, and national boundaries[29]. Collaboration over the ownership, management, and use of such resources is therefore critical to peace and stability[30].

It has been argued that mediation can promote effective management of natural resource based- conflicts by fostering collaborative approaches towards management of natural resources and conflicts related to such resources[31]. Collaborative natural resources management has been defined as a partnership by which various stakeholders agree on sharing among themselves the management functions, rights and responsibilities for a territory or a set of resources[32]. It involves a number of processes that help establish and maintain mutually agreeable principles and practices for managing natural resources including conflict management[33]. The main objective of collaborative management approaches is to manage natural resources such as lands, forests, marine areas and their products through negotiating mutually agreeable principles and practices among stakeholder and establishing ways of sharing among stakeholders the power to make decisions and exercise control over resource use[34]. It has been argued that

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[27] Ibid

[28] ReliefWeb., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

[29] Ibid

[30] Ibid

[31] Food and Agriculture Organization., 'An introduction to Natural Resource Conflicts, Collaborative Management and Sustainable Livelihoods.' Available at https://www.fao.org/3/a0032e/a0032e04.htm (Accessed on 21/01/2024)

[32] Ibid

[33] Ibid

[34] Ibid

mediation can foster effective management of natural resource- based conflicts by building consensus and collaboration[35]. Mediation can help stakeholders of natural resources to identify ways to maximize shared benefits and address common problems and challenges together[36]. Through mediation alongside other collaborative approaches including negotiation, natural resources can be treated as a platform for cooperation that transcends religious, ideological, political, or tribal differences, which can be leveraged to tackle more challenging problems down the line[37]. Mediation is therefore an effective mechanism for managing natural resource based conflicts due to its potential to build peace and bring people together, binding them towards the common goal of sharing resources[38].

The features of mediation including flexibility and party autonomy also make the process ideal in managing natural resource based conflicts[39]. Mediation has been identified an extremely flexible approach to dispute resolution that puts a wide range of tools, techniques, and processes in the hands of the mediator and the parties[40]. This flexibility provides plenty of room to bring in technical information and experts that can be seen as impartial and fair to all sides, or to use collaborative approaches to data collection, analysis, or monitoring[41]. It also gives parties the freedom to come up with their own creative and long-term solutions to natural resource based problems[42]. In addition, attributes of

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[35] Antonia. E., & Benedikt. K., 'Negotiation and Mediation Techniques for Natural Resource Management.' Available at *https://iwrmactionhub.org/node/1988/printable/pdf* (Accessed on 21/01/2024)

[36] United Nations Department of Political Affairs., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at *https://gsdrc.org/document-library/natural-resources-and-conflict-a-guide-for-mediation-practitioners/* (Accessed on 21/01/2024)

[37] Ibid

[38] International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Op Cit

[39] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

[40] Bennett. L., 'Mediation in Natural Resources and Land Conflicts.' Available at *https://climate-diplomacy.org/magazine/cooperation/mediation-natural-resources-and-land-conflicts* (Accessed on 21/01/2024)

[41] Ibid

[42] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

mediation including voluntary participation and agreement, confidentiality of exchanges among parties, the search of mutually satisfactory solutions have been identified as well suited for the multi-party complex context of natural resource based conflicts[43]. These features make mediation a viable tool in managing such conflicts by focusing on a broad range of benefits tied to natural resources, including employment opportunities, revenue, services, access and infrastructure[44].

Mediation can also foster effective management of natural resource- based conflicts by promoting participatory approaches towards conflict management[45]. It has been pointed out that mediation can foster community involvement in the conflict management process through the use of peace committees, Non-Governmental Organisations, religious bodies, among other bodies within communities[46]. This process can facilitate effective management of conflicts by addressing the root causes of such conflicts[47]. Therefore, in case of environmental conflicts, mediation affords parties an opportunity to sustain or improve their relationships[48]. By encouraging participation and consensus building, mediation encourages amicable management of environmental conflicts and provide the basis for sustained relationships which is especially important where environmental projects are involved[49]. Mediation is

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[43] Kaufman. S., 'Mediation in Environmental Disputes.' Available at https://www.eolss.net/samplechapters/c14/E1-40-03-03.pdf (Accessed on 22/01/2024)

[44] United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Available at *https://www.unep.org/news-and-stories/pressrelease/mediation-can-prevent-resolve-natural-resources-disputes-new-un* (Accessed on 22/01/2024)

[45] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Available at *https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-throughAlternative-Dispute-Resolution.pdf* (Accessed on 22/01/2024)

[46] Muigua. K., 'Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2019/09/Natural-ResourceConflictsAddressing-Inter-Ethnic-Strife-Through-Environmental-Justice-in-kenya-Kariuki-Muigua7th-September2019.pdf* (Accessed on 22/01/2024)

[47] Ibid

[48] Ibid

[49] Ibid

therefore vital in managing natural resource- based conflicts due to its ability to support the capacities of societies to manage their own conflicts[50]. It fosters the participation of all parties at all levels, including the elites and grassroots towards effective management of natural resource- based conflicts[51]. It has been argued that mediation is a people centred and participatory process[52]. It therefore shifts focus from resources to people and encourages their participation in conflict management in a manner which respects their views[53]. Mediation therefore fosters participatory approaches towards conflict management by encouraging community-based and collaborative approaches to resource management which enable different stakeholders to participate in decision-making in order to develop and manage their resources[54].

From the foregoing, it is evident that mediation can be effective strategy for managing natural resource- based conflicts. According to the African Union, national and trans-boundary resource dispute management and mediation mechanisms are important ways to help different parties move from a position of conflict to one of cooperation[55]. It further asserts that cooperating over shared resources or common challenges can help build confidence between divided groups and maintain a degree of communication[56]. Over time, this cooperation over the environment and natural resources can have important spillover effects, further binding the parties into sharing mutual benefits and diminishing the possibility of a return to conflict[57]. Further, according to UNEP, natural resource based conflicts are often more amenable to mediation

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[50] International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Op Cit

[51] Ibid

[52] Food and Agriculture Organization., 'An introduction to Natural Resource Conflicts, Collaborative Management and Sustainable Livelihoods.' Op Cit

[53] Ibid

[54] Ibid

[55] African Union., 'Report of the African Union Panel of the Wise on Improving the Mediation and Resolution of Natural Resource-Related Conflicts Across Africa.' Available   at *https://wedocs.unep.org/bitstream/handle/20.500.11822/31043/AUP.pdf?sequence=1* (Accessed on 22/01/2024)

[56] Ibid

[57] Ibid

that other dispute management processes[58]. UNEP points out that finding consensus and building alliances over natural resources is often easier because natural resources shape economic incentives that transcend other areas[59]. In addition, it has been argued that mediation over natural resources can effectively help parties identify ways to maximize and share benefits, and ultimately unlock entrenched or zero-sum positions, allowing parties to develop cooperative and constructive relationships that can be carried over to other areas[60].

Despite its potential to foster effective management of natural resource based conflicts, it has been pointed out that mediation has not been given an adequate chance within the framework of natural resource based conflict management[61]. According to UNEP, despite mediation being a vital tool in preventing and resolving conflicts, it is often underutilized in the context of conflicts involving natural resources[62]. This has been attributed to several reasons including the technical nature of natural resource- based conflicts, laxity by countries to identify or act on opportunities for proactive use of mediation as a tool for conflict prevention and peacebuilding, and the political dimension of natural resource- based conflicts[63]. It is necessary to address these concerns in order to enhance the use of mediation in managing natural resource based conflicts. It is also imperative to deal with some of the challenges inherent in mediation such as power imbalances, enforceability challenges and lack of urgent protection measures such as injunctions in order to strengthen its role in managing natural resource- based conflicts[64].

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[58] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at *https://wedocs.unep.org/bitstream/handle/20.500.11822/9294/-Natural_resources_and_conflic.pdf?sequence=2&amp%3BisAllowed* (Accessed on 22/01/2024)
[59] Ibid
[60] Ibid
[61] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit
[62] United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit
[63] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit
[64] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

3.0 Way Forward

There is need to embrace mediation in order to foster effective management of natural resource based conflicts. It has been contended that with climate change, rapid population growth and environmental degradation placing new pressures on environmental and social systems, effectively preventing and resolving resource natural resource- based conflicts has never been more urgent[65]. Mediation can be particularly effective in helping parties identify ways to maximise and share resource benefits therefore preventing and fostering effective management of natural resource- based conflicts[66].

In order to improve the practice of mediating natural resource- based conflicts, it is imperative to consider the context of the natural resource in question[67]. It has been argued that each natural resource sector generates multiple forms of conflict, which require different approaches to mediation[68]. As a result, it is important for the mediation process to take into account the characteristics and functionality of the resource in question, together with mechanisms for dealing with uncertainties[69]. It has been argued that for mediation to be effective in managing natural resource based conflicts, there is need to understand the root cause of the conflict, the interaction of natural resources

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[65] United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

[66] Ibid

[67] Humphreys. M., 'Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms.' Available at *https://d1wqtxts1xzle7.cloudfront.net/30923495/ch_8_-_humphreys-libre.pdf?1392206230=&response-contentdisposition=inline%3B+filename%3DNatural_resources_conflict_and_conflict.pdf&Expires=1705927305&Signature=Es-678uwVqTDUhNcfVqepokgpEsPjTMj55OkqsXCU8zVv6guYZwWP-ZA0SYWEgRPhkzHFnPpfQSS3B4V9-wkytt3CIeh0gUG15C9xgmorrPGeQ1LQEa1e7P~rqya0h6T-CdQwIxkSSj8ePNyY8Q8tDWzcDB9PuOr5-elHNoYc1XGewuiAg3FURjsscrctTgehuWlLKkuKfu9K4yxQzi~XWvB3yFYzvsbCajtvQh9BcPEVIxhn9vedLSD9SByB01Sy04CZ5X2Rf8BtfoDF73SwmsCUKehWQ-cdVhhVLDivUOhe1VfieG4-Q0mAuYsVGvW60pU3WQjL~eQnctbMwqKFQ__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA* (Accessed on 22/01/2024)

[68] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

[69] Ibid

with other conflict drivers, the broader political economy, and the entry-points for a mediated solution[70].

It is also necessary to enhance access and dissemination of information in order to strengthen the role of mediation in managing natural resource based conflicts[71]. Access to information can foster the participation of all stakeholders including the public in the mediation process[72]. It has been argued that one of the requirements for an effective mediation processes over natural resources is for all parties to have equal access to impartial scientific and technical information about the resource in dispute[73]. Access to information has confidence building benefits and ensures effective participation of all stakeholders in the mediation process towards mutually acceptable and long lasting solutions[74].

In addition, there is need to ensure that mediation embraces collaborative approaches towards managing natural resource based conflicts[75]. Collaborative approaches can help stakeholders of natural resources to identify ways to maximize shared benefits and address common problems and challenges together[76]. In addition, natural resources can be treated as a platform for cooperation that transcends religious, ideological, political, or tribal differences, which can be leveraged to tackle more challenging problems down the line[77]. It has been contended that in order to effectively mediate natural resource- based conflicts, mediation should aim for collaboration over shared benefits, which can generate the trust needed to tackle other issues[78]. In

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[70] Ibid

[71] Muigua. K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/Managing-Natural-Resource-Conflicts-in-Kenya-through-Negotiation-and-Mediation.pdf* (Accessed on 22/01/2024)

[72] Ibid

[73] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

[74] Ibid

[75] Antonia. E., & Benedikt. K., 'Negotiation and Mediation Techniques for Natural Resource Management.' Op Cit

[76] Ibid

[77] Ibid

[78] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

addition, it has been suggested that while when managing natural resource-based conflicts, mediators should try to help parties move past zero-sum, win-lose positions by identifying ways that stakeholders can maximize shared benefits and address common problems and challenges together[79]. Embracing collaborative approaches can enhance the effectiveness of mediating natural resource based conflicts.

It is also vital to ensure the participation of all stakeholders in the mediation process[80]. Mediation has the ability to promote effective management of natural resource based conflicts by encouraging consensus building and participatory approaches towards conflict management[81]. It can foster community involvement in the conflict management process through the use of peace committees, Non-Governmental Organisations, religious bodies, among other bodies within communities[82]. It is therefore necessary to embrace the participation of all stakeholders when mediating natural resource- based conflicts in order to address the root causes of conflicts and afford parties an opportunity to sustain or improve their relationships[83]. Despite the importance of inclusivity and participation in mediating natural resource based conflicts, it has correctly been pointed out that inviting the participation of all stakeholders may prove too difficult or fragmented to produce consensus[84]. Therefore, understanding which actors to include in mediation, and the potential political impacts of including some and excluding others, is essential[85]. However, ensuring consultation with a sufficiently wide set of stakeholders is crucial to establish and maintain the legitimacy of the process and foster effective mediating of natural resource based conflicts[86].

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[79] Ibid

[80] Muigua. K., 'Managing Environmental Conflicts through Alternative Dispute Resolution.' Available at *https://kmco.co.ke/wp-content/uploads/2024/01/Managing-Environmental-Conflicts-through-Alternative-Dispute-Resolution-1.pdf* (Accessed on 22/01/2024)

[81] Ibid

[82] Ibid

[83] Ibid

[84] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

[85] Ibid

[86] Ibid

Finally, it is imperative to strengthen the legal, policy, institutional and human capacity in order to effective mediate natural resource- based conflicts[87]. It has been suggested that there is need to enhance capacity building within communities in order to develop a level-playing field that will enable less powerful stakeholders to participate equitably in a process of consensual negotiation and mediation[88]. It is also important for mediators to enhance their capacity to mediate natural resource- based conflicts through education and training and seeking expert evidence in technical aspects related to natural resources[89]. It is also pertinent to strengthen the legal, policy and institutional framework on mediation at all levels including national levels in order to enhance its suitability in managing natural resource based conflicts[90].

The foregoing among other measures are important towards improving the practice of mediating natural resource based conflicts for peace and prosperity.

4.0 Conclusion

Mediation is an ideal mechanism in managing natural resource- based conflicts[91]. It can promote effective management of natural resource based conflicts by fostering collaborative approaches towards management of natural resources and conflicts related to such resources[92]. It also gives parties the freedom to come up with their own creative and long-term solutions to natural resource based problems[93]. Despite mediation being a vital tool in preventing and resolving conflicts, it is often underutilized in the context of

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[87] Muigua. K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation.' Op Cit

[88] Ibid

[89] United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

[90] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

[91] International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Op Cit

[92] Food and Agriculture Organization., 'An introduction to Natural Resource Conflicts, Collaborative Management and Sustainable Livelihoods.' Op Cit

[93] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

conflicts involving natural resources[94]. It is imperative to embrace mediation in order to effectively manage natural resource based conflicts in light of growing global challenges including climate change, rapid population growth and environmental degradation[95]. In order to improve the practice of mediating natural resource based conflicts, it is imperative to consider the context of the natural resource in question, enhance access and dissemination of information, embrace collaborative approaches towards managing natural resource based conflicts, ensure the participation of all stakeholders in the mediation process, and strengthen the legal, policy, institutional and human capacity on mediation at all levels[96]. Mediating natural resource- based conflicts for peace and prosperity is a goal that can be achieved by all countries.

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[94] United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

[95] United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

[96] Ibid; Muigua. K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation.' Op Cit; Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit; and [96] Muigua. K., 'Managing Environmental Conflicts through Alternative Dispute Resolution.'

Actualizing Agenda 2063 for Sustainable Development in Africa

Abstract

This paper critically examines the role of Agenda 2063 in fostering Sustainable Development in Africa. It discusses the salient provisions of Agenda 2063 and their efficacy in spurring Sustainable Development. The paper further explores the progress and challenges facing the realization of Agenda 2063. It suggests measures towards actualizing Agenda 2063 for Sustainable Development in Africa.

1.0 Introduction

Realizing Sustainable Development has become a pertinent concern in the wake of global challenges including climate change, poverty, food insecurity and hunger, environmental degradation and inequalities between and among nations[1]. Sustainable Development is defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs[2]. It has also been described under the *Environmental Management and Coordination Act* of Kenya 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[3]. Essentially, Sustainable Development seeks to foster *intra-generational equity*, that is equity among present generations, and *inter-generational equity*, that is equity between generations[4].(Emphasis added) The idea of Sustainable Development encompasses environmental protection, economic development and social concerns[5].

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[1] United Nations., 'The Sustainable Development Agenda.' Available at *https://www.un.org/sustainabledevelopment/development-agenda/#:~:text=Frequently%20Asked%20Questions-,What%20is%20sustainable%20development%3F,to%20meet%20their%20own%20needs.* (Accessed on 23/10/2023)

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

[3] Environmental Management and Coordination Act., No. 8 of 1999, Laws of Kenya, S 2

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

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

The concept of Sustainable Development has been embraced as the global blueprint for development as envisioned under the United Nations 2030 Agenda for Sustainable Development which captures the global goals towards securing environmental, economic, social and political development and sustainability for the sake of current and future generations[6]. The Agenda is a plan of action for people, planet and prosperity[7]. It also seeks to strengthen peace in larger freedom and eradicate poverty in all its forms and dimensions[8]. At the heart of the Agenda are 17 Sustainable Development Goals (SDGs) which envisage achievement of Sustainable Development by meeting targets such as ending extreme poverty, promoting food security, promoting access to health and education, achieving gender equality, promoting access to clean water and sanitation, ensuring access to affordable and clean energy, enhancing industry, innovation and infrastructure and combating climate change[9].

Achieving Sustainable Development is a fundamental concern in Africa. The continent continues to face numerous challenges such as poverty, hunger, food insecurity, drought, water scarcity, climate change, unemployment and inequalities which threaten the Sustainable Development agenda[10]. However, it has also been observed that the continent is making some progress towards implementing the sustainable development goals[11]. It has also been argued that actualizing the aspirations, goals, and targets of the African Union's Agenda 2063 can accelerate the Sustainable Development agenda in Africa[12].

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[6] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pd*f (Accessed on 23/10/20230

[7] Ibid

[8] Ibid

[9] Ibid

[10] African Development Bank., 'The way Forward to Achieving Sustainable Development in Africa.' Available at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/ADR15_chapter_8.pd f* (Accessed on 23/10/2023)

[11] United Nations Development Programme., '2023 Africa Sustainable Development Report.' Available at *https://www.undp.org/africa/publications/2023-africa-sustainable-development-report* (Accessed on 23/10/2023)

[12] Ibid

This paper critically examines the role of Agenda 2063 in fostering Sustainable Development in Africa. It discusses the salient provisions of Agenda 2063 and their efficacy in spurring Sustainable Development. The paper further explores the progress and challenges facing the realization of Agenda 2063. It suggests measures towards actualizing Agenda 2063 for Sustainable Development in Africa.

2.0 Overview of Agenda 2063

Agenda 2063 is founded on the African Union vision of an *'integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena[13].'*(Emphasis added)It sets out the continent's shared strategic framework for inclusive growth and Sustainable Development that takes into account past achievements, challenges and opportunities at the national, continental and global levels to provide the basis and context in which the continent's transformation is being designed and implemented[14]. Agenda 2063 is premised on seven aspirations. These are *Aspiration 1*: A prosperous Africa based on inclusive growth and sustainable development[15]; *Aspiration 2*: An integrated continent; politically united and based on the ideals of PanAfricanism and the vision of Africa's Renaissance[16]; *Aspiration 3*: An Africa of good governance, democracy, respect for human

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[13] African Union., 'Agenda 2063: The Africa we Want.' Available at *https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf* (Accessed on 23/10/2023)

[14] Ibid

[15] Aspiration 1 seeks to achieve several goals including high standards of living, quality of life and well-being; well-educated citizens and skills revolution underpinned by science, technology and innovation; healthy and well-nourished citizens; modern, affordable and liveable habitats; transformed economies; modern agriculture for increased production, productivity and value addition; sustainable governance of Africa's blue/ ocean economy and environmentally sustainable and climate resilient economies and communities.

[16] Aspiration 2 seeks to achieve the ideal of a united Africa (federal or confederate) and development of world class infrastructure that crisscrosses Africa.

rights, justice and the rule of law[17]; *Aspiration 4*: A peaceful and secure Africa[18]; *Aspiration 5*: An Africa with a strong cultural identity, common heritage, shared values and ethics[19]; *Aspiration 6*: An Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children[20]; and *Aspiration 7*: Africa as a strong, united, resilient and influential global player and partner[21].

The aspirations of Agenda 2063 mainly cover the areas of: social and economic development; integration, democratic governance and peace and security amongst others[22]. Agenda 2063 builds on past achievements and challenges and takes into account the continental and global context and trends in which Africa is realizing its transformation, including: The Pan African vision and project; lessons from global development experiences; learning from past and present African development efforts and challenges and forging an African-centred approach to transformation; people-centered development, gender equality and youth empowerment and the changing global context[23].

It has been rightly pointed out that Agenda 2063 is geared towards achieving Sustainable Development in Africa[24]. Agenda 2063 sets out several targets that

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[17] Aspiration 3 focuses on entrenching democratic values, practices, and respect for universal principles of human rights, justice and the rule of law and promoting capable institutions and transformative leadership in place at all levels.
[18] Aspiration 4 seeks to foster an entrenched culture of peace in Africa; security and safety for all citizens in Africa; and mechanisms to promote and defend the continent's collective security and interests.
[19] Aspiration 5 seeks to realize Pan Africanism and African Cultural Renaissance.
[20] Aspiration 6 focuses on achieving gender equality in all spheres of life; engagement and empowerment of the youth; and caring for children.
[21] Aspiration 7 seeks to achieve the position of Africa as a major social, political and economic force in the world, with her rightful share of the global commons (land, oceans and space); an active and equal participant in global affairs, multilateral institutions, and a driver for peaceful co-existence, tolerance and a sustainable and just world; and a continent that is fully capable and have the means to finance her development.
[22] African Union., 'Agenda 2063: The Africa we Want.' Op Cit
[23] Ibid
[24] Muigua. K., 'Africa's Agenda 2063: What is in it for Kenya?' Available at https://kmco.co.ke/wp-content/uploads/2019/06/Africa%E2%80%99s-Agenda-2063-What-is-in-it-for-Kenya-Kariuki-Muigua-28th-June-2019.pdf (Accessed on 23/10/2023)

are vital in realizing the ideal of Sustainable Development in Africa including eradicating poverty; providing opportunities for all Africans to have decent and affordable housing in clean, secure and well planned environments; fostering education and skills revolution and actively promoting science, technology, research and innovation; transforming, growing and industrializing African economies through beneficiation and value addition of natural resources; consolidating the modernisation of African agriculture and agro-businesses; combating climate change and fostering environmental conservation; connecting Africa through world-class infrastructure; fostering gender equality and empowerment of the youths in all sectors; and strengthening domestic resource mobilization[25].

The aspirations, goals and targets of Agenda 2063 fit well within the United Nations 2030 Agenda for Sustainable Development. It has been pointed out that Agenda 2063 and the 2030 Agenda for Sustainable Development are mutually supportive and coherent[26]. They can unlock virtually all the SDGs in Africa by ending poverty, promoting food security, fostering good health and well-being, promoting quality education, achieving gender equality, ensuring access to clean water and sanitation, enhancing access to affordable and clean energy, promoting decent work and economic growth, fostering industry, innovation and infrastructure, combating climate change, ensuring sound governance of the environment and natural resources and realizing peace, justice and strong institutions in Africa[27]. The African Union asserts that the SDGs fit neatly into the twenty goals of Agenda 2063[28]. Agenda 2063 is wide in scope, covering social, economic and sustainability considerations in the broader context of political, cultural and other African priorities hence by implementing Agenda 2063, African countries will also be meeting global obligations under the SDGs[29]. Actualizing Agenda 2063 can therefore accelerate Sustainable Development in Africa.

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[25] Ibid

[26] Muigua. K., 'Africa's Agenda 2063: What is in it for Kenya?' Op Cit

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

[28] African Union., 'Agenda 2063-SDGs.' Available at
https://au.int/en/ea/statistics/a2063sdgs#:~:text=SDGs%20scope%20is%20confined%20to,c ultural%20and%20other%20African%20priorities. (Accessed on 23/10/2023)

[29] Ibid

3.0 Progress made towards Actualizing Agenda 2063

In order to actualize Agenda 2063, the African Union adopted ten year implementation plans with the First Ten Year Implementation Plan covering the period from 2013 to 2023[30]. The First Ten Year Implementation Plan identifies priority areas for actualizing Agenda 2063 including sustainable and inclusive economic growth, human capital development, agriculture/value addition and agrobusiness development, employment generation, social protection, gender equality and youth empowerment , good governance, infrastructural development, industrialization, science, technology and innovation, and peace and security[31]. It seeks to: identify priority areas, their associated targets and expected outcomes and indicative strategies to stakeholders; highlight the fast track programmes and projects that will bring quick wins and generate and sustain the interest of the African Citizenry in the African Agenda; assign responsibilities and accountabilities to all stakeholders in the implementation, monitoring and evaluation of the plan and outline the strategies required to ensure resource and capacity availability and sustained citizen's engagement for plan execution[32].

According to the First Ten Year Implementation Plan, achievement of the set targets by the year 2023 will transform Africa through improvements in living standards, transformed, inclusive and sustainable economies, regional and continental integration, empowered women, youth and children, and a well governed, peaceful and cultural centric Africa in a global context[33]. It sets out the implementation, monitoring and evaluation responsibilities of key stakeholders including member states, regional economic communities and the African Union organs[34].

According to the First Continental Report on the Implementation of Agenda 2063, the continent has made some remarkable progress towards attaining the

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[30] Africa Union., 'The First-Ten Year Implementation Plan.' Available at *https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf* (Accessed on 23/10/2023)
[31] Ibid
[32] Ibid
[33] Ibid
[34] Ibid

goals identified in Agenda 2063's First Ten Year Implementation Plan[35]. The report notes the progress made towards meeting the goals of Agenda 2063 within the SDGs framework in Africa[36]. Some notable progress towards this end includes improvement of the standard of living, quality of life and well-being as evidenced by increased electricity access, improvement in health services in some countries, enhanced access to safe drinking water, increased access to internet and reduction in unemployment rates in some countries[37]. The report further notes improvement in the education sector through increased enrolment rates especially in basic education[38]. However, the report also notes the slow progress made in attaining some of the goals of Agenda 2063 that have a bearing on the SDGs including job creation, food security, the blue economy, and environmentally sustainable climate resilient economies and communities[39].

The Second Continental Report on the Implementation of Agenda 2063 further lauds achievements made towards actualizing Agenda 2063 including implementation of the flagship projects under the Agenda and operationalization of the African Continental Free Trade Area (AfCFTA)[40]. The report indicates that overall performance and implementation of Agenda 2063 stood at 51% compared to a score of 32% identified in the First Continental Report on the Implementation of Agenda 2063[41]. The report notes the progress made towards creating incomes, jobs and decent work; tackling poverty, inequality and hunger; enhancing access to basic quality services including the internet; promoting education, science, technology and innovation; enhancing health and nutrition; improving agriculture and food security; unlocking the blue/ocean economy; and achievement of environmentally sustainable and

[35] Africa Union., 'First Continental Report on the Implementation of Agenda 2063.' Available at *https://au.int/sites/default/files/documents/38060-doc-agenda_2063_implementation_report_en_web_version.pdf* (Accessed on 23/10/2023)
[36] Ibid
[37] Ibid
[38] Ibid
[39] Ibid
[40] Africa Union., 'Second Continental Report on the Implementation of Agenda 2063.' Available at *https://au.int/sites/default/files/documents/41480-doc-2nd_Continental_Progress_Report_on_Agenda_2063_English.pdf* (Accessed on 23/10/2023)
[41] Ibid

climate resilient economies and communities[42]. It also acknowledges the slow progress made in realizing some of the goals of Agenda 2063 in some African countries as evidenced by cases of unemployment, poverty, inequality, food insecurity, the threat of climate change and inadequate access to education and health among other services[43]. The report further acknowledges the impact of the COVID-19 pandemic on the realization of the goals of Agenda 2063 and the SDGs in Africa[44].

From the foregoing, it is evident that there has been mixed performance in actualizing the aspirations, goals and targets of Agenda 2063 as set out in the First Ten Year Implementation Plan. It has been noted that some African countries have made progress towards meeting some of the goals set out under Agenda 2063 through initiatives such as increase in the volume of intra-African trade, increase in access to electricity, increase in access to safe drinking water, improvements in standards of health and promotion of gender equality and youth empowerment[45]. However, it has also been pointed out that Africa's progress on the SDGs and the African Union's Agenda 2063 aspirations has been uneven, with significant differences among sub-regions, countries, and rural and urban areas[46]. Consequently, there are some pressing challenges facing the realization of Agenda 2063 and the SDGs in Africa.

4.0 Problems hindering Realization of Agenda 2063 and Sustainable Development in Africa

Despite the aspirations of Agenda 2063 to combat poverty in Africa, the continent still suffers from significant levels of poverty that hinders the

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[42] Ibid

[43] Ibid

[44] Ibid

[45] United Nations Development Programme., 'Eswatini Takes Stock of Progress Towards Agenda 2063.' Available at *https://www.undp.org/eswatini/press-releases/eswatini-takes-stock-progress-towards-agenda-2063* (Accessed on 23/10/2023)

[46] African Development Bank Group., 'Africa's SDGs Progress Uneven, Requires Accelerated Efforts to Meet the 2030 Deadline –Report' Available at *https://smartwatermagazine.com/news/african-development-bank-group/africas-sdgs-progress-uneven-requires-accelerated-efforts-mee*t (Accessed on 23/10/2023)

attainment of Sustainable Development[47]. It has been observed that persistent poverty and inequality are likely to undermine prosperity, peace and security in Africa unless governments embark on innovative and people-entered development models[48]. Further, despite the targets of Agenda 2063 to enhance food and nutrition security, most parts of the continent have continued to face a severe and enduring food crisis with millions of people in Africa facing extreme hunger[49]. For example, the horn of Africa region is facing a hunger crisis with an estimated number of more than 23 million people across parts of Ethiopia, Kenya and Somalia facing severe hunger[50]. This problem is related to water scarcity with most regions facing dire water shortages as a result of drought[51]. This has worsened the food situation in Africa as a result of death of livestock and drying up of crops.

Further, despite the aspiration and goal of Agenda 2063 to foster good health and well-being of all citizens in Africa, this target is yet to be realized. It has been pointed out that less than half of Africa's citizens have access to the healthcare they need, the continent's quality of health services is generally poor and the family planning needs of half the continent's women and girls are unmet[52]. In addition, despite the attempts made towards enhancing access

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[47] United Nations Economic Commission for Africa., 'Rising Poverty, Inequalities threaten Sustainable Development Goals.' Available at *https://www.uneca.org/stories/rising-poverty%2C-inequalities-threaten-sustainable-development-goals#:~:text=Rising%20poverty%2C%20inequalities%20threaten%20Sustainable%20Development%20Goals,-21%20March%2C%202023&text=Addis%20Ababa%2C%2021%20March%202023,and%20people%2Dentered%20development%20models.* (Accessed on 24/10/2023)
[48] Ibid
[49] British Red Cross., 'Africa Food Crisis: More than 160 million People are Going Hungry.' Available at *https://www.redcross.org.uk/stories/disasters-and-emergencies/world/africa-hunger-crisis-100-million-struggling-to-eat* (Accessed on 24/10/2023)
[50] World Food Programme., 'Horn of Africa Hunger Crisis Pushes Millions to the Brink.' Available at *https://www.wfp.org/stories/horn-africa-hunger-crisis-pushes-millions-brink* (Accessed on 24/10/2023)
[51] UNICEF., 'Water Crisis in the Horn of Africa.' Available at *https://www.unicef.org/documents/water-crisis-horn-africa* (Accessed on 24/10/2023)
[52] Cullivan. K., 'Universal Health Coverage: Only Half of Africans Have Access to Health Care.' Available at *https://healthpolicy-watch.news/only-half-of-africans-have-access-to-health-*

to education in Africa, inequalities, inefficiencies and exclusion at all levels are still evident in the sector[53]. For example, it has been observed that even with a substantial increase in the number of children with access to basic education, a large number still remain out of school[54]. Further, despite the aspiration, goal and targets of Agenda 2063 to enhance access to energy in Africa, access to energy represents one of Africa's greatest obstacles to social and economic development[55]. It has been pointed out that a majority of the population in Sub-Saharan Africa lack access to clean and affordable energy and depend on traditional fuels[56]. Africa still has high levels of energy poverty and faces energy justice concerns which hinder the realization of the Sustainable Development agenda[57].

One of the key aspirations under Agenda 2063 is to confront climate change and foster climate resilient economies and communities in Africa[58]. Africa is classified as a continent that is highly vulnerable to climate change due to several reasons including endemic poverty and high dependence on rain-fed agriculture, complex governance and institutional dimensions, limited access to capital including markets and technology, weak infrastructure, ecosystem degradation and poor management of natural resources, disasters both natural and man-made and conflicts[59].This vulnerability is worsened by strong

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care/#:~:text=Less%20than%20half%20of%20Africa's,women%20and%20girls%20are%20 unmet. (Accessed on 24/10/2023)

[53] Musau. Z., 'Africa Grapples with Huge Disparities in Education.' Available at *https://www.un.org/africarenewal/magazine/december-2017-march-2018/africa-grapples-huge-disparities-education#:~:text=It%20is%20widely%20accepted%20that,still%20remain%20out%20of% 20school.* (Accessed on 24/10/2023)

[54] Ibid

[55] Hafner. M., 'The Challenge of Energy Access in Africa.' Available at https://link.springer.com/chapter/10.1007/978-3-319-92219-5_1 (Accessed on 24/10/2023)

[56] Bildirici. M & Ozaksoy.F., 'Woody Biomass Energy Consumption and Economic Growth in SubSaharan Africa' *Procedia Economics and Finance* 38 (2016) 287 – 293

[57] Muigua. K., 'Towards Energy Justice in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2020/02/Towards-Energy-Justice-in-Kenya-00000005.pdf* (Accessed on 24/10/2023)

[58] African Union., 'Agenda 2063: The Africa we Want.' Op Cit

[59] 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

dependence of African economies on climate sensitive natural resources[60]. It has been observed that African countries are already experiencing effects of climate change such as drought, water scarcity, flooding among others[61]. Climate change is having a devastating impact on the African continent creating food insecurity, stressing water resources, depleting human health, displacing populations and impeding socio-economic development[62]. It has been observed that in Africa, approximately 50 million people are on the brink of falling below the poverty line for reasons connected to climate change, 100 million people are at risk of being displaced by climate change, and about 600 million people lack energy access[63].

Climate change is therefore one of the key challenges hindering the realization of the SDGs in Africa. The African Development Bank Group notes that despite having contributed the least to global warming and having the lowest emissions, Africa faces exponential collateral damage from the effects of climate change posing systemic risks to its economies, infrastructure investments, water and food systems, public health, agriculture, and livelihoods, threatening to undo its modest development gains and slip into higher levels of extreme poverty[64]. The United Nations further asserts that climate change is having a growing impact on the African continent, hitting the most vulnerable hardest, and contributing to food insecurity, population displacement and stress on water resources[65]. It is imperative to combat climate change as envisaged under Agenda 2063 in order to realize Sustainable Development in Africa.

_and_Adaptation_in _ECASADCCOMESA_region_Opportunities_and_Challenges (Accessed on 24/10/2023)

[60] Ibid

[61] Ibid

[62] Rao. V., & Yadav. P., 'Confronting Climate Change in Africa.' Available at *https://knowledge.insead.edu/responsibility/confronting-climate-change-africa* (Accessed on 24/10/2023)

[63] Ibid

[64] African Development Bank Group., 'Climate Change in Africa.' Available at *https://www.afdb.org/en/cop25/climate-change-africa* (Accessed on 24/10/2023)

[65] United Nations Framework Convention on Climate Change., 'Climate Change is an Increasing Threat to Africa.' Available at *https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa (*Accessed on 24/10/2023)

Another key aspiration of Agenda 2063 that is yet to be fully realized is fostering peace in Africa. There have been frequent conflicts across the African continent, which are fueled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others[66]. Numerous civil wars have occurred in Africa in several countries including Sudan, Chad, Liberia, Sierra Leone, Nigeria, Somalia and the Democratic Republic of the Congo (DRC)[67]. These conflicts have resulted in deaths and displacement of people creating a crisis of internally displaced persons, refugees and asylum seekers[68]. The ideal of peace in Africa as envisioned under Agenda 2063 is therefore yet to be fully realized. Conflicts over natural resources are also a common occurrence in Africa[69]. Despite being endowed with abundance of natural resources, Africa has over the years suffered from resource-based conflicts which threaten Sustainable Development in the continent[70]. It has been observed that the 'resource curse phenomenon' is widespread in Africa which refers to the paradox that countries endowed with natural resources tend be embroiled in conflicts and have high incidences of poverty[71]. DRC and Nigeria are examples of African countries endowed in natural resources that suffer widespread poverty[72]. The resource curse hinders realization of the ideal of Agenda 2063 of promoting sustainable management and beneficiation of Africa's minerals and natural resources[73].

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[66] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2021/05/Towards-Peacebuilding-and-Conflict-Managementin-Kenya.docx-Kariuiki-Muigua-MAY-2021x.pdf* (Accessed on 24/10/2023)

[67] Ibid

[68] Africa Center for Strategic Studies., 'African Conflicts Displace Over 40 Million People.' Available at *https://africacenter.org/spotlight/african-conflicts-displace-over-40-million-people/* (Accessed on 24/10/2023)

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

[70] Ibid

[71] Henri. A., 'Natural Resources Curse: A Reality in Africa.' *Resources Policy* , Volume 63, 2019

[72] Ibid

[73] African Union., 'Agenda 2063: The Africa we Want.' Op Cit

Finally, one of the key aspirations under Agenda 2063 is fostering good governance, respect for human rights, justice and the rule of law in Africa[74]. However, this is yet to be fully achieved as evidenced by governance problems in most African countries including corruption, weak legal and institutional regimes, abuse of human rights, insufficient transparency and accountability mechanisms, weaknesses in justice systems and political instability in some countries[75]. It has been pointed out that good governance is integral in the Sustainable Development agenda since it assists societies to develop effective governments within a democratic system, and to implement Sustainable Development principles through global partnership[76]. Without good governance, the vision of Agenda 2063 and the Sustainable Development agenda cannot be realized in Africa.

From the foregoing, it is evident that there are several problems hindering the attainment of the aspirations, goals and targets of Agenda 2063 and Sustainable Development in Africa. This calls for accelerated efforts to ensure that Africa achieves the ideal of Agenda 2063 for Sustainable Development in the continent.

5.0 Way Forward

The First and Second Continental Reports on the Implementation of Agenda 2063 proposes recommendations towards achievement of the First Ten Year Implementation Plan and Agenda 2063 in overall[77]. Such reforms include embedding the ideals and targets of Agenda 2063 in national and sub-national level planning and implementation processes and instruments; improved domestication, coordination, implementation and reporting on Agenda 2063; mobilising resources to ensure smooth implementation of Agenda 2063 at national, regional and continental level; development and deployment of new

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[74] Ibid

[75] Crocker. C., 'African Governance: Challenges and their Implications.' *https://www.hoover.org/research/african-governance-challenges-and-their-implications* (Accessed on 24/10/2023)

[76] United Nations., 'Good Governance in Sustainable Development.' Available at *https://sdgs.un.org/partnerships/good-governance-sustainable-development#:~:text=The%20objective%20of%20Good%20Governance,development%20principles%20through%20global%20partnership*. (Accessed on 24/10/2023)

[77] Africa Union., 'First Continental Report on the Implementation of Agenda 2063.'; Africa Union., 'Second Continental Report on the Implementation of Agenda 2063.

tools, approaches and institutional capacity support for member states for improved integrated national policy development and planning; enhancing public awareness of the content and relevance of Agenda 2063 to the local contexts, thereby highlighting synergies and complementarities between the continental, regional and national development agendas; and fostering stronger coordination between the African Union and the United Nations system to ensure synergies between the 2030 Agenda for Sustainable Development and Agenda 2063[78]. It is therefore imperative for all stakeholders including member states, regional economic communities and the African Union to implement these reforms in order to actualize Agenda 2063 towards achieving sustainable development in Africa.

In addition, it has correctly been pointed out that the development themes envisaged under Agenda 2063 notably overlap at the national and continental levels and it can thus be argued that the achievement of the national plans can greatly succeed by building synergies with the continental implementation plans especially as captured in the Agenda 2063 First Ten Year Implementation Plan 2014-2023[79]. The aspirations of Agenda 2063 can therefore be achieved effectively at national levels by countries aligning their development plans in accordance with the agenda and within the larger context of Sustainable Development[80].

Further, it is essential to pursue true Sustainable Development in Africa by pursuing development at the economic, social and environmental levels[81]. It has been argued that the United Nations 2030 Agenda for Sustainable Development and its SDGs fit neatly into the twenty goals of Agenda 2063 and that the two visions are mutually supportive and coherent[82]. Agenda 2063 can therefore be actualized by achieving the SDGs in Africa[83]. Thus, it is necessary

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[78] Ibid

[79] Muigua. K., 'Africa's Agenda 2063: What is in it for Kenya?' Op Cit

[80] Ibid

[81] Muigua. K., 'A Clarion call for Action: Realising True Sustainable Development.' Available at *https://kmco.co.ke/wp-content/uploads/2023/05/A-Clarion-call-for-Action-Towards-realisation-of-True-Sustainable-Development-Kariuki-Muigua-May-2023.pdf* (Accessed on 24/10/2023)

[82] Muigua. K., 'Africa's Agenda 2063: What is in it for Kenya?' Op Cit

[83] African Union., 'Agenda 2063-SDGs.' Op Cit

to eradicate poverty in Africa by pursuing sustainable economic growth, social protection, and environmental health and stewardship among other measures[84]. It is also vital to pursue food security in Africa by increasing the resilience and productive capacity of African food systems through measures such as embracing climate smart agriculture and improving agriculture and food technologies[85]. Eliminating intra-African tariffs and trade barriers in agriculture trade is also essential as envisioned under the AfCFTA[86]. Further, improving health systems in Africa and achieving universal health coverage is vital in achieving SDG3 and the aspiration of Agenda 2063 on good health and well-being for all citizens in Africa[87].

Another pertinent goal in Africa is realizing SDG 6 on clean water and sanitation[88]. Without achieving SDG 6, Africa cannot achieve its developmental goals on health, food security, economic growth, climate action, and many others since water is a critical component of development[89]. It is therefore vital to embrace measures such as strengthening the institutional regulation for water investments and valuing efficient water use across sectors

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[84] Muigua., 'Eradicating Poverty for Inclusive Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2020/12/Eradicating-Poverty-for-Inclusive-Development-in-Kenya-25th-December-2020-Kariuki-Muigua.pdf* (Accessed on 24/10/2023)

[85] The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Available at *https://www.worldbank.org/en/news/immersive-story/2022/10/17/putting-africans-at-the-heart-of-food-security-and-climate-resilience* (Accessed on 24/10/2023)

[86] Ayele. Y., & Mendez-Parra. M., 'How African Integration can Help Achieve Food Security.' Available at *https://odi.org/en/insights/how-african-integration-can-help-to-achieve-food-security/#:~:text=Eliminating%20tariffs%20on%20food%20products,culprit%20of%20high%20food%20prices.* (Accessed on 24/10/2023)

[87] Pheage. T., 'We can Improve Health Systems in Africa.' Available at *https://www.un.org/africarenewal/magazine/december-2016-march-2017/we-can-improve-health-systems-africa* (Accessed on 24/10/2023)

[88] United Nations., 'Sustainable Development Goal 6, Clean Water and Sanitation.' Available at *https://sdgs.un.org/goals/goal6* (Accessed on 24/10/2023)

[89] Global Water Partnership., 'Leaders Commit to Mind the Gap – Invest in Water as the Race to Achieve SDG 6 in Africa Accelerates.' Available at *https://www.gwp.org/en/GWP-SouthernAfrica/About-GWP-SAF/more/News/leaders-commit-to-mind-the-gap--invest-in-water-as-the-race-to-achieve-sdg-6-in-africa-accelerates/#:~:text=In%20Africa%2C%20progress%20on%20SDG,climate%20action%2C%20and%20many%20others.* (Accessed on 24/10/2023)

and industries among others in order to achieve this goal[90]. It is also important to accelerate the attainment of SDG 4 on quality education by increasing funding for education infrastructure, especially focusing on pre-primary and primary education, investing in the training of teachers, and digital connectivity; and SDG 5 on gender equality by fostering gender inclusivity and the enforcement of legal frameworks to protect women and girls against discrimination, domestic violence, child marriage and female genital mutilation among other vices[91].

It is also imperative to accelerate energy transition and foster energy justice in Africa in order to actualize Agenda 2063 and unlock Sustainable Development in the continent[92]. Agenda 2063 recognizes the importance of energy in the realization of its aspirations and seeks to enhance the transition to renewable energy and eradicate energy poverty in Africa[93]. It is therefore necessary to upscale investments in green energy sources as renewable energy and address energy injustices by enhancing the accessibility and affordability of energy in Africa and fostering public participation and inclusivity in energy decision making[94].

There is also need to confront climate change in Africa in order achieve Sustainable Development[95]. Agenda 2063 recognizes while Africa has played a relatively minor role and contributed little to the accumulation of greenhouse gases and the attendant climate change, it is the most vulnerable region to climate change risks[96]. It seeks to foster environmentally sustainable and

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[90] Ibid

[91] United Nations Development Programme., 'New Africa SDGs Report Shows Slow Progress, Calls for Greater Action to Meet Targets.' Available at *https://www.undp.org/africa/press-releases/new-africa-sdgs-report-shows-slow-progress-calls-greater-action-meet-targets* (Accessed on 24/10/2023)

[92] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

[93] African Union., 'Agenda 2063: The Africa we Want.' Op Cit

[94] Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Available at *https://kmco.co.ke/wp-content/uploads/2023/06/Adopting-Green-Energy-for-a-Bright-Tomorrow.pdf* (Accessed on 24/10/2023)

[95] Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2023/08/Reflections-on-Confronting-Climate-Change-in-Africa.pdf* (Accessed on 24/10/2023)

[96] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

climate resilient economies and communities in Africa[97]. It has been pointed out that while Africa has contributed negligibly to climate change, with just about two to three percent of global emissions, it stands out disproportionately as the most vulnerable region in the world[98]. It is thus imperative to combat climate change and foster climate justice in Africa[99]. There is need for African countries to respond to climate change by focusing and investing in climate change mitigation and adaptation strategies[100]. It is also vital to unlock climate finance in Africa at the national, regional and global levels in order to enhance the continent's response to climate change[101]. Developed countries also have a role to play in fostering climate justice in Africa through climate finance as envisioned under the principle of common but differentiated responsibilities stipulated under the United Nations Framework Convention for Climate Change (UNFCCC)[102]. It is therefore vital for developed countries to deliver on an agreed climate finance target of $100 billion annually by 2020 in order to aid the response towards climate change in developing countries including Africa[103]. Further, it is necessary to actualize the COP 27 Loss and Damage Fund in order to foster climate justice and provide funds for vulnerable countries in Africa and other areas to respond to the loss and damage resulting from the effects of climate change[104].

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[97] Ibid

[98] United Nations Environment Programme., 'Responding to Climate Change.' Available at *https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change* (Accessed on 24/10/2023)

[99] Ibid

[100] Diagana. O., '3 key Fronts on Which Africa Must Combat Climate Change.' Available at *https://blogs.worldbank.org/africacan/3-key-fronts-which-africa-must-combat-climate-change* (Accessed on 24/10/2023)

[101] Muigua. K., 'Unlocking Climate Finance for Development.' Available at *https://kmco.co.ke/wp-content/uploads/2023/08/Unlocking-Climate-Finance-for-Development.pdf* (Accessed on 24/10/2023)

[102] United Nations Framework Convention on Climate Change., United Nations, 1992., 'Available at *https://unfccc.int/resource/docs/convkp/conveng.pdf* (Accessed on 24/10/2023)

[103] Kone. T., 'For Africa to meet its Climate Goals, Finance is Essential.' Available at *https://climatepromise.undp.org/news-and-stories/africa-meet-its-climate-goals-finance-essential* (Accessed on 24/10/2023)

[104] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Available at *https://greenly.earth/en-us/blog/company-guide/what-is-the-cop27-loss-and-damage-fund* (Accessed on 24/10/2023)

Finally, it is vital to foster and embrace effective conflict management in Africa. Conflicts are a major hindrance to peace, security, sustainability and development in Africa[105]. It is therefore important to enhance access to justice through Alternative Dispute Resolution (ADR) mechanisms, promote effective, accountable and effective justice systems, strengthen the rule of law and foster good governance in order to effectively address conflicts in Africa[106]. There is also need to curb the resource curse through sustainable governance, management and benefit sharing in respect of natural resources in order to reduce conflicts and enhance economic, social and environmental benefits from natural resources[107]. Actualizing the Africa Mining Vision will also enhance sustainability in the mining sector in Africa[108].

The foregoing measures are essential in actualizing Agenda 2063 for Sustainable Development in Africa.

6.0 Conclusion

Agenda 2063 is geared towards achieving Sustainable Development in Africa[109]. The aspirations, goals and targets of Agenda 2063 fit well within the United Nations 2030 Agenda for Sustainable Development. Agenda 2063 and the 2030 Agenda for Sustainable Development are mutually supportive and coherent and can unlock virtually all the SDGs in Africa[110]. There has been progress towards actualizing the First Ten Year Implementation Plan of Agenda 2063 as pointed out in the First and Second Continental Reports on

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[105] United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Available at *https://www.un.org/osaa/sites/www.un.org.osaa/files/docs/2109875_osaa_sg_report_web_new.pdf*

[106] International Development Law Organization., 'Achieving the 2030 Agenda and Agenda 2063: The Rule of Law as a Driver of Africa's Sustainable Development.' Available at *https://www.idlo.int/sites/default/files/pdfs/publications/IDLO-AfricaConfered-ROL-Tanzania-REPORT-Edited-16.08.2017-RB.pdf* (Accessed on 24/10/2023)

[107] Henri. A., 'Natural Resources Curse: A Reality in Africa.' Op Cit

[108] Muigua. K., 'Embracing Sustainable Mining in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2023/10/Embracing-Sustainable-Mining-in-Africa.pdf* (Accessed on 24/10/2023)

[109] Muigua. K., 'Africa's Agenda 2063: What is in it for Kenya?' Op Cit

[110] Muigua. K., 'Africa's Agenda 2063: What is in it for Kenya?' Op Cit

the Implementation of Agenda 2063[111]. However, there are pressing challenges facing the realization of Agenda 2063 and the SDGs in Africa. It is therefore imperative to actualize Agenda 2063 in order to achieve Sustainable Development in Africa. This can be achieving by aligning national development plans with Agenda 2063 and pursuing true Sustainable Development through measures such as eradicating poverty; promoting food security; enhancing access to health, education and clean water and sanitation; accelerating the energy transition in Africa and promoting energy justice; confronting climate change; and embracing effective conflict management in Africa[112]. Actualizing Agenda 2063 for Sustainable Development in Africa is an ideal that can be achieved.

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[111] Africa Union., 'First Continental Report on the Implementation of Agenda 2063.'; Africa Union., 'Second Continental Report on the Implementation of Agenda 2063.
[112] Muigua. K., 'A Clarion call for Action: Realising True Sustainable Development.' Op Cit

Building Capacity for Sustainability in Africa

Abstract
Capacity building has been identified as a key tool for achieving sustainability. It has been pointed out that African countries can achieve Sustainable Development by strengthening their human, institutional and organizational capacities. This paper critically examines the role of capacity building in the Sustainable Development agenda in Africa. It argues that African countries can accelerate the achievement of sustainability by enhancing their human, institutional and organizational capacities. The paper discusses the progress made and challenges faced towards building capacity for sustainability in Africa. It also highlights interventions that are necessary towards building capacity for sustainability in Africa.

1.0 Introduction

Achieving sustainability has become a global agenda in recent decades in light of mounting problems including environmental challenges such as climate change, together with issues of poverty, increasing disparity between societies and the tensions brought by social inequalities[1]. The need to strike a balance between the environmental, social and economic facets of development towards sustainability gave rise to the concept of Sustainable Development[2]. The idea of Sustainable Development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs[3]. Sustainable Development seeks to foster sustainability by promoting environmental protection, economic development and social progress[4].

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[1] Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) Integrated Reporting. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 27/12/2023)

[2] Ibid

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

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

The United Nation's *2030 Agenda for Sustainable Development*[5] seeks to nurture sustainability. The Agenda represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development[6]. The Agenda envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability[7].

Achieving sustainability is an important agenda in Africa. The continent continues to face several problems which hinder the realization of sustainability including poverty, hunger, unemployment, a growing debt crisis, environmental degradation and political instability in some countries[8]. As a result of the foregoing among other problems facing the continent, it has been pointed out that Sustainable Development remains elusive for many African countries[9]. Tackling the foregoing problems is essential in realizing sustainability in Africa.

Capacity building has been identified as a key tool for achieving sustainability[10]. It has been pointed out that African countries can achieve Sustainable Development by strengthening their human, institutional and organizational capacities[11]. Building capacity is therefore necessary for sustainability in Africa.

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[5] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pdf* (Accessed on 27/12/2023)
[6] Ibid
[7] Ibid
[8] African Development Bank Group., 'The Way Forward to Achieving Sustainable Development in Africa.' Available at
https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/ADR15_chapter_8.pd f (Accessed on 27/12/2023)
[9] Ibid
[10] United Nations., 'Capacity-Building.' Available at
https://sustainabledevelopment.un.org/topics/capacity-building#:~:text=Sustainable%20Development%20Goal%20Target%2017.9,to%20impleme nt%20all%20the%20sustainable (Accessed on 27/12/2023)
[11] African Development Bank Group., 'Capacity-Building.'

This paper critically examines the role of capacity building in the Sustainable Development agenda in Africa. It argues that African countries can accelerate the achievement of sustainability by enhancing their human, institutional and organizational capacities. The paper discusses the progress made and challenges faced towards building capacity for sustainability in Africa. It also highlights interventions that are necessary towards building capacity for sustainability in Africa.

2.0 The Role of Capacity Building in the Sustainable Development Agenda

Capacity-building has long been recognized as one of the means of implementation for the achievement of Sustainable Development[12]. This is reflected in the outcome documents and action plans adopted by major international conferences on Sustainable Development[13]. *Agenda 21*[14] recognizes the role of capacity building in the Sustainable Development agenda. According to Agenda 21, the ability of a country to follow Sustainable Development paths is determined to a large extent by the capacity of its people and its institutions as well as by its ecological and geographical conditions[15]. Capacity-building as envisaged under Agenda 21 encompasses a country's human, scientific, technological, organizational, institutional and resource capabilities[16]. In addition, Agenda 21 states that the fundamental goal of capacity-building is to enhance the ability to evaluate and address the crucial questions related to policy choices and modes of implementation among development options, based on an understanding of environmental potentials and limits and of needs as perceived by the people of the country concerned[17]. Agenda 21 requires all countries to develop and improve national and related

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https://www.afdb.org/en/knowledge/african-development-institute/capacity-building (Accessed on 27/12/2023)

[12] United Nations., 'Capacity Development.' Available at *https://sdgs.un.org/topics/capacity-development* (Accessed on 28/12/2023)

[13] Ibid

[14] United Nations., 'United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992: Agenda 21.' Available at *https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf* (Accessed on 28/12/2023)

[15] Ibid, Chapter 37

[16] Ibid

[17] Ibid

subregional and regional capacities and capabilities for Sustainable Development, with the involvement of the non-governmental sectors[18].

In addition, the *Johannesburg Plan of Implementation (JPOI)[19]*, adopted at the 2002 World Summit on Sustainable Development also recognizes the importance of capacity-building for the achievement of Sustainable Development. The JPOI requires governments as well as relevant regional and international organizations and other relevant stakeholders to support capacity needs for training, technical know-how and strengthening national institutions in all countries for Sustainable Development[20]. It also urges developed countries to support capacity building efforts for Sustainable Development in developing countries through the urgent mobilization of financial resources and technological assistance and the development of human and institutional capacity[21].

The role of capacity building in Sustainable Development is also enshrined in the outcome document of the *Rio +20 Conference[22]*. The document emphasizes the need for enhanced capacity-building for Sustainable Development and calls for the strengthening of technical and scientific cooperation, including North-South, South-South and triangular cooperation[23]. It also urges countries to build capacity for Sustainable Development through human resource development, including training, the exchange of experiences and expertise, knowledge transfer and technical assistance for capacity-building, and strengthening institutional capacity, including planning, management and monitoring capacities[24].

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[18] Ibid

[19] United Nations., 'Plan of Implementation of the World Summit on Sustainable Development.' Available at *https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf* (Accessed on 28/12/2023)

[20] Ibid

[21] Ibid

[22] United Nations., 'United Nations Conference on Sustainable Development': Rio de Janeiro, Brazil 20-22 June 2012.' A/CONF.216/L.1., Available at *https://wedocs.unep.org/bitstream/handle/20.500.11822/13662/N1238164.pdf?sequence=1&amp%3BisAllowed=* (Accessed on 28/12/2023)

[23] Ibid

[24] Ibid

Further, the 2030 Agenda for Sustainable Development recognizes capacity building as a key mechanism for achieving sustainability[25]. Each SDG contains targets relating to means of implementation, including capacity- building[26]. Further, SDG 17 seeks to strengthen the means of implementation and revitalize the global partnership for Sustainable Development[27]. Capacity building is one the targets under SDG 17 which seeks to *inter alia* enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation[28].

Building capacity is therefore necessary for the achievement of Sustainable Development. It has been observed that capacity building activities are aimed at strengthening and maintaining the capabilities of states and societies to design and implement strategies that minimize the negative impacts of current social, economic and environmental crises and emerging challenges[29]. Further, it has been pointed out that capacity building activities can promote the integration of the 2030 Agenda for Sustainable Development and the SDGs into local, national, regional, continental and global Sustainable Development planning frameworks[30]. Capacity building therefore represents a fundamental approach in the implementation and achievement of the SDGs. According to the United Nations, capacity building is a fundamental strategy that underpins the entire framework of the Sustainable Development agenda[31]. Its holistic approach ensures that efforts in one area support and reinforce progress in others, creating a more integrated and effective path towards Sustainable Development[32]. The United Nations points out that capacity building requires a concerted effort from various stakeholders, including governments, international organizations, the private sector, civil society, and

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[25] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1.,' Op Cit
[26] Ibid
[27] Ibid
[28] Ibid
[29] United Nations., 'Capacity Development.' Op Cit
[30] Ibid
[31] United Nations., 'Capacity-Building.' Op Cit
[32] Ibid

local communities, to share knowledge, expertise, and resources[33]. It is therefore necessary for all countries to build capacity in order to achieve sustainability.

3.0 Building Capacity for Sustainability in Africa: Progress and Challenges

Building capacity is vital for achievement of sustainability in Africa. It has been argued that strengthening capacity in low-and-middle-income countries is recognized as a major contributor to a country's socioeconomic development and to achieving the SDGs[34]. It has been argued that in the African context, building capacity can be seen as a way of helping individuals, businesses, civil society organisations and governments gain the skills and resources they need to effectively implement projects and programmes geared towards Sustainable Development[35]. It has been asserted that some of the key elements of African capacity building include financial provision, personal development, project implementation, technology development, and monitoring and evaluation[36].

Africa Union's *Agenda 2063*[37] recognizes the importance of building capacity for sustainability in Africa. Agenda 2063 identifies capacity building as one of the intermediation instruments and intervention areas necessary for the realization of the Sustainable Development agenda in Africa[38]. According to Agenda 2063, international cooperation and partnerships for development on both bilateral and global levels that are in line with national ownership, has a crucial role to play as enablers to support through providing finance,

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[33] Ibid

[34] The Royal Society., 'Africa Capacity Building Initiative case study - Challenges and benefits for PhD students.' Available at *https://royalsociety.org/grants-schemes-awards/grants/africa-capacity-building/challenges-benefits-phd-students/#:~:text=The%20ACBI%20programme%20at%20a,achieving%20Sustainable%20Development%20Goals1* (Accessed on 28/12/2023)

[35] Sustainable African Strategies., 'Strategies-for-Sustainable-Development-in-African-Capacity-Building.' Available at *https://www.linkedin.com/pulse/strategies-for-sustainable-development/?trk=organization_guest_main-feed-card_feed-article-content* (Accessed on 28/12/2023)

[36] Ibid

[37] Africa Union., 'Agenda 2063: The Africa We Want.' Available at *https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf* (Accessed on 28/12/2023)

[38] Ibid

technology transfer, and *capacity building* in order to achieve the goals and aspirations of the Agenda[39]. Agenda 2063 envisages a holistic African approach to capacity development based on certain key elements including: transformative leadership; citizen transformation; evidence - based knowledge and innovation; using African potential skills and resources; capacity of the capacity developer; and integrated planning and implementation for sustainability[40]. According to Agenda 2063, it is imperative to build capacity across sectors and at various levels including the continental, regional, national, sectoral, sub-national and local levels in order to achieve sustainability in Africa[41].

Agenda 2063 envisages building capacity in three fundamental areas. The first key area is *individual (human) capacity* which generally includes capabilities in terms of skills, training, performance, values, attitudes, motivation, professional integrity, relationships, and communication skills[42]. According to Agenda 2063, building these skills can strengthen the ability to conceptualize, design, develop, implement, monitor and evaluate the required and result oriented programs/ projects, policies and strategies to make Agenda 2063 and sustainability happen in Africa[43]. In addition, another key area involves *institutional/ organizational capacity* which demands that the institutions tasked with delivering rapid structural transformation and growth be able to act both effectively and in a coordinated manner[44]. According to Agenda 2063, this requires approaches geared towards learning, relearning and flexibility, coupled with institutional capacities that are of relevance to the tasks defined[45]. In addition, Agenda 2063 correctly points out that achieving sustainability in Africa requires building capacity through *enabling policy, legal and regulatory environments(Emphasis added)*[46]. Agenda 2063 therefore envisions building capacity for sustainability in Africa through strengthening individual (human) capacity, organizational/institutional capacity, and the creation of enabling

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[39] Ibid

[40] Africa Union., 'Agenda 2063: The Africa We Want.' Op Cit

[41] Ibid

[42] Ibid

[43] Ibid

[44] Ibid

[45] Ibid

[46] Ibid

policy, legal and regulatory environments[47]. Realizing the goals and aspirations of Agenda 2063 is integral in building capacity for sustainability in Africa.

There has been some progress towards building capacity for sustainability in Africa across the key sectors identified under Agenda 2063 being individual (human) capacity, organizational/institutional capacity and enabling policy, legal, and regulatory environments[48]. In terms of human capacity, it has been noted that investing in human capital in Africa is crucial for achieving the SDGs[49]. It has been noted that most African countries are making progress towards building individual (human) capacity through investments in education and skills development which are vital factors in paving the way for prosperous economies and societies in the continent[50]. According to the African Union, the continent has made some progress towards building human capital through investments in health systems; education including vocational training; science, research and innovation, as well as social security and protection of vulnerable groups[51].

In addition, progress has been made towards building organizational/institutional capacity for sustainability in Africa. There has been growth of African-led institutions/organizations at the continental, regional, sub-regional, national and local levels geared towards fostering sustainability[52]. However, more needs to be done in this area since it has been

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[47] Africa Union., 'Agenda 2063: The Africa We Want.' Op Cit

[48] Ibid

[49] Suri. S., 'African Human Capital Investment: Crucial to Achieving the Sustainable Development Goals.' Available at *https://www.orfonline.org/expert-speak/african-human-capital-investment#:~:text=Investing%20in%20human%20capital%20in,and%20a%20lack%20of%20infrastructure.* (Accessed on 28/12/2023)

[50] Ibid

[51] Africa Union., 'Africa's Human Capacity.' Available at *https://au.int/en/auc/priorities/africa%E2%80%99s-human-capacity* (Accessed on 28/12/2023)

[52] Ezeh. A., & Lu. J., 'Transforming the Institutional Landscape in Sub-Saharan Africa: Considerations for Leveraging Africa's Research Capacity to Achieve Socioeconomic Development.' Available at *https://www.cgdev.org/sites/default/files/transforming-institutional-landscape-sub-saharan-africa-considerations-leveraging-africa.pdf* (Accessed on 28/12/2023)

pointed out that weak institutions and capacity to formulate and implement policies, strategies, programs and projects remain a persistent challenge in Africa which hinders the realization of Sustainable Development[53].

Further, it has been observed that many African states have put in place or are putting in place the legal and policy frameworks required to address sustainability across key thematic areas including environmental protection[54]. The United Nations Environment Programme notes that there have been positive steps towards strengthening environmental rule of law in some African countries as demonstrated by stronger environmental protection regimes and enhanced efforts towards tackling environmental challenges including climate change[55]. Building capacity is therefore necessary for sustainability in Africa.

Capacity building can accelerate the realization of Sustainable Development in Africa across all the SDGs including food security, health, education, energy and climate action[56]. In terms of food security, it has been pointed out that building capacity can increase agricultural production, diversification and innovations in agribusiness to increase the availability of nutritious food for vulnerable populations in Africa, as well as improve the quality of life for the people of Africa[57]. Further, in the health sector, it has been asserted that

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[53] African Development Bank Group., 'About African Development Institute.' Available at *https://www.afdb.org/en/knowledge/african-development-institute/about-adi* (Accessed on 28/12/2023)

[54] United Nations Development Programme., '2020 Africa Sustainable Development Report.' Available at https://www.undp.org/sites/g/files/zskgke326/files/migration/africa/RBA---ASDR-2020---updated---03032022.pdf (Accessed on 28/12/2023)

[55] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/43943/Environmental_rule_of_law_progress.pdf?sequence=3&isAllowed=y (Accessed on 28/12/2023)

[56] African Union., 'Three Decades of Capacity Building in Africa: ACBF Looks Back at 32 years of Service.' Available at https://au.int/en/pressreleases/20230403/three-decades-capacity-building-africa-acbf-looks-back-32-years-service (Accessed on 29/12/2023)

[57] African Development Bank Group., 'African Development Bank supports Capacity Building in Nutrition and Food Security in the ECOWAS Region.' Available at https://www.afdb.org/fr/news-and-events/african-development-bank-supports-

empowering African health practitioners and building the capacity of African research institutions facilitates the local capacity to battle diseases in the continent towards fostering good health and well-being for all[58]. Building capacity in the education sector in Africa can foster the achievement of innovative solutions and scale-up efforts to improve educational outcomes in Africa through measures such as strengthening teachers' professional development, and building capacity in education institutions[59]. In addition, capacity building for the energy sector in Africa can help respond to Africa's shortage of human and institutions skills, which has been identified as a major challenges facing the development of energy sector in Africa[60]. Capacity building can strengthen Africa's energy sector by enhancing innovation on energy technologies (renewable & conventional), energy regulatory framework, energy market and economies, energy projects development, operation and maintenance of energy facilities, renewable energies, the electricity sector among others[61]. Finally, capacity building can also strengthen climate action in the continent by enabling African countries to implement successful mitigation and adaptation strategies to climate change and further improving the capacity of African countries to participate effectively in multilateral climate negotiations[62].

Building capacity is therefore integral for sustainability in Africa. However, it has been pointed out that the ability of Africa to realize sustainability is hindered by several challenges. Africa's human capacity to unlock

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capacity-building-in-nutrition-and-food-security-in-the-ecowas-region-17265 (Accessed on 29/12/2023)

[58] Capacity building for better health in Africa., Available at https://funccet.es/capacity-building-for-better-health-in-africa/ (Accessed on 29/12/2023)

[59] International Institute for Capacity Building in Africa., Available at https://www.iicba.unesco.org/en/about-us (Accessed on 29/12/2023)

[60] African Union., 'Capacity Building for the Energy Sector.' Available at https://au-afrec.org/capacity-building (Accessed on 29/12/2023)

[61] Ibid

[62] United Nations Climate Change., 'Capacity-Building Portal: Africa.' Available at *https://unfccc.int/topics/capacity-building/workstreams/capacity-building-portal/complementary-resources/capacity-building-portal-africa*#*Adaptation* (Accessed on 29/12/2023)

sustainability is hindered by inadequate skills, knowledge and competence[63]. In addition, in terms of institutional capacity, it has been asserted that weak institutions and capacity to formulate and implement policies, strategies, programs and projects remain a persistent challenge in Africa that hinders the achievement of sustainability[64]. Further, the legal capacity in some African countries faces several challenges including weak legal regimes and failure to uphold the rule of law[65]. It is imperative to address these problems in order to build capacity for sustainability in Africa.

4.0 Way Forward

In order to achieve sustainability in Africa, there is need to build the Continent's *individual (human) capacity(Emphasis added)*[66]. This calls for strengthening of individual/human capabilities in terms of skills, training, performance, values, attitudes, motivation, professional integrity, relationships, and communication skills[67]. It has been pointed out that building individual/human capacity in Africa can strengthen the ability of Africans to conceptualize, design, develop, implement, monitor and evaluate the required and result oriented programs/ projects, policies and strategies geared towards sustainability in the continent[68]. It has correctly been pointed out that through capacity building, an individual who has been empowered to facilitate change can impact their organization and their community[69]. Individual (human) capacity in Africa can be enhanced through education, training and mentorship[70]. In addition, it has been pointed out that building capacity through developing entrepreneurial skills in individuals can help create more successful businesses in Africa which can lead to greater economic

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[63] African Development Bank Group., 'Human Capital Development.' Available at https://www.afdb.org/en/topics-and-sectors/sectors/human-capital-development (Accessed on 29/12/2023)

[64] African Development Bank Group., 'About African Development Institute.' Op Cit

[65] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[66] Africa Union., 'Agenda 2063: The Africa We Want.' Op Cit

[67] Ibid

[68] Ibid

[69] Capacity for Health., '8 Examples of Capacity Building Activities for Health Service Organizations.' Available at https://capacity4health.org/examples-of-capacity-building-activities/ (Accessed on 29/12/2023)

[70] Ibid

stability throughout the Continent[71]. It is therefore imperative to build individual (human) capacity in Africa. It has been correctly pointed out that harnessing individual potentials of Africa's human capital is the most sustainable key to economic transformation and social progress[72].

In addition, it is imperative to strengthen Africa's institutional/ organizational capacity. It has been pointed out that achieving sustainability in Africa demands that the institutions tasked with delivering rapid structural transformation and growth be able to act both effectively and in a coordinated manner[73]. However, the institutional/organizational capacity in many African countries is characterized by weak institutions which hinders the capacity to formulate and implement policies, strategies, programs and projects[74]. It has been pointed out that the institutional capacities of African countries will have to be strengthened if the many challenges facing the continent are to be overcome[75]. Institutions/organizations are the major drivers of socio-economic development throughout the world and thus achieving sustainability in Africa calls for the establishment of strong, independent and efficient institutions/organizations[76].

Further, there is need to create enabling policy, legal and regulatory environments in Africa through measures such as strengthening the rule of law and enacting and implementing sound laws[77]. The rule of law is widely recognized as an essential component of good governance and Sustainable Development[78]. However, the rule of law in some Africa countries is

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[71] Sustainable African Strategies., 'Strategies-for-Sustainable-Development-in-African-Capacity-Building.' Op Cit

[72] African Development Bank Group., 'Human Capital Development.' Available at https://www.afdb.org/en/topics-and-sectors/sectors/human-capital-development (Accessed on 29/11/2023)

[73] Africa Union., 'Agenda 2063: The Africa We Want.' Op Cit

[74] African Development Bank Group., 'About African Development Institute.' Op Cit

[75] Kabbaj. O., 'Capacity Building, Governance, and Economic Reform in Africa.' Available at *https://www.elibrary.imf.org/downloadpdf/book/9781589060722/ch002.xml* (Accessed on 29/12/2023)

[76] Ibid

[77] Africa Union., 'Agenda 2063: The Africa We Want.' Op Cit

[78] Centre for Strategic and International Studies., 'The Rule of Law and Sustainable Development.' Available at *https://www.csis.org/analysis/rule-law-and-sustainable-development (Accessed on 29/12/2023)*

threatened by challenges such as corruption, lack of strong independent democratic institutions, weak judiciaries, and a shrinking civic space[79]. It is therefore important to address these challenges in order to create enabling policy, legal and regulatory environments for sustainability in Africa. This calls for enactment and implementation of sound legislations, strengthening the rule of law, tackling corruption and fostering judicial independence[80].

Finally, there is need to embrace regional, continental and global cooperation towards building capacity for sustainability in Africa[81]. It has been asserted that countries can achieve sustainability through strengthening of technical and scientific cooperation, including North-South, South-South and triangular cooperation[82]. SDG 17 urges all countries to enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the SDGs, including through North-South, South-South and triangular cooperation[83]. It is therefore important to build capacity for sustainability in Africa by embracing regional, continental and global cooperation in areas such as technical and scientific cooperation and research[84].

It is important to embrace the foregoing among other measures in order to build capacity for sustainability in Africa.

5.0 Conclusion

Capacity-building is recognized as one of the means of implementation for the achievement of Sustainable Development[85]. Building capacity is vital for achievement of sustainability in Africa. There has been some progress towards building individual (human), institutional/organization and legal capacity for

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[79] Africa Legal., 'Advancing the Rule of Law in Africa.' Available at *https://www.lexisnexis.co.za/__data/assets/pdf_file/0004/901948/LN_Rule-of-Law_Report_Final.pdf* (Accessed on 29/12/2023)

[80] Ibid

[81] Kabbaj. O., 'Capacity Building, Governance, and Economic Reform in Africa.' Op Cit

[82] United Nations., 'United Nations Conference on Sustainable Development' Op Cit

[83] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1.' Op Cit

[84] Ibid

[85] United Nations., 'Capacity Development.' Op Cit

sustainability in Africa[86]. However, challenges such as inadequate skills, knowledge and competence; weak institutions; and weak legal regimes and failure to uphold the rule of law hinder the potential of Africa to achieve sustainability[87]. It is important to address these problems in order to build capacity for sustainability in Africa. Building capacity for sustainability in Africa calls for strengthening individual/human capabilities in terms of skills, training, performance, values, attitudes, motivation, professional integrity, relationships, and communication skills[88]; the establishment of strong, independent and efficient institutions/organizations[89]; strengthening the rule of law[90]; and embracing regional, continental and global cooperation towards building capacity for sustainability in Africa[91]. Building capacity for sustainability in Africa is an important and achievable ideal.

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[86] Africa Union., 'Agenda 2063: The Africa We Want.' Op Cit

[87] Ibid

[88] Ibid

[89] Kabbaj. O., 'Capacity Building, Governance, and Economic Reform in Africa.' Op Cit

[90] Centre for Strategic and International Studies., 'The Rule of Law and Sustainable Development.'

[91] Kabbaj. O., 'Capacity Building, Governance, and Economic Reform in Africa.' Op Cit

Third Party Funding in International Arbitration- A Reflection

Abstract
International Arbitration is field that is continuously evolving and now encompasses several emerging issues. Among the key emerging trends in international arbitration is the rise of third-party funding. This paper critically reflects upon the concept of third party funding in international arbitration. It defines third party funding and discusses its emergence in international arbitration. The paper further highlights the advantages of third party funding in international arbitration. It also discusses some of the key concerns about third party funding in international arbitration and proposes reforms in light of such concerns.

1.0 Introduction

Arbitration is one of the Alternative Dispute Resolution (ADR) processes[1]. ADR refers to a set of processes that are applied to manage disputes without resort to adversarial litigation[2]. It can also refer to a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes[3]. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[4].

The *Charter of the United Nations[5]* sets out the legal foundation for ADR mechanisms at the global level. It provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[6](Emphasis added). At a national level, the *Constitution of Kenya[7]* embraces ADR mechanisms. It mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation,

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[1] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[2] Ibid

[3] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[4] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[5] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[6] Ibid, Article 33 (1)

[7] Constitution of Kenya, 2010., Government Printer, Nairobi

arbitration and TDRMs[8]. ADR mechanisms are viewed as ideal in enhancing access to justice due to some of their key attributes[9]. These features include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes[10].

Arbitration refers to a private consensual process where parties in dispute agree to present their grievances to a third party for resolution[11]. It has also been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute[12]. Arbitration has emerged as the preferred mechanism for managing disputes especially those that are transnational in nature[13]. It has a transnational applicability which means that it applies across different jurisdictions and therefore guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems[14]. It also guarantees enforcement of decisions through the *New York Convention[15]* which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration.

International Arbitration is a field that is continuously evolving and now encompasses several emerging issues[16]. Among the key emerging trends in

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[8] Ibid, Article 159 (2) (c)

[9] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[10] Ibid

[11] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

[12] World Intellectual Property Organization., 'What is Arbitration' Available at *https://www.wipo.int/amc/en/arbitration/what-is-arb.html* (Accessed on 16/01/2024)

[13] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at
http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONALCOMMERCIALARBITRATION-IN-AFRICA.pdf (Accessed on 16/01/2024)

[14] Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

[15] United Nations Commission on International Trade Law., '*Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*' (New York, 1958)

[16] International Chamber of Commerce., 'Third-party Funding in International Arbitration.' Available at *https://iccthailand.or.th/media/www/product/92846621543303446.pdf* (Accessed on 16/01/2024)

international arbitration is the rise of third-party funding[17]. This paper critically reflects upon the concept of third party funding in international arbitration. It defines third party funding and discusses its emergence in international arbitration. The paper further highlights the advantages of third party funding in international arbitration. It also discusses some of the key concerns about third party funding in international arbitration and proposes reforms in light of such concerns.

2.0 Defining Third Party Funding in International Arbitration

It has been pointed out that the idea of third party funding originally emerged in civil litigation where it was conceived as a method of financing litigation and therefore a tool to reduce or eliminate the risk associated with potentially unfavorable outcome of the litigation[18]. It occurs when a third party, external to the parties and not involved in the legal relation between them, agrees to pay for the one party's (in most cases the Claimant) legal fees, including costs of lawyers, experts, outside counsels, any other costs that may be relevant or needed in the civil litigation in accordance with a stipulated agreement and stipulated budget, in exchange for an agreed return[19]. It has also been observed that third party funding arises when a third party litigation or arbitration funder provides financial support to enable individuals or commercial entities to pursue or defend legal proceedings[20]. In addition, the funder may additionally agree to pay the opposing party's costs if the funded party is so ordered and provide security for the opponent's cost[21]. It has been asserted that third-party funding is a growing phenomenon that is becoming more mainstream in both the litigation and the international arbitration communities[22].

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[17] Ibid

[18] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Available at *https://core.ac.uk/download/pdf/132335993.pdf* (Accessed on 16/01/2024)

[19] Ibid

[20] Ibid

[21] Ibid

[22] Sahani. V. S., 'Third-Party Funding in International Arbitration.' Available at *https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1217&context=shorter_works* (Accessed on 16/01/2024)

In international arbitration, third party funding occurs when a person who is not involved in an arbitration provides funds to a party to that arbitration in exchange for an agreed return[23]. It has also been defined as the involvement of an entity with no prior interest in the legal dispute, providing financial assistance to one of the parties, usually the Claimant, on a non-recourse basis in the case of an unsuccessful claim[24]. Third-party funding can also refer to a financing method in which an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award, or judgment rendered against that party, or both[25]. Typically, the funding will cover the funded party's legal fees and expenses incurred in the arbitration[26]. Further, the funder may also agree to pay the other side's costs and provide security for the opponent's costs if the funded party is so ordered[27].

It has been posited that the emergence of third-party funding can be attributed to the upsurge in the practice of international arbitration, with the users demanding innovative ways to finance arbitral matters[28]. In addition, it has been argued that international arbitration is a particularly attractive area of investment in form of third party funding due to certain factors[29]. These include the high values of the claims, the speed of the proceedings, the potential for greatly reduced evidentiary costs, the greater predictability of the outcome than in litigation, the industry expertise of the decision-makers, and the high enforceability of arbitration awards[30].

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[23] Ashurst., 'Third Party Funding in International Arbitration.' Available at *https://www.ashurst.com/en/insights/quickguide-third-party-funding-in-international-arbitration/#:~:text=Third%20party%20funding%20is%20where,expenses%20incurred%20in%20the%20arbitration* (Accessed on 16/01/2024)

[24] Nyamasi. I., 'Third Party Funding in International Arbitration.' Available at *https://ncia.or.ke/wp-content/uploads/2021/03/Third-Party-Funding-In-International-Arbitration.pdf* (Accessed on 16/01/2024)

[25] Sahani. V. S., 'Third-Party Funding in International Arbitration.' Op Cit

[26] Ashurst., 'Third Party Funding in International Arbitration.' Op Cit

[27] Ibid

[28] Nyamasi. I., 'Third Party Funding in International Arbitration.' Op Cit

[29] Sahani. V. S., 'Third-Party Funding in International Arbitration.' Op Cit

[30] Ibid

It has been observed that two key factors are driving the increased demand for dispute financing in form of third party funding in international arbitration[31]. On one hand, third party funding has been necessitated by the global financial market crisis, which has forced financial institutions to seek new forms of investments, which are available in international arbitration because of the large amount of money at stake[32]. For example, it has been argued that the provision of funds by non-parties to pursue or defend a dispute, namely third-party funding, has become a focal point in investment arbitration because of participation of States, and the high value of disputes and thus expenses[33]. On the other hand, third party funding is also driven by the very high costs of international arbitration, which induces either needy claimants, or companies that want to maintain sufficient cash flow to continue their regular business while the arbitral proceedings are ongoing, or that simply want to share the risk of the arbitration with a third party, to seek financing to pursue a meritorious claim[34].

It has been observed that in most jurisdictions, third party funding arrangements were traditionally illegal or void, most notably on the grounds of being contrary to the legal doctrines of maintenance and champerty[35]. However, in recent years, there has been a move away from this position and third party funding is a concept that is now permitted in a number of jurisdictions for international arbitrations and court proceedings related to international arbitrations[36]. Third party funding has gained prominence in recent years as a means of mitigating the financial risk and burden associated with international arbitration[37].

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[31] Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' *Arbitration International,* 2016, 32, 505–522
[32] Ibid
[33] Kayali. D., 'Third-Party Funding in Investment Arbitration: How to Define and Disclose It.' *ICSID Review - Foreign Investment Law Journal*, Volume 38, Issue 1, 2023, Pp 113–139
[34] Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' Op Cit
[35] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit
[36] Ibid
[37] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Available at https://www.linkedin.com/pulse/new-

Several international arbitration institutions have now embraced the idea of third party funding. The *International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules*[38] require a party who is a beneficiary of third party funding to issue a notice to that effect[39]. Under the Rules, a party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ('third-party funding')[40]. Further, the Rules provide that if the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person[41]. The Rules require the party who is a recipient of third party funding to file the Notice of Third-Party Funding with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration[42]. The party is required to immediately notify the Secretary-General of any changes to the information in the notice[43]. Further, the Secretary-General is required to transmit the Notice of Third-Party Funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding[44]. In addition, the Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding[45].

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frontier-exploring-role-third-party-funding-tariq-sheikh/?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 16/01/2024)

[38] The International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules., Available at https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (Accessed on 16/01/2024)

[39] Ibid, Rule 14

[40] Ibid, Rule 14 (1)

[41] Ibid

[42] Ibid, Rule 14 (2)

[43] Ibid

[44] Ibid, Rule 14 (3)

[45] Ibid, Rule 14 (4)

In addition, the *International Chamber of Commerce (ICC) Arbitration Rules*[46] also embraces the concept of third party funding. According to the Rules, in order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the *funding of claims or defences* and under which it has an economic interest in the outcome of the arbitration[47] (Emphasis added). It has been argued that under the ICC Arbitration Rules, disclosure and transparency in respect of third party funding arrangements seek to avoid conflicts of interest between an arbitral tribunal and the parties (or any related parties, including funders), thereby ensuring the enforceability of an award[48]. In addition, the obligation to disclose is consistent with a funder's interest to protect its investment since avoiding conflicts of interest further assures a funder of a return on its investment via an enforceable award[49].

The idea of third party funding is therefore being embraced in international arbitration.

3.0 Third Party Funding in International Arbitration: Advantages and Drawbacks

The rise of third party funding in international arbitration has been associated with some benefits. It has been argued that third party funding in international arbitration represents a positive phenomenon, in that it attracts investments, and it permits greater access to justice[50]. Further, it has been posited that the main advantage of third party funding is granting access to justice for those who could not, due to financial reasons, bear costs of expensive, often unpredictable and lengthy civil proceedings (or international or investment

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[46] International Chamber of Commerce (ICC) Arbitration Rules, 2021., Available at *https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf* (Accessed on 16/01/2024)

[47] Ibid, Article 11 (7)

[48] Barnett. J., Macedo. L., & Henze. J., 'Third-Party Funding Finds its Place in the New ICC Rules.' Available at *https://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/* (Accessed on 16/01/2024)

[49] Ibid

[50] Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' Op Cit

arbitration)[51]. In such circumstances, accepting external financial help in form of third party funding may be the only option for the claimant to pursue meritorious claim[52]. Third party funding can therefore enhance access to justice for under-resourced parties (as is often the case in investor–state disputes) enabling them to pursue proceedings which a lack of financing would otherwise have prevented[53]. It has been argued that by reducing the financial barriers to entry, third-party funding has made international arbitration more accessible for parties who may have otherwise been unable to pursue their claims[54]. This ensures that meritorious claims can be heard, regardless of the parties' financial means[55]. Further, for parties that are adequately resourced, third party funding also offers a more convenient financing structure, allowing capital which would otherwise be spent on legal fees to be allocated to other areas of their business during the proceedings[56].

In addition, third party funding in international arbitration has been associated with enhanced risk management[57]. It has been argued that third party funding can also serve as a risk management tool for parties engaged in international arbitration[58]. For example, by sharing the financial risk with an investor, parties can better manage their exposure to potential costs and secure the necessary resources for their legal strategy in international arbitration[59]. In addition, it has been observed that third party funding in international arbitration serves as a risk-management tool by sharing of risk associated with

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[51] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

[52] Ibid

[53] Norton Rose Fulbright., 'International Arbitration Report Issue 7 – September 2016.' Available at *https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-report---issue-7.pdf?revision=&revision=4611686018427387904* (Accessed on 17/01/2024)

[54] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

[55] Ibid

[56] Norton Rose Fulbright., 'International Arbitration Report Issue 7 – September 2016.' Op Cit

[57] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

[58] Ibid

[59] Ibid

the arbitration between a party and a funder[60]. It has also been posited that funders are interested in strong and grounded claims that offer high predictability of refund and will therefore conduct a due diligence and legal analysis to properly assess the risk of pursuing the case[61]. Through this approach, third party funding can therefore assist the Claimant to shape its strategy and prepare a well-grounded claim, which can even be decided through settlement[62].

Third party funding in international arbitration can therefore foster certain advantages including access to justice and enhanced risk management[63]. However, despite these advantages, third party funding in international arbitration can also result in certain concerns. It has been argued that third party funding may end up being expensive since a successful claimant will generally have to pay a significant proportion of damages recovered to the funder[64]. It has correctly been observed that in third party funding, a successful claimant has to pay a significant proportion of his or her recoveries to the funder as a remuneration for funding the arbitration a situation that could end up making the whole process more expensive compared to if the claimant had funded the arbitration on his or her own initiative[65].

In addition, third part funding may result in the loss of one of the key attributes of arbitration which is party autonomy[66]. The feature of party autonomy gives parties significant control in arbitration including the choice of arbitrator and conduct of proceedings and therefore the outcome may be mutually acceptable to the parties[67]. However, in third party funding, a Claimant may to a certain extent lose autonomy in favour of the funding party (in particular when considering settlement) since it may reserve the right of

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[60] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit
[61] Ibid
[62] Ibid
[63] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit
[64] Ashurst., 'Third Party Funding in International Arbitration.' Op Cit
[65] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit
[66] Ibid
[67] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

approval of the settlement[68]. It has been argued that although funders are generally prohibited from taking undue control or influence in an arbitration, there may be some loss of autonomy on the part of the funded party (in particular when considering settlement) since funders may reserve the right of approval of the settlement[69].

Further, third party funding may result in further costs for the party seeking funding[70]. A party seeking funding may incur substantial costs when packaging the case for presentation to a funder[71]. These costs will be wasted if the application for funding is unsuccessful[72]. It has also been observed that even if successful, funders are not usually liable for any costs incurred before the funding arrangement is put into place, including the costs of packaging and the negotiation of the funding arrangements[73]. The issue of costs is therefore a key concern in third party funding.

In addition, third party funding in international arbitration could potentially result in conflict of interest[74]. In third party funding, conflict of interest may arise where an arbitrator, or his/her colleagues or firm, have a relationship with a funder involved in the case[75]. It has also been pointed out that conflict of interest arises in third party funding when there is a direct and dependent relationship between the funder and the arbitrator where the outcome of the case significantly affects: the financial performance, profitability, or share price of the funder, or the arbitrator's personal financial interests[76]. It has been argued that third party funding increases the likelihood of conflict of interest in international arbitration due to cases where an arbitrator has close links

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[68] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit
[69] Ashurst., 'Third Party Funding in International Arbitration.' Op Cit
[70] Ibid
[71] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit
[72] Ibid
[73] Ashurst., 'Third Party Funding in International Arbitration.' Op Cit
[74] Ibid
[75] Ibid
[76] Gilcrest. S., 'When Peer Pressure is not Enough: Mandatory Disclosure and Third-Party Funding.' Available at *https://core.ac.uk/download/pdf/270219865.pdf* (Accessed on 17/01/2024)

with a funder by virtue of being a member of its corporate bodies, or if the arbitrator holds a substantial stake in the funder, given that some of the third party funders are now publicly traded companies[77]. Third party funding could therefore result in cases of conflict of interest. It has been pointed out that adding a third party interested in the outcome of the dispute increases the number of potential situations in which an arbitrator could be in conflict with a party[78].

It is therefore necessary to address the foregoing concerns in order to enhance the suitability of third party funding in international arbitration.

4.0 Way Forward
It has been observed that the growth of third party funding in international arbitration is set to continue, as a result of the ever-increasing costs and complexities of dispute management[79]. Therefore, it is necessary for participants in international arbitration including parties to disputes, arbitrators, lawyers and other party representatives to adapt and develop the necessary skills to navigate the evolving landscape of third party funding in international arbitration[80]. It is also vital to address some of the underlying concerns in third party funding in order to enhance the effectiveness of the process[81]. Several measures are necessary in order to achieve this objective.
To begin with, there is need for enhanced disclosure and transparency in relation to third party funding[82]. It has been pointed out that in most cases parties in international arbitration are not obliged to reveal the involvement of

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[77] Hubbuck. N., 'Reform of the Arbitration Act: Should Disclosure of Third-Party Funding be On the Agenda?' Available at *http://arbitrationblog.practicallaw.com/reform-of-the-arbitration-act-should-disclosure-of-third-party-funding-be-on-the-agenda/* (Accessed on 17/01/2024)
[78] Arnaud. B., 'Third-Party Funding.' Available at
https://jusmundi.com/en/document/publication/en-third-party-funding (Accessed on 17/01/2024)
[79] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit
[80] Ibid
[81] Ibid
[82] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

a funder in a dispute[83]. Therefore, the presence of the funder and the nature of its relationships with the lawyers and the parties in an international arbitration case is often unknown[84]. In addition, it has been observed that the funders generally require that their involvement is not revealed and use confidentiality agreements to prevent the disclosure[85]. However, there is an increasing move from this position with disclosure and transparency being required in third party funding[86]. It has been argued that disclosure of third party funding is necessary due to the arbitrators' impartiality requirement, the potential conflicts of interest, and the transparency, the latter especially in the investment treaty arbitration[87]. In addition, it has been posited that despite there being no general obligation on a funded party to disclose the fact of its funding arrangement, the demand for greater transparency is growing in light concerns regarding conflict of interest[88].

Disclosure and transparency in third party funding offers several advantages. It has been asserted that disclosure of the funding arrangement will often benefit a funded party since the fact that a claim is funded demonstrates that an independent third party has faith in the merits of the claim and so its existence may encourage parties to settle the dispute[89]. In addition, disclosure of third party funding arrangements at an early stage prevents the other party from raising conflict of interest arguments at the enforcement stage should the funded party prove successful[90]. It is therefore necessary for parties in international arbitration to embrace disclosure and transparency in order to enhance suitability of the process.

The need for disclosure and transparency in third party funding is being embraced in international commercial arbitration. *The International Bar*

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[83] Ibid

[84] Ibid

[85] Ibid

[86] Thrasher. R. D., 'Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform.' Available at https://lira.bc.edu/files/pdf?fileid=efcf2063-409d-41e7-ae00-0939116fa502 (Accessed on 17/01/2024)

[87] Ibid

[88] Ashurst., 'Third Party Funding in International Arbitration.' Op Cit

[89] Ibid

[90] Ibid

Association (IBA) Guidelines on Conflicts of Interest in International Arbitration[91] addresse the conflict of interest concerns arising from third party funding in international arbitration. Under the Guidelines, if one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, it may be considered to bear the identity of such party[92]. It has been correctly pointed out that given the fact that the funder may have a direct economic interest in the award, as such it may be considered to be an equivalent of the party[93]. In addition, the IBA Guidelines provide as follows in relation to the duty of disclosure:

> *'A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration (Emphasis added)[94].'*

The IBA Guidelines therefore embrace the duty of disclosure and transparency in third party funding. It has been pointed out that the IBA Guidelines were an important milestone towards transparency since they were the first rules that directly address third party funding[95]. Subsequently, international arbitration institutions are following this example and are now embracing the duty of disclosure and transparency in third party funding. For example the

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[91] International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Available at https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (Accessed on 17/01/2024)

[92] Ibid, General standard 6 (b)

[93] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

[94] International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.', General Standard 7 (a)

[95] Horodyski. D., & Kierska. M., 'Third Party Funding in International Arbitration: Legal Problems and Global Trends with a Focus on Disclosure Requirement.' Op Cit

ICSID Arbitration Rules[96] and the ICC Arbitration Rules[97] both require a party who is a beneficiary of third party funding to disclose the arrangement. It is therefore imperative to embrace disclosure and transparency in order to enhance the effectiveness of third party funding in international arbitration.

In addition, it is necessary for party representatives including lawyers to embrace third party funding and be equipped in certain aspects of the process in order to enhance the appropriateness of third party funding in international arbitration[98]. It has been argued that it is important for lawyers to familiarize themselves with the various third-party funding providers and their investment criteria including their track records, expertise, and reputation within the industry in order to effectively advise parties about the suitability of third party funding arrangements[99]. In addition, it has been pointed out that it is necessary for lawyers and other party representatives to examine the benefits and risks of third-party funding before encouraging parties to take up the option[100]. Therefore, it is important for lawyers and party representatives to advise their clients about the implications of funding arrangements, such as the potential for conflicts of interest, confidentiality concerns, and the funder's level of involvement in the arbitration process[101]. It is also pertinent for lawyers and party representatives to develop capacity in the legal and commercial aspects of third-party funding such as negotiation of funding agreements, due diligence procedures, and understanding the funder's return on investment expectations[102]. Finally, building and maintaining relationships with third-party funders is also vital in order to better understand their investment criteria and to facilitate potential collaborations[103].

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[96] The International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules., Op Cit

[97] International Chamber of Commerce (ICC) Arbitration Rules, 2021.,

[98] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

[99] Sahani. V. S., 'Reshaping Third-Party Funding.' *Tulane Law Review*., No. 2 of 2017

[100] Ibid

[101] Ibid

[102] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

[103] Ibid

The above measures are integral in enhancing the efficacy of third party funding in international arbitration.

5.0 Conclusion

Third party funding is fundamental concept in international arbitration. It is a positive phenomenon that can permit greater access to justice[104]. Third party funding in international arbitration is also associated with enhanced risk management[105]. However, third party funding in international arbitration is also associated with certain challenges key among them being the potential of conflict of interest[106]. It can also result in increased costs and loss of some of the key features of arbitration especially party autonomy[107]. Despite its challenges, the growth of third party funding in international arbitration is set to continue, as a result of the ever-increasing costs and complexities of dispute management[108]. It is therefore necessary to address the underlying concerns in order to enhance the suitability of third party funding in international arbitration. This calls for embracing disclosure and transparency in third party funding and the need for party representatives including lawyers developing their capacity on salient issues in third party funding including investment criteria by third party funders, risks and benefits of third party funding, and negotiation of funding agreements[109]. Third party funding is a welcome idea in international arbitration. There is need to embrace it in order to foster the growth of international arbitration and enhance access to justice.

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[104] Frignati. V., 'Ethical Implications of Third-Party Funding in International Arbitration.' Op Cit

[105] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

[106] Ashurst., 'Third Party Funding in International Arbitration.' Op Cit

[107] Ibid

[108] Arnaud. B., 'Third-Party Funding.' Op Cit

[109] Sheikh. T., 'The New Frontier: Exploring the Role of Third-Party Funding in International Arbitration.' Op Cit

Adopting Environmental, Social and Governance Tenets for Sustainable Investment in Africa

Abstract

Environmental, Social and Governance (ESG) has been described as a key concept in fostering sustainable, responsible and ethical investments. This paper critically examines the role of ESG in fostering sustainable investments in Africa. It argues that embracing ESG tenets can enhance sustainable, responsible and ethical investments in Africa. The paper highlights some of the factors hindering the realization of sustainable investments in Africa. It further proposes reforms aimed at adopting ESG tenets for sustainable investments in Africa.

1.0 Introduction

ESG has also been defined as a concept that seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance factors in corporate decision making[1]. ESG integration involves incorporating environmental, social and governance indicators into investment and business decision-making processes[2]. It has been correctly observed that the integration of the ESG criteria has become an instrument responsible for defining, planning, operationalizing and executing the actions of corporations directed at environmental prevention and preservation, in addition to social responsibility and the quality performance of their activities[3].

The concept of ESG is pertinent in the sustainability agenda[4]. The rise of ESG has been necessitated by global sustainability problems including climate change, corporate corruption and financial inequality[5]. It has been pointed out

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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] Barbosa. A., et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanities & Social Sciences Communications*., 2023

[3] Ibid

[4] Ibid

[5] 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 08/01/2023)

that ESG includes key elements around environmental and social impact, as well as how governance structures can be amended to maximize stakeholder well-being towards sustainability[6]. It incorporates Environmental factors such as climate change considerations, energy efficiency, carbon emissions, waste management and resource consumption[7]; Social factors including human rights, labour relations, employee welfare, community engagement, diversity and inclusion[8]; and Governance issues such as board diversity, transparency and internal control systems towards achieving sustainability[9]. Realizing ESG tenets is therefore necessary in order to achieve sustainability.

ESG is vital in fostering sustainable, responsible or ethical investments[10]. It has been argued that ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations[11]. ESG therefore stems from sustainable and responsible investments[12].

This paper critically examines the role of ESG in fostering sustainable investments in Africa. It argues that embracing ESG tenets can enhance sustainable, responsible and ethical investments in Africa. The paper highlights some of the factors hindering the realization of sustainable investments in Africa. It further proposes reforms aimed at adopting ESG for sustainable investments in Africa.

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[6] Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance).' Available at *https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/* (Accessed on 08/01/2023)

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

[8] Ibid

[9] Ibid

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

[11] Li. T., et al., 'ESG: Research Progress and Future Prospects.' Available at https://pdfs.semanticscholar.org/0dd4/941ebea33330210daff5f37a1c8cdd0547d7.pdf (Accessed on 08/01/2024)

[12] Ibid

2.0 The Link between ESG and Sustainable Investment

Sustainable investing is an idea which balances traditional investing with Environmental, Social, and Governance-related (ESG) insights in order to improve long-term outcomes[13]. Sustainable investing can also refer to a range of practices in which investors aim to achieve financial returns while promoting long-term environmental or social value[14]. It ensures that organizations are not judged solely on short-term financial gains but on a broader picture of what and how they contribute to society[15]. It has been argued that investments are sustainable if their total economic, social and environmental benefits can be predicted to outweigh their total cost[16]. Economic sustainability of investments refers to the long-term viability of a market-based activity for all actors involved[17]. Social sustainability consists of effects of investments on human development, individual well-being and collective outcomes such as peace and social cohesion[18]. Further, environmental sustainability is achieved investment activities do not surpass the boundaries of ecological systems that support life on Earth (considering issues such as climate change, chemical pollution and freshwater use)[19].

ESG is central to realizing sustainable investing[20]. It has been argued that ESG fosters socially responsible and sustainable investments by enabling investors to incorporate their values and concerns (such as environmental and social concerns) into their selection of investments instead of simply considering the

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[13] CFA Institute., 'What is Sustainable Investing?' Available at https://www.cfainstitute.org/en/rpc-overview/esg-investing/sustainable-investing (Accessed on 08/01/2024)

[14] Harvard Business School., 'What is Sustainable Investing?' Available at *https://online.hbs.edu/blog/post/sustainable-investing* (Accessed on 08/01/2024)

[15] Ibid

[16] Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Available at *https://www.oecd-ilibrary.org/sites/32dddc3a-en/index.html?itemId=/content/component/32dddc3a-en* (Accessed on 08/01/2024)

[17] Ibid

[18] Ibid

[19] Ibid

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

potential profitability and/or risk presented by an investment opportunity[21]. ESG presents a set of non-financial performance indicators that are vital in ensuring sustainable, ethical and responsible investments[22]. It has been observed that demand for non-financial information has risen considerably over the past few decades in order to enhance socially responsible investment therefore challenging the traditional capital market's view which assumes that an organization's responsibility is solely to its shareholders[23]. ESG enables organizations to foster sustainable investments by also seeking to address values beyond financial returns[24]. ESG therefore promotes sustainable investing by focusing on nonfinancial dimensions of a firm's performance[25]. It specifically relates to the impact of the company on the environment, social progress, and good governance[26].

It has been pointed out that the concept of ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance[27]. As an investment concept for evaluating the sustainability of organizations, the three tenets of ESG are the key factors to be considered in the process of investment analysis and decision making[28]. In addition, the ESG tenets can help to measure the sustainability and social impact of business activities[29]. Due to its importance in fostering sustainable investment, it has been correctly observed that ESG factors are becoming increasingly important

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[21] CFI, ESG (Environmental, Social and Governance), Available at: *https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-socialgovernance/ (*Accessed on 08/01/2024)

[22] Ibid

[23] Eccles. R., Lee. L-E., & Stroehle. J., 'The Social Origins of ESG? An Analysis of Innovest and KLD.' Available at *https://www.researchgate.net/profile/Judith-Stroehle/publication/330732655_The_Social_Origins_of_ESG_An_Analysis_of_Innovest_and_KLD/links/5c7fc8e9458515831f895ba7/The-Social-Origins-of-ESG-An-Analysis-of-Innovest-and-KLD.pdf* (Accessed on 08/01/2024)

[24] Ibid

[25] Van Duuren. E., Plantinga. A., & Scholtens. B., '. ESG Integration and the Investment Management Process: Fundamental Investing Reinvented.' *Journal of Business Ethics*, 138(3), 525-533.

[26] Ibid

[27] Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

[28] Ibid

[29] Ibid

to investors and customers[30]. As a result, 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 community[31]. Consequently, how companies handle ESG issues has become a major concern especially for investors, customers and other key stakeholders[32].

It has been pointed out the importance of ESG is evidenced by the change in the legal and regulatory landscapes around the world to reflect the expectations of investors, customers, employees and other stakeholders[33]. ESG factors now apply in many areas increasingly driving investment decisions and commercial contracts to company strategy and culture[34]. According to the Organisation for Economic Co-operation and Development (OECD), the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the Sustainable Development Goals (SDGs)[35]. This has seen the incorporation of climate transition factors among other ESG considerations into investment decisions and the growth of what has come to be known as ESG investing as a

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[30] Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Available at *https://kmco.co.ke/wp-content/uploads/2024/01/Rule-of-Law-Approach-for-Inclusive-Participation-in-Environmental-Social-and-Governance-ESG-Accountability-Mechanisms-for-Climate-Resilient-Responses.pdf* (Accessed on 08/01/2024)

[31] 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 08/01/2024)

[32] 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/EmbracingESG-Principles-for-Sustainable-Development-in-Kenya.pdf* (Accessed on 08/01/2024)

[33] Ibid

[34] 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

[35] Organisation for Economic Co-Operation and Development., 'Environmental Social and Governance (ESG) Investing' Available at *https://www.oecd.org/finance/esg-investing.htm* (Accessed on 08/01/2024)

leading form of sustainable finance for long-term value and alignment with societal values[36]. ESG is therefore a key component of sustainable investment.

3.0 ESG and Sustainable Investment in Africa: Promises and Pitfalls

ESG tenets are vital in enhancing sustainable investment in Africa. The African Union points out that the concept of ESG is increasingly become an important factor in determining the competitiveness of businesses as they serve the society in which they operate with a critical focus on the sustainability of their activities[37]. It further points out that Africa is not an exception to this evolving trend[38]. The African Union further states that ESG requirements are vital in accessing finance and markets in Africa[39]. It has been argued that a strong approach towards ESG in Africa is necessary in order to create value by laying the foundation for sustainable investing, continued government and community support, and access to investment capital and world-class partners, which will better position the continent for long-term profitability and impact[40].

It has also been argued that African organisations simply cannot afford to downplay the importance of ESG tenets[41]. Africa continues to face environmental, economic and social development problems including climate change, poverty, food insecurity, water scarcity, health challenges, energy crisis, environmental degradation, high debt distress risks among others which are major threat to the Sustainable Development agenda[42]. African organizations and Multinational Corporations (MNCs) play a major role in

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[36] Ibid

[37] African Union., 'The Environmental, Social, and Governance: An African Private Sector Study.' Available at
https://au.int/en/announcements/20230329/environmental-social-and-governance-african-private-sector-study (Accessed on 08/01/2023)

[38] Ibid

[39] Ibid

[40] Africa 50., 'ESG & Climate.' Available at *https://www.africa50.com/our-company/esg-climate/* (Accessed on 08/01/2023)

[41] PwC Kenya., 'Taking Action on your ESG Strategy – Africa.' Available at *https://www.pwc.com/ke/en/publications/taking-action-on-your-esg-strategy.html* (Accessed on 08/01/2023)

[42] The World Bank., 'The World Bank in Africa.' Available at *https://www.worldbank.org/en/region/afr/overview* (Accessed on 08/01/2024)

addressing these challenges and fostering Sustainable Development in Africa through investments in key sectors such as agriculture, health, energy, education, infrastructure among others[43]. As a result, it has been observed that African business leaders have the opportunity to drive effective ESG strategies towards sustainability[44]. African organisations can help to build trust in their societies and deliver sustained business outcomes by implementing effective ESG strategies[45]. It has correctly been asserted that businesses in Africa cannot succeed if their societies fail[46].

Sustainable investments are of vital importance in Africa in light of global challenges including the climate crisis and the aftermath of the COVID-19 pandemic[47]. It has been pointed out that recent global shocks have amplified investment barriers in Africa by lowering investor confidence and worsening information shortages while increasing the cost of capital in Africa more than in other regions of the world[48]. For example, it has been pointed out that as result of unfavourable country credit ratings and heightened risk aversion among international investors, the costs of public and private capital are far above global averages in many African countries, especially in the renewable energy sector[49]. Sustainable investments are essential to steer Africa's productive transformation towards inclusion and resilience[50]. It has been noted that there is a growing awareness that sustainable investing can tackle the environmental, social and economic challenges in Africa and that the resulting economic growth will be sustainable, benefitting investors and

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[43] Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf* (Accessed on 08/01/2024)

[44] PwC Kenya., 'Taking Action on your ESG Strategy – Africa.' Op Cit

[45] Ibid

[46] Ibid

[47] Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Op Cit

[48] Ibid

[49] Ibid

[50] Ibid

African citizens in the long run[51]. To this end, it has been argued that integrating ESG factors into investment is particularly important for developing countries, which have limited resources to adapt to urbanization and supply side shocks in the market[52]. Adopting ESG tenets can therefore unlock sustainable investment in Africa.

ESG can help Africa realize sustainable investments. It has been pointed out that ESG considerations are taking centre-stage in all discussions of sustainability and becoming an important benchmark for funding assessments across the world[53]. Firms in Africa can embrace ESG and incorporate its demands into their operations in order to attract critical sustainable investments[54]. It has been argued that ESG considerations will have an increasingly important impact on the investment landscape in Africa[55]. As a result, it has been contended that firms in Africa big and small will experience increased demands and expectations regarding how they conduct business hence the need to adopt ESG for sustainable investments in Africa[56].

It has been argued that Africa has immense potential to adopt ESG for sustainable investments[57]. Africa Union's Agenda 2063 enshrines the ideal of a prosperous Africa, based on inclusive growth and Sustainable

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[51] Premji. Z., 'Sustainable Investing: Unlocking Africa's Potential.' Available at *https://www.bscapitalmarkets.com/sustainable-investing-unlocking-africarsquos-potential.html* (Accessed on 08/01/2024)

[52] Ibid

[53] Nunekpeku. R., 'ESG Inroads and Sustainable Investments in Africa: Promoting Compliance by Private Companies.' Available at
https://thebftonline.com/2023/04/11/esg-inroads-and-sustainable-investments-in-africa-promoting-compliance-by-private-companies/?amp= (Accessed on 09/01/2024)

[54] Ibid

[55] International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Available at
https://www.ilo.org/actemp/regions/africa/WCMS_848401/lang--en/index.htm (Accessed on 09/01/2024)

[56] Ibid

[57] Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Op Cit

Development[58]. Agenda 2063 seeks to achieve Sustainable Development in Africa through various strategies including fostering intra-African investments[59]. Agenda 2063 presents a case for sustainable investments in Africa by advocating for corporate social and environmental investments[60].

It has further been argued that Africa can leverage on the African Continental Free Trade Area (AfCFTA) to promote sustainable investing and green transition in the continent[61]. AfCFTA seeks to achieve certain objectives including creating a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent[62]. It has been argued that the AfCFTA will be a game changer, creating the world's largest free trade area and a single market for goods and services worth $3.4 trillion for more than 1.3 billion Africans[63]. The United Nations opines that AfCFTA is appropriately designed to deepen integration, foster trade and investment, enhance the mobility of capital and labour, support industrialization, and the development of a dynamic services sector[64]. At its full realization, the AfCFTA with the mandate of eliminating trade barriers, will be the largest free trade area in the world bringing together the

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[58] Africa Union., 'Agenda 2063: The Africa We Want.' Available at
https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf
(Accessed on 09/01/2024)
[59] Ibid
[60] Ibid
[61] United Nations Economic Commission for Africa., 'Africa Should Leverage the AfCFTA to Promote Green Transition.' Available at
https://www.uneca.org/stories/africa-should-leverage-the-afcfta-to-promote-green-transition
(Accessed on 09/01/2024)
[62] African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at *https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf* (Accessed on 09/01/2024)
[63] African Economic Outlook 2023., 'Mobilizing Private Sector Financing for Climate and Green Growth in Africa.' Available at *https://www.afdb.org/sites/default/files/documents/publications/afdb23-01_aeo_main_english_0602.pdf* (Accessed on 09/01/2024)
[64] United Nations., 'Africa's Free Trade on Track, More Efforts Needed.' Available at *https://www.un.org/africarenewal/magazine/january-2023/africa%E2%80%99s-free-trade-track-moreefforts-needed#:~:text=lies%20ahead%2C%20though.-,Presently%2C%20intra%20Africa%20trade%20stands%20low%20at%20just%2014.4%25%20of,day)%2C%20according%20to%20UNCTAD* (Accessed on 09/01/2024)

55 countries[65]. It has been argued that the AfCFTA Protocol on Investment presents a unique opportunity for African countries to attract and promote investments in green sectors that support green transition[66]. The Protocol provides several mechanisms for African countries to achieve green transition and sustainable investment[67]. These mechanisms include promoting investment in green sectors, facilitating technology transfer, developing green investment standards and encouraging regional cooperation[68]. The AfCFTA can therefore be a catalyst of sustainable investments in Africa which embrace ESG tenets.

In addition, Africa is also endowed with an abundance of natural resources which presents numerous opportunities for sustainable investment. It has been observed that with its massive deposit of oil, gas and mineral resources, Africa is the world's fastest-growing region for Foreign Direct Investment[69]. The United Nations further opines that Africa is rich in natural resources ranging from crude oil, natural gas, minerals, forests and wildlife which holds the key for social and economic development in the continent[70]. It asserts that measures such as sustainable investments can serve to reverse the losses from natural capital to help the continent free resources that can finance implementation of development agendas[71]. African countries can adopt ESG for sustainable investment in their natural resources[72]. For example, it has been pointed out that Africa is seeing increased investment in renewable energy

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[65] United Nations Economic Commission for Africa., 'Africa Should Leverage the AfCFTA to Promote Green Transition.' Op Cit

[66] Ibid

[67] Ibid

[68] Ibid

[69] Abe. O., 'Leveraging Natural Resources for Sustainable Development in Africa.' Available at *https://www.afronomicslaw.org/2019/07/30/leveraging-natural-resources-for-sustainable-development-in-africa* (Accessed on 09/01/2024)

[70] United Nations Environment Programme., 'Is Africa's Natural Capital the Gateway to Finance Its Development?' Available at *https://www.unep.org/news-and-stories/story/africas-natural-capital-gateway-finance-its-development* (Accessed on 09/01/2024)

[71] Ibid

[72] Wadhwani. H., 'Charting the ESG Landscape in Africa: Sustainable Opportunities and Challenges.' Available at *https://www.linkedin.com/pulse/charting-esg-landscape-africa-sustainable-challenges-wadhwani/* (Accessed on 09/01/2023)

and infrastructure projects, which align with ESG goals[73]. Solar and wind energy projects, for instance, not only address environmental concerns but also contribute to expanding access to clean energy in the region[74]. Africa therefore has the potential to adopt ESG for sustainable investing.

However, adopting ESG for sustainable investing in Africa faces certain hurdles. It has been contended that the African investment reality is marked by the dominance of extractive industries, high exposure to climate change and pressing developmental needs[75]. The dominance of extractive industries poses a clear obstacle to the rise of 'green' investment strategies on the continent[76]. For example, investment strategies by some Multinational corporations in the extractives sector in Africa have been accused of flouting ESG requirements by resulting in environmental concerns including the extinction of biodiversity, contamination and destruction of soil and air pollution as a result of oil spillages and social challenges including gross human rights violations and land injustices[77]. Such practices have had an impact on economic activities, social-cultural life and human health of the affected people thus hindering the attainment of Sustainable Development within the ESG framework in Africa[78].

In addition, it has been argued that there are significant barriers in the form of: poor infrastructure, weak regional infrastructure links, limited access to market information, failure of regulation, and small domestic markets hindering the adoption of ESG for sustainable investments in Africa[79]. As a

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[73] Ibid

[74] Ibid

[75] International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Op Cit

[76] Ibid

[77] Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' Share the World Resources, 3rd October 2006, available at *http://www.stwr.org/multinationalcorporations/multinational-corporations-mncs-beyond-theprofitmotive.html#legalrights* (Accessed on 09/01/2024)

[78] Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

[79] Premji. Z., 'Sustainable Investing: Unlocking Africa's Potential.' Op Cit

result, it has been argued that Africa's sustainable financing and investment gap remains small in global comparison[80]. Addressing these challenges calls for the adoption of ESG principles for sustainable investment in Africa.

4.0 Way Forward

In order to adopt ESG for sustainable investment in Africa, there is need to accelerate ESG integration in investment practices[81]. It has been pointed out that the heightened focus on investments in Sub-Saharan Africa is certain to increase the flow of finance to the region, increasing infrastructure and benefitting its businesses and clients[82]. However, a clear, systematic approach is important for ESG integration for sustainable investment in Africa[83]. It has been asserted that in order to remain competitive, businesses in Africa must strike the right balance between short-term focus on profitability and the long-term benefits of ESG integration to secure investment[84]. It is therefore necessary for African governments to prioritise responsible and sustainable investments in all sectors and collaborate with private sector entities to establish stringent regulations, industry best practices, and transparent reporting mechanisms[85].

There is also need to foster access to ESG data in order enhance sustainable investment in Africa. It has observed that as investors increasingly look for ways to align their portfolios with sustainability, the need for reliable ESG data has become increasingly significant[86]. In Africa, ESG considerations often go

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[80] International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Op Cit

[81] Premji. Z., 'Sustainable Investing: Unlocking Africa's Potential.' Op Cit

[82] Ibid

[83] Ibid

[84] Modise. P., 'Expert Opinion: How ESG can unlock sustainable investment for Africa.' Available at *https://environment-analyst.com/global/109676/expert-opinion-how-esg-can-unlock-sustainable-investment-for-africa#:~:text=ESG%20integration%20for%20long%2Dterm%20benefits&text=It%20is%20essential%20for%20African,practices%2C%20and%20transparent%20reporting%20mechanisms.* (Accessed on 09/01/2024)

[85] Ibid

[86] How and Where to Find ESG Data to Invest in Africa., Available at *https://toum.ai/blog/how-and-where-to-find-esg-data-to-invest-in-africa* (Accessed on 09/01/2024)

hand-in-hand with requirements such as improving communities, fostering good governance, and creating sustainable infrastructure[87]. It has been contended that accurate ESG data allows investors to assess risk and make better-informed decisions about where and how to invest[88]. According to OECD, limited availability of ESG data is a major issue which hinders risk assessments and mitigation strategies and increasing the cost of searching for investment opportunities[89]. Lack of data also makes it difficult to measure the allocation of funds towards sustainable development and impacts[90]. Enhancing access to ESG data through measures such as ESG disclosure and reporting can help foster sustainable investment towards the realization of Sustainable Development in Africa[91].

ESG disclosure and reporting requirements have been identified as vital tools in adopting ESG for sustainable investment in Africa[92]. ESG reporting and disclosure frameworks can help embed ESG factors in investment decisions[93]. ESG disclosure and reporting can also enhance access to ESG information which is a key driver of investment and development policy decision making[94]. African countries can therefore adopt mandatory ESG disclosure and reporting requirements which comply with relevant international treaties, ESG standards and local regulations in order to foster sustainable investments[95]. In Kenya for example, the Nairobi Securities Exchange has developed an ESG Disclosure Manual to guide listed companies in Kenya on

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[87] Ibid

[88] Ibid

[89] Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Op Cit

[90] Ibid

[91] African Development Bank Group., 'Africa Economic Brief - The role of ESG rating in Sustainable Development in Africa - Volume 12 | Issue 10.' Available at *https://www.afdb.org/en/documents/africa-economic-brief-role-esg-rating-sustainable-development-africa-volume-12-issue-10* (Accessed on 09/01/2023)

[92] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

[93] Ibid

[94] African Development Bank Group., 'Africa Economic Brief - The role of ESG rating in Sustainable Development in Africa - Volume 12 | Issue 10.' Op Cit

[95] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

ESG disclosure and reporting[96]. The ESG Manual proposes mandatory ESG disclosures for NSE listed companies to help achieve sustainable business practices[97]. Embracing reporting and disclosure requirements can lead to the adoption of ESG for sustainable investment in Africa.

Further, it has been argued that there is need to need to integrate ESG clauses in Bilateral Investment Treaties (BITs) in order to realize sustainable investment in Africa[98]. It has been pointed out that many BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development[99]. African countries should therefore negotiate appropriately and integrate ESG clauses in BITs in order to make investments more aligned with ESG concerns such climate action, environmental governance, respect for human rights as well as other public policy imperatives[100]. Integrating ESG clauses in BITs can help promote sustainable, ethical and socially responsible investments in Africa[101]. Finally, it is imperative for the private sector in Africa to embrace Sustainable Development practices including green investments in order to foster the ESG agenda in the continent[102]. It has been argued that Africa's private sector can bolster the continent's green agenda and drive increased Gross Domestic Product (GDP), higher income per capita, and create numerous jobs for people

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[96] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual', available at *https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf* (Accessed on 09/01/2024)

[97] Ibid

[98] Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2023/07/Bilateral-Investment-Treaties-and-Environmental-Social-and-Governance-in-Africa-1.pd*f (Accessed on 09/01/2024)

[99] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Available at *https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf* (Accessed on 09/01/2024)

[100] Ibid

[101] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

[102] United Nations Environment Programme., 'Africa's Green Business Opportunities are Abundant, UNEP Study Shows.' Available at *https://www.unep.org/news-and-stories/press-release/africas-green-business-opportunities-are-abundant-unep-study-shows* (Accessed on 09/01/2023)

on the continent[103]. According to UNEP, there are numerous opportunities for green investments in Africa in areas such as sustainable agriculture, agribusiness, the blue economy, ecotourism, climate smart opportunities for a net zero transition including renewable energy solutions and the African voluntary carbon market[104]. Fostering investments in these among other areas can lead to green growth in line with ESG requirements and contribute towards the attainment of the Sustainable Development goals in Africa[105].

Through the foregoing among other measures, adopting ESG tenets for sustainable investment in Africa will become a reality.

5.0 Conclusion

ESG is vital in fostering sustainable, responsible or ethical investments[106]. It is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations[107]. There is immense potential to adopt ESG tenets for sustainable investment in Africa as set out in Agenda 2063, opportunities presented by AfCFTA and the abundance of natural resources in Africa[108]. However, the adoption of ESG for sustainable investment in Africa faces several barriers in the form of: poor infrastructure, weak regional infrastructure links, limited access to market information, failure of regulation, and small domestic markets[109]. Adopting ESG principles for sustainable investment in Africa calls for accelerating ESG integration in investment practices[110]; enhancing access to ESG data[111]; embracing ESG disclosure and reporting[112]; integrating ESG clauses in BITs[113];

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[103] Ibid

[104] Ibid

[105] Ibid

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

[107] Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

[108] International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Op Cit

[109] Premji. Z., 'Sustainable Investing: Unlocking Africa's Potential.' Op Cit

[110] Ibid

[111] How and Where to Find ESG Data to Invest in Africa., Op Cit

[112] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

[113] Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Op Cit

and embracing Sustainable Development practices in the private sector[114]. Adopting ESG tenets for sustainable investment in Africa is the way to go in order to achieve sustainability.

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[114] United Nations Environment Programme., 'Africa's Green Business Opportunities are Abundant, UNEP Study Shows.' Op Cit

Realizing the Governance ('G') tenet in ESG for Sustainability

Abstract

Governance plays a crucial role in sustainability. This role is recognized under the concept of Environmental, Social and Governance (ESG), an idea which seeks to foster sustainability. This paper critically examines the role of governance in sustainability. It argues that good governance is important in achieving sustainability. The paper explores ways through which governance can enhance sustainability. It also highlights some of the governance challenges that are hindering the ideal of sustainability. The paper concludes by making proposals towards realizing the Governance 'G' tenet in ESG for sustainability.

1.0 Introduction

Sustainability has become a clarion call in the wake of problems facing the planet from the environmental, social and economic spheres[1]. Environmental problems including climate change and depletion of natural resources; social concerns such as poverty; and economic challenges including recessions are a major hindrance to sustainability[2]. The need to strike a balance between the environmental, social and economic facets of development towards sustainability gave rise to the concept of Sustainable Development which was coined by the World Commission on Environment and Development ('*Brundtland Commission'*) as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs[3].' Sustainable Development seeks to foster sustainability by ensuring environmental protection, economic development and addressing social concerns[4]. It has been asserted that Sustainable Development seeks to improve the quality of life on earth in a comprehensive manner, including economic prosperity, social equity and environmental protection[5].

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[1] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

[2] Scoones. I., 'Sustainability.' *Development in Practice* 17.4-5 (2007): 589-596.

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

[4] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.'
International Sustainable Development Law., Vol 1

[5] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

The need for sustainability was also considered during the United Nations Conference on Environment and Development also known as the '*Earth Summit*', held in Rio de Janeiro, Brazil, from 3-14 June 1992[6]. The Earth Summit concluded that the concept of Sustainable Development was an attainable goal for all the people of the world, regardless of whether they were at the local, national, regional or international level[7]. It also recognized that integrating and balancing economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet and that such an integrated approach is possible[8]. The Earth Summit gave birth to *Agenda 21*[9] a daring program of action calling for new strategies to invest in the future to achieve overall Sustainable Development in the 21st century; and the *Rio Declaration on Environment and Development*[10] which sees to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development. The Rio Declaration stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a healthy and productive life in harmony with nature[11]. It further states that in order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it[12]. The Rio Declaration identifies key principles that are pertinent in fostering sustainability[13].

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[6] United Nations., 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.' Available at
https://www.un.org/en/conferences/environment/rio1992 (Accessed on 28/10/2023)

[7] Ibid

[8] Ibid

[9] United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992., 'Agenda 21.' Available at
*https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*9uipp7*_ga* MjA2ND*
k2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*MTY5NDU5NjE3MS41NS4xLjE2 OTQ1OTgzODUuM C4wLjA (Accessed on 28/10/2023)

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

[11] Ibid, Principle 1

[12] Ibid, Principle 4

[13] Ibid

The importance of sustainability has resulted in the adoption of Sustainable Development as the global blueprint for development as set out in the United Nation's 2030 Agenda for Sustainable Development[14]. The Agenda represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development[15]. At the heart of the 2030 Agenda for Sustainable Development are 17 Sustainable Development Goals (SDGs0 which seek to strike a balance between social, economic and environmental sustainability[16]. The Constitution of Kenya also embraces Sustainable Development as one of the national values and principles of governance[17].

It has been observed that governance plays a crucial role in sustainability[18]. This role is recognized under the concept of Environmental, Social and Governance (ESG), an idea which seeks to foster sustainability[19]. This paper critically examines the role of governance in sustainability. It argues that good governance is important in achieving sustainability. The paper explores ways through which governance can enhance sustainability. It also highlights some of the governance challenges that are hindering the ideal of sustainability. The paper concludes by making proposals towards realizing the Governance 'G' tenet in ESG for sustainability.

2.0 Governance in ESG for Sustainability

ESG is an acronym for Environmental, Social and Governance, which has been described as a framework that helps stakeholders understand how an

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[14] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at
*https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pd*f (Accessed on 28/10/2023)
[15] Ibid
[16] Ibid
[17] Constitution of Kenya, 2010., Article 10 (2) (d)
[18] Mwangi. J., 'Role of Governance in Sustainability.' Available at
https://ics.ke/governance-blog/item/41-role-of-governance-in-sustainability (Accessed on 28/10/2023)
[19] 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.

organization manages risks and opportunities around sustainability issues[20]. ESG includes key elements around environmental and social impact, as well as how governance structures can be amended to maximize stakeholder well-being towards sustainability[21]. ESG has also been defined as a concept that seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance concerns in corporate decision making[22]. ESG therefore stands for the three broad categories, or areas, of interest for "socially responsible investors" who consider it important to incorporate their values and concerns (such as sustainability concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity[23]. It has been pointed out that ESG takes the holistic view that sustainability extends beyond just environmental issues and incorporates social and governance aspects in the sustainability discourse[24].

ESG therefore seeks to incorporate environmental factors including environmental sustainability and climate change concerns such as climate resilience and low carbon development; social tenets such as improving social welfare and fostering inclusive participation with stakeholders; and governance factors including fostering good governance practices internally and externally in order to realize sustainability[25]. It has further been asserted that ESG incorporates environmental metrics including direct and indirect greenhouse gas emissions, stewardship over natural resources, and an organization's overall resiliency against physical climate risks like climate change, flooding, and fires; social tenets including Human Capital Management (HCM) metrics like fair wages and employee engagement but

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[20] Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance).' Available at *https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/* (Accessed on 28/10/2023)

[21] Ibid

[22] Stuart. L.G et al., 'Firms and social responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

[23] Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance).' Op Cit

[24] Ibid

[25] African Development Bank Group., 'Environmental, Social and Governance (ESG).' Available at *https://www.afdb.org/en/topics-and-sectors/topics/environmental-social-and-governance-esg* (Accessed on 28/10/2023)

also an organization's impact on the communities in which it operates; and governance factors focusing on how an organization is led and managed through internal controls, transparency and accountability mechanisms[26]. ESG aims to integrate Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities[27]. The Organisation for Economic Co-operation and Development (OECD) opines that the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the SDGs[28]. ESG is therefore an important tool in achieving sustainability.

Governance is at the heart of ESG and has been recognized as instrumental in realizing sustainability[29]. It has been argued that the 'G' tenet in ESG is the oldest since governance has been an integral part of robust investment for ages even before the rise of environmental and social movements[30]. While older forms of governance focused on serving and protecting shareholders, the newer approaches stretch beyond basic dimensions related to financial and accounting misconduct as well as legal and regulatory non-compliance, such as transparency, corporate structures and ethics[31]. The World Economic Forum posits that sustainable governance represents part of the ESG equation and should be understood as a prerequisite for achieving the entire spectrum of ESG goals[32]. Behind each breach of a company's environmental or social

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[26] Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance).' Op Cit

[27] Li. T.T et al., 'ESG: Research Progress and Future Prospects.' *Sustainability*, No. 13 of 2021

[28] Organisation for Economic Co-operation and Development., 'Environmental Social and Governance (ESG) Investing' available at
https://www.oecd.org/finance/esg-investing.htm (Accessed on 28/10/2023)

[29] Temel. M., Lozano. R., & Barreiro-Gen. M., 'Analysing the Governance Factors for Sustainability in Organisations and their Inter-Relations.' Available at *https://www.frontiersin.org/articles/10.3389/frsus.2021.684585/full* (Accessed on 28/10/2023)

[30] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf* (Accessed on 28/10/2023)

[31] Ibid

[32] World Economic Forum., 'Why Sustainable Governance and Corporate Integrity are Crucial for ESG' Available at https://www.weforum.org/agenda/2022/07/the-g-in-

commitments lies ineffective corporate governance, be it inadequate anti-corruption practices, perverse incentive structures, contradictory lobbying activity, ineffective board oversight or ill-equipped leadership[33]. It has been asserted that achieving sustainability requires effective governance structures which facilitate efficient decision-making and considers the long-term impacts of actions and policies[34].

It has been asserted that good governance entails several elements including participation, respect for the rule of law, transparency, responsiveness, consensus building, accountability, equity, inclusiveness, effectiveness and efficiency[35]. Governance plays an important role in achieving sustainability by establishing the rules and regulations that guide behavior and shape outcomes; stipulating environmental regulations that limit pollution and promote sustainable practices; fostering accountability and transparency which are key components of sustainable decision making[36]. Further, audits and clear reporting standards ensure accountability, taking responsibility, and helping ensure sustainable environmental and social impacts[37]. In addition, the governance requirements of transparency, or the disclosure of information, are integral in ensuring sustainability by helping build trust among stakeholders and enable informed decision-making[38]. The United Nations further asserts that good governance is integral in the Sustainable Development agenda since it assists societies to develop effective governments within a democratic system, and to implement Sustainable Development principles through global partnership[39].

esg-3-ways-to-not-missit/?DAG=3&gclid=CjwKCAjw5MOlBhBTEiwAAJ8e1q7lLuk_egfH4cyQe8v1kI MLHVQXfYG6_juEF202f NzXAhU7B25YlxoC7Z0QAvD_BwE (Accessed on 31/10/2023)

[33] Ibid
[34] Mwangi. J., 'Role of Governance in Sustainability.' Op Cit
[35] Ramzy. O et al., 'Sustainable Development & Good Governance.' *European Journal of Sustainable Development* (2019), 8, 2, 125-138
[36] Ibid
[37] Ibid
[38] Ibid
[39] United Nations., 'Good Governance in Sustainable Development.' Available at https://sdgs.un.org/partnerships/good-governance-sustainabledevelopment#:~:text=The%20objective%20of%20Good%20Governance,d

Good governance is therefore necessary in achieving sustainability and the Sustainable Development agenda envisioned by the United Nations. Since Sustainable Development depends on the choices that society makes and the participative processes by which such choices are made, there is a clear need to ensure wide acceptance of the governance processes that are used in decision-making[40]. It has been contended that good governance fosters sustainability by ensuring that the principles of openness, accountability, participation, coherence and effectiveness are incorporated in every decision making process[41]. Good governance can also foster sustainability by promoting effective strategies; efficient legal, policy and institutional frameworks; sustainability reporting; and effective boards in organizations which can enhance good decision making[42]. Governance is therefore a key component of ESG and sustainability. It is therefore imperative to realize the Governance 'G' tenet of ESG for sustainability.

3.0 Realizing Sustainability through Governance: Opportunities and Setbacks

The Rio Declaration on Environment and Development is one of the key legal instruments that upholds the role of governance in sustainability[43]. The Declaration captures the principle of participation which is one the key tenets of good governance. It requires states to foster the principle of public participation, access to information and access to justice in order to achieve sustainability[44]. The Declaration further envisages the role of good governance in sustainability by requiring states to enact effective environmental legislation, standards, management objectives and priorities which should

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evelopment%20principles%20th rough%20global%20partnership (Accessed on 28/10/2023)

[40] Ashton. P., 'The Role of Good Governance in Sustainable Development: Implications for Integrated Water Resource Management in Southern Africa.' *Governance as a Trialogue: Government-Society-Science and Transition.*, pp 77-100

[41] Ibid

[42] Temel. M., Lozano. R., & Barreiro-Gen. M., 'Analysing the Governance Factors for Sustainability in Organisations and their Inter-Relations.' Op Cit

[43] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' Op Cit

[44] Ibid, Principle 10

reflect the environmental and developmental context to which they apply[45]. The Declaration also requires states to foster inclusivity by embracing the role of women and youth in sustainability[46].

The role of governance in sustainability is also enshrined under the United Nation's 2030 Agenda for Sustainable Development[47]. In order to achieve Sustainable Development, SDG 16 requires states to promote peaceful and inclusive societies, provide access to justice for all and build effective, accountable and inclusive institutions at all levels[48]. SDG 16 recognizes that tenets of good governance including adherence to the rule of law; equal access to justice for all; effective, accountable and transparent institutions at all levels; responsive, inclusive, participatory and representative decision-making at all levels; public access to information; and protection of human rights are essential in achieving Sustainable Development[49]. Achieving SDG 16 is therefore important in enhancing the role of governance in sustainability.

Further, the Africa Union's *Agenda 2063* upholds the role of good governance in realizing its vision for inclusive growth and Sustainable Development in Africa[50]. One of the aspirations under Agenda 2063 is fostering good governance, respect for human rights, justice and the rule of law in Africa[51]. It seeks to realize this aspiration through consolidating democratic gains and improving the quality of governance, promoting respect for human rights and the rule of law; building strong institutions for a development state; enhancing participatory development and local governance; and facilitating the emergence of development-oriented and visionary leadership in all spheres and at all levels[52]. Realizing the aspirations of Agenda 2063 can strengthen good governance and enhance sustainability in Africa.

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[45] Ibid, Principle 11
[46] Ibid, Principle 20 and 21.
[47] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit
[48] Ibid, Sustainable Development Goal 16
[49] Ibid
[50] Africa Union., 'Agenda 2063: The Africa we Want.' Available at
https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf
(Accessed on 29/10/2023)
[51] Ibid, Aspiration 3
[52] Ibid

The importance of governance in sustainability is also acknowledged in Kenya. The *Constitution of Kenya* upholds good governance as one of the national values and principles of governance and further requires its tenets including integrity, transparency and accountability to be fostered[53]. It also requires the state to uphold the rule of law, democracy and participation of the people which are key elements of good governance[54]. The Constitution of Kenya further recognizes and seeks to foster the role of good governance in environmental sustainability[55]. It requires the state to promote sound stewardship of the environment and natural resources through good governance approaches including ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensuring the equitable sharing of the accruing benefits; encouraging public participation in the management, protection and conservation of the environment; establishing systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminating processes and activities that are likely to endanger the environment; and utilising the environment and natural resources for the benefit of the people of Kenya[56]. These provisions of the Constitution are fundamental in achieving sustainability through good governance.

The *Environmental Management and Co-ordination Act[57]* further embraces the role of good governance in environmental sustainability. It requires the tenets of good governance including public participation, access to information, access to justice and legal remedies, and the rule of law to be upheld in order to achieve sound environmental governance and management in Kenya[58].
Good governance is therefore a key factor in achieving sustainability. The International Development Law Organization posits that the governance and management of land, water, forests and other natural resources is essential in fostering sustainability through the protection of ecosystems and biodiversity,

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[53] Constitution of Kenya, 2010., Article 10 (2) (c)
[54] Ibid, Article 10 (2) (a)
[55] Ibid, Article 69 (1)
[56] Ibid
[57] Environmental Management and Co-ordination Act., No. 8 of 1999, Laws of Kenya
[58] Ibid

and sustaining life and livelihoods[59]. Good governance can enhance sustainability by providing incentives to tackle global problems including climate change through rule of law-based policies and legal frameworks which support public and private sector actors in accessing international climate finance for mitigation and adaptation purposes[60]. Further, tenets of good governance including environmental integrity, transparent governance, respect for human rights and the protection of social well-being are integral parts of climate justice which is a key concept in sustainability[61]. The IDLO further asserts that sound 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 flourish[62].

Good governance can therefore help both the public and private sectors foster sustainability and unlock the SDGs. Good governance can help governments establish clear policies and strong institutions which can accelerate the realization of SDGs by combating poverty, fostering food security, promote good health and well-being of citizens, promoting access to clean water and sanitation, and fostering decent work and economic growth among other SDGs[63]. Good governance further enhances accountability, fairness, responsiveness and inclusivity which are vital factors in unlocking the SDGs[64].

It has further been asserted that sustainability has become an integral component of the strategies pursued by companies and of the relationships they establish with various players in the corporate value chain[65]. Good governance can enhance the role of companies in sustainability through sustainability reporting which can be a tool to monitor and disclose corporate

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[59] International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Available at *https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_paper_-_climate_action_-_final.pdf* (Accessed on 30/10/2023)
[60] Ibid
[61] Ibid
[62] Ibid
[63] Ramzy. O et al., 'Sustainable Development & Good Governance.' Op Cit
[64] Ibid
[65] Naciti. V et al., 'Corporate Governance and Sustainability: A Review of the Existing Literature.' *Journal of Management and Governance,* 2021

progress on aspects such as the achievement of the SDGs[66]. Good governance can enhance corporate sustainability through management practices which positively affect the ecosystem, the community and economic development[67].

It has been observed that achieving the 'G' tenet in ESG can strengthen the role of companies in sustainability at the economic level through investments in areas such as energy, infrastructure, industry and the distribution of income through payment of fair wages[68]; in the context of environment governance through waste reduction, pollution reduction, energy efficiency, reduction of air emissions, reduction of the consumption of hazardous and toxic materials and mitigating the frequency of environmental accidents among other measures aimed at promoting the right to a clean and healthy environment and enhancing climate change mitigation and adaption[69]; and at the social level through creating employment opportunities, provide equal opportunities for all persons, fostering diversity, encouraging social contacts within and outside the corporation and promoting quality life for their employees[70].

Governance is therefore an important factor in sustainability. However, the ideal of good governance faces several challenges in both the public and private sectors. Some corporations have been accused of engaging in bad governance practices thus affecting the attainment of the 'G' pillar of the ESG agenda[71]. Such practices include corruption, lack of board diversity, weak transparency and accountability mechanisms, and failure to embrace

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[66] Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' *European Journal of Sustainable Development* (2022), 11, 3, 326-339

[67] Boeva. B et al., 'Corporate Governance and the Sustainable Development.' *European Journal of Economics and Business Studies,* Volume 7, No. 1 of 2017

[68] Achim. M., 'The Impact of the Quality of Corporate Governance On Sustainable Development: An Analysis Based On Development Level.' Available at https://www.tandfonline.com/doi/epdf/10.1080/1331677X.2022.2080745?needAccess=true&role=buttn (Accessed on 30/10/2023)

[69] Boeva. B et al., 'Corporate Governance and the Sustainable Development.' Op Cit

[70] Ibid

[71] Filatotchev, I. & Stahl, G. K., 'Towards Transnational CSR. Corporate Social Responsibility Approaches and Governance Solutions for Multinational Corporations. ' *Organizational Dynamics*, Volume 44, No.2

Corporate Social Responsibility (CSR)[72]. Further, some countries are still facing governance problems including corruption, weak legal and institutional regimes, abuse of human rights, insufficient transparency and accountability mechanisms, weaknesses in justice systems and political instability which hinder sustainability[73]. It is imperative to realize the Governance tenet in ESG in order to foster sustainability.

4.0 Way Forward

It is imperative for companies to foster transparency and accountability by embracing corporate disclosure requirements such as sustainability reporting[74]. Sustainability reporting has been described as a key tool good governance due to its ability to help companies monitor and disclose corporate progress on aspects such as the achievement of the SDGs[75]. In order to foster good governance, initiatives such as the United Nations Global Compact (UNGC) have developed sustainability principles focusing on human rights, labour, the environment and anti-corruption and encourages participants to self-assess, prepare, and submit a progress report to the UNGC on their performance around these four topical areas[76]. Further, the Carbon Disclosure Project (CDP) allows signatory companies to provide performance data on issues such as climate change, water security and deforestation on a self-disclosure basis[77].

Further, in Kenya, the Nairobi Securities Exchange has developed an ESG Disclosures Guidance Manual (ESG Manual) which is designed to guide listed companies in Kenya and other organizations interested in ESG reporting on how to collect, analyse, and publicly disclose important ESG information in a

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[72]Ibid

[73] Crocker. C., 'African Governance: Challenges and their Implications.' Available at *https://www.hoover.org/research/african-governance-challenges-and-their-implications* (Accessed on 31/10/2023)

[74] Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

[75] Ibid

[76] United Nations Global Compact: available at
https://www.unglobalcompact.org/engagelocally/africa/kenya (Accessed on 31/10/2023)

[77] Carbon Disclosure Project, available at *https://www.cdp.net/en* (Accessed on 31/10/2023)

way that meets international sustainability reporting standards[78]. This is expected to ensure transparency in ESG disclosures which can help in building integrity and trust in the capital markets thus enhancing competitiveness to attract investment to the capital markets in Kenya[79]. Corporations can therefore embrace sustainability and ESG reporting as a way of realizing good governance. However, there is need to ensure transparency and full disclosure in such reporting in order to capture the true image in relation to a corporation's role in fostering sustainability[80].

In addition, it is vital for countries to embrace good governance as envisaged under SDG 16 which requires states to promote peaceful and inclusive societies, provide access to justice for all and build effective, accountable and inclusive institutions at all levels[81]. SDG 16 recognizes that tenets of good governance including adherence to the rule of law; equal access to justice for all; effective, accountable and transparent institutions at all levels; responsive, inclusive, participatory and representative decision-making at all levels; public access to information; and protection of human rights are essential in achieving Sustainable Development[82]. It has been asserted that fostering good governance within the 'G' pillar of ESG is achieving SDG 16[83]. It is therefore important for countries to pursue the objectives of SDG 16 by strengthening the rule of law, building accountable and inclusive institutions at all levels, upholding human rights and enhancing access to justice[84]. This will foster good governance and enhance sustainability through open, accountable and responsive governments and institutions[85].

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[78] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual', available at *https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf* (Accessed on 31/10/2023)

[79] Ibid

[80] Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

[81] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Sustainable Development Goal 16

[82] Ibid

[83] 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 31/10/2023)

[84] Ibid

[85] Ibid

Finally there is need to enhance public participation and access to information at all levels in order to realize the Governance tenet in ESG and foster sustainability[86]. SDG 16 acknowledges the role of participatory and representative decision-making at all levels and public access to information in good governance and sustainability[87]. The Rio Declaration recognizes the role of public participation in sustainability and stipulates that environmental issues are best handled with the participation of all concerned citizens, at the relevant level[88]. It requires states to facilitate and encourage public participation and access to information in environmental governance towards sustainability[89]. It has been argued that public participation is 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 since it encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making and good governance[90]. Public participation and access to information can enhance the role of people at all levels in governance including the management of natural environments, enabling the conditions for peace, development and sustainability to flourish[91]. It is therefore imperative to foster public participation and access to information in order to realize the Governance tenet in ESG for sustainability.

5.0 Conclusion

Governance is at the heart of ESG and has been recognized as instrumental in realizing sustainability[92]. Tenets of good governance including participation,

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[86] Ibid

[87] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Sustainable Development Goal 16

[88] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' Principle 10

[89] Ibid

[90] 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 31/10/2023)

[91] Ibid

[92] Temel. M., Lozano. R., & Barreiro-Gen. M., 'Analysing the Governance Factors for Sustainability in Organisations and their Inter-Relations.' Op Cit

respect for the rule of law, transparency, responsiveness, consensus building, accountability, equity, inclusiveness, effectiveness and efficiency are important in achieving the goals of ESG towards sustainability[93]. Further, SDG 16 acknowledges the role of good governance in achieving the Sustainable Development agenda[94]. However, concerns in the private and public sectors including corruption, weak legal and institutional regimes, abuse of human rights, insufficient transparency and accountability mechanisms, weaknesses in justice systems and political instability hinder realization of good governance towards sustainability[95]. It is therefore important to foster good governance in both the private and public sectors by strengthening transparency and accountability mechanisms through measures such as sustainability reporting[96]; fostering SDG 16 by strengthening the rule of law, building accountable and inclusive institutions at all levels, upholding human rights and enhancing access to justice[97]; and enhancing public participation and access to information at all levels[98]. Realizing the Governance ('G') tenet in ESG for sustainability is a worthy and achievable endeavor.

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[93] Ramzy. O et al., 'Sustainable Development & Good Governance.' Op Cit

[94] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Sustainable Development Goal 16

[95] Crocker. C., 'African Governance: Challenges and their Implications.' Op Cit

[96] Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

[97] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Sustainable Development Goal 16

[98] Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.'

Embracing Sound Environmental Governance in Africa

Abstract

This paper critically explores the need to embrace sound environmental governance in Africa. It argues that embracing sound environmental governance is an important agenda towards sustainability in Africa. The paper examines the progress made towards realizing good environmental governance in Africa. It also discusses some of the challenges facing the attainment of sound environmental governance in Africa. In addition, the paper also suggests reforms towards embracing sound environmental governance in Africa for sustainability.

1.0 Introduction

Governance refers to the fundamental question of how organisation, decisions, order and rule are achieved in heterogeneous and highly differentiated societies[1]. It has been asserted that at its core, governance addresses the problem of economic and political co-ordination in social life[2]. It has been argued that governance is one of the most important factors for ensuring effective environmental management and conservation actions[3].

Environmental governance has been defined as the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes[4]. It comprises of rules, practices, policies and institutions that shape how humans interact with the environment[5]. Environmental governance is a process that links and harmonizes policies, institutions, procedures, tools and information to allow participants (public and private sector, Non-Governmental Organizations (NGOs), local communities) to manage conflicts, seek points of consensus, make

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[1] Bridge. G., & Perreault. T., 'Environmental Governance.' *A Companion to Environmental Geography.,* Blackwell Publishing Ltd, 2009

[2] Ibid

[3] Bennett. N., & Satterfield. T., 'Environmental Governance: A Practical Framework to Guide Design, Evaluation, and Analysis.' Available at *https://onlinelibrary.wiley.com/* (Accessed on 10/01/2024)

[4] Lemos. M.C., & Agrawal. A., 'Environmental Governance' *Annual Review of Environmental Resources*., Volume 31, 2006, pp 297-325

[5] Haque. M., 'Environmental Governance.' Available at https://www.researchgate.net/publication/318166768_Environmental_Governance (Accessed on 10/01/2024)

fundamental decisions, and be accountable for their actions[6]. Environmental governance can also refer to the processes of decision-making involved in controlling and managing the environment and natural resources[7]. According to the United Nations Environment Programme (UNEP), environmental governance includes policy, rules and norms that govern human behavior and it also addresses who makes decisions, how decisions are made and carried out, the scientific information needed for decision-making and how the public and major stakeholders can participate in the decision-making[8].

It has been argued that environmental governance should be understood broadly so as to include all institutional solutions for resolving conflicts over environmental resources[9]. It has been pointed that this approach would eliminate the distinction between 'governance' and 'government' in environmental matters and help to understand why solutions not involving the state are used to respond to some environmental conflicts, and why solutions based on the central role of the state prevail in others[10]. To this extent, it has been asserted that 'governance' is an umbrella term for diverse forms of state and non-state political control exercised today at various policy levels against the backdrop of growing complexity in actor structures and the operating environment[11]. The term 'governance' therefore takes in a broader range of actors and policy instruments than 'government' which is restricted to state action[12]. It has correctly been pointed out that an important aspect of

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[6] Ibid

[7] What is Environmental Governance., Available at
https://acrobat.adobe.com/id/urn:aaid:sc:EU:a6a47b07-e9e0-4590-8a49-9e55a3bb2a75 (Accessed on 10/01/2024)

[8] United Nations Environment Programme., 'Environmental Governance.' Available at *https://www.unep.org/regions/west-asia/regional-initiatives/environmental-governance* (Accessed on 10/01/2024)

[9] Paavola. J., 'Institutions and Environmental Governance: A Reconceptualization.' *Ecological Economics*., Volume 63, No. 1 (2007): 93-103, p 94

[10] Ibid

[11] Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Glenwood Publishers Limited, 2020

[12] Bell. C., 'Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions.' Available at *https://www.politicalsettlements.org/wp-content/uploads/2017/09/2015_BP_4_Bell_Governance-and-Law.pdf* (Accessed on 10/01/2024)

governance as opposed to government, and of multi-level governance in particular, is the participation of non-state actors in decision-processes on the different levels of governance[13]. It has been suggested that good governance entails elements such as participation, rule of law, transparency, responsiveness, consensus building, equity and inclusiveness, effectiveness and efficiency, and accountability[14]. Sound environmental governance takes into account the role of all actors that impact the environment, including governments, NGOs, the private sector and civil society, who must all cooperate to achieve effective governance that can help humanity move to a more sustainable future[15].

This paper critically explores the need to embrace sound environmental governance in Africa. It argues that embracing sound environmental governance is an important agenda towards sustainability in Africa. The paper examines the progress made towards realizing good environmental governance in Africa. It also discusses some of the challenges facing the attainment of sound environmental governance in Africa. In addition, the paper also suggests reforms towards embracing sound environmental governance in Africa for sustainability.

2.0 The Need for Sound Environmental Governance
Sound environmental governance is vital in fostering Sustainable Development[16]. It has correctly been pointed out that sound management of the environment and natural resources in a sustainable and transparent manner can be the engine for Sustainable Development as well as a platform for peace and justice[17]. It has been contended that sound environmental governance has four generalizable and distinct objectives: to be effective, to be equitable, to be responsive, and to be robust[18]. Effective environmental

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[13] Newig. J., & Fritsch. O., 'Environmental Governance: Participatory, Multi-Level – And Effective?' *Environmental Policy & Governance.*, Volume 19, Issue 3 (2009)

[14] United Nations Environment Programme., 'Environmental Governance.' Op Cit

[15] Ibid

[16] Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

[17] Ibid

[18] Bennett. N., & Satterfield. T., 'Environmental Governance: A Practical Framework to Guide Design, Evaluation, and Analysis.' Op Cit

governance focuses on aspects such as direction, coordination, capacity, accountability, and efficiency; equitable environmental governance engages decision-making processes and produces socioeconomic outcomes that might be characterized as: inclusive, participatory, fair, and just[19]; responsiveness ensures that environmental governance is adaptable both to changing environmental and social conditions and to diverse contexts[20]; and robust environmental governance ensures functioning institutions which persist over time, maintain performance, and cope with environmental disturbances and crises[21].

Sound environmental governance fosters environmental justice[22]. Environmental Justice refers to the right of every person 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[23]. It has been argued that Environmental Justice seeks to achieve the ideal of access, participation and procedural justice in environmental decision making[24]. Environmental Justice highlights the plight of vulnerable people and communities who bear the most burden when it comes to environmental damage and seeks to give them a voice through access to environmental information and participation in environmental decision making in order to ensure sustainable and equitable development[25]. It has been argued that sound environmental governance reflects both distributive and procedural justice concerns[26]. Procedural justice

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[19] Ibid

[20] Ibid

[21] Ibid

[22] Paavola. J., 'Institutions and Environmental Governance: A Reconceptualization.' Op Cit

[23] Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at *https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml* (Accessed on 10/01/2024)

[24] Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' *WIREs Clim Change* 2014

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

[26] Paavola. J., 'Institutions and Environmental Governance: A Reconceptualization.' Op Cit

assures those whose interests are not endorsed by a particular environmental decision that their interests can count in other decisions[27]. It also enables affected parties to express their consent or dissent, and to maintain their dignity[28]. Distributive justice on the other hand seeks to ensure that environmental benefits and burdens are shared fairly and in a way that does not contribute toward further marginalization of vulnerable groups, from both intra and intergenerational perspectives, within and among nations[29].

According to UNEP, sound environmental governance can safeguard the environment and human rights and contribute towards the achievement of all 17 United Nations Sustainable Development Goals[30].It further points out that there is need for appropriate legal frameworks on the global, regional, national and local level to pursue good environmental governance that will lead to a healthy and prosperous planet for all living creatures, now and in the future[31]. The need for sound environmental governance is succinctly captured in the United Nation's 2030 Agenda for Sustainable Development[32]. The 2030 Agenda seeks to balance the three dimensions of Sustainable Development: the economic, social and environmental[33]. It urges all countries to embrace sound environmental governance in order to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change so that the planet can support the needs of the present and future generations[34]. The 2030 Agenda embeds environmental protection in

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[27] Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

[28] Ibid

[29] Ibid

[30] United Nations Environment Programme., 'About Environmental Rights and Governance.' Available at *https://www.unep.org/explore-topics/environmental-governance/about-environmental-rights-and-governance#:~:text=In%20our%20globalized%20world%2C%20environmental,humans%20interact%20with%20the%20environment.* (Accessed on 10/01/2024)

[31] United Nations Environment Programme., 'Environmental Governance.' Op Cit

[32] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf* (Accessed on 10/01/2024)

[33] Ibid

[34] Ibid

virtually all the Sustainable Development Goals (SDGs)[35]. Realizing the 2030 Agenda for Sustainable Development is critical in fostering sound environmental governance at all levels[36].

The importance of sound environmental governance was also considered during the Earth Summit in 1992[37]. The Earth Summit concluded that the concept of Sustainable Development was an attainable goal for all the people of the world, regardless of whether they were at the local, national, regional or international level[38]. It also recognized that integrating and balancing economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet and that such an integrated approach is possible[39]. One of the major results of the Earth Summit was the adoption of *Agenda 21*[40] a daring program of action calling for new strategies to invest in the future to achieve overall sustainable development in the 21st century. Agenda 21 affirms that integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future[41]. One of the key objectives of Agenda 21 is to improve the legal and institutional capacities of countries to cope with national problems of governance and effective law-making and law-applying in the field of environment and Sustainable Development[42].

Another important legal instrument that was adopted during the Earth Summit which is vital in promoting sound environmental governance is the

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[35] Ibid

[36] Ibid

[37] United Nations., 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.' Available at

https://www.un.org/en/conferences/environment/rio1992

[38] Ibid

[39] Ibid

[40] United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992., 'Agenda 21.' Available at
https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*9uipp7*_ga* MjA2NDk2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*MTY5NDU5NjE3MS41N S4xLjE2OTQ1OTgzODUuM C4wLjA (Accessed on 10/01/2024)

[41] Ibid, Preamble

[42] Ibid

Rio Declaration on Environment and Development[43]. The Declaration seeks to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development[44]. The Declaration stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a healthy and productive life in harmony with nature[45]. It further states that in order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it[46]. The Rio Declaration upholds key environmental principles that are vital in promoting sound environmental governance which include Sustainable Development, inter and intra generational equity, environmental protection, public participation, the precautionary principle and the principle of state cooperation[47]. Further, in order to achieve sound environmental governance, the Rio Declaration requires states to enact effective environmental legislation[48]. It also recognizes the role of women, youth and indigenous people and local communities in environmental governance[49]. In particular, the Declaration provides that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices[50]. It requires states to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of Sustainable Development[51]. Implementing the principles enshrined in the Rio Declaration on Environment and Development can enhance sound environmental governance.

From the foregoing, it emerges that sound environmental governance is a prerequisite for the attainment of Sustainable Development. It has been argued

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[43] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)
[44] Ibid, Principle 2
[45] Ibid, Principle 1
[46] Ibid, Principle 4
[47] Rio Declaration on Environment and Development, Op Cit
[48] Ibid, Principe 11
[49] Rio Declaration on Environment and Development, Op Cit
[50] Ibid, Principle 22
[51] Ibid

that there is need to embrace sound environmental governance in Africa in order to achieve sustainability[52].

3.0 Embracing Sound Environmental Governance in Africa: Progress and Setbacks

Africa is endowed with a rich environment that includes natural resources ranging from arable land, water, oil, natural gas, minerals, forests and wildlife[53]. It has been correctly pointed out that the continent holds a huge proportion of the world's natural resources, both renewables and non-renewables[54]. UNEP asserts that over 70 per cent of people living in sub-Saharan Africa depend on forests and woodlands for their livelihoods[55]. Further, it has been observed that land is an economic development asset as well as a socio-cultural resource in Africa[56]. Although not evenly distributed, each country in Africa has a fair share of its own natural resources therefore resulting in diversity on the availability of these resources in the continent[57].

These include organic natural resources ranging from forests and the forest products in general and other land based resources such as oil, gold, iron, cobalt, uranium, copper, bauxite, silver and petroleum[58]. Africa is home to the world's largest arable landmass; second largest and longest rivers (the Nile and the Congo); and its second largest tropical forest[59]. Further, it is estimated that the continent's proven oil reserves constitute 8 per cent of the world's stock and those of natural gas amount to 7 per cent[60]. In addition, minerals

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[52] Asongu. S., & Odhiambo. N., 'Enhancing Governance for Environmental Sustainability in Sub-Saharan Africa.' *Energy Exploration & Exploitation*., Volume 39, Issue 1 (2020)

[53] United Nations Environment Programme., 'Our Work in Africa.' Available at *https://www.unep.org/regions/africa/our-work-africa* (Accessed on 11/01/2024)

[54] Ibid

[55] Ibid

[56] Ibid

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

[58] Ibid

[59] African Development Bank Group., 'Catalyzing Growth and Development through Effective Natural Resources Management.' Available at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_ANRC_BROCHURE_en.pdf* (Accessed on 11/01/2023)

[60] Ibid

account for an average of 70 per cent of total African exports and about 28 per cent of Gross Domestic Product (GDP)[61]. Against this backdrop, sound environmental governance is vital if Africa is to reap the full benefits from its rich environment and natural resources.

It has been posited that Africa's natural resources provide a unique opportunity to foster human and economic development in the continent[62]. According to UNEP, Africa has a lot to gain in pulling together and harnessing its vast environment and natural resources to finance the development agenda towards greater prosperity; and it must also ensure that future growth and exploitation of natural resources is results-oriented, climate resilient and sustainable[63]. On this basis, it has been argued that there is need to enhance responsible environmental stewardship in order to ensure sustainability in Africa[64]. The continent has enormous potential for sustainable growth and environmental conservation[65].

According to the African Union, sustainable environmental management is fundamental to the pursuit of food security, peace, security, and stability in Africa[66]. The African Union correctly opines that many African economies are heavily dependent on natural resources to fuel economic growth and development[67]. For example, agriculture, forestry and fishing, mining and quarrying, and oil and natural gas are crucial contributors to the GDP of many African economies[68]. In addition, it has been correctly observed that a large portion of the African population, especially the rural population, is directly dependent on the natural environment for their sustenance and livelihoods[69].

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[61] Ibid

[62] African Development Bank Group., 'Catalyzing Growth and Development through Effective Natural Resources Management.' Op Cit

[63] United Nations Environment Programme., 'Our Work in Africa.' Op Cit

[64] African Development Bank Group., 'Catalyzing Growth and Development through Effective Natural Resources Management.' Op Cit

[65] United Nations Environment Programme., 'Our Work in Africa.' Op Cit

[66] Africa Union., 'Africa Environment and Wangari Maathai Day.' Available at https://au.int/en/wangari-maathai-day (Accessed on 11/01/2024)

[67] Ibid

[68] Ibid

[69] Ibid

According to Africa Union's *Agenda 2063*[70], Africa's natural resources play a critical role for vast segments of Africa's population who depend on the continent's biodiversity, forests and land for their livelihoods directly or indirectly[71]. Africa's natural resources also make a direct contribution to economic development through tourism, agriculture, logging among other activities[72]. Therefore, sound governance and management of the continent's natural resources is of paramount importance if the continent is to achieve the Sustainable Development agenda[73].

The need for sound environmental governance in Africa is captured in African Union's development blueprint *Agenda 2063*[74]. Agenda 2063 enshrines the ideal of a prosperous Africa, based on inclusive growth and Sustainable Development[75]. Sound environmental governance is an important item under Agenda 2063 which seeks to put in place measures to sustainably manage the continent's rich biodiversity, forests, land and waters and using mainly adaptive measures to address climate change risks[76]. Among the key goals of Agenda 2063 is to foster environmentally sustainable and climate resilient economies and communities in Africa[77]. Agenda 2063 seeks to achieve this goal through sound environmental governance practices including sustainable natural resource management; conservation of biodiversity, genetic resources and ecosystems; promoting sustainable consumption and production patterns in Africa; fostering water security; enhancing climate resilience and natural disasters preparedness and prevention; and embracing renewable energy in Africa[78]. Realizing these targets is essential in promoting sound environmental governance in Africa.

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[70] African Union., 'Agenda 2063: The Africa we Want.' Available at *https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pd*f (Accessed on 11/01/2024)

[71] Ibid

[72] Ibid

[73] Africa Union., 'Africa Environment and Wangari Maathai Day.' Op Cit

[74] African Union., 'Agenda 2063: The Africa we Want.' Op Cit

[75] Ibid

[76] Ibid

[77] Ibid

[78] Ibid

In addition, there has been adoption of legal instruments in Africa at the continental, regional and national levels aimed to guide countries in their efforts to foster sound environmental governance towards Sustainable Development. The *African Convention on the Conservation of Nature and Natural Resources*[79] aims to enhance environmental protection in Africa; 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 in Africa[80]. The Convention requires states to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner[81].

Further, the *Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*[82] seeks to foster environmental conservation in Africa by prohibiting the import of all hazardous wastes for any reason into Africa. It has been argued that the Convention is meant to ensure that even as African countries engage in development projects and international trade with countries outside the region, they do not engage in activities that adversely affect the environment[83]. At the regional level, the *Treaty for the Establishment of the East African Community*[84] seeks to foster sound environmental governance within the East African Community (EAC). The treaty recognises that development activities may have negative impacts on the environment leading to the degradation of

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[79] African Union., 'African Convention on the Conservation of Nature and Natural Resources.' Available at https://au.int/sites/default/files/treaties/41550-treaty-Charter_ConservationNature_NaturalResources.pdf (Accessed on 11/01/2024)
[80] Ibid, Article II
[81] Ibid, Article III (3)
[82] African Union., 'Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.' Available at https://au.int/sites/default/files/treaties/7774-treaty-0015_-_bamako_convention_on_hazardous_wastes_e.pdf (Accessed on 11/01/2024)
[83] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016
[84] East African Community., 'Treaty for the Establishment of the East African Community.' Available at https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf (Accessed on 11/01/2024)

the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for Sustainable Development[85]. It requires actions by the EAC relating to the environment to pursue certain objectives including: to preserve, protect and enhance the quality of the environment; to contribute towards the sustainability of the environment; to ensure sustainable utilisation 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[86]. The Treaty also requires member states of the EAC to cooperate in the management of the environment and natural resources[87]. The Treaty is therefore vital in fostering sound environmental governance within the EAC.

At the national level, the *Constitution of Kenya of Kenya*[88] for example, seeks to promote sound environmental governance. It enshrines Sustainable Development as one the national values and principles of governance[89]. It also recognizes the right to a clean and heathy environment as a fundamental human right[90]. The Constitution further stipulates several obligations by the state in respect of the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits, the need to encourage public participation in the management, protection and conservation of the environment, the obligation to protect genetic resources and biological diversity and the obligation to eliminate processes and activities that are likely to endanger the environment[91]. The Constitution also recognizes the role of courts in promoting environmental governance and stipulates 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

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[85] Ibid, Article 111

[86] Ibid

[87] Ibid, Articles 112 & 114

[88] Constitution of Kenya, 2010, Government Printer, Nairobi

[89] Ibid, Article 10 (2) (d)

[90] Ibid, Article 42

[91] Ibid, Article 69

other legal remedies that are available in respect to the same matter[92]. Realizing these provisions is vital in fostering sound environmental governance in Kenya.

Further, the *Environmental Management and Co-ordination Act*[93] establishes the legal and institutional framework for the management of the environment in Kenya. The Act upholds the right of every Kenyan to a clean and healthy environment and sets out various measures towards upholding this right including environmental planning, protection and conservation of the environment, Environmental Impact Assessment, Environmental Audit and Monitoring, environmental restoration and conservation orders and enforcement of environmental rights through courts and tribunals[94]. The Act further establishes the National Environment Management Authority which has the mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment[95].

As a result of the foregoing efforts, it has been observed that there has been progress towards embracing sound environmental governance in Africa[96]. UNEP notes that efforts have been made towards promoting sound environmental governance in Africa through measures such as strengthening environmental legislation, use of technology in environmental enforcement, decentralization of authority to govern renewable resources such as forests, irrigation systems, and inland fisheries, criminalization of environmental offences and enhanced environmental litigation[97]. In addition the *African Commission on Human and Peoples' Rights* has continued to elaborate on the

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[92] Ibid, Article 70 (1)
[93] Environmental Management and Co-ordination Act., No. 8 of 1999, Government Printer, Nairobi
[94] Ibid
[95] Ibid, S 7 & 9
[96] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/43943/Environmental_rule_of_law_progress.pdf?sequence=3 (Accessed on 11/01/2024)
[97] Ibid

understanding of environment-related rights enshrined in the African Charter on Human and Peoples' Rights, including the right to a general satisfactory environment favourable to development, the right to life , and the right to cultural development and equal enjoyment of the common heritage of mankind[98].

However, despite these efforts there are several challenges hindering the realization of sound environmental governance in Africa. It has been pointed out that unsustainable exploitation of Africa's natural resources by its growing population, and the laxity by authorities to effect and implement sound regulations to tame abuse and over exploitation of these resources is creating environmental challenges[99]. In addition, it has been pointed out that Africa is facing the prospect of environmental calamity in the form of the triple planetary crisis comprising of climate change, nature and biodiversity loss, and pollution and waste[100]. Africa is currently facing pressing environmental issues which include deforestation, air pollution, water pollution, biodiversity loss and oil spills which have been attributed to poor environmental governance among other reasons[101]. According to the African Union, the unfolding phenomena of climate change, biodiversity depletion, desertification, land degradation and unsustainable use of finite natural resources remain a serious risk for Africa since they pose real impediments to achieving the SDGs and Africa's Agenda 2063[102]. It also notes that crises being witnessed across the continent such as droughts, armed conflicts, or other natural disasters, are exacerbated by environmental deterioration[103]. It is imperative to embrace sound environmental governance in order to address the foregoing among other environmental challenges in Africa.

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[98] Ibid

[99] United Nations Environment Programme., 'Our Work in Africa.' Op Cit

[100] United Nations Environment Programme., 'Fostering Collaboration to Address Environmental Challenges in Africa.' Available at https://www.unep.org/news-and-stories/speech/fostering-collaboration-address-environmental-challenges-africa (Accessed on 11/01/2024)

[101] Nguyen. L., '5 Biggest Environmental Issues in Africa in 2023.' Available at https://earth.org/environmental-issues-in-africa/ (Accessed on 11/01/2024)

[102] Africa Union., 'Africa Environment and Wangari Maathai Day.' Op Cit

[103] Ibid

4.0 Way Forward

In order to embrace sound environmental governance in Africa, there is need to strengthen environmental rule of law[104]. Environmental law is a collective term encompassing all aspects of the law that provide protection to the environment[105]. It entails a set of regulatory regimes and environmental legal principles which focus on the management of specific natural resources, such as land, wildlife and biodiversity, forests, minerals, water, fisheries and coastal and marine resources[106]. According to UNEP, environmental rule of law is central to Sustainable Development[107]. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance[108]. It has been contended that without environmental rule of law and the enforcement of legal rights and obligations, environmental governance, conservation, and protection may be arbitrary, subjective, and unpredictable[109]. Therefore, environmental rule of law and robust institutions are vital in fostering responses to increasing environmental pressures that threaten the ecological integrity of the Earth, in a way that respects fundamental rights and principles of justice and fairness[110]. Environmental rule of law is therefore an essential tool of environmental governance[111]. Strengthening environmental rule of law can promote sound environmental governance in Africa through measures such as

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[104] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[105] Conserve Energy Future., 'What is Environmental Law: Importance and Components.' Available at *https://www.conserve-energy-future.com/environmental-law-and-itscomponents.php#:~:text=The%20two%20basic%20factors%20that,preserve%20and%20protect%20the%20 environmen* (Accessed on 11/01/2024)

[106] Ibid

[107] United Nations Environment Programme., 'Promoting Environmental Rule of Law.' Available at *https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law (Accessed on 11/01/2023)*

[108] Ibid

[109] International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Available at *http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091064.pdf* (Accessed on 11/01/2023)

[110] Ibid

[111] Muigua. K., 'Strengthening Environmental Rule of Law for Sustainability.' Available at *https://kmco.co.ke/wp-content/uploads/2023/09/Strengthening-Environmental-Rule-of-Law-for-Sustainability-.pdf* (Accessed on 11/01/2024)

implementation and enforcement of environmental laws, building strong environmental institutions and enhancing access to justice in environmental matters[112].

In addition, there is need to embrace civic engagement in environmental management[113]. It has been pointed out that civic engagement encompasses sharing of information between the government and the public, participation by civil society organizations and other stakeholders—including academics, businesses and media—in decision-making processes, and political action by citizens to influence the adoption and implementation of policies and laws[114]. Civic engagement in environmental matters is a dynamic process that supports inclusive, consultative and accountable decision-making and implementation[115]. The Role of civic engagement in environmental governance is succinctly captured by the *Rio Declaration on Environment and Development* which stipulates as follows:

> 'Environmental issues are best handled with the *participation of all concerned citizens, at the relevant level.* At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to *participate in decision-making processes. States shall facilitate and encourage public awareness and participation* by making information widely available. *Effective access to judicial and administrative proceedings*, including *redress and remedy, shall be provided*. (Emphasis added)[116].

Principle 10 of the Rio Declaration establishes three fundamental pillars of civic engagement in environmental decision-making which are broad access

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[112] Ibid

[113] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[114] Ibid

[115] Ibid

[116] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1), Principle 10

to information concerning the environment that is held by public authorities; realistic and meaningful opportunities to participate in decision-making processes related to the environment; and effective access to judicial and administrative proceedings[117]. It has been correctly opined that the pillars of civic engagement including access to information and public participation can promote Sustainable Development and improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions in the context of social, environmental and economic decision making[118]. In addition, public participation can also improve policy implementation and foster peace and sustainability by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict[119]. It has been asserted that 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 public[120].In addition, effective access to judicial and administrative proceedings is essential in fostering environmental justice[121]. Therefore, in order to embrace sound environmental governance in Africa, there is need to enhance civic engagement through access to information, public participation, and effective access to judicial and administrative proceedings.

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[117] Ibid

[118] 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 on11/01/2024)

[119] Ibid

[120] Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDSMEANINGFULPUBLICPARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf* (Accessed on 11/01/2024)

[121] Muigua. K., 'Realizing Environmental Justice through Litigation.' Available at *https://kmco.co.ke/wpcontent/uploads/2023/07/Realizing-Environmental-Justice-through-Litigation.pdf* (Accessed on 11/01/2024)

It is also imperative foster the role of indigenous people and indigenous knowledge in environmental conservation and management[122]. Indigenous people are often at the heart of environmental conservation efforts because conserving unique biodiversity relies on the knowledge, innovations and practices of those who live in direct contact with nature[123]. For example, it has been pointed out that forests managed by indigenous peoples and local communities are at least as effective at maintaining forest cover as those under stricter protection regimes[124]. The Rio Declaration provides that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices[125]. It requires states to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of Sustainable Development[126].

It has been posited that in Africa, indigenous knowledge systems such as using animal dung as manure, sighting of the new moon before planting, rain-making rituals, and planting of trees to serve as shades have helped to conserve the wetlands and the forests of most societies and are effective in promoting environmental sustainability[127]. African societies have for many centuries used indigenous knowledge to manage environmental issues such as water scarcity or pollution, land pollution, erosion, protection of forests, curbing overfishing, deforestation, and management of other natural resources[128]. African countries can therefore leverage indigenous knowledge to foster sound environmental governance. This can be achieved through approaches such as decentralized or community-based environmental

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[122] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[123] Ibid

[124] Ibid

[125] Rio Declaration on Environment and Development, Principle 22

[126] Ibid

[127] Egeruoh-Adindu. I., 'Leveraging Indigenous Knowledge for Effective Environmental Governance in West Africa.' Available at *https://www.scirp.org/journal/paperinformation?paperid=121949#:~:text=Indigenous%20knowledge%20systems%20such%20as,effective%20in%20promoting%20environmental%20sustainability.* (Accessed on 11/01/2024)

[128] Ibid

management systems[129]. It has been argued that such approaches can promote sound environmental governance because of factors such as competition among subnational units, bringing decision-making closer to those affected by governance, thereby promoting higher participation and accountability and helping decision makers take advantage of more precise time- and place-specific knowledge about natural resources[130].

Finally there is need to combat climate change among other pressing environmental problems in Africa[131]. Africa is classified as a continent that is highly vulnerable to climate change due to several reasons including endemic poverty and high dependence on rain-fed agriculture, complex governance and institutional dimensions, limited access to capital including markets and technology, weak infrastructure, ecosystem degradation and poor management of natural resources, disasters both natural and man-made and conflicts[132]. This vulnerability is worsened by strong dependence of African economies on climate sensitive natural resources[133]. It has been observed that climate change is having a devastating impact on the African continent creating food insecurity, stressing water resources, depleting human health, displacing populations and impeding socio-economic development[134]. Climate change therefore represents a major threat to Africa achieving the Sustainable Development Goals[135]. Climate change is significantly impacting the environment and natural resources in Africa through intense droughts, water

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[129] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[130] Ibid

[131] Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2023/08/Reflections-on-Confronting-Climate-Change-in-Africa.pdf* (Accessed on 11/01/2024)

[132] 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_Ad aptation_in _ECASADCCOMESA_region_Opportunities_and_Challenge*s (Accessed on 11/01/2024)

[133] Ibid

[134] Rao. V., & Yadav. P., 'Confronting Climate Change in Africa.' Available at *https://knowledge.insead.edu/responsibility/confronting-climate-change-africa* (Accessed on 11/01/2024)

[135] African Development Bank Group., 'Climate Change in Africa.' Available at *https://www.afdb.org/en/cop25/climate-change-africa* (Accessed on 11/01/2024)

scarcity and increasing risk of extinction of biodiversity including plant and animal species[136]. Confronting climate change alongside other environmental problems including pollution, desertification and loss of biodiversity in Africa is thus an urgent need if the continent is to realize the Sustainable Development agenda[137]. African countries should therefore take urgent action to combat climate action and its impacts on the continent through measures such as embracing sound environmental governance[138].

The foregoing measures among others are essential in embracing sound environmental governance in Africa.

5.0 Conclusion

Sound management of the environment and natural resources in a sustainable and transparent manner can be the engine for Sustainable Development as well as a platform for peace and justice[139]. The United Nation's 2030 Agenda enshrines the need for sound environmental governance by seeking to balance the three dimensions of Sustainable Development: the economic, social and environmental[140]. Further, the importance of sound environmental governance in Africa is set out in the African Union's development blueprint *Agenda 2063*[141]. There have been efforts towards promoting sound environmental governance in Africa through measures such as strengthening environmental legislation, use of technology in environmental enforcement, decentralization of authority to govern renewable resources such as forests, irrigation systems, and inland fisheries, criminalization of environmental offences and enhanced environmental litigation[142]. However, sound environmental governance in Africa continues to be threatened by environmental problems including

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[136] Ibid

[137] Ibid

[138] Muigua. K., 'Taking Urgent Action to Combat Climate Change.' Available at *https://kmco.co.ke/wp-content/uploads/2023/09/Taking-Urgent-Action-to-Combat-Climate-Change.pdf* (Accessed on 11/01/2024)

[139] Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

[140] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

[141] African Union., 'Agenda 2063: The Africa we Want.' Op Cit

[142] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

climate change, biodiversity depletion, desertification, land degradation and unsustainable use of finite natural resources[143]. It is imperative to embrace sound environmental governance in Africa in order to achieve sustainability. This can be realized through strengthening environmental rule of law[144]; embracing civic engagement in environmental management[145]; fostering the role of indigenous people and indigenous knowledge in environmental conservation and management[146]; and combating climate change among other pressing environmental problems in Africa[147].

Embracing Sound Environmental Governance in Africa is key if the goal of Sustainability is to be attained.

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[143] Africa Union., 'Africa Environment and Wangari Maathai Day.' Op Cit

[144] United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

[145] Ibid

[146] Egeruoh-Adindu. I., 'Leveraging Indigenous Knowledge for Effective Environmental Governance in West Africa.' Op Cit

[147] Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Ibid

Enhancing Food Security in Africa

Abstract
This paper critically interrogates the need to enhance food security in Africa. It argues that achieving food security is vital if Africa is to realize the Sustainable Development agenda. The paper explores the progress made towards enhancing food security in Africa. It also examines some of the obstacles facing the realization of food security in Africa. The paper further suggests initiatives which can be adopted towards enhancing food security in Africa.

1.0 Introduction

Food security has been defined as a product of food availability, food access, stability of supplies and biological utilization[1]. At the World Food Summit in 1996, it was agreed that food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life[2]. Food security has also been defined to mean access by all people at all times to adequate food for an active healthy life, and entails both the availability of food and the ability of all members to have access to adequate amount of food[3]. According to the Food and Agriculture Organization (FAO), food security entails several elements including food availability: which refers to the availability of sufficient quantities of food of appropriate quality, supplied through domestic production or imports (including food aid)[4]; food access: which means access by individuals to adequate resources (entitlements) for acquiring appropriate foods for a nutritious diet[5]; utilization: which refers to utilization of food through adequate diet, clean water, sanitation and health care to reach a state of nutritional well-being where all physiological needs are met[6]; and stability: the idea that to be food secure, a population, household or

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[1] Gibson. M., 'Food Security—A Commentary: What Is It and Why Is It So Complicated?'

[2] Food and Agriculture Organization., 'Food Security.' Available at *https://www.fao.org/fileadmin/templates/faoitaly/documents/pdf/pdf_Food_Security_Cocept_Note.pdf* (Accessed on 12/01/2024)

[3] Reutlinger, S. and Pellekaan, J.V.H., Poverty and Hunger: Issues and options for food security in developing countries, (The World Bank, 1986)

[4] Food and Agriculture Organization., 'Food Security.' Op Cit

[5] Ibid

[6] Ibid

individual must have access to adequate food at all times and that they should not risk losing access to food as a consequence of sudden shocks (such as an economic or climatic crisis) or cyclical events including seasonal food insecurity[7]. According to the World Food Programme (WFP), people are considered food secure when they have availability and adequate access at all times to sufficient, safe, nutritious food to maintain a healthy and active life[8]. In addition, it has been asserted that food security is a very important determinant of whether people can lead an active and healthy life, because it determines their access to foods required to meet nutrient needs[9].

Achieving food security has been described as a key determinant for the realization of the human right to food towards Sustainable Development[10]. The right to food has been defined as the right to have regular, permanent and unrestricted access—either directly or by means of financial purchases— to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear[11]. This right is enshrined at the international level under the *International Covenant on Economic, Social and Cultural Rights[12]* which recognizes the right of everyone to an adequate standard of living for himself and his family, including *adequate food*, clothing and housing, and to the

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[7] Ibid

[8] World Food Programme, "What is food security?" available at https://www.wfp.org/node/359289 (Accessed on 12/01/2024)

[9] De Pee. S., 'Food Security.' Encyclopedia of Human Nutrition., 3rd Edition.,(2013), pp 353-360

[10] Muigua. K., 'Achieving the Right to Food for Sustainable Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf* (Accessed on 12/01/2024)

[11] United Nations Office of the High Commissioner for Human Rights., 'About the Right to Food and Human Rights.' Available at *https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights#:~:text=The%20right%20to%20food%20defined&text=The%20Committee%20declared%20that%20%E2%80%9Cthe,or%20means%20for%20its%20procurement.* (Accessed on 12/01/2024)

[12] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

continuous improvement of living conditions (emphasis added)[13]. It requires all countries recognizing the fundamental right of everyone to be free from hunger, to take, individually and through international co-operation, measures, including specific programmes, which are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge among other measures[14]. At a national level, the *Constitution of Kenya,* for example, also recognizes the right of every person to be free from hunger, and to have adequate food of acceptable quality[15].

Food security is at the heart of the Sustainable Development agenda. The United Nation's *2030 Agenda for Sustainable Development* envisions a world where food is sufficient, safe, affordable and nutritious[16]. Sustainable Development Goal (SDG) 2 seeks to end hunger, achieve food security, and improved nutrition and promote sustainable agriculture[17]. SDG 2 sets out several targets towards enhancing food security which include ensuring access by all people to safe, nutritious and sufficient food all year round; ending all forms of malnutrition; doubling the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment;[18] ensuring sustainable food production systems and implementing resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality;[19] increasing investment, including through enhanced international cooperation, in rural infrastructure,

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[13] Ibid, Article 11 (1)

[14] Ibid, Article 11 (2)

[15] Constitution of Kenya., 2010, Article 43 (1) (c)., Government Printer, Nairobi

[16] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pdf* (Accessed on 12/01/2024)

[17] Ibid, Sustainable Development Goal 2

[18] Ibid

[19] Ibid

agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries;[20] correcting and preventing trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect;[21] and adopting measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility[22]. Achieving the targets of SDG 2 is therefore necessary in order to enhance food security.

Enhancing food security is vital for Sustainable Development in Africa. It has been argued that demand for food across the world is increasing, driven by a range of population and demographic changes including population growth, changes in population structure, consumption growth, and urbanization[23]. Meeting the increasing demand for food is potentially constrained by factors such as biological performance, climate change, and the local and planetary boundaries that determine the need for agriculture to be more sustainable[24]. Therefore, meeting the challenges associated with food security require more than simply innovating to increase yields, but also demands changes in farming systems to promote the sustainable, and resilient production of food to meet the nutritional requirements of local and global populations[25]. In light of the foregoing, it has been posited that Africa's food systems must become more resilient and guarantee access to healthy and affordable diets for all[26].

This paper critically interrogates the need to enhance food security in Africa. It argues that achieving food security is vital if Africa is to realize the Sustainable Development agenda. The paper explores the progress made

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[20] Ibid

[21] Ibid

[22] Ibid

[23] Benton. T. G., 'Food Security.' Encyclopedia of Applied Sciences., Volume 2, 2nd Edition., (2017), pp 19-22

[24] Ibid

[25] Ibid

[26] Strengthening Africa's Food Systems., Available at
 https://www.brookings.edu/wp-content/uploads/2023/01/foresightafrica2023_chapter2.pdf
(Accessed on 12/01/2024)

towards enhancing food security in Africa. It also examines some of the obstacles facing the realization of food security in Africa. The paper further suggests initiatives which can be adopted towards enhancing food security in Africa.

2.0 Enhancing Food Security in Africa: Opportunities and Challenges

Enhancing food security is an important agenda in Africa. It has been opined that establishing food security is important for millions of people facing hunger in Africa and is crucial for sustainable economic development and long-term prosperity of the continent[27]. Enhancing food security is essential to achieving Africa's continental collective development objectives[28]. It has been posited that increasing food production is key in a context in which food demand in Africa, measured by the growth of its population, is expected to increase by approximately 60% in the year 2030[29].

Achieving food security can accelerate socio-economic development in Africa[30]. It is has been estimated that more than two-thirds of Africans depend on agriculture for their income and their basic food needs[31]. Research has shown that countries with higher agricultural growth have lower poverty rates[32]. Therefore, by improving agriculture and food markets, there is an opportunity to further lift millions of African people out of poverty[33].

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[27] Munang. R., & Han. Z., 'Food Security: Regional Solutions Key to Solving Africa's Challenges.' Available at https://www.un.org/africarenewal/web-features/food-security-regional-solutions-key-solving-africa%E2%80%99s-challenges (Accessed on 12/01/2024)

[28] Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Available at *https://odi.org/en/insights/how-african-integration-can-help-to-achieve-food-security/* (Accessed on 12/01/2024)

[29] Ibid

[30] Ibid

[31] Australian AID., 'Improving Food Security in Africa.' Available at *https://www.dfat.gov.au/sites/default/files/improving-food-security-africa.pdf* (Accessed on 12/01/2024)

[32] Ibid

[33] Ibid

It has been observed that African countries are making some progress in improving food security[34]. For example, improvements in democracy and political stability in some countries in Africa have enhanced the prospects for renewed food production, distribution and purchase[35]. In addition, it has been asserted that markets are freer and private investment in the food sector is growing in some countries[36]. Further, according to FAO where there has been a restoration of peace and security, people have been able to resume farming and agricultural production has increased[37]. In addition, it has been pointed out that in some countries, improved food production is allowing farmers to shift to cash crop development in association with private investment in processing and trading[38].

The *Africa Agriculture Status Report[39]* highlights the progress made towards enhancing food security in Africa. The Report posits that Africa with its vast arable lands and youthful population, holds the potential to not only ensure food security for its people but also play a crucial role in the global food system[40]. According to the Report, specific interventions in some countries have had a significant positive impact on food systems in Africa including promising innovations, initiatives, and policies[41]. These interventions include Climate Smart Agriculture practices such as conservation agriculture that includes minimal soil disturbance (no-till farming), permanent soil cover, and crop rotation;[42] agroforestry which integrates trees into farming systems;[43] the adoption of weather based insurance schemes in some African countries; improved water management practices including rain water harvesting; and

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[34] Food and Agriculture Organization., 'Food Security in Africa.' Available at *https://www.fao.org/3/w9290e/w9290e01.htm#:~:text=The%20development%20of%20hum an%20resources,the%20direct%20causes%20of%20hunger* (Accessed on 12/01/2024)

[35] Ibid

[36] Ibid

[37] Ibid

[38] Ibid

[39] Alliance for a Green Revolution in Africa., 'Empowering Africa's Food Systems for the Future.' Issue 11 (2022), Nairobi, Kenya, Available at *https://agra.org/wp-content/uploads/2023/11/AASR-2023.pdf* (Accessed on 12/01/2024)

[40] Ibid

[41] Ibid

[42] Ibid

[43] Ibid

irrigation[44]. In addition, the Report notes that practices such as mechanization, adoption of digital technologies, research and development are revolutionizing food systems in Africa, increasing food productivity and enhancing food security[45].

As a result of the foregoing efforts, it has been pointed out that African countries are making progress towards tackling hunger and poverty by improving food security, nutrition and incomes in their countries[46]. The need to enhance food security in Africa is set out under several legal and policy instruments at the continental, regional and national levels.

Africa Union's *Agenda 2063*[47] sets out the need to enhance food security in the continent. It states that for Africa, food security is a matter of national security[48]. Agenda 2063 calls for urgent measures for reducing food insecurity and malnutrition in Africa, among them, the need to implement clear and affirmative policies for sustainable food security[49]. Agenda 2063 correctly points out that considerable financial resources are required to finance the socio-economic transformational agenda in key areas including agriculture and food security[50]. It further posits that the implementation of the African Continental Free Trade Area (AfCFTA) will boost food security in Africa through reduction of protection on trade in agricultural produce among African countries[51]. Realizing the vision and aspirations of Agenda 2063 can therefore enhance food security in Africa.

In addition, there are a number of continental frameworks and declarations made to combat Africa's food and agriculture problem towards enhancing

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[44] Ibid

[45] Ibid

[46] Australian AID., 'Improving Food Security in Africa.' Op Cit

[47] Africa Union., 'Agenda 2063: The Africa we Want.' Available at *https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf* (Accessed on 12/01/2024)

[48] Ibid

[49] Ibid

[50] Ibid

[51] Ibid

food security. The *Maputo Declaration on Agriculture and Food Security in Africa*[52] recognizes that it is Africa's responsibility to reinvigorate its food and agriculture sector for the economic prosperity and welfare of its people[53]. The Declaration sets out certain initiatives geared towards enhancing food security in Africa including revitalizing the agricultural sector including livestock, forestry and fisheries through special policies and strategies targeted at small scale and traditional farmers in rural areas and the creation of enabling conditions for private sector participation, with emphasis on human capacity development and the removal of constraints to agricultural production and marketing, including soil fertility, poor water management, inadequate infrastructure, pests and diseases;[54] and the establishment of regional food reserve systems, including food stocks, linked to Africa's own production, and the development of policies and strategies under the African Union and the Regional Economic Communities (RECs), to fight hunger and poverty in Africa[55].

The Maputo Declaration led to the establishment of the Comprehensive Africa Agriculture Development Programme (CAADP) to improve food security and nutrition and increase incomes in Africa's largely agriculture based economies[56]. The CAADP champions reform in the agricultural sector in Africa setting broad targets such as ensuring 6 per cent annual growth in agricultural Gross Domestic Product (GDP), and an allocation of at least 10 per cent of public expenditures to the agricultural sector[57]. It has been pointed out that in the CAADP, Africa as a continent has recognized that enhanced agricultural performance is key to growth and poverty reduction through its direct impact on: job creation and increasing opportunities, especially for women and youth;

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[52] African Union., 'Declaration on Agriculture and Food Security in Africa.' Assembly/AU/Decl.4- 11 (II)
[53] Ibid
[54] Ibid
[55] Ibid
[56] Ibid
[57] Sidler. P., 'Overview on the CAADP, the 2003 Maputo and particularly 2014 Malabo Declarations.' Available at https://www.shareweb.ch/site/Agriculture-and-Food-Security/news/Documents/2018_05_28_overview_caadp_malabo_declaration.pdf (Accessed on 12/01/2024)

food security and improved nutrition; and strengthening resilience of food systems in Africa[58].

In addition, the *Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods*[59] sets out key strategies aimed at enhancing food security in Africa which include, among others: the pursuit of agriculture-led growth as a main strategy to achieve targets on food and nutrition security and shared prosperity;[60] the exploitation of regional complementarities and cooperation to boost growth;* the application of principles of evidence-based planning, policy efficiency, dialogue, review, and accountability, shared by all New Partnership for Africa's Development (NEPAD) programs;* the use of partnerships and alliances including farmers, agribusiness, and civil society;[61] and supporting implementation at countries levels, and regional coordination and harmonisation[62]. The Declaration sets out several commitments aimed at enhancing food security in Africa among them being enhancing investment finance in agriculture, ending hunger in Africa by 2025, halving poverty by the year 2025, through inclusive agricultural growth and transformation, boosting Intra-African trade in agricultural commodities and services, and enhancing resilience of livelihoods and production systems to climate variability and other related risks[63].

Further, at a national level, Kenya's *National Food and Nutrition Security Policy 2011*[64] was formulated to add value, build synergies and assist with the implementation of existing national and sectoral policies and strategies to effectively address issues of food insecurity and malnutrition in Kenya[65]. The

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[58] Ibid

[59] Africa Union., 'Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods.' Available at https://www.resakss.org/sites/default/files/Malabo%20Declaration%20on%20Agriculture_2014_11%2026-.pdf (Accessed on 12/01/2024)

[60] Ibid

[61] Ibid

[62] Ibid

[63] Ibid

[64] Republic of Kenya., National Food and Nutritional Security Policy, 2011., Government Printer, Nairobi

[65] Ibid

Policy seeks to ensure that all Kenyans, throughout their life-cycle enjoy at all times safe food in sufficient quantity and quality to satisfy their nutritional needs for optimal health[66]. It aims to achieve certain objectives which include achieving good nutrition for optimum health of all Kenyans; increasing the quantity and quality of food available, accessible and affordable to all Kenyans at all times;[67] and protecting vulnerable populations using innovative and cost-effective safety nets linked to long-term development[68]. Among the key priority areas under the Policy geared towards enhancing food security in Kenya include ensuring food availability and access, promoting food safety, standards and quality control, nutrition improvement, fostering school nutrition and nutrition awareness, enhancing access to food security and nutrition information, promoting early warning and emergency management in the food sector and financing of programmes geared towards enhancing food security[69].

The foregoing initiatives have played a key role in enhancing food security in Africa. However, several factors are hindering the achievement of food security in Africa. It has been opined that climate change is reversing the downward trend in food insecurity after many years of improvements associated with the economic development of the continent[70]. Climate change impacts food security in Africa by turning areas once perfectly suitable for agriculture production into deserts and modifying rain patterns, increasing uncertainty and reducing yields[71]. For example, it has been pointed out that approximately 37 million people in the Greater Horn of Africa are facing acute hunger in one of the region's worst droughts in decades[72]. It has been argued that food supplies and prices are especially vulnerable to climate change in sub-Saharan Africa because of a lack of resilience to climatic events, food

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[66] Ibid

[67] Ibid

[68] Ibid

[69] Ibid

[70] Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

[71] Ibid

[72] Mabaya. E., & Richardson. R., & Jayne. T., 'Towards Zero Hunger in Africa: 5 Steps to Achieve Food Security.' Available at *https://www.preventionweb.net/news/towards-zero-hunger-africa-5-steps-achieve-food-security* (Accessed on 12/01/2024)

import dependence, and excessive government intervention[73]. Further, most people in Africa live in rural agricultural and fishing communities that cannot afford infrastructure to protect them from adverse weather[74]. For example, they depend on rain to water their crops, and less than 1 percent of arable land is equipped with irrigation[75]. It has also been pointed out that global geopolitics such as the Russian invasion of Ukraine has worsened the food situation in Africa by increasing prices of commodities and key inputs[76].

According to FAO, African countries confront many significant political, economic, social and environmental constraints to increased food production[77]. It points out that many of Africa's agricultural and rural development problems have been related to misguided policies, weak institutions and a lack of well-trained human resources[78]. In addition, FAO posits that food insecurity in Africa due to factors such as low yields is a result of poverty since many African farmers lack access to improved seeds, fertilizers and pesticides as well as the knowledge and in-formation to use them effectively and efficiently[79].

The African Union succinctly captures the challenges the achievement of food security in Africa[80]. It points out that the continent has approximately 60 percent of the world's available arable land and agriculture is the source of livelihood for 70 percent of the population yet it generates only 10 percent of global agricultural output[81]. According to the African Union, African agriculture is plagued by challenges such as low productivity, under-investment, urban-biased policies and bottlenecks preventing women's access

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[73] Kemoe. L et al., 'How Africa Can Escape Chronic Food Insecurity Amid Climate Change.' Available at *https://www.imf.org/en/Blogs/Articles/2022/09/14/how-africa-can-escape-chronic-food-insecurity-amid-climate-change* (Accessed on 12/01/2024)

[74] Ibid

[75] Ibid

[76] Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

[77] Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

[78] Ibid

[79] Ibid

[80] African Union., 'Food Security.' Available at *https://au.int/en/auc/priorities/food-security (Accessed on 12/01/2024)*

[81] Ibid

to productive capital, including secure land tenure[82]. In addition, it asserts that African agriculture also has low value addition and poor rural infrastructure[83]. According to the African Union, as a result of poor performance, the famine menace that has disappeared from other parts of the world still persists in Africa[84].

It has also been observed that achieving food security in Africa is threatened by factors such as rapid population growth, prevalence of conflicts, and the continued underinvestment in and marginalization of pastoral areas[85]. In addition, it is estimated that 82 percent of the nearly 149 million Africans facing acute food insecurity are in conflict-affected countries underscoring that conflict continues to be one of the primary driver of Africa's food crisis[86].For example, 8 of the top 10 African countries experiencing acute food insecurity are facing conflicts[87].

As a result of the foregoing challenges, it has been observed that Africa is facing a food security crisis[88]. For example, it is estimated that nearly 282 million people in Africa (about 20 percent of the population) are undernourished, more than a billion people are unable to afford a healthy diet and around 30 percent of children are stunted because of malnutrition[89]. The World Bank further estimates that at least one in five Africans goes to bed hungry and an estimated 140 million people in Africa face acute food insecurity[90]. Africa has therefore been classified as the most food insecure

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[82] Ibid

[83] Ibid

[84] Ibid

[85] Muigua. K., 'Food Security and Environmental Sustainability in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/FOOD-SECURITY-AND-ENVIRONMENTAL-SUSTAINABILITY-IN-KENYA.pdf* (Accessed on 12/01/2024)

[86] Africa Center for Strategic Studies., 'Unresolved Conflicts Continue to Drive Africa's Food Crisis.' Available at *https://africacenter.org/spotlight/unresolved-conflicts-continue-to-drive-africas-food-crisis/* (Accessed on 12/01/2024)

[87] Ibid

[88] Food and Agriculture Organization., 'Africa Regional Overview of Food Security and Nutrition: Statistics and Trends' Available at *https://www.fao.org/3/cc8743en/online/cc8743en.html* (Accessed on 12/01/2024)

[89] Ibid

[90] The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Available at https://www.worldbank.org/en/news/immersive-

region in the world[91]. As a result of these challenges, it has been pointed out that Africa remains off-track to meet the food security and nutrition targets of the Sustainable Development Goals by 2030, and the Malabo targets of ending hunger and all forms of malnutrition by 2025[92].

It is therefore important to enhance food security in Africa if the continent is to realize the Sustainable Development agenda.

3.0 Way Forward

In order to enhance food security in Africa, it is vital to confront climate change[93]. Climate change has been identified as a major cause of food insecurity in Africa[94]. Climate change impacts food security in Africa by turning areas once perfectly suitable for agriculture production into deserts and modifying rain patterns, increasing uncertainty and reducing yields[95]. In addition, climate change leads to a breakdown of food systems, resulting in loss of rural livelihoods, income, and ecosystems[96]. According to FAO, climate change affects food security in all its dimensions: access, availability, utilization and stability[97]. It affects food production, and thus food availability[98]. Climate change also impacts the livelihoods and income of small-scale food producers and also, through food price increases and

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story/2022/10/17/putting-africans-at-the-heart-of-food-security-and-climate-resilience (Accessed on 12/01/2024)

[91] Ibid

[92] Food and Agriculture Organization., 'Africa Regional Overview of Food Security and Nutrition: Statistics and Trends' Op Cit

[93] The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit

[94] Ibid

[95] Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

[96] Relief Web., 'Championing Climate Actions to Avert Food Crises and Malnutrition in Eastern Africa.' Available at *https://reliefweb.int/report/world/championing-climate-actions-avert-food-crises-and-malnutrition-eastern-africa#:~:text=Climate%20change%20leads%20to%20a,people%20in%20sub%2DSaharan%20Africa.* (Accessed on 13/01/2024)

[97] Food and Agriculture Organization., 'Climate Change and Food Security: Risks and Responses.' Available at *https://www.fao.org/3/i5188e/I5188E.pdf* (Accessed on 13/01/20240

[98] Ibid

volatility, the livelihoods of poor net food buyers, restricting access to food[99]. In addition, climate change also impacts on the quality of drinking water, which is key to the good absorption of nutrients[100]. Africa is already experiencing the impacts of climate change on its food systems. For example, the Horn of Africa region is currently facing a severe drought following the worst performing rains in many years and successive failed rainy seasons[101].

Further, it has been pointed out that the frequency and severity of the drought is likely to increase affecting more than 36 million people due to food insecurity, with women and girls disproportionately affected by the direct and indirect impacts of the drought[102]. It is therefore necessary for African countries to take urgent action to confront climate change and its impacts in order to enhance food security in the region[103]. There is need to embrace climate smart agriculture in order to enhance food security in Africa[104]. It has been proved that traditional agricultural practices like agro forestry, intercropping, crop rotation, cover cropping, traditional organic composting and integrated crop-animal farming all have potentials for enhancing crop productivity and mitigating climate change in Africa[105]. In addition, it has been suggested that adoption of regenerative agricultural practices such as crop rotation, agroforestry, use of drought- and heat-resistant crops, integrated pest control systems, water harvesting and irrigation can foster high-yielding,

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[99] Ibid

[100] Ibid

[101] United Nations Development Programme., 'Can Groundwater act as a Catalyst for Sustainable Development in Africa's borderlands?' Available at https://www.undp.org/africa/africa-borderlandscentre/blog/can-groundwater-act-catalyst-sustainable-developmentafricasborderlands?gclid=EAIaIQobChMIpM6GnoGxgAMV1uZ3Ch0b kAPOEAMYAyAAEgLKG_D_Bw E (Accessed on 13/01/2024)

[102] Ibid

[103] Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2023/08/Reflections-on-Confronting-Climate-Change-in-Africa.pdf* (Accessed on 13/01/2024)

[104] Diagana. O., '3 key Fronts on Which Africa Must Combat Climate Change.' Available at *https://blogs.worldbank.org/africacan/3-key-fronts-which-africa-must-combat-climate-chang*e (Accessed on 13/01/2024)

[105] Rinku . S & Singh. G., 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production'Energy, *Ecology and Environment*, No. 2 of 2017, 296

climate resilient, and adaptive practices[106]. Embracing climate smart agriculture is therefore essential in fostering climate-resilient food systems and enhancing food security in Africa[107].

There is also need to boost Intra-African trade in order to enhance food security in Africa[108]. It has been argued that the strengthening of trade links between African countries may make it possible to decrease the risk of food insecurity in the long term through diversification of supply sources and increased ease of access for all farmers to a larger market[109]. African countries have been urged to make the most out of the most out of the AfCFTA in order to enhance food security in the region[110]. AfCFTA aims to strengthen Intra-African trade in food through measures such as phasing out tariffs[111]. It has been asserted that tariffs and, in many cases, Value Added Tax (VAT) and excise duties applied on food are a major culprit of high food prices in Africa which can result in food insecurity[112]. Implementation of the AfCFTA can therefore strengthen Intra-African trade in food and enhance food security in the region. According to the African Union, the implementation of the AfCFTA will boost food security in Africa through reduction of protection on trade in agricultural produce among African countries[113]. AfCFTA has the potential to spur the development of regional food value chains and reinforce

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[106] Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Available at *https://climatechampions.unfccc.int/call-to-action-for-climate-resilient-sustainable-food-systemsinafrica/* (Accessed on 13/01/2024)

[107] The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit

[108] Ancharaz. V., 'Intra-African Trade Can Boost Food Security for Millions of People.' Available at *https://blogs.lse.ac.uk/africaatlse/2023/02/01/intra-african-trade-can-boost-food-security-for-millions-of-people/* (Accessed on 13/01/2024)

[109] Badiane. O., '2022, A Year of Crisis: What Does It Mean for African Trade and Food Security?' Available at *https://www.foodfortransformation.org/full-article/2022-a-year-of-crisis-what-does-it-mean-for-african-trade-and-food-security.html* (Accessed on 13/01/2024)

[110] Ibid

[111] Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

[112] Ibid

[113] Africa Union., 'Agenda 2063: The Africa we Want. Op Cit

trade among African economies[114]. It is therefore important to accelerate the implementation of the AfCFTA in order to increase intra-African trade, including in food, and therefore enhance regional food security[115].

In addition, it is necessary to strengthen human resources through capacity development in order to enhance food security in Africa[116]. The lack of well-trained human resources has been pointed out to a major cause of food insecurity in Africa[117]. It has been argued that the development of human resources is essential for food security in Africa since an educated and informed populace is fundamental to any policies and strategies to reduce poverty, excessive population growth, environmental degradation and other factors that are most often the direct causes of hunger[118]. According to FAO, there is an urgent need for human capacity development and for increased knowledge and information about food production in order to achieve food security in Africa[119]. It has been argued that human resource development contributes to food security by enhancing agricultural production and improving human well-being[120]. In addition, it has been correctly observed that efforts to enhance agricultural production, especially among low-income small holders and women farmers, can increase food availability and accessibility, leading to improved food security and human development[121]. Human resource development therefore plays a crucial role in promoting food security by empowering individuals and communities to enhance food productivity and improve their overall well-being[122]. Human resource development is therefore a key component of sustainable agricultural

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[114] Ancharaz. V., 'Intra-African Trade Can Boost Food Security for Millions of People.' Op Cit

[115] Ibid

[116] Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

[117] Ibid

[118] Ibid

[119] Ibid

[120] Burchi. F., 'A Human Development and Capability Approach to Food Security: Conceptual Framework and Informational Basis.' Available at *https://typeset.io/papers/a-human-development-and-capability-approach-to-food-security-2w91109jrl* (Accessed on 13/01/2024)

[121] Ibid

[122] Ibid

production and improved food security in Africa[123]. It is therefore vital to enhance human capacities in order to strengthen food security in Africa. It has been argued that Africa must invest in domestic human, institutional and system-wide capacities and capabilities in order to achieve food security[124].

Further, there is need to enhance investments in in food systems in order to achieve food security in Africa. The CAADP urges African countries to enhance investments in food systems by allocating at least 10 per cent of public expenditures to the agricultural sector[125]. It has been argued that through investments, Africa can build resilience in its food systems and enhance food security[126]. For example, investing in irrigation can minimise dependence on rain-fed agriculture so that food can be produced year-round even when rains fail[127]. In addition, investing in research and development can lead to the adoption of drought-resistant and water-efficient varieties of crops that can enhance food security in Africa.[128] It is therefore necessary for African countries to increase investments in agri-food systems in order to achieve food security[129]. In addition, it is vital for African countries to invest in research and development on food systems in order to enhance food security[130]. This can lead to the adoption of higher yielding seed varieties, mechanisation, improved soil management and conservation practices and profitable and efficient fertiliser use towards enhancing food security in the region[131].

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[123] Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

[124] Mabaya. E., & Richardson. R., & Jayne. T., 'Towards Zero Hunger in Africa: 5 Steps to Achieve Food Security.' Op Cit

[125] Sidler. P., 'Overview on the CAADP, the 2003 Maputo and particularly 2014 Malabo Declarations.' Op Cit

[126] Nwafor. A., 'Investment for Resilience in African Food Systems.' Available at *https://farmingfirst.org/2023/03/investment-for-resilience-in-african-food-systems/#:~:text=Building%20resilience&text=This%20means%20investment%20in%20irrigation,them%20in%20times%20of%20loss.* (Accessed on 13/01/2024)

[127] Ibid

[128] Ibid

[129] Ibid

[130] Traub. L. N., Jayne. T., & Sihlobo. W., 'Research and Development are Key to Resilient Food Systems in Africa.' Available at *https://theconversation.com/research-and-development-are-key-to-resilient-food-systems-in-africa-165251* (Accessed on 13/01/2024)

[131] Ibid

It is also vital to address conflicts in the continent. Evidence points out to a relationship between conflicts and food insecurity in Africa[132]. Most Africans facing acute food insecurity are in conflict-affected countries underscoring that conflict continues to be one of the primary driver of Africa's food crisis[133]. African countries such as Sudan, Somalia, Democratic Republic of the Congo, and Central African Republic which have been characterized by conflicts for many decades are some of the most food insecure countries on the continent[134]. According to FAO, armed conflict, both within and between countries, is another central factor contributing to food insecurity in Africa[135]. FAO posits that conflict and food insecurity are inextricably linked, each triggering and reinforcing the other[136]. Some people living in food-insecure communities feel they have been marginalized by central governments[137]. At the same time, conflict itself almost always intensifies hunger, since it drives people from their homes and disrupts marketing and distribution systems[138]. Addressing conflicts and fostering peace is therefore necessary in enhancing food security in Africa.

Finally, there is need for African countries to embrace sustainable management of natural resources in order to enhance food security in the region[139]. The African Union correctly points out that the continent has an abundance of natural resources that can enhance food security in the region including arable land, fresh water resources comprising of large rivers and lakes such as the Congo, Nile, Zambezi and Niger and Lake Victoria, forests and the blue/ocean economy[140]. However, despite the presence of these resources, food insecurity continues to be a major challenge in the continent[141]. This has been attributed to unsustainable practices including poor cultivation

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[132] Africa Center for Strategic Studies., 'Unresolved Conflicts Continue to Drive Africa's Food Crisis.' Op Cit

[133] Ibid

[134] Ibid

[135] Food and Agriculture Organization., 'Food Insecurity in the Horn of Africa.' Available at *https://www.fao.org/3/x8530e/x8530e02.htm* (Accessed on 13/01/2024)

[136] Ibid

[137] Ibid

[138] Ibid

[139] Africa Union., 'Agenda 2063: The Africa we Want. Op Cit

[140] Ibid

[141] Ibid

practices including over cultivation, over grazing, deforestation, overfishing among others[142]. It has been posited that well managed natural resources can contribute to income and food security improvement especially in rural populations[143]. African countries should therefore embrace sustainable and sound management of their natural resources including land, forests, water resources, fisheries and the blue economy in order to enhance food security[144]. The foregoing among other measures are necessary in order to enhance food security in Africa.

4.0 Conclusion

Achieving food security is a key determinant for the realization of the human right to food towards Sustainable Development[145]. SDG 2 seeks to end hunger, achieve food security, and improved nutrition and promote sustainable agriculture[146]. Enhancing food security is important for millions of people facing hunger in Africa and is crucial for sustainable economic development and long-term prosperity of the continent[147]. There has been some progress towards enhancing food security in Africa[148]. However, achieving food security continues to be a major challenge in Africa. Africa has been classified as the most food insecure region in the world a situation that has been attributed to factors such as climate change, prevalence of conflicts and weak human capacities among others[149]. It is necessary to enhance food security in Africa in order to achieve Sustainable Development. This can be fostered through measures such as confronting climate change[150]; boosting Intra-

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[142] Bouda. Z., 'Natural Resource Management and Food Security in Africa.' Available at *https://link.springer.com/referenceworkentry/10.1007/978-3-319-69626-3_75-1* (Accessed on 13/01/2024)

[143] Ibid

[144] Ibid

[145] Muigua. K., 'Achieving the Right to Food for Sustainable Development in Kenya.' Op Cit

[146] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., SDG 2

[147] Munang. R., & Han. Z., 'Food Security: Regional Solutions Key to Solving Africa's Challenges.' Op Cit

[148] Australian AID., 'Improving Food Security in Africa.' Op Cit

[149] Food and Agriculture Organization., 'Africa Regional Overview of Food Security and Nutrition: Statistics and Trends' Op Cit

[150] The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit

African trade[151]; strengthening human resources through capacity development[152]; enhancing investments in in food systems[153]; addressing conflicts in the continent[154]; and embracing sustainable management of natural resources[155]. Enhancing food security in Africa is an agenda that needs to be fast-tracked in order to achieve Sustainable Development.

[151] Ancharaz. V., 'Intra-African Trade Can Boost Food Security for Millions of People.' Op Cit

[152] Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

[153] Ibid

[154] Africa Center for Strategic Studies., 'Unresolved Conflicts Continue to Drive Africa's Food Crisis.' Op

[155] Africa Union., 'Agenda 2063: The Africa we Want. Op Cit

Building Peace in Africa through Alternative Dispute Resolution

Abstract

The paper critically discusses the role of Alternative Dispute Resolution (ADR) mechanisms in peace building in Africa. It interrogates the need for peace in Africa and the efficacy of various initiatives adopted towards realizing this ideal. The paper argues that ADR mechanisms can play a fundamental role in building peace in Africa. The paper further posits that ADR mechanisms are able to enhance sustainable peace in Africa due to their focus on reconciliation and restorative justice. It proposes solutions towards building peace in Africa through ADR.

1.0 Introduction

The term peace has a lot of definitions and often involves ideas such as the normal, non-warring condition of a nation, group of nations, or the world; an agreement or treaty between warring or antagonistic nations, communities and groups to end hostilities and abstain from further fighting or antagonism; and a state of mutual harmony between people or groups, especially in personal relations[1]. Peace has also been associated to the concepts of harmony, tranquility, cooperation, alliance, well-being, and agreement[2]. It has been pointed out that peace is not merely the absence of violence but it also entails other facets[3]. Consequently, the concept of peace has been classified into positive peace that entails attitudes, institutions and structures, that when strengthened, lead to peaceful societies and negative peace which entails the absence of violence[4].

Peace is one of the fundamental requirements for the realization of the Sustainable Development agenda[5]. The United Nations 2030 Agenda for

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[1] Herath. O., 'A critical analysis of Positive and Negative Peace.' Available at *http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y* (Accessed on 20/10/2023)

[2] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

[3] Ibid

[4] Herath. O., 'A critical analysis of Positive and Negative Peace.' Op Cit

[5] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2021/05/Towards-Peacebuilding-and-Conflict-Management-in-Kenya.docx-Kariuiki-Muigua-MAY-2021x.pdf* (Accessed on 20/10/2023)

Sustainable Development acknowledges that there can be no Sustainable Development without peace and no peace without Sustainable Development[6]. It seeks to foster peaceful, just and inclusive societies which are free from fear and violence[7]. Sustainable Development Goal 16 aims to achieve peaceful and inclusive societies for Sustainable Development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels[8]. Peace is therefore vital in the realization of the Sustainable Development agenda.

It has been contended that Alternative Dispute Resolution (ADR) mechanisms can play a fundamental role in enhancing sustainable peace and strengthening peace building efforts[9]. ADR entails a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes[10]. ADR has also been defined a set of processes that are applied to manage disputes without resort to adversarial litigation[11]. It encompasses various processes including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[12]. These mechanisms are viewed as ideal in enhancing access to justice due to their attributes which include privacy, confidentiality, flexibility, informality, efficiency, party autonomy and the ability to foster expeditious and cost effective management of disputes[13].

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[6] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainable%20Development%20web.pdf* (Accessed on 20/10/2023)

[7] Ibid

[8] Ibid, Goal 16

[9] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Op Cit

[10] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[11] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[12] Ibid

[13] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-developmentinKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf* (Accessed on 20/10/2023)

The paper critically discusses the role of ADR mechanisms in peace building in Africa. It interrogates the need for peace in Africa and the efficacy of various initiatives adopted towards realizing this ideal. The paper argues that ADR mechanisms can play a fundamental role in building peace in Africa. The paper further posits that ADR mechanisms are able to enhance sustainable peace in Africa due to their focus on reconciliation and restorative justice. It proposes solutions towards building peace in Africa through ADR.

2.0 ADR and Peace Building in Africa: Prospects and Challenges

Africa has been highly susceptible to intra and inter- state wars and conflicts for many years[14]. As a result, it has been contended that the history of Africa as a continent is replete with conflict[15]. There have been frequent conflicts across the African continent, which are fueled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others[16]. Numerous civil wars have occurred in Africa in several countries including Sudan, Chad, Liberia, Sierra Leone, Nigeria and the Democratic Republic of the Congo (DRC)[17]. These conflicts have resulted in deaths and displacement of people creating a crisis of internally displaced persons, refugees and asylum seekers[18]. The Rwandan genocide which is estimated to have resulted in the deaths of more than one million people demonstrates some of the severe impacts of conflict in Africa[19]. Some African countries such as Somalia have been caught in a vicious cycle of conflicts and wars making them dangerous and unstable, a situation that has resulted in them being

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[14] Olaosebikan. A., 'Conflicts in Africa: Meaning, Causes, Impact and Solution.' *African Research Review.,* Volume 4, No. 4 (2010)

[15] Ibid

[16] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Op Cit

[17] Ibid

[18] Africa Center for Strategic Studies., 'African Conflicts Displace Over 40 Million People.' Available at *https://africacenter.org/spotlight/african-conflicts-displace-over-40-million-people/* (Accessed on 20/10/2023)

[19] United Nations., 'Outreach Programme on the 1994 Genocide Against the Tutsi in Rwanda.' Available at *https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml* (Accessed on 20/10/2023)

labelled as 'failed states'[20]. Military coups have also been a common occurrence in Africa especially in the 20th century further fueling the incidences of conflict in Africa[21]. Such cases have fueled political instability, insecurity and social problems including the use of child soldiers in armed conflicts[22].

Conflicts over natural resources have also been prevalent in Africa[23]. Despite being endowed with abundance of natural resources, Africa has over the years suffered from resource-based conflicts which usually form a threat to Sustainable Development and has the potential of undermining economic development and sustainability[24]. It has been observed that the 'resource curse phenomenon' is widespread in Africa which refers to the paradox that countries endowed with natural resources tend be embroiled in conflicts and have incidences of poverty[25]. DRC and Nigeria are examples of African countries endowed in natural resources that suffer widespread poverty[26].

The prevalence of conflicts and wars has been a major hindrance in the achievement of Sustainable Development in Africa[27]. It has been contended that around Africa, social conflict has affected national and social development in unprecedented ways that have resulted in mass exodus of people to other areas, as refugees[28]. Conflicts have had adverse impacts on every aspect and corner of the African family, community and nation-state, with economic,

[20] International Committee of the Red Cross., 'Somali Conflict.' Available at *https://www.icrc.org/en/where-we-work/africa/somalia/somalia-conflict* (Accessed on 20/10/2023)

[21] Africa Center for Strategic Studies., 'Africa's Crisis of Coups.' Available at *https://africacenter.org/in-focus/africa-crisis-coups/* (Accessed on 20/10/2023)

[22] Ibid

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

[24] Ibid

[25] Henri. A., 'Natural Resources Curse: A Reality in Africa.' *Resources Policy* , Volume 63, 2019

[26] Ibid

[27] United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Available at *https://www.un.org/osaa/sites/www.un.org.osaa/files/docs/2109875_osaa_sg_report_web_new.pdf* (Accessed on 20/10/2023)

[28] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

cultural, political, social, and environmental costs[29]. As a result of the conflicts in Africa, peace has become more challenging to sustain and protracted and recurring conflict more difficult to prevent or resolve, often because their underlying causes are not well understood or addressed[30]. It has been observed that peace agreements, which are rarely fully implemented, typically cover proximate causes and seldom address the deep-rooted factors that cause or sustain conflict[31]. In addition, many countries in Africa continue to face multiple challenges to societal stability and national cohesion thus threatening sustainable peace[32]. Building peace in Africa is therefore an imperative in the realization of the Sustainable Development agenda.

It has been contended that peacebuilding efforts aim at addressing the reasons that lead to conflicts and seek to support societies to manage their differences and conflicts without resorting to violence[33]. Building peace therefore entails a broad range of measures, either focusing on preventing, managing or addressing the effects of conflict[34]. Such measures can also be geared towards preventing the outbreak, escalation, continuation or reoccurrence of conflicts[35]. Building peace is vital in Africa in order to foster inclusive development, security and stability[36].

ADR mechanisms can play a pertinent role in building peace in Africa by preventing and managing conflicts and enhancing stability[37]. ADR

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[29] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Available at *https://www.cambridgescholars.com/resources/pdfs/978-1-4438-5707-9-sample.pdf* (Accessed on 20/10/2023)

[30] United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Op Cit

[31] Ibid

[32] Ibid

[33] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

[34] Ibid

[35] Ibid

[36] United Nations., 'Root Causes of Conflicts in Africa Must Be Addressed beyond Traditional Response, Special Adviser Tells Security Council Debate on Silencing Guns.' Available at *https://press.un.org/en/2023/sc15249.doc.htm* (Accessed on 20/10/2023)

[37] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

mechanisms have been practiced in Africa for many centuries[38]. African communities were guided by values such harmony, togetherness, social cohesion and peace as expressed in phrases such as '*ubuntu'*[39]. Such values contributed to social harmony that ensured the stability of African societies and were subsequently incorporated in conflict management strategies[40]. African societies therefore developed conflict management strategies that were based on institutions such as the council of elders who ensured that the values and principles that guided African societies were respected and upheld[41]. Conflicts were an undesirable phenomenon in Africa societies and were seen as a threat to the social fabric that holds the community together[42]. As a result, there was need for expeditious and efficient management of conflicts and for preventing their escalation into violence, a situation which could threaten the social fabric[43]. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[44].

It has been pointed out that conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques which were administered by institutions such as the council of elders[45]. These techniques fitted comfortably within traditional concepts of

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[38] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

[39] Muigua. K., 'Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya.' Available at *http://kmco.co.ke/wpcontent/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER.pdf* (Accessed on 20/10/2023)

[40] Ibid

[41] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallenges-and-opportunities-1.pdf* (Accessed on 20/10/2023)

[42] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

[43] Ibid

[44] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[45] Ibid

African justice, particularly its core value of reconciliation[46]. They were able to restore relationships and foster peace and social cohesion in African societies[47]. ADR mechanisms can therefore play a vital role in building peace in Africa. It has been contended that low-level disputes in Africa can spiral into violence and conflict due to the lack of effective judicial systems that can provide a credible and timely process for resolving differences[48]. Indeed, the judicial system in most countries in Africa faces problems such as costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal knowhow[49]. As a result of these problems, it has been observed that many African countries are still struggling to establish functional, timely, and trusted judicial systems[50]. These problems hinder effective access to justice in Africa and can threaten peace and stability where disputes and conflicts are not managed in a timely and efficient manner[51]. ADR has emerged as an increasingly popular channel outside formal procedures to resolve disputes in timely manner, while restoring the parties' sense of justice and fostering peace[52]. It has been argued that ADR processes can strengthen dispute settlement systems and bridge the gap between formal legal systems and traditional modes of African justice[53]. These processes may have particular value in stabilization and state building efforts especially when judicial institutions are weak and social tensions are high[54].

Some African countries are characterized by conflict, post conflict and fragile contexts, where societal tensions are high and justice systems typically do not

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[46] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[47] Ibid

[48] Ibid

[49] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

[50] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[51] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit

[52] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

[53] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[54] Ibid

function efficiently[55]. In such contexts, the need for prompt and expeditious management of disputes is of critical importance since without timely, accessible, affordable, and trusted mechanisms to resolve differences, minor disagreements can degenerate into broader conflicts contributing to cultures of violence and vigilante justice in some instances[56]. ADR mechanisms can address this problem by providing an avenue for timely, accessible, affordable and efficient management of disagreements and disputes[57].

It has been argued that ADR processes can enhance efforts towards building peace in Africa through objectives such as decongestion of the court system, the creation of access to justice, promotion of peaceful out of court settlements, conflict prevention or de-escalation, and timely management of conflicts[58]. Further, it has been contended that for efficient peace building in Africa, the root causes of conflicts must be addressed beyond traditional responses[59]. Towards this end, it has been argued that addressing the internal and external root causes of conflicts in Africa beyond the traditional response, which only tackled their symptoms, would create the capacities that help African countries overcome the peace and security challenges they face, which have deep historical roots[60]. Some ADR mechanisms such as mediation are able to achieve this goal since they address the root causes of conflict resulting in mutually satisfying and long lasting outcomes thus creating a suitable environment for peace by eliminating the likelihood of conflicts reemerging in future[61].

ADR mechanisms can therefore be utilized in building peace in Africa. It has been asserted that ADR mechanisms are effective in leading to peace building

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[55] Kudonoo. E., 'The Peace Model: A Sustainable Approach to Conflict Prevention and Resolution in Africa.' *Current Politics & Economics of Africa.*, Volume 9, No. 4 (2016)

[56] Ibid

[57] Ibid

[58] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit

[59] United Nations., 'Root Causes of Conflicts in Africa Must Be Addressed beyond Traditional Response, Special Adviser Tells Security Council Debate on Silencing Guns.' Op Cit

[60] Ibid

[61] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

and conflict resolution in both interpersonal and community levels[62]. There have been instances where ADR processes have been successfully utilized as instruments of peace building in Africa. For example, after the Rwanda Genocide, the Rwandan Government institutionalized *Gacaca* courts as a means to obtain justice and deal with a majority of the genocide cases that the formal Courts and International Criminal Tribunal for Rwanda (ICTR) could not handle[63]. The *Gacaca* was a form of ADR in traditional Rwanda which involved the use of elders to manage conflicts through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts[64].ADR also plays a pertinent role in conflict management among the Kom People in Cameroon where traditional institutions are still relevant[65]. The aim of conflict resolution among the Kom is to accommodate all parties involved in the conflict, through genuine collaboration by all, in the search for effective compromise[66]. In doing so, unnecessary competition is avoided, because the ultimate aim of conflict management is amicable resolution by persuasion, mediation, adjudication, reconciliation, arbitration and negotiation, not necessarily reverting to the use of force or coercion at all cost, or at any cost[67]. These strategies are vital in fostering peace and social harmony.

However, the efficacy of ADR mechanisms in building peace in Africa is often hampered by several challenges. The current form of ADR in Africa was adopted from Western nations where it is understood as 'alternative' to the formal legal systems in such countries[68]. This can be traced back to the colonial

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[62] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[63] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[64] Ibid

[65] Accord., 'Traditional Methods of Conflict Resolution.' Available at *https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/#:~:text=The%20major%20sources%20of%20conflict,customs%20and%20traditions%2C%20were%20upheld.* (Accessed on 20/10/2023)

[66] Ibid

[67] Ibid

[68] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 21/10/2023)

era where government-controlled dispute resolution replaced the customary law systems that were in place[69]. This resulted in subjugation of traditional and customary dispute resolution systems in favour of Western formal legal system[70]. In Kenya, the repugnancy clause was introduced. It curtailed the application of traditional and customary justice systems to the extent that they were not 'repugnant' to the western conception of 'justice and morality'[71]. This has hindered the growth of ADR mechanisms in Africa and their role in building peace since they are viewed as subservient to formal justice systems[72].

In addition, it has been asserted that inadequacies in areas such as government support, human resources, legal foundations and sustainable financing may hinder successful implementation of ADR mechanisms in Africa[73]. Inadequate government support hinders the role of ADR in peace building since it affects institution building and ultimately constrains the development of personnel and effective legal framework on ADR[74]. In addition, the implementation of ADR may face opposition from the legal profession who may view it as threat to their careers and the judiciary since judges may view it as a threat to their control over non-litigation resolutions or out of court settlements[75]. It is imperative to address these concerns and embrace ADR mechanisms in order to build peace in Africa.

3.0 Way Forward
Several reforms are required in order to enhance the role of ADR in building peace in Africa. It has been pointed out that there is need to enact proper legislations in order to facilitate the institutionalization of ADR mechanisms[76].

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[69] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[70] Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at *https://www.ajol.info/index.php/mlr/article/view/186176* (Accessed on 21/10/2023)

[71] Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)

[72] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit

[73] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[74] Ibid

[75] Ibid

[76] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at https://kmco.co.ke/wp-

The benefits of legitimizing ADR mechanisms include elevating the status of ADR in dispute management, fostering public confidence, increasing the application of ADR mechanisms and promoting ethical practice[77]. Further, it has been contended that legislation can enhance the appropriateness of ADR by providing a framework for reference, review and reform, as well as institutionalizing much needed education and professional training in ADR[78]. Capacity building is also essential in enhancing the viability of ADR processes in building peace in Africa[79]. It is therefore imperative for all stakeholders in ADR including governments and international partners to invest in capacity building efforts including training and infrastructural support for ADR in order to advance best practice[80]. It has been contended that capacity building efforts should also involve the training of local and religious leaders, traditional authorities in African communities and chiefs, election officials, police and security personnel, human rights organizations, public complaints bureaus such as the office of the ombudsperson, and women and youth leaders[81]. Enhancing the ADR skills of these groups such as negotiation and facilitation skills will be of great value by increasing each country's conflict mitigation or prevention capacity[82]. There is also need to support ADR initiatives in conflict prone countries and communities in Africa in order to bolster conflict mitigation and efforts towards peace[83].

It is also necessary to foster synergies between formal institutions such as courts and ADR systems including informal or traditional justice systems through measures such as formulating clear referral systems providing for referral of disputes from courts to ADR and vice versa[84]. This has the potential

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content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf (Accessed on 21/10/2023)

[77] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit

[78] Ibid

[79] Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective.' Available at *https://www.csq.ro/wp-content/uploads/CSQ-22.pdf#page=36* (Accessed on 21/10/2023)

[80] Ibid

[81] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit

[82] Ibid

[83] Ibid

[84] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

to scale up access to justice and to create a sustainable system of peaceful, nonviolent conflict resolution and mitigation[85]. Such synergies will accelerate the use of ADR in both formal and informal settings. It has been contended that one of the great advantages of ADR is flexibility and thus ADR processes can adapt to the people and the dispute at hand, and are equally effective in formal legal systems, traditional disputing mechanisms and broad-based multiparty conflicts[86]. Enhancing synergies between formal and informal justice systems can therefore enhance the use of ADR in both settings.

Further, it has been argued that there is need to monitor the growth and progress of ADR in Africa in order to maximize the efficiencies and complementarities of ADR with the official judicial process[87]. This includes inter alia measuring key qualitative and quantitative data such as ADR usage, number of cases filed and managed through ADR, the amount of time spent on each case, number of successful ADR settlements, number of qualified ADR institutions and practitioners and community acceptance and compliance with ADR outcomes[88]. Such initiatives can help in determining how ADR affects a country's conflict vulnerability and mitigation capability a move that can result in adjustments in the scope and focus of ADR efforts towards building peace[89].

Finally, it is pertinent to continue embracing ADR mechanisms for enhanced access to justice in Africa[90]. African countries should adopt and embrace effective ADR systems that are flexible in design and rooted in satisfying the interest of parties and in the administration of justice in a culturally sensitive manner[91]. ADR mechanisms have been hailed for their ability to promote peace building and conflict resolution at all levels and enhancing stabilization

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[85] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit
[86] Ibid
[87] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit
[88] Ibid
[89] Ibid
[90] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit
[91] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

and state building efforts in Africa[92]. These mechanisms have been part and parcel of the African culture since time immemorial and were able to foster peace, cohesion and social harmony in African communities, reconciliation and restorative justice[93]. It is therefore necessary to view these mechanisms as 'Appropriate' and not 'Alternative' in order to effectively embrace them towards building peace in Africa.

4.0 Conclusion

Building peace is a vital concern in Africa as a result of the frequent conflicts across the continent, which are fueled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others[94]. The prevalence of conflicts and wars has been a major hindrance in the achievement of Sustainable Development in Africa[95]. ADR mechanisms can play a pertinent role in building peace in Africa by preventing and managing conflicts and enhancing stability[96]. ADR processes are able to restore relationships and foster peace and social cohesion in Africa due to their focus on reconciliation and restorative justice[97]. However, the role of ADR mechanisms in building peace in Africa is hindered by several factors including the notion of them being 'Alternative' to formal justice systems, inadequacies in areas such as government support, human resources, legal foundations and sustainable financing[98]. Building peace in Africa through ADR therefore requires several reforms including enacting proper legislations in order to facilitate the institutionalization of ADR mechanisms, capacity

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[92] Ibid

[93] Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Available at https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf (Accessed on 21/10/2023)

[94] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Op Cit

[95] United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Op Cit

[96] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[97] Ibid

[98] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

building including training and infrastructural support, fostering synergies between formal institutions such as courts and ADR systems, monitoring the growth and progress of ADR in Africa and enhancing access to justice through ADR in Africa[99]. Building peace in Africa through ADR is achievable.

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[99] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

Managing Energy Disputes in Africa

Abstract
Energy disputes are undesirable. Such disputes can adversely impact the viability and success of energy projects. As a result, there is need to effectively and efficiently manage energy disputes in order to foster the success of energy projects and ensure that the energy transition maintains its positive course. The paper argues a case for effective management of energy disputes in Africa. It posits that energy disputes are a threat to the energy transition and Sustainable Development in Africa. It examines the nature and causes of energy disputes in Africa. The paper further explores the efficacy of the current framework on managing energy disputes in Africa and proposes reforms towards effective management of energy related disputes in the Continent in order to foster energy justice and accelerate the energy transition.

1.0 Introduction
Disputes in the energy industry are inevitable. It has been asserted that energy projects are, by their nature, often complex undertakings[1]. They frequently involve new and innovative technologies, significant investment, and also a high degree of interface between multiple parties who may sometimes have different, and even competing, interests[2]. This means that energy projects are often incredibly interesting and dynamic, but also may be exposed to a variety of risks and challenges such as disputes which can adversely impact project viability and success[3]. It has been argued that the nature of the energy industry has consistently thrown up disputes[4]. This has been attributed to the size and complexity of most energy and natural resource projects meaning that the stakes are normally high enough to fight over[5]. Further it has been observed that from the effects of the prolonged war in Ukraine, to the energy transition

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[1] Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Available at https://www.burges-salmon.com/energy-disputes-guide-managing-risk-and-avoiding-disputes-in-your-energy-project (Accessed on 02/12/2023)

[2] Ibid

[3] Ibid

[4] Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Available at *https://www.financierworldwide.com/forum-managing-energy-and-natural-resources-industry-disputes* (Accessed on 02/12/2023)

[5] Ibid

and other geopolitical tensions, the potential for energy-related disputes is on the rise worldwide[6]. According to the International Centre for Settlement of Investment Disputes (ICSID), the energy industry is the single largest user of international investment arbitration demonstrating a prevalence of disputes in the sector[7].

Energy disputes can be attributed to various factors. It has been pointed out that energy companies usually operate in environments where projects generally involve a variety of public and private stakeholders, significant investment and programmes that sometimes span years[8]. Further, energy projects often involve the use of cutting-edge technology, have touch points within geographically and politically challenging jurisdictions, and form part of complex global supply chains[9]. As a result, it is therefore unsurprising that energy companies become involved in cross-border disputes[10]. Potential disputes in the energy sector include joint venture/contractual disputes, claims arising from weather conditions in renewable energy projects, construction related disputes, technology related disputes, investor/state disputes, and regulatory disputes[11].

Energy disputes are undesirable. Such disputes can adversely impact the viability and success of energy projects[12]. As a result, it has been argued that

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[6] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Available at *https://content.clearygottlieb.com/regions/africa-outlook/resolving-energy-disputes-in-africa-through-arbitration-and-alternative-dispute-resolution/index.html* (Accessed on 02/12/2023)

[7] International Centre for Settlement of Investment Disputes., 'Annual Report: 2023.' Available at *https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf* (Accessed on 02/12/2023)

[8] Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Available at *https://www.ashurst.com/en/insights/managing-and-resolving-cross-border-disputes-in-the-energy-sector/* (Accessed on 02/12/2023)

[9] Ibid

[10] Ibid

[11] McMahon. M., Shah. P., 'The Rise of Renewable Energy Disputes and Arbitration.' Available at https://www.stewartslaw.com/news/rise-of-renewable-energy-disputes/ (Accessed on 02/12/2023)

[12] Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Op Cit

there is need to effectively and efficiently manage energy disputes in order to foster the success of energy projects and ensure that the energy transition maintains its positive course[13]. The paper argues a case for effective management of energy disputes in Africa. It posits that energy disputes are a threat to the energy transition and Sustainable Development in Africa. It examines the nature and causes of energy disputes in Africa. The paper further explores the efficacy of the current framework on managing energy disputes in Africa and proposes reforms towards effective management of energy related disputes in the Continent in order to foster energy justice and accelerate the energy transition.

2.0 Energy Disputes in Africa

Africa is a continent that is endowed with immense sources of energy including renewables such as wind, solar, hydro, bioenergy, ocean tidal waves, geothermal among other renewables[14]. It has been pointed out that the Continent is home to approximately eight per cent of the world's natural gas and 12 per cent of the world's oil reserves[15]. According to the International Energy Agency, oil and gas continue to dominate energy use in North Africa and coal dominates in South Africa, due to the local availability of low cost resources, while renewables are the dominant fuel category in Sub-Saharan Africa[16].

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[13] Herbert Smith Freehills., 'Energy Transition and the Impact on Disputes.' Available at https://www.herbertsmithfreehills.com/insights/2021-07/energy-transition-and-the-impact-on-disputes#:~:text=A%20ubiquitous%20feature%20of%20energy,some%20or%20all%20of%20them. (Accessed on 02/12/2023)

[14] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 04/12/2023)

[15] United Nations Environment Programme., 'Our Work in Africa.' Available at *https://www.unep.org/regions/africa/our-workafrica#:~:text=The%20continent%20has%2040%20percent,internal%20renewable%20fresh%20water%20so urce* (Accessed on 04/12/2023)

[16] International Energy Agency., 'Africa Energy Outlook: 2022.' Available at *https://iea.blob.core.windows.net/assets/220b2862-33a6-47bd-81e9-00e586f4d384/AfricaEnergyOutlook2022.pdf* (Accessed on 04/12/2023)

Africa Union's *Agenda 2063* identifies energy as the backbone of Africa's economic transformation[17]. Agenda 2063 seeks to enhance utilization of the Continent's energy sources, especially renewable energy in fostering economic growth and eradicating energy poverty[18]. It further seeks to promote environmentally sustainable and climate resilient economies and communities in Africa wherein renewable energy (including wind, solar, hydro, bioenergy, ocean tidal waves, geothermal and other renewables) will claim more than half of the energy consumption for households, businesses and organizations[19]. The International Energy Agency asserts that electricity will underpin Africa's economic future, with solar leading the way[20]. It further posits that electricity is the backbone of Africa's new energy systems, powered increasingly by renewables[21].

The need for energy transition has accelerated investments in energy in Africa towards enhancing access to energy[22]. Sustainable Development Goal (SGG) 7 under the United Nations 2030 Agenda for Sustainable Development seeks to ensure universal access to affordable, reliable, sustainable and modern energy for all[23]. Access to energy in Africa is crucial not only for the attainment of health and education outcomes, but also for reducing the cost of doing business and for unlocking economic potential and creating jobs[24]. However, access to energy in Africa still remains a major problem where majority of the population lack access to clean and affordable energy and depend on traditional fuels[25]. It has been estimated that nearly 600 million people or an

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[17] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

[18] Ibid

[19] Ibid

[20] International Energy Agency., 'Africa Energy Outlook: 2022.' Op Cit

[21] Ibid

[22] Ibid

[23] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pdf* (Accessed on 04/12/2023)

[24] Africa Development Bank Group., 'Light Up and Power Africa – A New Deal on Energy for Africa.' Available at *https://www.afdb.org/en/the-high-5/light-up-and-power-africa-%E2%80%93-a-new-deal-on-energy-for-africa* (Accessed on 04/12/2023)

[25] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at https://unctad.org/publication/commoditiesglance-special-issue-access-energy-

equivalent of 43 per cent of the Continent's population lack access to electricity[26]. It has also been pointed out that Africa does poorly compared to other regions regarding access to clean cooking since a majority of its population relies on traditional biomass for preparing food[27]. These problems have necessitated investments in energy in order to foster access to energy in Africa. Further, the International Energy Agency points out that problems in the energy sector including global energy crisis brought about by Russia's invasion of Ukraine, and climate change have underscored the urgency as well as the benefits of an accelerated scale up of cheaper and cleaner sources of energy in Africa[28].

It has been asserted that the immense potential for growth in the energy sector in Africa, and the need to do so in line with the large and growing population's energy demand, makes it an attractive destination for global investment flow[29]. Further, it has been correctly observed that the renewable energy resources with which Africa is endowed, in tandem with the recent initiatives to accelerate development of its energy requirements, has resulted in an increase in energy projects and, with that, the potential for a growing number of disputes coming from the energy sector in Africa[30]. Despite the vast investment opportunities available in the energy sector in Africa, entrants into energy markets in Africa often face risks that pose huge threats to the

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saharanafrica#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time (Accessed on 04/12/2023)

[26] International Energy Agency., 'Access to Electricity.' Available at https://www.iea.org/reports/sdg7-   data-and-projections/access-to-electricity (Accessed on 04/12/2023)

[27] United Nations., 'Advancing SDG 7 in Africa.' Available at *https://sdgs.un.org/sites/default/files/2023-06/2023%20Advancing%20SDG7%20in%20the%20Africa062923.pdf* (Accessed on 04/12/2023)

[28] International Energy Agency., 'Africa Energy Outlook: 2022.' Op Cit

[29] Global Arbitration Review., 'Energy Arbitration in Africa.' Available at *https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2022/article/energy-arbitration-in-africa* (Accessed on 06/12/2023)

[30] Ibid

economic viability of investments[31]. If not properly addressed and mitigated, such risks may result in complex and protracted legal disputes[32].

It is estimated that Africa will see the largest growth in energy-related disputes, driven by an increase in exploration activities in many countries across the continent[33]. In addition, it has been observed that given the heavy presence of foreign investors in the African energy sector, energy disputes are likely to arise under both contractual instruments (such as concession agreements) and investment treaties[34]. Additionally, energy disputes in Africa may arise in respect of compliance with requirements under concessions and local laws such as the decommissioning of oil fields in a safe, environmentally-friendly manner[35]. The potential for Africa to be a hive of activity for energy-related disputes is ultimately a consequence of its leading position in global energy production, both in the oil & gas and renewable energy sectors[36].

There is need for effective management of energy disputes in Africa. Such disputes can adversely impact the viability and success of energy projects in Africa[37]. Consequently, it is imperative to effectively and efficiently manage energy disputes in Africa in order to foster the success of energy projects and ensure that the energy transition maintains its positive course[38].

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[31] Nalule. V., Olawuyi. D., 'Introduction to International Energy Arbitration Disputes in Africa.' *The Palgrave Handbook of Arbitration in the African Energy and Mining Sectors*. Palgrave Studies in Energy Transitions. Palgrave Macmillan, Cham. Available at https://doi.org/10.1007/978-3-030-96183-1_1-1 (Accessed on 06/12/2023)

[32] Ibid

[33] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

[34] Ibid

[35] Ibid

[36] Ibid

[37] Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Op Cit

[38] Herbert Smith Freehills., 'Energy Transition and the Impact on Disputes.' Op Cit

3.0 Management of Energy Disputes in Africa: Opportunities and Challenges

The need for effective management of energy disputes at the global stage is envisaged under the *Energy Charter Treaty*[39]. The Charter stipulates that energy disputes between an investor and a contracting state shall be settled amicably[40]. In the absence of amicable settlement of disputes, the Charter provides for the settlement of energy disputes through other mechanisms including courts and administrative tribunals of the contracting party to the dispute, international arbitration and conciliation[41]. In relation to energy disputes between contracting parties, the Charter provides that such disputes shall be managed through diplomatic channels and where such channels fail, then the dispute shall be managed through an ad hoc arbitral tribunal[42]. The Energy Charter Treaty therefore sets out mechanisms for management of energy disputes including amicable settlement, use of courts and tribunals, international arbitration, conciliation and diplomacy[43].

Arbitration has been identified as the predominant method of dispute resolution for energy-related disputes on the African continent[44]. It has been observed that over the past decades, arbitration has emerged as a key mechanism for dispute resolution in Africa's growing energy industry[45]. This is due to the fact that arbitration has developed into the preferred mode of management of disputes especially those that are transnational in nature[46]. It has been correctly observed that in the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as

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[39] The Energy Charter Treaty., Available at
https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf
(Accessed on 06/12/2023)
[40] Ibid, Article 26 (1)
[41] Ibid, Articles 26 (2) (a) & 3 (a)
[42] Ibid, Article 27
[43] Ibid
[44] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit
[45] Nalule. V., Olawuyi. D., 'Introduction to International Energy Arbitration Disputes in Africa.' Op Cit
[46] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIALARBITRATION-IN-AFRICA.pdf (Accessed on 06/12/2023)

well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable[47]. At the international level, arbitration has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems[48]. Further, arbitration also guarantees enforcement of decisions through the *New York Convention* which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration[49].

Arbitration also has a number of attributes including privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes[50]. These features make arbitration a viable mechanism for managing disputes. The need for expeditious management of energy disputes is of paramount importance. It has been pointed out that disputes in the energy sector can take a very long time to be resolved, during which there may be significant disruptions to energy supply[51]. Parties therefore have a particular interest in resolving disputes swiftly. For example, according to the International Chamber of Commerce (ICC), half of all emergency arbitrator proceedings under the ICC rules concern disputes in the infrastructure/energy sectors[52]. International Commercial Arbitration has thus been widely embraced as the preferred mechanism of managing global commercial disputes including energy disputes. It has been pointed out that foreign investors' preference for arbitration may be explained by arbitration's flexibility, the ability to provide for confidentiality and the ability to enlist specialist, commercial-minded arbitrators to determine the dispute, and its ability to provide for a neutral forum in complex energy disputes involving

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[47] Ibid

[48] Moses, '*The Principles and Practice of International Commercial Arbitration*' 2nd Edition, 2017, Cambridge University Press

[49] United Nations Commission on International Trade Law., '*Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*' (New York, 1958)

[50] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers Limited, 4th Edition, 2022

[51] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

[52] Ibid

international parties, particularly when compared to litigation before domestic courts[53].

As a result of its advantages, there has been prevalence of arbitration in African energy projects[54]. For example, it has been observed that the growing renewable energy sector in Africa is embracing arbitration in managing disputes due to several reasons which include the confidentiality of arbitration proceedings and awards which preserves the information and data behind the new technologies at the heart of renewable energy projects; finality and enforceability of arbitral awards under the New York Convention; ability to provide a neutral and final dispute resolution forum since renewable energy projects often involve joint ventures between investors or contractors from several jurisdictions; the flexibility of parties in choosing a panel of arbitrators that have the most relevant technical expertise in the subject matter; the ability to consolidate cases in multi-party arbitration either under the terms of an arbitration clause or under the rules of an arbitral institution thus avoiding the risk of competing tribunals and inconsistent awards; and the ability to protect investors under investor/state arbitration[55].

Arbitration of energy disputes is envisaged in energy projects under the 2013 Tanzanian Model *Product Sharing Agreement (PSA)[56]*. The PSA seeks to ensure that petroleum operations including exploration activities are conducted in an ethical, efficient, safe, transparent and accountable manner on the basis of the best international environmental, social and economic sustainability principles in order to achieve optimal long-term petroleum resource exploitation for maximum value creation for equitable benefit and welfare of the people of the United Republic of Tanzania[57]. It provides for management of disputes between investors and the Republic of Tanzania through

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[53] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

[54] Ibid

[55] McMahon. M., Shah. P., 'The Rise of Renewable Energy Disputes and Arbitration.' Op Cit

[56] Republic of Tanzania., 'Model Product Sharing Agreement, 2013.' Available at https*://www.resourcecontracts.org/contract/ocds-591adf-8006566420/download/pdf* (Accessed on 06/12/2023)

[57] Ibid

negotiations and in the event such negotiations fail, then such disputes shall be managed through arbitration[58]. The PSA envisages arbitration of energy disputes in Tanzania under the auspices of the International Chamber of Commerce (ICC)[59]. In addition, the Ugandan Model Production Sharing Agreement also envisages the use of arbitration in managing energy disputes related to the exploration, development and production of petroleum[60]. It stipulates that a dispute arising under the Agreement which cannot be settled amicably within one hundred and twenty (120) days, shall be referred to arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules[61]. Further, the Standard Power Purchase Agreement of Kenya provides for final settlement of disputes through arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce[62].

Arbitration of energy disputes in Africa often takes the form of investment arbitration often taking the form of investor/state arbitration and commercial arbitration[63]. In the context of investor/state arbitration, it is estimated that there are over five hundred Bilateral Investment Treaties (BITs) between foreign investors and African countries including almost fifty intra-African BITs in force, alongside more than thirty multilateral treaties with investment protections, including the COMESA (Common Market for Eastern and Southern Africa) Treaty (1993); the OIC (Organisation of Islamic Cooperation) Investment Agreement (1981); the Economic Community of the Western African States (ECOWAS) Supplementary Act for Common Investment Rules for the Community (2008) and the Common Investment Code (2019); as well as the Arab League of States' Arab Investment Agreement (1980) covering

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[58] Ibid

[59] Ibid

[60] Republic of Uganda., 'Model Production Sharing Agreement.' Available at https://www.unoc.co.ug/wp-content/uploads/2018/06/MPSA.pdf (Accessed on 06/12/2023)

[61] Ibid, Article 24

[62] Republic of Kenya., 'Standard Power Purchase Agreement.' Available at *https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Kenya_ppa_ppfull.pdf* (Accessed on 06/12/2023)

[63] Global Arbitration Review., 'Energy Arbitration in Africa.' Op Cit

investments in various sectors including energy[64]. Against this backdrop, there have been a number of Africa-related ICSID cases involving energy disputes. In its 2023 annual report, ICSID notes that North Africa and Sub Saharan Africa accounted for 9% each of the cases registered in Financial Year 2023 with most of the cases involving the oil, gas, and mining industries as well as electric power and other energy sources[65].

For commercial arbitration, there has been an increase in energy disputes involving parties from Africa before international arbitration centres including the International Chamber of Commerce and the London Court of International Arbitration[66]. In addition, there are a number of regional arbitration centres gaining prominence in Africa such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Arbitration Foundation of Southern Africa (AFSA), Lagos Court of Arbitration (LCA), the Kigali International Arbitration Centre (KIAC), the Nairobi Centre for International Arbitration (NCIA), the Mediation and Arbitration Centre (MARC) in Mauritius, and the Casablanca International Mediation and Arbitration Centre (CIMAC) which have been vital in fostering energy arbitration in Africa[67].

Other Alternative Dispute Resolution (ADR) mechanisms including negotiation and mediation have also been proposed as viable in managing energy disputes. It has rightly been asserted that commercial relationships in the energy sector are often long term and frequently operate across projects, borders and cultures[68]. This creates incentives for players in the energy sector including energy companies to look at alternatives to more formal dispute

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[64] White & Case., 'Investment Treaty Protection: How to Safeguard Foreign Investments in Africa.' Available at *https://www.whitecase.com/insight-our-thinking/africa-focus-winter-2022-investment-treatyprotection#:~:text=As%20of%20October%202022%2C%20there%20were%20525%20BITs%20with%20African,OIC%20(Organisation%20of%20Islamic%20Cooperation)* (Accessed on 06/12/2023)
[65] International Centre for Settlement of Investment Disputes., 'Annual Report: 2023.' Op Cit
[66] Global Arbitration Review., 'Energy Arbitration in Africa.' Op Cit
[67] Ibid
[68] Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Op Cit

resolution mechanisms such as litigation or arbitration[69]. Alternative Dispute Resolution (ADR) provides parties with the opportunity to manage and resolve disputes before they escalate, which can not only save time and costs but can also preserve critical business relationships[70]. ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice[71]. In addition, these mechanisms have the ability to foster long term solutions by addressing the root causes of conflicts[72]. These mechanisms are therefore viable in managing energy disputes. For example, it has been observed that negotiation features at some stage in almost every dispute in the energy sector[73]. In most occasions, it is the first process in a dispute resolution journey, either because is mandated by a dispute resolution clause or because it is instigated by the parties at the time the dispute arises[74]. It has been asserted that negotiation in energy disputes is most effective either at the time the dispute first arises, before the parties have formed entrenched views on the matter, or following a mediation or other structured ADR process[75].

In addition, it has been argued that there is potential for the use of mediation in managing energy disputes in Africa since parties to long-term energy contracts may seek to agree mediated solutions rather than escalating their dispute to a judicial forum[76]. Mediation can be used as a precursor to arbitration, with agreements or investment treaties frequently providing for multi-tiered dispute resolution processes facilitating escalation of disputes to

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[69] Ibid

[70] Ibid

[71] Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at *http://kmco.co.ke/wpcontent/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-DisputeResolution-in-Kenya-Prospects-and-Challenges.pdf* (Accessed on 06/12/2023)

[72] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[73] Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Op Cit

[74] Ibid

[75] Ibid

[76] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

arbitration in the event that mediation is unsuccessful[77]. The viability of mediation in managing energy disputes in Africa is further enhanced by the United Nations Convention on International Settlement Agreements Resulting from Mediation ('*Singapore Convention*'), which promotes the use of international commercial mediation by harmonizing the regime for the enforcement of mediated settlements of disputes[78]. It is therefore important to embrace mediation in the management of energy disputes particularly in cases where parties have a continuing relationship[79].

Finally, litigation can also be an effective mechanism in managing energy disputes in Africa. The viability of litigation in managing energy disputes in Africa is attributed to its emphasis on efficiency in granting interim and preventive measures in the form of interim injunctions, and other such measures designed to minimize disruptions to energy production and supply during the pendency of energy related disputes[80]. Such measures of protection may not be easily obtained in other mechanisms including ADR processes such as arbitration and mediation.

From the foregoing, it is evident that there is a wide range of mechanisms available for managing of energy disputes in Africa including arbitration, negotiation, mediation and litigation. However, energy disputes often pose unique challenges that needs to be taken in consideration to ensure their effective management. For example, it has been pointed out that the industry has always had a political dimension and, by their very nature, energy or natural resources projects are capital intensive and involve long-term commitments[81]. Therefore whenever an energy dispute arises, there will often

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[77] Ibid

[78] United Nations: United Nations Commission on International Trade Law.,' Convention on International Settlement Agreements Resulting from Mediation.' United Nations, New York, 2019., Available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (Accessed on 06/12/2023)

[79] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

[80] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

[81] Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Op Cit

be a narrow line to tread, between standing up for commercial rights and maintaining good longer-term government relations[82]. In addition, it has been asserted that energy related disputes in Africa have historically involved unique challenges as a result of state ownership of energy assets and frequent collaboration between state-owned entities and foreign investors[83]. Such challenges are likely to affect the nature of energy disputes in Africa and the course of the dispute management process[84].

Further, energy disputes often involve control and management of vital transboundary natural resources and could escalate into protracted legal battles that could threaten peace and sustainable management of natural resources[85]. For example, the construction of the Grand Ethiopia Renaissance Dam on the Blue Nile has resulted in a protracted dispute between Ethiopia and the two neighboring downstream countries of Egypt and which argue that the dam threatens to cut off their water supply[86]. It has been argued that such conflicts in the energy sector if not properly managed could escalate into direct clashes between nations threatening peace and sustainability in Africa[87]. It is therefore imperative to take these concerns into account in order to foster effective management of energy disputes in Africa.

There is also need to address the challenges facing dispute management processes in the energy sector including arbitration, mediation and litigation. For example, it has been pointed out that the practice of arbitration in Africa faces several challenges including inadequate legal and institutional framework, inadequate marketing, uncertainty in drafting arbitration clauses, interference by national courts, uncertainty of costs, perception of corruption

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[82] Ibid

[83] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

[84] Ibid

[85] Kaledzi. I., 'How Could Ethiopia's Dam Dispute Escalate?.' Available at *https://www.dw.com/en/how-could-ethiopias-dam-dispute-escalate/a-66798628* (Accessed on 06/12/2023)

[86] Ibid

[87] Ibid

and bias against Africa[88]. Mediation on the other faces challenges such as enforceability of decisions due to its non-binding nature, the possibility of endless proceedings, lack of precedents and inability to grant urgent protection such as injunctions[89]. Further, use of litigation in managing energy disputes could result in delays, costs and damaging of relationships which is an undesirable situation especially in long term energy projects[90]. It is imperative to address the foregoing concerns in order to enhance effective and efficient management of energy disputes in Africa.

4.0 Way Forward

There is need to embrace ADR mechanisms in the management of energy disputes in Africa. It has been pointed out that concerns with regard to time and cost relating to energy disputes call for swift and efficient dispute resolution in Africa, which will likely take the form of ADR methods, especially in the context of volatile economic and commercial contexts[91]. ADR mechanisms including arbitration and mediation are therefore appropriate in the management of energy disputes in Africa[92]. It has rightly been observed that ADR mechanisms have been practiced in Africa for many centuries[93]. These techniques fit comfortably within traditional concepts of African justice, particularly its core values of reconciliation, peace and cohesion[94]. ADR mechanisms provide parties with the opportunity to manage and resolve disputes before they escalate, which can not only save time and costs but can also preserve critical business relationships especially in long term energy

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[88] Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2021/10/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf* (Accessed on 06/12/2023)

[89] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[90] Bird & Bird., 'A Need for Speed? The Possible Use of Expedited Dispute Resolution Procedures in the Energy Sector.' Available at *https://www.twobirds.com/en/insights/2016/uk/a-need-for-speed-the-possible-use-of-expedited-dispute-resolution-procedures* (Accessed on 06/12/2023)

[91] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit

[92] Ibid

[93] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

[94] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

projects[95]. Parties should therefore embrace ADR mechanisms including negotiation, mediation and arbitration in order to foster effective management of energy disputes in Africa.

In the case of arbitration, it is essential to address inadequate legal and institutional framework, inadequate marketing, uncertainty in drafting arbitration clauses, interference by national courts, uncertainty of costs, perception of corruption and bias against Africa[96]. This calls for strengthening the legal and institutional capacity on arbitration in Africa, drafting of effective arbitration clauses in energy contracts, marketing Africa as a hub for arbitration, capacity building for arbitrators through education and training, limiting court intervention in arbitration to a basic and necessary minimum, and addressing the problem of corruption through good governance[97]. It has also been suggested that there is need to establish a unified international arbitration court for energy disputes[98]. It has been argued that there is a need for unification of the current international arbitration mechanisms since the different arbitration procedures, subject to different procedural and substantial rules, may result in problems concerning the enforcement of the arbitral awards in local jurisdictions[99]. Establishment of a unified international arbitration court for energy disputes will ensure that the court has the widest jurisdiction to hear the energy disputes through the most suitable procedural and substantial rules for energy-specific disputes[100]. This will also ensure predictable, transparent, and unified arbitration mechanism for management of energy disputes[101].

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[95] Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Op Cit

[96] Muigua. K., 'Nurturing International Commercial Arbitration in Kenya.' Op Cit

[97] Ibid

[98] Ozcan. T., & Sareen. D., 'A New Suggestion for Resolution of Energy Disputes Through a Unified International Arbitration Court For Energy Disputes.' Available at *https://www.mondaq.com/turkey/oil-gas--electricity/1031994/a-new-suggestion-for-resolution-of-energy-disputes-through-a-unified-international-arbitration-court-for-energy-disputes* (Accessed on 07/12/2023)

[99] Ibid

[100] Ibid

[101] Ibid

It is also imperative for parties to embrace dispute avoidance. It has been asserted that conflict avoidance requires clear, concise, careful and proper planning of the strategy for the execution of projects[102]. It is also about adopting a proactive conflict avoidance approach such as risk analysis, clarity in the contract documentation or partnering[103]. It is therefore vital for players in the energy sector in Africa including energy companies to avoid or minimise the chance of disputes arising in the first instance through measures such as ensuring clear and well-drafted contracts which include workable and not overly complicated dispute resolution provisions followed by effective project management from beginning to end[104].

Finally, there is need for the energy sector in Africa to embrace Sustainable Development. The principle of Sustainable Development requires an integrated approach to development that takes into account environmental protection, economic development and social progress[105]. Players in the energy sector in Africa especially multinational corporations in the oil and gas sector have on several occasions been accused of failing to adhere to the principles of Sustainable Development as evidenced by environmental concerns including the extinction of biodiversity, contamination and destruction of soil and air pollution as a result of oil spillages[106]. Further, multinational corporations operating in Africa including those in the energy sector have been accused of gross human rights violations, such as killings, bad labour practices and land injustices[107]. Such practices have had an impact on economic activities, social-cultural life and human health of the affected

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[102] Gould. N., 'Conflict Avoidance and Dispute Resolution.' Available at *https://www.fenwickelliott.com/sites/default/files/nick_gould_-_conflict_avoidance_and_dispute_resolution.indd_.pdf* (Accessed on 07/12/2023)

[103] Ibid

[104] Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Op Cit

[105] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' International Sustainable Development Law., Vol 1

[106] Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

[107] Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' Share the World Resources, 3rd October 2006, available at *http://www.stwr.org/multinationalcorporations/multinational-corporations-mncs-beyond-theprofitmotive.html#legalrights* (Accessed on 07/12/2023)

people thus hindering the attainment of Sustainable Development[108]. This has also led to rise of disputes between host states and investors under investment treaty arbitration with host states seeking to enforce the tenets of Sustainable Development including environmental protection and human rights against multinational corporations[109]. It is therefore imperative for energy companies including multinational corporations in Africa to embrace Sustainable Development by fostering social justice, environmental sustainability, alternative energy and clean technology efforts[110]. In addition, it has been asserted that it is important for African Countries to ensure that they review and negotiate appropriately with foreign countries in order to capture the tenets of Sustainable Development including Environmental, Social and Governance (ESG) clauses in BITs[111]. The need for Sustainable Development in the energy sector in Africa is informed by global agendas including energy transition, environmental protection and confronting climate change[112].

5.0 Conclusion

Energy disputes in Africa are undesirable. Such disputes can adversely impact the viability and success of energy projects in Africa[113]. As a result, there is need to effectively and efficiently manage energy disputes in Africa in order to foster the success of energy projects and ensure that the energy transition maintains its positive course[114]. In order to effectively and efficiently embrace energy disputes in Africa, it is important to embrace ADR mechanisms including arbitration and meditation, address the challenges facing dispute management processes in the energy sector including arbitration, mediation

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[108] Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' Op Cit

[109] Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business*., Volume 15, Issue 6, 2022

[110] Oehmke. M & Opp. M., 'A Theory of Socially Responsible Investment.' Available at https://www.runi.ac.il/media/rzcpiq4a/a-theory-of-s.pdf (Accessed on 07/12/2023)

[111] Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Available at https://kmco.co.ke/wp-content/uploads/2023/07/Bilateral-Investment-Treaties-and-Environmental-Social-and-Governance-in-Africa-1.pdf (Accessed on 07/12/2023)

[112] Global Arbitration Review., 'Energy Arbitration in Africa.' Op Cit

[113] Burges-Salmon., 'Energy Disputes Guide: Managing Risk and Avoiding Disputes in your Energy Project.' Op Cit

[114] Herbert Smith Freehills., 'Energy Transition and the Impact on Disputes.' Op Cit

and litigation, foster dispute avoidance and promote Sustainable Development[115]. There is need to effectively manage disputes in Africa in order to accelerate the energy transition towards Sustainable Development. Effectively managing energy disputes in Africa is an imperative whose time is now.

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[115] Clearly Gottlieb., 'Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Op Cit; Financier Worldwide Magazine., 'FORUM: Managing Energy and Natural Resources Industry Disputes.' Op Cit; and Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?'

Eradicating Poverty for Sustainable Development in Africa

Abstract

Poverty is a major problem in Africa especially in the Sub Saharan region. Africa contains the largest remaining share of global extreme poverty with approximately 400 million Africans still living in extreme poverty. Poverty in Africa results in hunger, epidemics of disease such as malaria, cholera, AIDS and high infant death rates, and a lowering of the overall living standards in the African countries. Despite efforts being made towards tackling poverty in Africa, high levels of poverty are still present in many African countries especially in the Sub Saharan region. The paper argues a case for eradicating poverty in Africa. It posits that poverty is a major hindrance towards the achievement of Sustainable Development in Africa. It examines the causes and effects of poverty in Africa. The paper further examines the efficacy of some of the measures adopted towards eradicating poverty in Africa. It also offers suggestions towards eradicating poverty for Sustainable Development in Africa.

1.0 Introduction

Poverty is commonly understood as the state of lack of income or productive resources to sustain livelihoods[1]. It has also been defined as a human condition where people do not have adequate access to their fundamental needs such as income, food, clothing, shelter, health care, security, education[2]. It has been asserted that the term poverty entails several clusters of meanings including *income poverty* which measures and compares the levels of income between individuals; *material lack or want* which includes lack of or little wealth and lack or low quality of other assets such as shelter, clothing, furniture, personal means of transport, radios or television and poor access to services; and *capability deprivation* which includes but goes beyond material lack or want to include human capabilities, for example skills and physical abilities, and also

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[1] Regmi. M., 'Preventing Poverty is a Legal Obligation.' Available at *https://apolitical.co/solution-articles/en/poverty-is-a-human-rights-violation* (Accessed on 24/11/2023)

[2] Ibid

self-respect in society[3]. According to the World Bank, extreme poverty is measured as the number of people living on less than $1.90 per day[4].

It has rightly been argued that poverty is not merely an economic issue[5]. Rather, it is a multifaceted phenomenon that comprises a lack of both income opportunities and basic capabilities to live in dignity[6]. According to the United Nations, poverty entails more than the lack of income and productive resources to ensure sustainable livelihoods[7]. It points out that the manifestations of poverty include hunger and malnutrition, limited access to education and other basic services, social discrimination and exclusion as well as the lack of participation in decision-making[8]. The United Nations further observes that various social groups bear disproportionate burden and levels of poverty[9]. It has been asserted that for those living in poverty, many human rights are out of reach[10]. Among many other deprivations, they often lack access to education, health services, safe drinking water and basic sanitation[11]. They are often excluded from participating meaningfully in the political process and prevented from seeking justice for violations of their human rights[12]. As a result, it has been argued that the view that poverty is a shortage of income should be discarded in favour of an approach that perceives poverty as 'unfreedoms' of various sorts: the lack of freedom to

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[3] United Nations Development Programme., 'What is Poverty? Concepts and Measures.' Available at *https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/120/rc145.pdf?s* (Accessed on 24/11/2023)

[4] The World Bank Group., 'Understanding Poverty.' Available at *https://www.worldbank.org/en/understanding-poverty* (Accessed on 24/11/2023)

[5] Regmi. M., 'Preventing Poverty is a Legal Obligation.' Op Cit

[6] Ibid

[7] United Nations., 'Poverty Eradication.' Available at *https://www.un.org/development/desa/socialperspectiveondevelopment/issues/poverty-eradication.html#:~:text=The%20World%20Social%20Summit%20identified,resources%2C%20including%20credit%2C%20education%20and* (Accessed on 24/11/2023)

[8] Ibid

[9] Ibid

[10] United Nations Office of the High Commissioner for Human Rights., 'About Extreme Poverty and Human Rights.' Available at *https://www.ohchr.org/en/special-procedures/sr-poverty/about-extreme-poverty-and-human-rights* (Accessed on 24/11/2023)

[11] Ibid

[12] Ibid

achieve even minimally satisfactory living conditions[13]. This is because while low income can contribute to poverty, lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role in poverty[14]. Therefore as long as these factors exist, then poverty cannot be said to have been eliminated despite increase in levels of income[15]. Poverty can therefore be viewed as a socio-economic phenomenon[16].

It has been rightly observed that the eradication of extreme poverty should not be seen as a question of charity, but as a pressing human rights issue[17]. The persistence of poverty in countries that can afford to eliminate it amounts to a clear violation of fundamental human rights[18]. The United Nations identifies poverty eradication as an ethical, social, political and economic imperative of mankind and calls upon governments to address the root causes of poverty, provide for basic needs for all and ensure that the poor have access to productive resources, including credit, education and training[19]. According to the United Nations, a social perspective on development requires addressing poverty in all its dimensions[20].

Eradicating poverty is at the heart of Sustainable Development. The concept of Sustainable Development has been defined as development that meets the needs of the present without compromising the ability of future generations to

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[13] Green, D., 'From Poverty to Power: How active citizens and effective states can change the world.' (2nd ed., 2012), p. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International Available at *http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf* (Accessed on 24/11/2023)

[14] Muigua, K., 'Nurturing Our Environment for Sustainable Development.', Glenwood Publishers, Nairobi, 2016.

[15] Muigua. K., 'Eradicating Poverty for Inclusive Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2020/12/Eradicating-Poverty-for-Inclusive-Development-in-Kenya-25th-December-2020-Kariuki-Muigua.pdf* (Accessed on 24/11/2023)

[16] Ibid

[17] United Nations Office of the High Commissioner for Human Rights., 'About Extreme Poverty and Human Rights.' Op Cit

[18] Ibid

[19] United Nations., 'Poverty Eradication.' Op Cit

[20] Ibid

meet their own needs[21]. It seeks to strike a balance between environmental protection, economic development and social progress[22]. It has rightly been pointed out that at the heart of the concept of Sustainable Development is the fulfillment of the basic needs of the world's poor without compromising the capacity of the environment to provide similar benefits for future generations[23]. Sustainable development therefore as defined in the *Brundtland Commission Report*, includes human development[24]. It has been argued that one of the ways of achieving human development which empowers people, both men and women, is addressing poverty in order to empower people to contribute positively towards national development with dignity, without solely relying on the Government to do so[25].

The *United Nations 2030 Agenda for Sustainable Development*[26]acknowledges that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for Sustainable Development. The 2030 Agenda sets out the global determination to end poverty in all its forms and dimensions and ensure that all human beings can fulfill their potential in dignity and equality and in a healthy environment[27]. Sustainable Development Goal 1 aims to end poverty in all its forms everywhere in the world[28]. SDG 1 sets out several targets towards

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

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

[23] Mbote. P.K., 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management.' Available at http://erepository.uonbi.ac.ke/handle/11295/41149 (Accessed on 24/11/2023)

[24] Costantini, V. & Monni, S., 'Measuring Human and Sustainable Development: an integrated approach for European Countries.' Available at https://www.researchgate.net/publication/24125340_Measuring_human_and_Sustainable_Development_An_Integrated_Approach_for_European_Countries (Accessed on 24/11/2023)

[25] Muigua, K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

[26] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf* (Accessed on 24/11/2023)

[27] Ibid

[28] Ibid, Sustainable Development Goal 1

eradicating poverty by 2030 which include reducing at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions; implementing nationally appropriate social protection systems and measures for all and by 2030 achieve substantial coverage of the poor and the vulnerable; ensuring that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance; building the resilience of the poor and those in vulnerable situations and reducing their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters; ensuring significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions; and creating sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions[29]. Poverty eradication is therefore a pertinent global concern.

The paper argues a case for eradicating poverty in Africa. It posits that poverty is a major hindrance towards the achievement of Sustainable Development in Africa. It examines the causes and effects of poverty in Africa. The paper further examines the efficacy of some of the measures adopted towards eradicating poverty in Africa. It also offers suggestions towards eradicating poverty for Sustainable Development in Africa.

2.0 Poverty in Africa: Causes and Effects

Poverty is a major problem in Africa. It has been pointed out that Africa contains the largest remaining share of global extreme poverty with approximately 400 million Africans still living in extreme poverty[30]. The World

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[29] Ibid

[30] Institute for Security Studies., 'Reducing Poverty in Africa: Huge Potential, But More Realistic Goals Needed.' Available at https://issafrica.org/about-us/press-releases/reducing-poverty-in-africa-huge-potential-but-more-realistic-goals-

Bank further estimates that about 462 million people in Africa are still living in extreme poverty in 2023[31]. It has also been estimated that Africa has the largest share of extreme poverty rates globally, and contains 23 of the world's poorest 28 countries at extreme poverty rates above 30%[32]. According to the 2023 Global Multidimensional Poverty Index Report, 10 million of the 12 million poor people with the highest deprivation scores (90–100%) live in Sub Saharan Africa[33]. The report further points out that in Sub-Saharan Africa, poverty affects an average of 49.5 % of the population, but incidences vary widely across countries[34]. It has been observed that Malawi, Niger, and Tanzania have Africa's highest extreme poverty rates based on the $ 2.15 per day extreme poverty indicator (updated from $ 1.90 in September 2022)[35]. Although the levels of poverty on the continent are predicted to decrease in the coming years, Africa would remain the poorest region compared to the rest of the world[36].

Within Africa, most poverty is concentrated in the Sub-Saharan Africa region[37]. It has been pointed out that Central Africa has the highest extreme poverty rate in Africa followed by Southern Africa with rates in Western and Eastern Africa also being significantly high[38]. According to the United Nations

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needed#:~:text=Policies%20that%20may%20boost%20poverty,and%20promote%20progressive%20social%20change (Accessed on 24/11/2023)

[31] The World Bank Group., 'The World Bank in Africa.' Available at https://www.worldbank.org/en/region/afr/overview#:~:text=About%20462%20million%20people%20in,has%20expedited%20this%20debt%20surge. (Accessed on 24/11/2023)

[32] Institute for Security Studies., 'Africa is Losing the Battle Against Extreme Poverty.' Available at https://issafrica.org/iss-today/africa-is-losing-the-battle-against-extreme-poverty (Accessed on 24/11/2023)

[33] United Nations Development Programme., 'Global Multidimensional Poverty Index 2023.' Available at https://hdr.undp.org/system/files/documents/hdp-document/2023mpireportenpdf.pdf (Accessed on 24/11/2023)

[34] Ibid

[35] Statistica., 'African Countries with the Highest Share of Global Population Living Below the Extreme Poverty Line in 2023.' Available at https://www.statista.com/statistics/1228553/extreme-poverty-as-share-of-global-population-in-africa-by-country/ (Accessed on 24/11/2023)

[36] Ibid

[37] Institute for Security Studies., 'Africa is Losing the Battle Against Extreme Poverty.' Op Cit

[38] Ibid

Development Programme, in Sub-Saharan Africa the intensity of poverty is particularly serious[39]. The region is home not only to the highest number of poor people but also to the poorest of the poor[40]. On a positive note, it has been pointed out that North Africa met the SDG 1 target of a poverty rate of below 3% in 2019[41]. Further, it has been observed that for many African countries, economic inequality - the unequal distribution of income and opportunity between different groups in society - is most concerning[42]. Even the African countries with the highest Gross Domestic Product (GDP), such as Nigeria, South Africa, Egypt, Algeria, Morocco, and Angola, record some of the highest levels of poverty and inequality[43].

Poverty in Africa and other regions of the world has been attributed to multiple factors. It has been observed that regions with critical situations of employment, education, health, nutrition, war, and conflict usually have larger poor populations[44]. As a result, poverty tends to be more prevalent in least-developed and developing countries worldwide[45]. Poverty in Africa has therefore been attributed to causes such as rapid population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures[46]. It has been pointed out that the problem of poverty in Africa is interrelated to other social, economic and political problems facing the continent[47]. For example, one of the regional trends that can be observed in Africa is that the top 10 poorest countries in the Continent are mainly those

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[39] United Nations Development Programme., 'Global Multidimensional Poverty Index 2023.' Op Cit

[40] Ibid

[41] Institute for Security Studies., 'Africa is Losing the Battle Against Extreme Poverty.' Op Cit

[42] Miyandazi. L., 'Challenges to Reducing Poverty and Inequalities in Africa.' Available at *https://globaldialogue.isa-sociology.org/articles/challenges-to-reducing-poverty-and-inequalities-in-africa* (Accessed on 24/11/2023)

[43] Ibid

[44] Statistica., 'African Countries with the Highest Share of Global Population Living Below the Extreme Poverty Line in 2023.' Op Cit

[45] Ibid

[46] Muigua. K., 'Eradicating Poverty for Inclusive Development in Kenya.' Op Cit

[47] Black Economics., 'The Effects of Poverty in Africa.' Available at *https://blackeconomics.co.uk/2013/08/15/the-effects-of-poverty-in-africa/#:~:text=Poverty%20in%20Africa%20results%20in,standards%20in%20the%20African%20countries* (Accessed on 24/11/2023)

that have suffered from political instability, conflicts, and a lack of economic development[48]. These factors often lead to high poverty rates, low life expectancy, and poor education outcomes[49].

Poverty is a major threat to Sustainable Development in Africa. Poverty in Africa results in hunger, epidemics of disease such as malaria, cholera, AIDS and high infant death rates, and a lowering of the overall living standards in the African countries[50]. The effects of poverty in Africa have been identified to be hunger with more than a quarter of the hungry in the world living on the African continent; physical and mental underdevelopment in children due to growth disorders such as stunting as a result of chronic malnutrition; high infant mortality rates; child labour; inadequate access to health, education and clean water; and prevalence of illnesses and diseases including malaria and AIDS[51]. Poverty is therefore a major problem in Africa which threatens the achievement of Sustainable Development. This is despite the fact that Africa as a continent is endowed with immense natural and human resources as well as great cultural, ecological and economic diversity[52]. Eradicating poverty is therefore an urgent concern in Africa.

3.0 Eradicating Poverty in Africa: Promises and Challenges

There has been some progress towards eradicating poverty in Africa. Africa Union's *Agenda 2063*[53] acknowledges that millions of Africans have escaped absolute poverty and there are improvements in all spheres of human development including health, education, gender, youth and access to services and basic necessities of life which are key indicators in poverty eradication[54].

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[48] Wisevoter., 'Poorest Countries in Africa.' Available at https://wisevoter.com/country-rankings/poorest-countries-in-africa/ (Accessed on 24/11/2023)
[49] Ibid
[50] Black Economics., 'The Effects of Poverty in Africa.' Op Cit
[51] Muigua. K., 'Eradicating Poverty for Inclusive Development in Kenya.' Op Cit
[52] Muigua. K., 'Utilizing Africa's Natural Resources to Fight Poverty.' Available at https://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf (Accessed on 24/11/2023)
[53] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 24/11/2023)
[54] Ibid

It points out that poverty levels in Africa are falling, incomes are rising and there are improvements in both health and education outcomes[55]. Agenda 2063 seeks to achieve the ideal of a prosperous Africa based on inclusive growth and Sustainable Development by ending poverty, tackling inequalities of income and opportunity; fostering job creation; addressing the challenges of rapid urbanization, improvement of habitats and access to basic necessities of life; providing social security and protection; developing Africa's human and social capital (through an education and skills revolution emphasizing science and technology and expanding access to quality health care services, particularly for women and girls[56]. It recognizes that poverty, inequality and hunger are priority areas towards achieving this goal[57]. According to Agenda 2063, ending all forms of poverty will be the highest priority of African governments in the next decades[58]. It has been asserted that African Union's Agenda 2063 process offers an important opportunity for Africa to take charge of its own development trajectory by eradicating poverty and tackling other economic, social and environmental challenges in the Continent[59]. Agenda 2063 has been described as a solid launching pad to materialize the aspirations of the continent[60]. It is therefore imperative to actualize the aspirations of Agenda 2063 in order to eradicate poverty in Africa.

In addition, the *Africa Union Draft Declaration on Employment, Poverty Eradication and Inclusive Development in Africa[61]* notes that progress has been made on the policy development front, labour market governance and budget allocation by Member States, Regional Economic Communities in the fight

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[55] Ibid

[56] Ibid

[57] Ibid

[58] Ibid

[59] Institute for Security Studies., 'Reducing Poverty in Africa: Huge Potential, But More Realistic Goals Needed.' Op Cit

[60] United Nations., 'Despite Gains in Reducing Poverty, Fuelling Growth, Africa Still Needs International Funding, Training to Overcome Development Challenges, Speakers Tell General Assembly.' Available at https://press.un.org/en/2019/ga12205.doc.htm (Accessed on 24/11/2023)

[61] Africa Union., 'Draft Declaration on Employment, Poverty Eradication and Inclusive Development in Africa.' Available at https://www.tralac.org/images/docs/5987/au-draft-declaration-on-employment-poverty-eradication-and-inclusive-development-in-africa-2014.pdf (Accessed on 24/11/2023)

against high levels of unemployment, underemployment and poverty in Africa[62]. Under the Declaration, African countries commit to address the link between poverty eradication, decent work, social protection and inclusive growth[63]. The Declaration seeks to eradicate poverty in Africa through initiatives such as employment creation, social protection extension and social inclusion[64]. According to the Declaration, efforts geared towards poverty eradication and productive employment creation, particularly in the fields of infrastructure, agriculture and rural development, environmental conservation, cultural enterprises, fisheries, forestry, Information and Communication Technology(ICT) industry, trade and tourism have a high potential for job creation and reducing poverty in Africa[65].

In addition, the New Partnership for Africa's Development (NEPAD) was adopted by African Heads of State and Government in 2001 and was ratified by the African Union in 2002 to address Africa's development problems within a new paradigm[66]. NEPAD's main objectives are to reduce poverty, put Africa on a Sustainable Development path, halt the marginalization of Africa, and empower women[67]. It addresses critical challenges facing the continent including poverty, development and Africa's marginalization internationally and provides unique opportunities for African countries to take full control of their development agenda, to work more closely together, and to cooperate more effectively with international partners[68]. Towards eradicating poverty in Africa, NEPAD manages several programmes and projects in key thematic areas which include agriculture and food security, climate change and natural resource management, regional integration and infrastructure, human development, economic and corporate governance, and cross cutting areas such as gender, capacity development and ICT[69]. The implementation of

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[62] Ibid

[63] Ibid

[64] Ibid

[65] Ibid

[66] United Nations., 'New Partnership for Africa's Development – NEPAD.' Available at
https://www.un.org/development/desa/socialperspectiveondevelopment/issues/new-partnership-for-africas-development-nepad.html (Accessed on 24/11/2023)

[67] Ibid

[68] Ibid

[69] Ibid

NEPAD is expected to bring about economic growth and development, increased employment, a reduction in poverty and inequity, the diversification of productive activities, enhanced international competitiveness and increased exports, and finally an increased integration of the African continent[70].

It has also been argued that the implementation of the African Continental Free Trade Area (AfCFTA) Agreement will strengthen efforts towards eradicating poverty in Africa[71]. The opportunities created by the AfCFTA have the ability to stimulate increased trade and investment, promote value addition, foster innovation and productivity growth, both at national and regional levels, and consequently contribute to the reduction of poverty, vulnerability, and inequality[72]. Agenda 2063 notes that the establishment of the AfCFTA and its fast tracking will lead to a significant growth of Intra-Africa trade and assist Africa to use trade more effectively as an engine of growth, job creation, reducing poverty and Sustainable Development[73]. According to the World Bank, the AfCFTA could help lift up to 50 million Africans from extreme poverty by bringing significant economic and social gains for the region, leading to higher incomes, lower poverty, and faster economic growth[74]. It further posits that AfCFTA has the potential to encourage greater Foreign Direct Investment (FDI) required for Africa to diversify into new industries, such as agribusiness, manufacturing, and services, and reduce the region's vulnerability to commodity boom-bust

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[70] African Development Bank Group.,' New Partnership for Africa's Development (NEPAD).' Available at https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/nepad (Accessed on 24/11/2023)

[71] United Nations Economic Commission for Africa., 'Boosting Intra-Africa Trade through Implementation of the AfCFTA Agreement Key to Eliminating Poverty and Inequality in Southern Africa.' Available at https://www.uneca.org/stories/boosting-intra-africa-trade-through-implementation-of-the-afcfta-agreement-key-to#:~:text=%E2%80%9CThe%20opportunities%20created%20by%20the,and%20inequality%2C%E2%80%9D%20said%20Ms. (Accessed on 24/11/2023)

[72] Ibid

[73] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

[74] The World Bank Group., 'Free Trade Pact Could Help Lift Up to 50 Million Africans from Extreme Poverty.' Available at https://www.worldbank.org/en/news/press-release/2022/06/30/free-trade-pact-could-help-lift-up-to-50-million-africans-from-extreme-poverty (Accessed on 24/11/2023)

cycles[75]. It is therefore imperative for Africa to make the most out of the AfCFTA in order to unlock the potential gains in trade, investment, job creation and poverty reduction[76].

Due to the foregoing among other initiatives, it has been observed that poverty levels have declined in most African countries with the proportion of African households with a consumption level below the $ 1.9 per day poverty line significantly reducing[77]. However, despite the gains made in reducing poverty, the problem is still persistent in Africa and more needs to be done in order to effectively deal with the issue. Agenda 2063 notes that the poverty situation has worsened in several other countries and overall gains remain fragile and reversible due to rising inequalities and exposure to shocks (economic, political, social and environmental)[78]. Despite the progress, Africa remains the continent with the highest concentration of poverty[79]. Africa contains the largest remaining share of global extreme poverty with an estimated number of over 400 million Africans living in extreme poverty[80]. The rapid economic growth witnessed in some African countries in recent years has failed to translate into corresponding and significant poverty reduction or improved living conditions for many Africans[81]. As a result, it has been argued that Africa will probably miss the SDG 1 poverty targets, but the right policies could deliver significant reductions[82]. Eradicating poverty is therefore an urgent concern in Africa. It has been argued that there is huge potential in Africa to make significant strides to reduce extreme poverty in coming decades, but more realistic targets are needed[83]. It is crucial for African

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[75] Ibid

[76] Ibid

[77] United Nations Conference on Trade and Development., 'Economic Development in Africa Report 2021: Reaping the Potential Benefits of the African Continental Free Trade Area for Inclusive Growth.' Available at *https://unctad.org/press-material/facts-and-figures-7* (Accessed on 24/11/2023)

[78] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

[79] Ibid

[80] Institute for Security Studies., 'Reducing Poverty in Africa: Huge Potential, But More Realistic Goals Needed.' Op Cit

[81] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

[82] Institute for Security Studies., 'Africa is Losing the Battle Against Extreme Poverty.' Op Cit

[83] Institute for Security Studies., 'Reducing Poverty in Africa: Huge Potential, But More Realistic Goals Needed.' Op Cit

countries to focus on improving the lives of the poorest and most marginalized through creating a sustainable, just, and equitable society in all aspects of life[84].

4.0 Way Forward

It has been rightly observed that for Africa to effectively address the problem of poverty, governments must mainstream poverty eradication into national development policies, programs and actions[85]. Governments have an obligation to address the root causes of poverty, provide for basic needs for all and ensure that the poor have access to productive resources, including credit, education and training[86]. It is therefore imperative for African governments to implement policies and programs aimed at creating decent jobs and extending vital support to people experiencing poverty through measures such as social protection[87]. It has been observed that employment can be a tool to lift people out of poverty in Africa but this can only be achieved if job quality is sufficient, including adequate earnings, job security and safe working environments[88]. Universal social protection is also urgently needed in Africa in order to guarantee income security for everyone, prioritizing society's most vulnerable members[89]. It is also imperative for Governments to enhance access to vital and basic services including health care, clean water, education in order to effectively address poverty[90].

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[84] Miyandazi. L., 'Challenges to Reducing Poverty and Inequalities in Africa.' Op Cit

[85] United Nations., 'Poverty Eradication.' Op Cit

[86] Ibid

[87] Steiner. A., 'International Day for the Eradication of Poverty - 17 October 2023.' Available at *https://www.undp.org/speeches/international-day-eradication-poverty-17-october-*
2023#:~:text=That%20is%20an%20approach%20rooted,take%20more%20precedence%20o
ver%20profit.&text=The%20theme%20of%20this%20year's,UNDP%20feature%20story%
20on%20poverty%20 (Accessed on 25/11/2023)

[88] Ibid

[89] United Nations., 'International Day for the Eradication of Poverty, 17 October: 2023 theme, 'Decent Work and Social Protection: *Putting dignity in practice for all,'* Available at https://www.un.org/en/observances/day-for-eradicating-poverty (Accessed on 25/11/2023)

[90] World Vision., '8 World-Changing Solutions to Poverty.' Available at *https://www.worldvision.ca/stories/advocacy/solutions-to-poverty* (Accessed on 25/11/2023)

It is also vital to foster gender equity and equality in order to eradicate poverty especially among women. It has been observed that women's poverty arises from unequal access to economic resources[91]. Discriminatory norms may keep women in certain occupations, working for wages less than those of men[92]. In addition, certain laws and customary practices may restrict their ability of women to inherit land or seek credit[93]. It has further been pointed out that women left financially dependent on men are more vulnerable to poverty, and less equipped to manage risks such as economic downturns[94]. It therefore vital for African countries to embrace gender equity and equality in order to eradicate poverty.

In addition, there is need to prioritize food security in Africa. According to the World Bank, at least one in five Africans goes to bed hungry and an estimated 140 million people in Africa face acute food insecurity[95]. It has been pointed out that the Horn of Africa is suffering from persistent drought and African Countries that depend on Russia and Ukraine for wheat and sunflower oil imports have seen prices skyrocket out of reach of ordinary people due to the ongoing war between the two countries[96]. Such factors threaten to worsen the food security situation in Africa. Food insecurity can worsen the poverty situation in Africa since it leads to malnutrition and the inability of the poor to afford food supplies as a result of high prices[97]. African countries should therefore foster food security through measures such as investments in climate resilient agriculture, embracing the 'green' revolution in the agricultural sector, enhancing Intra-African food trade, ensuring the affordability of food

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[91] United Nations Women., 'SDG 1: End Poverty in all its Forms Everywhere.' Available at https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-1-no-poverty (Accessed on 25/11/2023)

[92] Ibid

[93] Ibid

[94] Ibid

[95] The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Available at *https://www.worldbank.org/en/news/immersive-story/2022/10/17/putting-africans-at-the-heart-of-food-security-and-climate-resilience* (Accessed on 25/11/2023)

[96] Ibid

[97] Kemoe. L et al., 'How Africa Can Escape Chronic Food Insecurity Amid Climate Change' Available at *https://www.imf.org/en/Blogs/Articles/2022/09/14/how-africa-can-escape-chronic-food-insecurity-amid-climate-change* (Accessed on 25/11/2023)

commodities, embracing agri-business, and investing in research and technology in order to increase food production[98].

Another key measure towards eradicating poverty in Africa is managing the Continent's debt crisis. It has been observed that Africa faces an imminent financial crisis caused by rising debt problems due to borrowing from both public and private external creditors[99]. The soaring cost of borrowing and debt distress have strained public finance in most African countries with severe consequences on social spending[100]. According to the International Monetary Fund, the external debt in many African countries has reached unsustainable levels[101]. It further posits that the burden of adjustment, when it comes, will inevitably fall on the most vulnerable especially women, children, and the poor[102]. While debt serves a critical function for development, the rate at which debt is rising has constrained growth and limited many African countries' ability to cope with future crises or invest for development[103]. It has rightly been asserted that every dollar Africa spends on debt servicing is one less dollar available for development spending in key priority areas including poverty eradication, education and healthcare[104]. It has been observed that more than half of Africa's population lives in countries that spend more on interest payments than education or health[105]. Managing the debt situation in Africa is therefore essential in strengthening efforts towards poverty eradication. Reforms covering both multilateral as well as private creditors are key to allow Africa to develop sustainably and lift some of the world's most vulnerable out of poverty. Addressing Africa's debt sustainability issues will

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[98] The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit

[99] Miyandazi. L., 'Challenges to Reducing Poverty and Inequalities in Africa.' Op Cit
[100] Ibid
[101] Bokosi. F., 'The Low-Income Trap.' Available at
https://www.imf.org/en/Publications/fandd/issues/2018/03/point1 (Accessed on 25/11/2023)
[102] Ibid
[103] United Nations Conference on Trade and Development., 'A World of Debt.' Available at https://unctad.org/publication/world-of-debt/regional-stories (Accessed on 25/11/2023)
[104] Ibid
[105] Ibid

not only help make Africa more financially sound, but it will contribute toward the continent achieving sustainability and meeting the SDGs[106].

There is also need to control population growth in Africa. Fueled by a combination of falling mortality and some of the highest birth rates in the world, Africa's total population has increased tenfold and now stands at over 1.4 billion[107]. The United Nations projects that by 2050, Africa's population will reach close to 2.5 billion which will mean that than 25 percent of the world's population will be African[108]. Five of eight countries expected to account for over half of global population growth to 2050 are in Africa, with Nigeria predicted to become the world's third-most-populous country[109]. Such figures could stretch the continent's resources and hinder efforts towards poverty eradication. It has been highlighted that one of the major causes of poverty in Africa is high population growth which comes with extra expenditure and stretched out incomes thus undoing all the gains made in eradication of poverty[110]. It is therefore imperative for African countries to embrace population control through measures such as educating and encouraging citizens on the need of birth control in order to ease economic and other strains on households and national economies[111].

Regional cooperation has also been advocated as a key strategy in eradicating poverty in Africa[112]. It has been asserted that regional cooperation and integration are effective tools in alleviating poverty within nations and reducing their dependency on foreign or development aid[113]. For example, the

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[106] Ibid

[107] International Monetary Fund., 'A Demographic Transformation in Africa has the Potential to Alter the World Order.' Available at https://www.imf.org/en/Publications/fandd/issues/2023/09/PT-african-century#:~:text=Fueled%20by%20a%20combination%20of,reach%20close%20to%202.5%20billion. (Accessed on 25/11/2023)

[108] Ibid

[109] Ibid

[110] Muigua. K., 'Eradicating Poverty for Inclusive Development in Kenya.' Op Cit

[111] Ibid

[112] Nhongo. W., 'The Role of Regional Cooperation in Eradicating Poverty and Aid Dependency in East Africa.' Available at https://www.diplomacy.edu/resource/the-role-of-regional-cooperation-in-eradicating-poverty-and-aid-dependency-in-east-africa/ (Accessed on 25/11/2023)

[113] Ibid

East African Community (EAC) has been hailed as a successful developing country regional economic integration process with evidence pointing to rising trade, and declining monetary and multi-dimensional poverty over the period of EAC integration for countries such as Rwanda, Tanzania and Uganda[114]. According to the African Union, Regional Economic Communities in Africa are at the forefront of the implementation of Agenda 2063[115]. It posits that the pace of regional integration needs to be accelerated to allow Africans to take their destiny in their own hands[116]. It is therefore necessary to embrace and accelerate regional economic integration in Africa in order to strengthen efforts towards eradicating poverty. There is also need to fast track the implementation of the Continent's development agenda including Agenda 2063 and NEPAD in order to effectively combat poverty.

It is also imperative to foster good governance in Africa. It has been asserted that one of the causes of poverty in the continent is poor governance characterized by corruption, embezzlement and mismanagement of funds[117]. This often results in loss funds that could be channeled into poverty eradication programmes[118]. In addition, it has been pointed out that for the poorest and most vulnerable, the difference that good, or particularly bad, governance, makes to their lives is profound: the inability of government institutions to prevent conflict, provide basic security, or basic services can have life-or-death consequences; lack of opportunity can prevent generations of poor families from lifting themselves out of poverty; and the inability to grow economically and collect taxes can keep countries trapped in a cycle of aid-dependency[119]. Good governance is therefore central to eradicating

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[114] Gasiorek. M., 'Regional Integration, Poverty and the East African Community: What do We Know and What Have We Learnt?.' Available at https://www.gov.uk/research-for-development-outputs/regional-integration-poverty-and-the-east-african-community-what-do-we-know-and-what-have-we-learnt (Accessed on 25/11/2023)

[115] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

[116] Ibid

[117] Black Economics., 'The Effects of Poverty in Africa.' Op Cit

[118] Ibid

[119] The Organization for Economic Cooperation and Development., 'The Politics of Poverty: Elites, Citizens and States.' Available at *https://www.oecd.org/derec/unitedkingdom/48688822.pdf (Accessed on 25/11/2023)*

poverty in Africa by achieving development and ending conflict[120]. It has rightly been pointed out that the governments and people of Africa especially Sub-Saharan Africa must foster good governance by instituting corruption-free progressive governments led by capable, competent, qualified, progressive leaders, chosen through free and fair elections if the problem of poverty in Africa would ever be effectively addressed[121].

There is also need to utilize Africa's natural resources to fight poverty[122]. It has rightly been observed that Africa as a continent is endowed with immense natural and human resources as well as great cultural, ecological and economic diversity[123]. The continent is generously endowed with productive land and with valuable natural resources, which include renewable resources such as water, forestry, and fisheries and non-renewable resources including minerals, coal, gas, and oil[124]. The United Nations Environment Programme (UNEP) states that Africa is rich in natural resources ranging from arable land, water, oil, natural gas, minerals, forests and wildlife[125]. UNEP further points out that the continent holds a huge proportion of the world's natural resources, both renewables and non-renewables[126]. However, African countries have over the years failed to effectively utilize their abundant natural resources to eradicate poverty and foster economic development a situation that has been referred to as the resource curse phenomenon[127]. The Continent and especially, the Sub-Saharan Africa region has become a classic case of the

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[120] Ibid

[121] Black Economics., 'The Effects of Poverty in Africa.' Op Cit

[122] Muigua. K., 'Utilizing Africa's Natural Resources to Fight Poverty.' Op Cit

[123] Ibid

[124] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/%28E%29%20AfricanBank%202007%20Ch4.pdf (Accessed on 25/11/2023)

[125] United Nations Environment Programme., 'Our Work in Africa.' Available at https://www.unep.org/regions/africa/our-workafrica#:~:text=The%20continent%20has%2040%20percent,internal%20renewable%20fresh%20water%20so urce (Accessed on 25/11/2023)

[126] Ibid

[127] Extractive Industries Transparency Initiative., 'The Natural Resource Curse in Sub-Saharan Africa: Transparency and International Initiatives.' Available at https://eiti.org/documents/natural-resourcecurse-sub-saharan-africa-transparency-and-international-initiatives (Accessed on 25/11/2023)

resource-curse phenomenon characterized by the abundance of natural resources poverty, low economic development, misuse of natural resources and prevalence of conflicts[128]. The resource curse in Africa has been attributed to factors such as poor governance, mismanagement of natural resources, corporate dominance by foreign multinational corporations, unfair and inequitable economic policies, use of poor technology and climate change[129]. It is therefore important for African countries to conquer the resource curse in order to effectively utilize their natural resources to eradicate poverty[130]. This can be achieved through fostering sound management if natural resources, promoting good governance and transparency, enhancing the principle of equitable benefit sharing, embracing sound, fair and equitable globalization policies, value addition, use of modern technology in natural resources management and combating climate change[131].

The foregoing among other initiatives are vital in eradicating poverty in Africa.

5.0 Conclusion

Poverty is a major problem in Africa. Africa contains the largest remaining share of global extreme poverty with approximately 400 million Africans still living in extreme poverty[132]. Poverty in Africa has been attributed to causes such as rapid population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures[133]. Poverty is a major threat to Sustainable Development in Africa since it results in hunger, epidemics of disease such as malaria, cholera, AIDS and high infant death rates, and a lowering of the overall living standards in the African countries[134]. Despites efforts made towards fighting poverty, the problem is still widespread in Africa. Eradicating poverty is therefore an urgent concern in Africa. Poverty in Africa can be eradicated through measures such as

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[128] Ibid

[129] Muigua. K., 'Utilizing Africa's Natural Resources to Fight Poverty.' Op Cit

[130] Muigua. K., 'Conquering the Resource Curse in Africa.' Available at https://kmco.co.ke/wp-content/uploads/2023/11/Conquering-the-Resource-Curse-in-Africa.pdf (Accessed on 25/11/2023)

[131] Ibid

[132] Institute for Security Studies., 'Reducing Poverty in Africa: Huge Potential, But More Realistic Goals Needed.' Op Cit

[133] Muigua. K., 'Eradicating Poverty for Inclusive Development in Kenya.' Op Cit

[134] Black Economics., 'The Effects of Poverty in Africa.' Op Cit

mainstreaming poverty eradication into national development policies, programs and actions; implementing policies and programs aimed at creating decent jobs and extending vital support to people experiencing poverty through measures such as social protection; enhancing access to basic services including health, education and clean water; fostering gender equity and equality; prioritizing food security; managing Africa's debt crisis; controlling population growth in Africa; accelerating regional economic integration; fostering good governance; and utilizing Africa's natural resources to fight poverty[135]. Eradicating poverty for Sustainable Development in Africa needs to be a priority agenda in the continent.

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[135] United Nations., 'Poverty Eradication.' Op Cit; See also The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit; United Nations Conference on Trade and Development., 'A World of Debt.' Op Cit ; Nhongo. W., 'The Role of Regional Cooperation in Eradicating Poverty and Aid Dependency in East Africa.' Op Cit ; and Muigua. K., 'Utilizing Africa's Natural Resources to Fight Poverty.' Op Cit

Fostering Energy Justice in Africa

Abstract

The paper critically explores the concept of energy justice in Africa. It argues that energy is a fundamental need that is required to unlock socio-economic development in Africa. The paper further posits that challenges in the energy sector in Africa including inadequate and unreliable access to clean and modern energy sources raises injustices and inequalities. The paper conceptualizes energy justice and highlights its salient components. It further discusses the idea of energy justice in Africa and the promises and pitfalls facing its realization. The paper also suggests reforms towards fostering energy justice in Africa.

1.0 Introduction

Energy is an essential input to economic activity, with access to reliable and affordable energy supply fundamental for social and economic development[1]. It has correctly been pointed out that energy services are a crucial input to the primary development challenge of providing adequate food, shelter, clothing, water, sanitation, medical care, schooling, and access to information[2]. As a result, it has been argued that energy is one dimension or determinant of poverty and development[3]. Energy supports the provision of basic needs such as cooked food, a comfortable living temperature, lighting, the use of appliances, piped water or sewerage, essential health care (refrigerated vaccines, emergency and intensive care), education aids, and communication and transport[4]. Energy also fuels productive activities, including agriculture, commerce, manufacture, industry, and mining[5]. Conversely, lack of access to energy contributes to poverty and deprivation and can contribute to economic decline[6].

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[1] World Trade Organization., 'Energy Services.' Available at
https://www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm (Accessed on 21/11/2023)
[2] Sagar. A., 'Alleviating Energy Poverty for the World's Poor' (2005) *Energy Policy* (2005), 33, 1367.
[3] Ibid
[4] Ibid
[5] Bradbrook. A., 'Access to Energy Services in a Human Rights Framework.' Available at
https://www.un.org/esa/sustdev/sdissues/energy/op/parliamentarian_forum/bradbrook_hr.pdf (Accessed on 21/11/2023)
[6] Ibid

It has been pointed out that access to a reliable and quality energy supply is vital to the economic development of any country[7]. It drives industrialization, boosts productivity and economic growth, spurs human development, and is crucial to achieve almost all of the United Nations Sustainable Development Goals (SDGs). Modern energy services are crucial to human well-being and to a country's economic development[8]. According to the International Energy Agency, access to modern energy is essential for the provision of clean water, sanitation and healthcare and for the provision of reliable and efficient lighting, heating, cooking, mechanical power, transport and telecommunications services[9]. Access to energy is therefore a pre-condition for socio-economic development due to its potential to spur economic development and poverty eradication[10]. It has been argued that no country in the recent past has been able to spur economic development and substantially reduce poverty levels without an increase in energy services[11].

Due to its importance, it has been argued that energy is a fundamental human right[12]. A basic legal right of access to energy services has been pointed out as ideal in ensuring access on the basis of equality and non-discrimination to a sufficient, regular, reliable, efficient, safe, and affordable supply of (ideally clean and sustainable) energy[13]. It has been asserted that recognizing access to

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[7] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at *https://unctad.org/publication/commodities-glance-special-issue-access-energy-sub-saharan-africa#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time.* (Accessed on 21/11/2023)
[8] International Energy Agency., 'Defining Energy Access: 2020 Methodology.' Available at *https://www.iea.org/articles/defining-energy-access-2020-methodology* (Accessed on 21/11/2023)
[9] Ibid
[10] United Nations Development Programme., 'Energy Access.' Available at *https://www.undp.org/energy/our-work-areas/energy-access* (Accessed on 21/11/2023)
[11] Yoshida. T., & Zusman. E., 'Achieving the Multiple Benefits of a Sustainable Development Goal for Energy' Available at *https://iges.or.jp/en/publication_documents/pub/bookchapter/en/4934/08_Ch8_Achieving_the_SDG s_.pdf* (Accessed on 21/11/2023)
[12] Muigua. K., 'Access to Energy as a Constitutional Right in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/*Access-to-Energy-as-a-Constitutional-Right-in-Kenya-NOVEMBER-2013.pdf (Accessed on 21/11/2023)
[13] Ibid

energy as a human right places it in the context of justice to include a broader variety of issues, such as production, distribution and consumption of energy of both contemporaries and future generations[14]. Energy is therefore a fundamental human need and right and a crucial factor for the attainment of other socioeconomic rights such as the right to education, right to food and the right to health among others[15]. As a result, it has been contended that energy should be adopted as the next internationally-recognised human right[16].

It has been observed that while energy is a multi-faceted issue and needs a coordinated international response on many fronts, the issue that has attracted most attention recently has been the need to provide universal access to modern energy services[17]. The energy sector in Africa raises critical issues such as access to clean, modern and affordable energy services for the poor and sustainability in its environmental, financial, and fiscal aspects[18]. It has been pointed out that a significant number of the global population lack access to modern energy services with this problem being more compounded in Sub-Saharan Africa where majority of the population lack access to clean and affordable energy and depend on traditional fuels[19]. This raises energy justice concerns with access to energy representing one of Africa's greatest obstacles to social and economic development[20].

The paper critically explores the concept of energy justice in Africa. It argues that energy is a fundamental need that is required to unlock socio-economic

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[14] Lofquist . L., 'Is there a Universal Human Right to Electricity?.' *The International Journal of Human Rights.*, Volume 24, Issue 6., (2020)
[15] The World Bank, 'Sustainable Development Goal on Energy (SDG7) and the World Bank Group, available at h*ttps://www.worldbank.org/en/topic/energy/brief/sustainable-development-goal-onenergy-sdg7-and-the-world-bank-group* (Accessed on 21/11/2023)
[16] Hughes. M., 'Why Access to Energy Should be a Basic Human Right.' Available at *https://www.forbes.com/sites/mikehughes1/2018/12/10/why-access-to-energy-should-be-a-basic-human-right/?sh=1ac8d18145f*2 (Accessed on 21/11/20230
[17] Bradbrook. A., 'Access to Energy Services in a Human Rights Framework.' Op Cit
[18] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015
[19] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit
[20] Hafner. M., 'The Challenge of Energy Access in Africa.' Available at https://link.springer.com/chapter/10.1007/978-3-319-92219-5_1 (Accessed on 21/11/2023)

development in Africa. The paper further posits that challenges in the energy sector in Africa including inadequate and unreliable access to clean and modern energy sources raises injustices and inequalities. The paper conceptualizes energy justice and highlights its salient components. It further discusses the idea of energy justice in Africa and the promises and pitfalls facing its realization. The paper also suggests reforms towards fostering energy justice in Africa.

2.0 Conceptualizing Energy Justice

It has been argued that the conceptual sophistication of environmental justice work over the years has spawned efforts to apply lessons to a widening scope of concerns including those in the energy sector[21]. Environmental Justice refers to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies[22]. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment[23]. Environmental Justice thus seeks to address distributive inequity, lack of recognition, disenfranchisement and exclusion in environmental matters[24]. It has been asserted that the idea of energy justice comes from the concepts of social justice and environmental justice[25].

Energy justice has emerged as a concept that seeks to apply justice principles to energy production, energy consumption, energy systems, energy policy,

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[21] Lee. J., & Byrne. J., 'Expanding the Conceptual and Analytical Basis of Energy Justice: Beyond the Three-Tenet Framework.' Available at *https://www.frontiersin.org/articles/10.3389/fenrg.2019.00099/full* (Accessed on 22/11/2023)

[22] United States Environmental Protection Agency; 'Environmental Justice.' Available at *https://www.epa.gov/environmentaljustice* (Accessed on 22/11/2023)

[23] Ibid

[24] Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' *WIREs Clim Change*, 2014

[25] United Nations., 'In Quest of an Energy Justice Framework for Bangladesh.' Available at *https://www.un.org/en/chronicle/article/quest-energy-justice-framework-bangladesh* (Accessed on 22/11/2023)

energy security, and the political economy of energy[26]. Energy justice evaluates where injustices in the energy sector emerge, which sections of the society are affected and ignored, and which processes exist for their remediation in order to reveal, and reduce injustices in the energy sector[27]. Energy justice therefore offers an opportunity to explore where injustices occur, developing new processes of avoidance and remediation, and recognizing new sections of society[28].

It has been argued that energy justice requires a clear exposition of how energy transition can be achieved globally to support the democratization of energy access[29]. It envisions elements of a global energy system that fairly distributes both energy services' benefits and burdens and can be used as a framework to identify and remedy energy injustices[30]. According to the United Nations, energy justice seeks to ensure universal access to safe, affordable and sustainable energy for all individuals, across all areas and to protect individuals from the disproportionate share of costs or negative impacts relating to building, operating, maintaining, generating, transmission, and distribution of energy and to ensure equitable access to benefits from each system[31]. Energy justice has the goal of achieving equity in both the social and economic participation in the energy system, while also remediating social, economic, environmental and health burdens of those disproportionately harmed by the energy system[32]. Energy justice aims to make energy and energy systems accessible, affordable, clean, and democratically managed for all people and communities[33].

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[26] Jenkins. K et al., 'Energy Justice: A conceptual Review.' *Energy Research & Social Science.*, Volume 11, 2016, pp 174-182
[27] Ibid
[28] Ibid
[29] Opal. A., & Nathwani. J., 'Chapter 32 - Global Energy Transition Risks: Evaluating the Intergenerational Equity of Energy Transition Costs.' *Energy Democracies for Sustainable Futures.*, 2023, pp 301-310
[30] Ibid
[31] United Nations., 'In Quest of an Energy Justice Framework for Bangladesh.' Op Cit
[32] Initiative for Energy Justice., 'What is Energy Justice?' Available at https://iejusa.org/ (Accessed on 22/11/2023)
[33] Ibid

The concept of energy justice thus seeks to apply basic principles of justice and fairness to the inequalities witnessed in the availability, affordability, sustainability and due process in the energy sector[34]. It envisions the ideal of a global energy system that fairly disseminates both the benefits and costs of energy services, and one that has representative and impartial energy decision-making[35]. It further poses a justice and ethical dilemma of allocating the benefits of scarce energy resources among citizens and between the present and future generations[36]. Through energy justice, availability, security, affordability, and sustainability in the energy sector can be achieved for human and economic development[37].

Energy justice is premised on the tenets of distributional, recognition and procedural justice[38]. Distributional justice recognises both the physically unequal allocation of environmental benefits and ills, and the uneven distribution of their associated responsibilities and represents a call for the even distribution of benefits and ills on all members of society regardless of their status[39]. It assesses issues such as uneven distribution, production and consumption of energy[40]. The location of energy production facilities such as wind power stations, dams and gas power stations could create inequalities in access to energy thus raising justice concerns[41]. Simultaneously, studies of energy poverty have questioned the distributional burden of rising energy prices[42]. Distributional justice therefore seeks to explore and address injustices in both production and consumption of energy. Recognition justice on the other hand entails the idea that individuals must be fairly represented, that

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[34] Heffron. J.R., & McCauley. D., 'The Concept of Energy Justice across the Disciplines' *Energy Policy*, 105 (2017) 658-667

[35] Sovacool. B., & Dworkin. M., 'Global Energy Justice: Problems, Principles and Practices.' Cambridge Univ. Press, 2014.

[36] Sovacool. B., 'Energy Decisions Reframed as Justice and Ethical Concerns' Energy Justice.' Available at https://core.ac.uk/download/pdf/42579074.pdf (Accessed on 22/11/2023)

[37] Muigua. K., 'Towards Energy Justice in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2020/02/Towards-Energy-Justice-in-Kenya-00000005.pdf* (Accessed on 22/11/2023)

[38] Ibid

[39] Jenkins. K et al., 'Energy Justice: A conceptual Review.' Op Cit

[40] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

[41] Ibid

[42] Jenkins. K et al., 'Energy Justice: A conceptual Review.' Op Cit

they must be free from physical threats and that they must be offered complete and equal political rights[43]. It is aimed at determining the section of the population ignored or misrepresented in energy access in order to cure such ills[44]. Procedural justice concerns access to decision-making processes that govern the distributions in the energy sector and manifests as a call for equitable procedures that engage all stakeholders in a non-discriminatory way[45]. Procedural justice is aimed at streamlining the decision- making processes in the energy sector that engages all stakeholder to ensure inclusivity non-discrimination[46]. It further aims at achieving just outcomes through local knowledge mobilization, greater information disclosure, and better institutional representation[47]. The concept of energy justice therefore envisages that if injustices are to be tackled in the energy sector, it is imperative to identify the concern - distribution; identify who it affects - recognition, and only then identify strategies for remediation – procedure[48].

Energy justice is thus an important concept towards enhancing availability, security, affordability, sustainability and due process in the energy sector. It is based on certain core principles including the availability principle which urges countries to have sufficient modern energy resources; the affordability principle which argues that all people, including the poor, should get energy at a reasonable cost; the due process principle which requires countries to follow the rule of law and human rights in their production and use of energy; the sustainability principle which places an obligation on states to ensure long-term sustainable energy development with prudent management; the good governance principle which implies that all people should have access to all information regarding energy and environment, and citizens must be able to participate in fair, transparent and accountable forms of the energy decision-making process; the principle of intragenerational equity which emphasizes that every person has the right to fair access to energy services to enable them

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[43] Ibid

[44] Bouzarovski. S., & Simcock. N., 'Spatializing Energy Justice.' *Energy Policy*, (2017) 107. pp. 640-648.

[45] Ibid

[46] Heffron. J.R., & McCauley. D., 'The Concept of Energy Justice across the Disciplines' Op Cit

[47] Jenkins. K et al., 'Energy Justice: A conceptual Review.' Op Cit

[48] Ibid

to enjoy a basic standard of well-being; the principle of intergenerational which stipulates that future generations have a right to enjoy a good life undisturbed by the damage our energy systems inflict on the world today; and the responsibility principle that places a duty on all nations to protect the natural environment and its sustainability as well as diminish energy-related environmental threats[49]. These principles are based on the *Rio Declaration on Environment and Development[50]* that places an obligation on states to pursue Sustainable Development by striking a balance between exploitation of their natural resources (including energy resources) for development and environmental conservation. It is therefore necessary for all countries to foster energy justice.

3.0 Fostering Energy Justice in Africa: Promises and Pitfalls

Fostering energy justice is a global concern. Sustainable Development Goal (SGG) 7 under the United Nations 2030 Agenda for Sustainable Development seeks to ensure universal access to affordable, reliable, sustainable and modern energy for all[51]. SDG 7 sets out several targets towards realizing this goal including substantially increasing the share of renewable energy in the global energy mix; improvement in energy efficiency; enhancing international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology; and expanding infrastructure and upgrading technology for supplying modern and sustainable energy services for all in developing countries[52]. According to the United Nations, achieving SDG 7 is key to the development of all sectors including agriculture, business, communications, education, healthcare and transportation[53]. It urges all

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[49] United Nations., 'In Quest of an Energy Justice Framework for Bangladesh.' Op Cit
[50] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)
[51] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (Accessed on 22/11/2023)
[52] Ibid, SDG 7
[53] United Nations., 'SDG 7: Affordable and Clean Energy.' Available at https://www.un.org/sustainabledevelopment/energy/#:~:text=Goal%207%20is%2

countries to pursue SDG 7 through measures such as accelerating electrification, increasing investments in renewable energy, improving energy efficiency and developing enabling policies and regulatory frameworks[54].

In Africa, *Agenda 2063*[55] seeks to enhance utilization of the Continent's energy sources, especially renewable energy in fostering economic growth and eradicating energy poverty[56]. Agenda 2063 seeks to promote environmentally sustainable and climate resilient economies and communities in Africa wherein renewable energy (including wind, solar, hydro, bioenergy, ocean tidal waves, geothermal and other renewables) will claim more than half of the energy consumption for households, businesses and organizations[57]. It identifies key challenges in Africa's energy profile including low production, low consumption, and high dependence on traditional biomass energy in the midst of a huge wealth of unexploited energy resources[58]. Agenda 2063 identifies energy justice concerns in Africa which include low generation capacity and efficiency, high costs, unstable and unreliable energy supplies, low access to modern energy, insufficient energy infrastructure, and lack of institutional and technical capacity to harness huge resources[59]. It seeks to foster energy justice in Africa through initiatives such as attaining energy security, achieving transition from traditional to modern and clean sources of energy and ensuring access of a majority of their citizens to electricity, and raising the share of renewable energy in total energy production[60]. Agenda 2063 emphasizes that energy is the backbone of Africa's economic transformation[61]. Actualizing Agenda 2063 is a vital step towards fostering energy justice in Africa.

0about%20ensuring,%2C%20education%2C%20healthcare%20and%20transportation (Accessed on 22/11/2023)

[54] Ibid

[55] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 22/11/2023)

[56] Ibid

[57] Ibid

[58] Ibid

[59] Ibid

[60] Ibid

[61] Ibid

At the regional level, the *Treaty Establishing the East African Community*[62] recognizes the role of energy in the East African integration agenda. It urges member states to adopt policies and mechanisms to promote the efficient exploitation, development, joint research and utilisation of various energy resources available within the region[63]. In addition, the Treaty calls upon member states to promote the exploitation and utilisation of new and renewable sources of energy within the East African Community[64]. The Treaty also implores member states to take measures towards supplying affordable energy to their citizens while taking cognisance of the protection of the environment[65].

There has been some progress towards fostering energy justice in Africa. It has been observed that the continent has made progress towards universal energy access in recent years with electricity coverage increasing from forty four to fifty six per cent of the continent's population between 2010 and 2023[66]. It has been pointed out that while some African countries including Ethiopia, Ghana, Kenya, Rwanda and Uganda have been steadily increasing their electrification rate and could achieve universal access, others such as Algeria, Carbo Verde, Egypt, Mauritius, Morocco, Seychelles, and Tunisia are already at or nearly at the point of universal access demonstrating the continent's efforts towards energy justice[67]. In addition, there has been increased production of renewable energy in Africa with hydro, solar, wind, biofuels and biomass accounting for a significant percentage of the total primary energy produced on the continent[68]. Renewable energy investments are beginning to bear fruit in several African countries with wind and solar power dominating non-hydro

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[62] Treaty Establishing the East African Community., Available at *https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2487/download* (Accessed on 22/11/2023)

[63] Ibid, Article 101 (1)

[64] Ibid, Article 101 (2) (a)

[65] Ibid, Article 101 (2) (f)

[66] United Nations., 'Advancing SDG 7 in Africa.' Available at *https://sdgs.un.org/sites/default/files/2023-06/2023%20Advancing%20SDG7%20in%20the%20Africa-062923.pdf* (Accessed on 23/11/2023)

[67] Ibid

[68] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

renewable energy generation and installed capacity[69]. Further, it has been highlighted that East African economies are using available geothermal resources to generate an estimated 630 MW of power annually with Kenya being an African leader for operational geothermal power plants, with its geothermal power production totaling more than 40 per cent of the country's total electricity production[70].

It is therefore evident that there has been progress towards enhancing energy access and security in Africa. The United Nations observed that Africa has made substantial progress in proactive policy development, energy infrastructure resource mobilisation and enhanced independent power production[71]. However, despite this progress, there are several energy justice concerns in Africa related to access, security, reliability and affordability of energy.

The International Energy Agency estimates that nearly 600 million people or an equivalent of 43 per cent of the Continent's population lack access to electricity[72]. It further points out that less than a fifth of African countries have targets to reach universal electricity access by 2030[73]. It has been observed that the Sub-Saharan region of Africa has the lowest rate of access to electricity with just nearly half of the population having access to electricity compared to the global access rate of nearly 90 per cent[74]. Most of these people live in rural areas, and indeed, despite numerous national initiatives, rural electrification remains a significant difficulty for most African nations. Another key challenge in access to electricity in Africa is the significant difference in electrification between urban and rural areas. It has been noted that there is a substantial urban-rural difference in electricity access, with electrification in

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[69] United Nations., 'Advancing SDG 7 in Africa.' Op Cit
[70] Elbarbary. S., 'Geothermal Renewable Energy Prospects of the African Continent Using GIS.' *Geothermal Energy*., Volume 10, No. 8 (2022)
[71] United Nations., 'Advancing SDG 7 in Africa.' Op Cit
[72] International Energy Agency., 'Access to Electricity.' Available at https://www.iea.org/reports/sdg7-data-and-projections/access-to-electricity (Accessed on 23/11/2023)
[73] Ibid
[74] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

urban areas averaging nearly 78 per cent in sub-Saharan Africa and rural areas electrified on average at 28 per cent[75].

In addition, it has been observed that while Africa has made some progress towards enhancing access to electricity, progress remains slow in promoting clean cooking facilities[76]. The United Nations points out that Africa does poorly compared to other regions regarding access to clean cooking since a majority of its population relies on traditional biomass for preparing food[77]. Bio-energy sources such as charcoal, wood fuel and dung remain the most common source of energy for cooking in Africa especially among the rural population[78]. However use of these sources is associated with environmental challenges such as air and soil pollution and environmental degradation through deforestation[79]. Further, the use of such sources of energy in cooking has been linked to more than 500,000 annual deaths associated with indoor pollution[80]. It has also rightly been observed that in the African set up, production and use of biomass fuels is the responsibility of women and children[81]. However, due to diminishing biomass energy supplies, women and children in some parts of Africa are spending increasing amounts of time fetching firewood and other biomass fuels leaving little time for other productive activities for women; and limited study-time particularly for the girl child[82].

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[75] United Nations., 'Advancing SDG 7 in Africa.' Op Cit

[76] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

[77] United Nations., 'Advancing SDG 7 in Africa.' Op Cit

[78] Muchiri. L., 'Gender and Equity in Bioenergy Access and Delivery in Kenya' Practical Action East Africa, 2008, available at *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahU KEwiy2P29z6PnAhUEiFwKHQlyCLoQFjAAegQIBRAB&url=http%3A%2F%2Fwww.cas.ed.ac.uk%2F__d ata%2Fassets%2Fword_doc%2F0007%2F24793%2FGender_and_Equity_in_Bio_energy_Access_and_Deliv ery_in_Kenya_final.doc&usg=AOvVaw2AKp1mvTSC9tafkIKJ-36_* (Accessed on 23/11/2023)

[79] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

[80] United Nations., 'Advancing SDG 7 in Africa.' Op Cit

[81] Republic of Kenya., 'Sessional Paper No. 4 on Energy.' Available at *https://repository.kippra.or.ke/bitstream/handle/123456789/1371/SESSIONAL%20PAPER %204%20O N%20ENERGY%202004.pdf?sequence=3&isAllowed=y* (Accessed on 23/11/2023)

[82] Ibid

Further, it has been asserted that Africa's energy potential, especially renewable energy, is enormous, yet only a fraction of it is being currently employed[83]. The potential for renewable energy production in Africa is very important because of the vast resources of solar, wind, hydro, geothermal and biomass available in the continent[84]. However, several challenges remain in exploiting these resources in terms of developing adequate infrastructure, increasing access to finance, and establishing appropriate regulations and targets to diversify the continent's energy mix. It has been pointed out that despite its vast potential, Africa has the lowest share of modern renewable energy compared to other continents and the world[85].

Another key concern in the energy sector in Africa relates to efficiency, reliability and affordability. Africa has been classified as the least energy-efficient continent in the world[86]. It has been observed that the energy sector in most African countries is crippled with unreliable electricity supply that often results in frequent power cuts which last for days in some areas[87]. Such a situation forces most people to resort to alternative sources of energy including bioenergy and generators that are powered by oil products resulting in environmental concerns[88]. According to the International Energy Agency, providing access to electricity is essential, but access has to bring with it a reliable supply of electricity if households, businesses and public services are to reap the full benefits[89]. A lack of reliable electricity supply disrupts daily lives and activities, lowers trust and use of the grid, increases costs for consumers and utilities and may result in the use alternative sources of energy

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[83] Africa Development Bank Group., 'Light Up and Power Africa – A New Deal on Energy for Africa.' Available at *https://www.afdb.org/en/the-high-5/light-up-and-power-africa-%E2%80%93-a-new-deal-on-energy-for-africa* (Accessed on 23/11/2023)
[84] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit
[85] Ibid
[86] United Nations., 'Advancing SDG 7 in Africa.' Op Cit
[87] Mutiso. R., & Taneja. J., 'The Seven Major Threats to Kenya's Power Sector.' Available at *https://energyforgrowth.org/article/the-seven-major-threats-to-kenyas-power-sector/* (Accessed on 23/11/2023)
[88] Ibid
[89] International Energy Agency., 'Africa Energy Outlook 2019.' Available at *https://iea.blob.core.windows.net/assets/2f7b6170-d616-4dd7-a7caa65a3a332fc1/Africa_Energy_Outlook_2019.pdf* (Accessed on 23/11/2023)

with significant environmental impacts[90]. Energy affordability is also a key challenge in most sub-Saharan African Countries due to the high cost of power relative to income[91].

The foregoing challenges contribute to energy injustices and insufficient energy access in Africa. According to the African Development Bank, insufficient energy access manifests itself in hundreds of thousands of deaths annually due to the use of wood-burning stoves for cooking; handicaps the operations of hospitals and emergency services; compromises educational attainment; and drives up the cost of doing business in the continent[92]. Further, it has been pointed out that low access to energy in Africa has implications on health, education, poverty reduction and Sustainable Development and contributes to energy poverty resulting in energy justice concerns[93]. Energy poverty in Africa has been linked to inadequate and poor planning, poor regulatory frameworks for electrification, underperforming state-owned enterprises, lack of investment in infrastructure and poor maintenance of existing energy and electricity infrastructure[94]. It is imperative to address these problems in order to foster energy justice in Africa.

4.0 Way Forward

In order to foster energy justice in Africa, there is need to enhance universal access to modern energy sources of energy including electricity. Without electricity in Africa, women and girls have to spend hours fetching water, clinics cannot store vaccines for children, many schoolchildren cannot do homework at night, and people cannot run competitive businesses therefore affecting socio-economic development in the continent[95]. It is therefore imperative for African countries to accelerate investments in energy and implement policies geared towards ensuing universal access to electricity[96]. It

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[90] Ibid

[91] International Energy Agency, 'Africa Energy Outlook 2019' Op Cit

[92] Africa Development Bank Group., 'Light Up and Power Africa – A New Deal on Energy for Africa.' Op Cit

[93] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

[94] Ibid

[95] United Nations., 'SDG 7: Affordable and Clean Energy.' Op Cit

[96] International Energy Agency., 'Access to Electricity.' Op Cit

has been pointed out that energy access for all is one of the key drivers of inclusive growth since it creates opportunities for women, youths, children both in urban and rural areas[97]. African countries should thus prioritize fostering access to energy including promoting rural electrification programs in order to ensure equity and fairness in respect to energy access[98].

There is also need accelerate progress towards clean cooking solutions in Africa. According to the United Nations, slow progress towards clean cooking solutions is of grave concern both in Africa and across the globe, affecting both human health and the environment, and if the world does not meet its energy goals by 2030, nearly a third of the world's population mostly women and children will continue to be exposed to harmful household air pollution[99]. It has been asserted that burning biomass for cooking increases Africa's greenhouse gas emissions and raises concerns about achieving commitments to reduce carbon emissions to meet the Paris Agreement goals on climate change[100]. Measures can be put in place to enhance access to clean energy sources for purposes of cooking such as embracing improved cooking stoves and reducing the cost of Liquefied Petroleum Gas (LPG) to promote its affordability[101]. Electricity is another option for cooking that is worth considering, but this will depend on its access, affordability and reliability of supply in Africa[102].

It is also of fundamental importance for African countries to embrace and fast track the uptake of green sources of energy such as renewable energy technologies[103]. It has correctly been observed that Africa has immense potential for renewable energy including wind, solar, hydro, bioenergy, ocean

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[97] Africa Development Bank Group., 'Light Up and Power Africa – A New Deal on Energy for Africa.' Op Cit

[98] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

[99] United Nations., 'SDG 7: Affordable and Clean Energy.' Op Cit

[100] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

[101] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

[102] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

[103] Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Available at *https://kmco.co.ke/wp-content/uploads/2023/06/Adopting-Green-Energy-for-a-Bright-Tomorrow.pd*f (Accessed on 23/11/2023)

tidal waves, geothermal among other renewables[104]. However, despite Africa's renewable energy potential, only a fraction of it is being currently employed[105]. Renewable energy technologies have become increasingly important as the world faces the challenge of mitigating the negative impacts of climate change and reducing the dependence on finite and polluting fossil fuels[106]. The use of renewable energy sources has been recognized as a key factor in promoting Sustainable Development, which aims to meet the needs of the present generation without compromising the future[107]. Green energy sources including renewable energy offers immense opportunities and advantages for Africa. Green energy is important for the environment since it replaces the negative effects of fossil fuels with more environmentally-friendly alternatives[108]. Green energy is derived from natural resources and thus renewable and clean, meaning that it emits no or few greenhouse gases and is often readily available[109].

Africa therefore has the capacity to build a cleaner and greener future by increasing access to clean energy through sustainable and environment-friendly solutions such as green and renewable sources of energy in order to ensure that the region is not left behind as the world moves towards zero-emission fuels[110]. Exploiting the vast reserve of renewable energy sources on the Continent could help increase electricity generation capacity in the region, helping the transition to low-carbon or zero-emission energy sources[111]. It is therefore necessary for African countries to increase investments in renewable

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[104] Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

[105] Africa Development Bank Group., 'Light Up and Power Africa – A New Deal on Energy for Africa.' Op Cit

[106] Verma. A., 'The Role of Renewable Energy Technologies in Sustainable Development.' Available at *https://timesofindia.indiatimes.com/blogs/voices/the-role-of-renewable-energy-technologies-in-sustainable-development/* (Accessed on 23/11/2023)

[107] Ibid

[108] TWI Global., 'What is Green Energy? (Definition, Types and Examples).' Available at *https://www.twi-global.com/technical-knowledge/faqs/what-is-green-energy* (Accessed on 23/11/2023)

[109] Ibid

[110] United Nations Conference on Trade and Development., 'Improving Energy Access Key to Meeting Development Goals in Africa.' Available at https:*//unctad.org/news/improving-energy-access-key-meeting-development-goals-africa* (Accessed on 23/11/2023)

[111] Ibid

energy in order to fast track the Continent's energy transition. It is also imperative to promote sound environmental management and conservation in order to enhance the adoption of green energy in Africa[112]. Conservation of the environment 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[113].

Another key measure towards fostering energy justice in Africa is ensuring efficiency, reliability and affordability of energy. It has been observed that access to a reliable and quality energy supply is vital to the economic development of any country[114]. However, most African countries are faced with the problem of limited or unreliable electricity a situation which often affects socio-economic development[115]. It is therefore vital to promote reliability in the energy sector in Africa.

It has been argued that decentralization of the energy sector in Africa through measures such as distributed generation is able to provide enhanced energy and more democratized access, with improved reliability and efficiency[116]. In addition, since security and resilience issues are easier to be addressed due to the local and reduced-order size of these schemes, decentralized schemes can also encourage equity, inclusivity, information, accountability, and adaptability of energy systems, which also work towards the mitigation of climate-related issues[117]. African countries should therefore consider embracing decentralized energy schemes in order to enhance energy efficiency and reliability. Further, it is imperative to make the costs of energy including electricity and clean cooking facilities affordable to all people in order to foster energy justice in Africa[118]. According to the United Nations, our everyday life

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[112] Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Op Cit

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

[114] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

[115] Ibid

[116] Lup. A., 'Sustainable Energy Technologies for the Global South: Challenges and Solutions Toward Achieving SDG 7.' *Environmental Science: Advances*., No. 2 of 2023., 570-585

[117] Ibid

[118] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

depends on reliable and affordable energy[119]. African countries can accelerate the transition to an affordable, reliable, and sustainable energy system by investing in renewable energy resources, prioritizing energy efficient practices, and adopting clean energy technologies and infrastructure[120]. The International Energy Agency calls upon decision makers in the energy sector to accelerate access related development plans and programs that address affordability issues, supporting decentralised solutions and productive use of energy, and national electrification plans in order to achieve universal access to reliable, affordable and modern energy[121].

Finally, it is also necessary embrace and foster public participation in the energy sector in order to guarantee energy justice[122]. It has been asserted that sustainability in the energy sector also calls for the identification of the energy needs of consumers in a country and ensuring that the needs are met in a manner that is efficient[123]. Public participation can ensure that local concerns are considered during the implementation of energy projects in order to ensure efficiency and reliability[124]. Public participation enhances energy justice by encourage equity, inclusivity, access to information, accountability, and adaptability of energy systems[125].

Therefore, governments and the private sector should embrace public participation in energy decision making such as when undertaking energy projects in order to ensure acceptability and social sustainability of such projects[126]. Community consultation through meaningful public participation is important to ensure that there is public acceptance and cooperation in green energy projects in Africa. Public participation is an essential component of

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[119] United Nations., 'SDG 7: Affordable and Clean Energy.' Op Cit

[120] Ibid

[121] International Energy Agency., 'Access to Electricity.' Op Cit

[122] Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Op Cit

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

[124] Lup. A., 'Sustainable Energy Technologies for the Global South: Challenges and Solutions Toward Achieving SDG 7.' Op Cit

[125] Ibid

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

environmental governance including investments in green energy as envisaged under the *Rio Declaration* which acknowledges that environmental issues are best handled with the participation of all concerned citizens, at the relevant level[127].

Through the foregoing among other measures, energy justice will be fostered in Africa.

5.0 Conclusion

Energy is an essential input to economic activity, with access to reliable and affordable energy supply fundamental for social and economic development[128]. However, the energy sector in Africa raises critical issues such as access to clean, modern and affordable energy services for the poor and sustainability in its environmental, financial, and fiscal aspects[129]. Despite the progress made towards fostering access to energy in Africa, energy justice concerns are still prevalent as evidenced by the lack of access to electricity and clean cooking facilities, and challenges of efficiency, reliability and affordability in the energy sector in the Continent[130].

There is need to foster energy justice in Africa in order to achieve SDG 7 which seeks ensure universal access to affordable, reliable, sustainable and modern energy for all[131]. This can be achieved through enhancing universal access to modern energy sources of energy including electricity in Africa, accelerating progress towards clean cooking solutions in Africa, embracing and fast tracking the uptake of green sources of energy including renewable energy technologies, ensuring efficiency, reliability and affordability of energy and

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[127] United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' Op Cit

[128] World Trade Organization., 'Energy Services.' Op Cit

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

[130] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

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

embracing and fostering public participation in the energy sector[132]. Fostering energy justice in Africa is an ideal that needs to be achieved for Sustainable Development.

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[132] United Nations., 'Advancing SDG 7 in Africa.' Op Cit; See also Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit; and United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Op Cit

Mainstreaming Alternative Justice Systems in Africa

Abstract

Access to Justice is a fundamental human right. However, access to justice in Africa especially by the marginalized, poor, uneducated and underprivileged in the society is hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts, lack of legal knowhow and the long durations of time it takes to resolve disputes in courts. In light of these challenges, Alternative Justice Systems have been advocated as a catalyst for advancing access to justice in Kenya and Africa. The paper critically discusses the need to mainstream Alternative Justice Systems (AJS) in Africa. It argues that mainstreaming AJS is an important step towards the fulfilment, respect, observance, promotion and protection of the right to access to justice. It defines Alternative Justice Systems and highlights their advantages in enhancing access to justice in Africa. The paper further examines the progress and challenges made towards mainstreaming AJS in Africa. It further proposes reforms towards mainstreaming AJS in Africa in order to promote access to justice.

1.0 Introduction

Access to justice has been conceptualized as a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, expeditiously and without discrimination, fear or favour and a greater role for alternative dispute resolution[1]. It has also been defined as the presence of a fair and equitable legal framework that protects human rights and ensures delivery of justice[2]. Access to justice also refers to judicial, non-judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue[3]. It has been asserted that access to justice has two dimensions: procedural access (having

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[1] Ladan. M., 'Access to Justice as a Human Right Under the Ecowas Community Law.' Available at https://www.researchgate.net/publication/272246292_Access_to_Justice_as_a_Human_Right_Under_the_Ecowas_Community_Law (Accessed on 19/11/2023)

[2] Ibid

[3] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

a fair hearing before a tribunal) and also substantive justice (to receive a fair and just remedy for a violation of one's rights)[4].

The right of access to justice is an internationally acclaimed human right that is considered to be basic and inviolable[5]. According to the United Nations, access to justice is a basic principle of the rule of law[6]. The United Nations further asserts that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable[7]. Delivery of justice should therefore be impartial and non-discriminatory[8]. The International Development Law Organization (IDLO) further posits that access to justice is a critical pillar of poverty reduction and Sustainable Development[9]. Access to justice has been enshrined as a fundamental human right in Kenya[10]. The Constitution of Kenya requires the state to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice[11].

Access to justice is a fundamental concern in Africa. It has been asserted that the justice system and effective rule of law represent significant mechanisms in ongoing social, political and economic developmental landscapes which reflect the interests of citizens of a state and provide an avenue through which these interests can be protected[12]. Therefore, in ideal scenario, access to justice should be equal; the poor should not be excluded on the basis of poverty; women should not be silenced by the voices of men; the young should be

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[4] Ibid

[5] Ibid

[6] United Nations., 'Access to Justice.' Available at *https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/* (Accessed on 19/11/2023)

[7] Ibid

[8] Ibid

[9] International Development Law Organization., 'An Overview of IDLO's Work in Kenya.' Available at *https://www.idlo.int/sites/default/files/pdf/Overview%20of%20IDLO%27s%20Work%20in%20Kenya.pdf* (Accessed on 19/11/2023)

[10] Constitution of Kenya, 2010., Article 48

[11] Ibid

[12] Bowd. R., 'Access to Justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia.' Available at https://www.files.ethz.ch/isn/112459/NO13OCT09.pdf (Accessed on 19/11/2023)

protected by adults when necessary; and there should be equity between the provision of justice in rural and urban areas[13]. The level of access to justice in a state can be vital in underpinning the roots of democracy and the development of that state[14]. However, it has been pointed out that the rule of law in many African countries remains fragile, leaving marginalized populations highly vulnerable to exclusion, discrimination and extreme poverty[15]. The right of access to justice in Kenya, East Africa and Africa at large has hitherto been hampered by many unfavourable factors such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow[16]. It has also been pointed out that access to justice in Africa, especially by the marginalized, poor, uneducated and underprivileged in the society, has been hindered by several factors including lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long durations of time it takes to resolve disputes in courts[17].

In the wake of the foregoing concerns, AJS has been advocated as a catalyst for advancing access to justice in Kenya and Africa[18]. It has been argued that mainstreaming AJS is an important step towards the fulfilment, respect,

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[13] Ibid

[14] Ibid

[15] United Nations Development Programme., 'Strategic Partnerships needed to Improve Access to Justice for Women and Girls across Africa.' Available at *https://www.undp.org/africa/news/strategic-partnerships-needed-improve-access-justice-for-women-and-girls-across-africa#:~:text=A%20recent%20survey%20by%20Japan,exclusion%2C%20discrimination%20and%20extreme%20poverty.* (Accessed on 19/11/2023)

[16] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

[17] Muigua. K., 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf* (Accessed on 19/11/2023)

[18] United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Available at *https://www.unodc.org/easternafrica/en/Stories/alternative-justice-system-as-a-catalyst-for-advancing-access-to-justice-in-kenya.html#:~:text=Alternative%20justice%20processes%20reduce%20the,than%20replacing%20reliance%20on%20courts.* (Accessed on 19/11/2023)

observance, promotion and protection of the right to access to justice[19]. The paper critically discusses the need to mainstream AJS in Africa. It defines AJS and highlights their advantages in enhancing access to justice in Africa. The paper further examines the progress and challenges made towards mainstreaming AJS in Africa. It further proposes reforms towards mainstreaming AJS in Africa in order to promote access to justice.

2.0 Alternative Justice Systems in Africa

AJS has been described as both a philosophical concept as well as a practice for accessing justice[20]. As a philosophical concept, AJS are consistent with the human rights school of thought and are based on the fundamental ideas of freedom, equality, non-discrimination, dignity, and equity[21]. Further, as a practice for access to justice, AJS refer to initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity[22]. AJS may be defined as the administration of justice by the people using their culture, customary law, practices and beliefs to resolve disputes[23]. AJS are a form of restorative justice that aims to ensure social inclusion, and are generally more affordable, participatory and more expeditious than court processes[24]. AJS have been described as a useful avenue of responding to the challenge of backlog of court cases[25]. AJS can therefore be related to the use of Alternative Dispute Resolution (ADR) mechanisms to access justice.

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[19] United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Available at *https://www.unodc.org/easternafrica/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-kenya.html#:~:text=AJS%20may%20be%20defined%20as,more%20expeditious%20than%20court%20processes*. (Accessed on 19/11/2023)

[20] Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Available at *https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/* (Accessed on 20/11/2023)

[21] Ibid

[22] Ibid

[23] United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Op Cit

[24] Ibid

[25] Judiciary., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

ADR denotes a wide range of dispute management techniques that function outside but may be linked to formal court processes[26]. ADR has also been defined as a set of processes that are used to manage conflicts without resort to courts[27]. The term ADR encompasses many dispute resolution techniques including negotiation, mediation, arbitration, conciliation, adjudication, early neutral evaluation, expert determination, minitrials, traditional justice systems among others[28]. The *Charter of the United Nations[29]* provides the legal basis for the application of ADR mechanisms at the global level. It stipulates 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[30]. Further, in Kenya, the Constitution urges courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[31].It has been asserted that ADR offers numerous advantages in the administration of justice including a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice[32]. These mechanisms possess certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes making them ideal in enhancing access to justice[33].

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[26] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.'
Africa Security Brief, No. 16 of 2011

[27] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[28] Kerbeshian. L., 'ADR: To be or…' *North Dakota Law Review*, Volume 70, No. 2

[29] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[30] Ibid, Article 33 (1)

[31] Constitution of Kenya., 2010., Article 159 (2) (c)

[32] Main. T., 'ADR: The New Equity.' Available at
https://www.researchgate.net/profile/ThomasMain/publication/228182886_ADR_The_new_e quity/links/53d00e470cf2fd75bc5c57a5/ADR-The-newequity.pdf (Accessed on 20/11/2023)

[33] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

It has been asserted that the concept of AJS goes beyond resolution of disputes[34]. AJS including most ADR mechanisms also focus on dispute prevention and ensuring minimal or non-recurrence of disputes[35]. AJS have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities, hence their recognition[36]. AJS also promote and achieve social justice and inclusion, particularly amongst groups that have been excluded from the formal justice system[37].

AJS have been hailed for recognizing the role of culture in the resolution of disputes[38]. The Constitution of Kenya recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and urges the state to promote all forms of national and cultural expression[39]. AJS embrace culture and uphold the importance of integrating traditional values, customs, and beliefs into the justice system in order to ensure its relevance and effectiveness in diverse communities[40].

AJS including ADR mechanisms have been practiced in Africa for many centuries and were firmly embedded in the culture and customs of African communities[41]. Before the advent of formal justice systems in Africa, conflict management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people[42]. Conflict management in African societies was premised on the values that were held sacrosanct including

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[34] Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines.' Available at *https://www.trocaire.org/wp-content/uploads/2021/04/Alternative-Justice-Systems-regulations-final.pdf?type=policy* (Accessed on 20/11/2023)

[35] Ibid

[36] Ibid

[37] Ibid

[38] United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

[39] Constitution of Kenya., 2010., Article 11

[40] United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

[41] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

[42] Ademowo. A., 'Conflict Management in Traditional African Society.' Available at *https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society* (Accessed on 20/11/2023)

peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect[43]. The philosophy of *Ubuntu/Utu* was essential in fostering social harmony and was effectively incorporated in conflict management strategies[44]. Conflict management in African societies was therefore aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs[45]. African communities therefore embraced AJS including traditional forms of mediation, adjudication, reconciliation, arbitration and negotiation since these techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation[46].

AJS therefore seek to promote restorative justice as opposed to retributive justice[47]. They aim at reconciliation by restoring parties' relationships, peace-building and focusing on parties' interests rather than allocating rights between disputants[48]. It has been observed that these mechanisms have been resilient despite non-recognition in law for a long time[49]. AJS are important in enhancing access to justice particularly in rural areas and have the ability to strengthen the rule of law and contribute to development[50]. It is therefore imperative to mainstream AJS in Africa in order to enhance their role in accessing justice.

3.0 Mainstreaming Alternative Justice Systems in Africa: Progress and Challenges

Mainstreaming AJS entails putting in place appropriate legal, policy, institutional and administrative measures that will ensure that ADR, Traditional Dispute Resolution (TDR) mechanisms and other informal justice

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[43] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa Africa,* me 17, No.1, 2015

[44] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[45] Ibid

[46] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.'

[47] Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf* (Accessed on 20/11/2023)

[48] Ibid

[49] Ibid

[50] Ibid

systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the marginalized, poor, uneducated and underprivileged in the society[51]. It involves recognizing and providing space by which AJS can continue to be utilised to manage disputes and their existence and outputs not just appreciated but respected by the formal justice system[52]. Mainstreaming therefore does not seek to create but rather to provide anchorage and uphold alternative and traditional mechanisms practised by communities in resolving their disputes[53].

Mainstreaming AJS is important in bringing customary and traditional means of dispute resolution from the periphery into the mainstream and recognizing the legitimate place of alternative systems in contemporary administration of justice[54]. It further recognizes the role of culture and the importance of integrating traditional values, customs, and beliefs into the justice system to ensure its relevance and effectiveness in diverse communities[55]. It has been asserted that mainstreaming AJS through appropriate policy, statutory and administrative interventions is necessary to ensure the efficacy of both conventional and ADR mechanisms including traditional dispute resolution strategies and community-based justice systems[56]. Mainstreaming AJS is also essential in promoting a pluralistic approach to justice that is sensitive to the

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[51] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf* (Accessed on 20/11/2023)

[52] Odote. C., 'Effect Alternative Justice Beyond Tokenism.' Available at *https://www.businessdailyafrica.com/analysis/columnists/Effect-alternative-justice-beyond-tokenism/4259356-5619882-wmkrv8z/index.html* (Accessed on 20/11/2023)

[53] Ibid

[54] United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Op Cit

[55] United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

[56] Muigua. K., 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf* (Accessed on 20/11/2023)

cultural, socio-economic, and geographic diversity of the population[57]. Mainstreaming AJS is therefore vital in enhancing access to justice by reducing the burden on courts and strengthening the links between formal and informal justice systems[58]. It has been pointed out that many people in Africa face formal, informal and systemic barriers in their attempts to access formal justice institutions[59]. This undermines the rule of law, erodes public trust and confidence in the justice system and perpetuates inequality and injustice[60]. Informal justice systems, such as customary and traditional dispute resolution mechanisms, are often more accessible and affordable than formal justice systems and mainstreaming them can enhance access to justice and foster the rule of law[61]. Further, due to their participatory nature, they ensure more social inclusion[62].

Sustainable Development Goal 16 requires all countries to promote peaceful and inclusive societies for Sustainable Development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels[63]. This is to be achieved through measures such as promoting the rule of law at the national and international levels and ensuring equal access to justice for all[64]. It has been argued that AJS have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities, hence the need to recognize and mainstream them[65].

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[57] Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS).' Available at *https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/#:~:text=The%20implementation%20of%20the%20AJS,Kajiado%2C%20Nakuru%20and%20Lamu%20counties.* (Accessed on 20/11/2023)

[58] United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

[59] Ibid

[60] Ibid

[61] Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS).' Op Cit

[62] Ibid

[63] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' SDG 16, Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainable%20Development%20web.pdf* (Accessed on 20/11/2023)

[64] Ibid, SDG 16.3

[65] Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines.' Op Cit

It has been observed that there is a growing recognition and implementation of AJS as a means of advancing access to justice in Africa[66]. For example, in Kenya, the Constitution recognizes AJS and urges courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[67]. It has been argued that the recognition of ADR and TDR mechanisms under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya[68]. This is because ADR and TDR mechanisms have existed in Africa since time immemorial and are therefore derived from the customs and traditions of the communities in which they operate[69]. In most African communities, ADR and TDR mechanisms existed even before the formal dispute settlement mechanisms were introduced[70]. Constitutional recognition of ADR mechanisms is an important step in mainstreaming AJSs in Kenya.

Further, the *Alternative Justice Systems Framework Policy*[71] seeks to ensure affective and efficient access to justice in Kenya though respecting, protecting and transformation of AJS mechanisms in Kenya[72]. The Policy upholds the relevance and importance of AJS in Kenya and acknowledges that AJS reflect the lived realities of Kenyans and are an effective process for increasing access to justice for most Kenyans; AJS are a mode for doing justice differently and more effectively; AJSs are effective mechanisms for the reduction of case backlogs and decongestion of courts; AJSs are mechanisms for social re-engagement with (and re-legitimizing) the State; AJSs are mechanisms for reconstituting the state and the citizen as part of the constitutional project to remake the Kenyan State; and that AJSs are a site for reclaiming neglected customary norms and as a project to resituate the traditional as rational[73]. It

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[66] Ibid

[67] Constitution of Kenya., 2010., Article 159 (2) (c)

[68] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[69] Ibid

[70] Ibid

[71] The Judiciary of Kenya., 'Alternative Justice Systems Framework Policy.' Available at
https://www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf (Accessed on 20/11/2023)

[72] Ibid

[73] Ibid

identifies challenges facing AJSs in Kenya including lack of recognition, lack of accountability mechanisms, and the potential to promote gender injustices and exclude marginalized groups and vulnerable individuals[74]. It identifies key measures towards mainstreaming AJSs in Kenya such as the formal recognition of AJS and identification of the kinds of cases that can be handled through AJS; strengthening the process for selection, election, appointment and removal of AJS practitioners; development of procedures and customary law jurisprudence; facilitation of effective intermediary interventions; and strengthened and sustainable resource allocation and mobilization[75]. There is need to fully implement the Alternative Justice Systems Framework Policy in order to effectively mainstream AJS in Kenya.

In addition, the *National Alternative Dispute Resolution Policy*[76] of Kenya recognizes ADR as a major apparatus for access to justice in Kenya. The Policy outlines that inadequate access to justice is negatively correlated to development and that high transactional costs of litigation disempower and impoverish the indigent who cannot afford means for redress hence the need to embrace ADR in Kenya[77]. The Policy acknowledges that ADR has the potential to divert focus from litigation and thereby complement and de-clog the court system and that through its reconciliatory and mostly non-adversarial approach, ADR is a catalyst to peace and cohesion in the Country[78]. The Policy seeks to actualize the Constitutional provisions on AJSs in Kenya through a robust framework for strengthening, guiding and supporting the coordinated growth of ADR practice and uptake in Kenya[79]. It aims to achieve this by proposing a balanced and necessary co-existence of ADR and the court system, while at the same time maintaining the autonomy of ADR as a distinct dispute resolution system[80].

The Policy identifies challenges facing the practice of ADR in Kenya including conceptual and definition problems, unclear scope of ADR, jurisdictional

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[74] Ibid

[75] Ibid

[76] Judiciary of Kenya., 'Draft National ADR Policy Discussed.' Available at *https://judiciary.go.ke/draft-national-adr-policy-discussed/* (Accessed on 20/11/2023)

[77] Ibid

[78] Ibid

[79] Ibid

[80] Ibid

challenges, questions of justifiability, and lack of sectoral framework legislation, and inadequate institutional development[81]. It also proposes reforms aimed at addressing these challenges and gaps, towards development of ADR in Kenya including adapting an inclusive approach to the definition and scope of ADR; Situating the oversight mandate for the ADR sector in a National umbrella agency; Promoting self-regulation and governance of ADR; Encouraging the establishment of an ADR Centre at the Judiciary as the focal point for linkage and coordination of the Judiciary with the ADR sector, and promotion of ADR in the Judiciary; Proposing strategies and modalities for the promotion of availability, accessibility, and uptake of ADR in the Country including compulsory subjection of disputes to ADR, and compulsory pre-court ADR information sessions; and inculcating ADR as a way of life through embedding, integrating, and mainstreaming it in all spheres of life such as through school curricula and agents of social change[82]. There is need to actualize the ADR Policy in order to mainstream AJS in Kenya.

The *Alternative Dispute Resolution Bill[83]* has also been introduced into parliament. The Bill seeks to provide a legal framework for the management of civil disputes through ADR mechanisms such as conciliation, mediation and traditional dispute resolution mechanisms[84]. It seeks to achieve certain objectives inherent in the African conceptions of justice including promoting a conciliatory approach to dispute resolution, enhancing community and individual involvement in dispute resolution and fostering peace and cohesion[85]. There is need to enact the Bill into law (with necessary amendments) in order to mainstream AJS in Kenya through ADR mechanisms.

Kenya has therefore made some progress towards mainstreaming AJS in the quest towards access to justice. Other African countries are also having a

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[81] Ibid

[82] Ibid

[83] Republic of Kenya., 'The Alternative Dispute Resolution Bill, 2021.' Available at *http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf* (Accessed on 20/11/2023)

[84] Ibid

[85] Ibid

positive experience with AJS including Ghana which has been hailed for mainstreaming AJS through the enactment of a comprehensive ADR legislation[86]. The Alternative Dispute Resolution Act of Ghana sets out the legal framework for settlement of disputes by arbitration, mediation and customary arbitration[87]. It also establishes an Alternative Dispute Resolution Centre whose function is to promote the growth of ADR in Ghana[88]. The Act also upholds the binding nature of ADR outcomes including mediation agreements which are recognized as binding and enforceable as court judgments[89]. The Act also embraces customary arbitration a move geared towards upholding customary management of disputes in line with African conceptions of justice[90].

It has been asserted that AJS and the notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation[91]. Further, it has been observed that pioneering ADR projects in African countries such as Ghana, Ethiopia, and Nigeria have generated positive results and illustrate the suitability of AJS in African contexts[92]. AJS can contribute to building an effective dispute settlement system and bridge the gap between the formal legal system and traditional modes of African justice in Africa[93]. It has been pointed out that many African countries are still struggling to establish functional, timely, and trusted judicial systems[94]. AJS are therefore vital in enhancing access to justice in Africa. However, despite their viability, AJS face several challenges which undermine their capability in delivering justice to Africans.

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[86] Republic of Ghana., 'Alternative Dispute Resolution Act, 2010.' Available at *https://www.dennislawgh.com/law-preview/alternative-dispute-resolutionact/1324#:~:text=AN%20ACT%20to%20provide%20for,ASSENT%3A%2031st%20May%2C%202010.* (Accessed on 20/11/2023)
[87] Ibid
[88] Ibid
[89] Ibid, S 82
[90] Ibid, Part III
[91] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit
[92] Ibid
[93] Ibid
[94] Ibid

It has been asserted that AJS including customary and TDRMs suffer from several drawbacks including disregard for basic human rights (for example where women are discriminated against or where corporal punishment is meted out); application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; limited resources and financial inability of the systems; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made[95].

In addition, effective adoption of AJS in Africa is hindered by several legal, political, institutional, capacity and financial challenges including inadequate political support, human resources, legal foundations, and sustainable financing[96]. It has been observed that many African governments are slow to understand or recognize the need for ADR, hence most ADR programs in Africa are often donor initiated[97]. In addition, the lack of national or local government support constrains institution-building that will in turn spur the development of personnel and create an enabling legal framework for AJS[98]. Further, the introduction of western justice systems resulted in disregard and subjugation of AJS in favour of formal court processes whereby AJS could only be applied in in Africa to the extent that they were not repugnant to the western conception of 'justice and morality'[99]. For example, in Kenya, the Constitution provides that AJSs such as TDRMs shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality[100]. There is need to address these problems in order to effectively mainstream AJSs in Africa.

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[95] Muigua. K., 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems.' Op Cit

[96] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[97] Ibid

[98] Ibid

[99] Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Available at *https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf* (Accessed on 21/11/2023)

[100] Constitution of Kenya., 2010., Article 159 (3) (b)

4.0 Way Forward

In order to effectively mainstream AJS in Africa, there is need to for African countries to enact robust legislations on AJS including ADR mechanisms. It has been asserted that enacting legislation on AJS would elevate the status of these mechanisms before skeptical disputants, build public confidence in AJS, and further increase their utilization[101]. Legislation is important in recognizing and affirming the importance of AJS in the administration of justice[102]. It is therefore necessary for African countries to formally recognize AJS as an access to justice tool and widen the scope of AJS for the provision of the full spectrum of access to justice while ensuring that there are safeguards that will recognize the rights of individuals who seek redress[103]. African countries should therefore enact legislations which recognize and harmonize AJS. It is imperative that such legislations promote the uptake of AJS in a manner that adheres with the core principles enshrined in states Constitutions and international law including human rights standards[104].

Further, it is essential to establish a clear interface between AJS and formal courts through measures such as formulating clear referral systems providing for referral of disputes from courts to AJS including ADR mechanisms and vice versa[105]. In order to achieve this goal, there is need to adopt policies which promote appropriate interactions between the Judiciary and the various models of AJS in order to enhance their uptake in access to justice; promote AJS as a forum of first instance for appropriate cases; formulate systems to facilitate appropriate cooperation between the Courts and AJS to enable co-references of cases between them; and develop and adopt AJS User guidelines for all stakeholders[106]. Establishing a clear interface between AJS and the formal processes is therefore important in mainstreaming AJSin Africa.

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[101] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[102] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[103] Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

[104] Ibid

[105] Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Op Cit

[106] Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

It is also necessary to ensure that mainstreaming AJS is done in a manner that does not result in the loss of some of the salient features of these mechanisms such as informality, voluntariness, confidentiality, flexibility, and party autonomy[107]. These features are the hallmarks of AJS including ADR mechanisms and losing them will hinder the viability and efficacy of AJSs in access to justice[108]. It is therefore crucial to preserve the key features of AJS in modern legal practice in order to ensure their viability in promoting access to justice[109].

There is also need for African countries to invest in broad capacity building in order to effectively mainstream AJS. This can be achieved by enhancing the capacity of AJS practitioners through education, training and mentorship[110]. This will enhance their skills and ability to manage disputes through AJS in a manner that safeguards the key concepts of justice such as human rights[111]. It is also important to strengthening the processes for selection, election, appointment and removal of AJS practitioners in order to enhance their competence and accountability in the administration of justice[112]. There is also need for continued public sensitization and enhancing access to information on AJS in order to boost support and accelerate the uptake of AJS including ADR mechanisms in Africa[113]. It is also imperative for African countries in collaboration with other stakeholders to facilitate resource mobilization and management for the development and enhancement of AJS[114].

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[107] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

[108] Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Op Cit

[109] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' Op Cit

[110] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at *https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf* (Accessed on 21/11/2023)

[111] Ibid

[112] Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

[113] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[114] Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

Finally, there is need to embrace the true spirit of conflict management in Africa in order to effectively and efficiently mainstream AJS. It has correctly been observed that conflict management in African societies was guided by culture and premised on the values that were held sacrosanct including peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect[115]. The philosophy of *Ubuntu/Utu* was essential in fostering social harmony and was effectively incorporated in conflict management strategies[116]. As a result, mainstreaming AJS should be done in a manner that promotes and preserves the African values of justice, which are based on reconciliation and restorative justice[117]. It has been observed that the role of AJS in access to justice goes beyond dispute resolution since these mechanisms also seek to promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution[118]. Mainstreaming AJS in Africa should therefore be targeted at promoting access to justice while preserving customs and traditions of the people of Africa.

Through the foregoing measures, AJS will effectively be mainstreamed in Africa.

5.0 Conclusion

AJS have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities[119]. AJS also promote and achieve social justice and inclusion, particularly amongst groups that have been excluded from the formal justice system[120]. Mainstreaming AJS is an important step towards the fulfilment, respect, observance, promotion

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[115] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

[116] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[117] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at *https://www.researchgate.net/publication/228182138_Alternative_Dispute_Resolution_AD R_in_SubSaharan_Africa_The_Role_of_Customary_Systems_of_Conflict_Resolution_CSCR* (Accessed on 21/11/2023)

[118] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[119] Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines.' Op Cit

[120] Ibid

and protection of the right to access to justice[121]. There has been some progress towards mainstreaming AJS in Africa as evidenced by their Constitutional recognition in some countries and the enactment of laws and Policies on AJS[122]. However, effective adoption of AJS in Africa is hindered by several legal, political, institutional, capacity and financial challenges including inadequate political support, human resources, legal foundations, and sustainable financing[123]. It is therefore essential to mainstream AJS in Africa in order to enhance their role in access to justice. Mainstreaming AJS in Africa can be achieved through enactment of robust legislations on AJS including ADR mechanisms, establishing a clear interface between AJS and formal courts, preserving the key features of AJS in modern legal practice, investing in broad capacity building, and embracing the true spirit of conflict management in Africa[124]. Mainstreaming AJS in Africa is a goal that can be realized.

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[121] United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Op Cit

[122] For example, article 159 (2) (c) recognizes ADR mechanisms in Kenya; the Alternative Dispute Resolution Act of Ghana sets out the legal framework for settlement of disputes by arbitration, mediation and customary arbitration. Further in Kenya, there has been progress towards strengthening the legal and policy framework on AJSs through the Alternative Justice Systems Framework Policy, the National Alternative Dispute Resolution Policy and the Alternative Dispute Resolution Bill.

[123] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[124] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit; See also Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Op Cit

Conquering the Resource Curse in Africa

Abstract
The paper critically examines the resource curse in Africa. It argues that the resource curse is a major hindrance to the attainment of Sustainable Development in Africa. The paper discusses the causes and consequences of the resource curse in Africa. It further suggests measures towards conquering the resource curse in Africa.

1.0 Introduction
Natural resources are essential for survival and livelihood[1]. It has been pointed out that natural resources play a vital role in the life of human beings which roles may be classified as economic, social and cultural[2]. 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; socially, natural resources like water bodies play recreational roles among others; and culturally, communities especially in Africa 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 occur[3]. However, while one might expect to see better development outcomes after countries discover natural resources, it has been observed that resource-rich countries tend to have higher rates of conflict and authoritarianism, and lower rates of economic stability and economic growth, compared to their non-resource-rich neighbors[4]. There is documented evidence from majority of resource-rich countries, especially those endowed with depletable natural resources such as fuels, ores, minerals and metals which suggests that resource riches can be a ''curse'' rather than a ''blessing''[5].

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

[2] Ibid

[3] Ibid

[4] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 1. Available at *https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf* (Accessed on 10/11/2023)

[5] Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 181.

The resource curse (also known as the paradox of plenty) refers to the failure of many resource-rich countries to benefit fully from their natural resource wealth, and for governments in these countries to respond effectively to public welfare needs[6]. It has also been described as the paradox that countries endowed with raw materials tend to have lower GDP per capita and worse development outcomes than countries with fewer natural resources[7]. It refers to the scenario where countries that are abundantly endowed with natural resources encounter pitfalls that interfere with the expected superior economic performance[8].

It has been pointed out that in the past, natural resources were thought to create economic growth and prosperity[9]. However, in recent years, debate has flared over whether natural resources, such as minerals and metals, oil, agricultural resources, and so on, stimulate economic growth or act as a hindrance to growth[10]. The idea that natural resources actually hinder growth is known as the "curse" of natural resources[11]. The curse of natural resources is a well-documented phenomenon for developing countries[12]. It has been observed that economies that are richly endowed with natural resources tend to grow slowly with numerous examples showing a significant negative correlation between natural resource abundance and economic growth[13].

The paper critically examines the resource curse in Africa. It argues that the resource curse is a major hindrance to the attainment of Sustainable Development in Africa. The paper discusses the causes and consequences of

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[6] Ibid

[7] Henri. A., 'Natural Resources Curse: A Reality in Africa.' *Resources Policy.*, Volume 63, October 2019

[8] Frankel. J., 'The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions.' Available at *https://www.elibrary.imf.org/display/book/9781616353797/ch002.xml* (Accessed on 10/11/2023)

[9] Karabegovic. A., 'Institutions, Economic Growth, and the "Curse" of Natural Resources.' *Studies in Mining Policy.*, July 2009

[10] Ibid

[11] Ibid

[12] Kronenberg. T., 'The Curse of Natural Resources in the Transition Economies.' Available at https://www.econstor.eu/bitstream/10419/83802/1/wp241.pdf (Accessed on 10/11/2023)

[13] Ibid

the resource curse in Africa. It further suggests measures towards conquering the resource curse in Africa.

2.0 The Resource Curse in Africa: Causes and Effects

Africa is a continent that is blessed with vast natural resources and rich environments[14]. The continent is generously endowed with productive land and with valuable natural resources, which include renewable resources such as water, forestry, and fisheries and non-renewable resources including minerals, coal, gas, and oil[15]. The United Nations Environment Programme (UNEP) states that Africa is rich in natural resources ranging from arable land, water, oil, natural gas, minerals, forests and wildlife[16]. UNEP further points out that the continent holds a huge proportion of the world's natural resources, both renewables and non-renewables[17].

For example, it has been pointed out that Africa holds 65 per cent of the world's arable land and ten percent of the planet's internal renewable fresh water source[18]. Further, Africa is home to some 30 percent of the world's mineral reserves, eight per cent of the world's natural gas and 12 per cent of the world's oil reserves[19]. The Democratic Republic of the Congo (DRC), for example, produces over 70% of the world's cobalt; DRC and Zambia together supply nearly 10% of global copper; Botswana and South Africa produce a significant amount of diamond; while Ghana and South Africa are significantly endowed with gold deposits[20]. It has further been stated that the continent has 40 percent of the world's gold and up to 90 percent of its

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[14] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Available at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/%28E%29%20Africa nBank%202007%20Ch4.pdf* (Accessed on 11/11/2023)

[15] Ibid

[16] United Nations Environment Programme., 'Our Work in Africa.' Available at *https://www.unep.org/regions/africa/our-work-africa#:~:text=The%20continent%20has%2040%20percent,internal%20renewable%20fresh %20water%20source.* (Accessed on 11/11/2023)

[17] Ibid

[18] Ibid

[19] Ibid

[20] Statistica., 'Mining Industry in Africa - Statistics & Facts.' Available at *https://www.statista.com/topics/7205/mining-industry-in-africa/* (Accessed on 11/11/2023)

chromium and platinum while the largest reserves of cobalt, diamonds, platinum and uranium in the world are also in Africa[21]. Africa is therefore classified as a major producer of many key mineral commodities in the world, with bountiful reserves of vital metals and minerals including gold, diamond, cobalt, bauxite, iron ore, coal, and copper available across the continent[22]. In addition, it has been asserted that Africa has an opportunity to emerge as a production hub for 'rare earths' with significant deposits being available in the continent especially in Eastern and Southern countries including South Africa, Madagascar, Malawi, Kenya, Namibia, Mozambique, Tanzania, Zambia and Burundi[23]. Rare earths have been described as the catalysts of industrial societies in the 21st century since they are vital to key products from hi-tech items including smartphones and monitors to energy conversion systems such as wind turbines, photovoltaic panels and electrical machinery and even military equipment including lasers and radar[24].

Natural resources therefore dominate many national economies in Africa and are central to the livelihoods of the poor rural majority in the continent[25]. These resources are the basis of income and subsistence for large segments of Africa's population and constitute a principal source of public revenue and national wealth[26]. It has been observed that in most African countries, natural capital accounts for between 30 percent and 50 percent of total wealth[27]. Further, over 70 per cent of people living in sub-Saharan Africa depend on forests and woodlands for their livelihoods[28].

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[21] United Nations Environment Programme., 'Our Work in Africa.' Op Cit

[22] Statistica., 'Mining Industry in Africa - Statistics & Facts.' Op Cit

[23] Italian Institute for International Political Studies., 'The Scramble for Africa's Rare Earths: China is not Alone.' Available at *https://www.ispionline.it/en/publication/scramble-africas-rare-earths-china-notalone-30725* (Accessed on 11/11/2023)

[24] Ibid

[25] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Op Cit

[26] Ibid

[27] United Nations Environment Programme., 'Our Work in Africa.' Op Cit

[28] Ibid

It has correctly been argued that the abundant natural resources in Africa are able to trigger social and economic development[29]. According to the African Development Bank Group, under the right circumstances, a natural resource boom can be an important catalyst for growth, development, and the transition from cottage industry to factory production[30]. It further asserts that with the right approach, natural resources can be used to make the transformation from a low-value economy that relies on exports of primary commodities to one with a substantial labor-intensive manufacturing base[31]. Africa therefore has the potential to utilize its exceptional natural wealth for economic development and social progress[32]. However, this ideal is yet to be realized.

A significant share of natural resources in Africa is used unsustainably while others are lost through illegal activities, meaning that the stream of benefits generated from these resources is being reduced over time[33]. UNEP estimates that Africa loses an estimated USD 200 billion annually of its natural capital through causes such as illicit financial flows, illegal mining, illegal logging, the illegal trade in wildlife, unregulated fishing and environmental degradation and loss among others[34]. Further, according to the African Development Bank Group, natural resources industries in Africa, and especially extractives, have developed as 'enclave economies', generating wealth that is exported rather than shared, or ploughed into the areas where it is needed most, in meeting human development challenges and building infrastructure[35]. As a result, it has been observed that the 'resource curse phenomenon' is widespread in Africa which refers to the paradox that countries endowed with natural resources tend be embroiled in conflicts and have incidences of poverty[36].

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[29] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit
[30] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Op Cit
[31] Ibid
[32] African Development Bank Group., 'Africa's Mineral Wealth: A Blessing or a Curse?.' Available at *https://blogs.afdb.org/this-is-africas-hour/post/africas-mineral-wealth-a-blessing-or-a-curse-12336* (Accessed on 11/11/2023)
[33] United Nations Environment Programme., 'Our Work in Africa.' Op Cit
[34] Ibid
[35] African Development Bank Group., 'Africa's Mineral Wealth: A Blessing or a Curse?.' Op Cit
[36] Henri. A., 'Natural Resources Curse: A Reality in Africa.' Op Cit

The Continent and especially, the Sub-Saharan Africa region has become a classic case of the resource-curse phenomenon characterized by the abundance of natural resources, low economic development, misuse of natural resources and prevalence of conflicts[37]. For instance, extractive industries, particularly in sub-Saharan Africa, has been associated with increasing levels of political, social, technical and environmental risk[38]. This has been the case in countries like Sudan, the Democratic Republic of the Congo (DRC) and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources as well as significant environmental degradation culminating in poverty and even conflict[39].

In Nigeria, despite the abundance of oil reserves, poverty rates are generally higher and infrastructure is poorer in the oil-rich states and there is disproportionate allocation of such funds[40]. Further, the Democratic Republic of the Congo (DRC), which is one of the most resource rich countries in Africa faces consistent economic and political instability and prevalence of conflicts[41]. In addition, it has been observed that Ghana, another African country rich in mineral wealth, faces high poverty levels as a result of misappropriation of mineral benefits[42]. In Zimbabwe, it has been pointed out that mining has failed to contribute towards Sustainable Development in the form of improved service delivery at the national and local levels and the realisation of human

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[37] Extractive Industries Transparency Initiative., 'The Natural Resource Curse in Sub-Saharan Africa: Transparency and International Initiatives.' Available at *https://eiti.org/documents/natural-resource-curse-sub-saharan-africa-transparency-and-international-initiatives* (Accessed on 11/11/2023)

[38] Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48; see also Lohde, L.A., The Art and Science of Benefit Sharing in the Natural Resource Sector, (International Finance Corporation, February 2015), p. 55. Available at *https://commdev.org/wpcontent/ uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf* (Accessed on 14/11/2023)

[39] Ibid

[40] Shaxson, N., 'Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?' (Royal Institute of International Affairs, 2009), p. 4

[41] Nichols. E., 'The Resource Curse: A Look into the Implications of an Abundance of Natural Resources in the Democratic Republic of Congo," *Scholarly Horizons: University of Minnesota, Morris Undergraduate Journal*: Vol. 5: Iss. 2, Article 6.

[42] Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *Resources Policy*, vol. 40, 2014, pp.74–82, p. 75.

rights[43]. There is evidence of state complicity in human rights violations in the mining sector, either directly or indirectly, through systemic oversight failures[44]. It has been observed that this has left the country exposed to predatory investors targeting the extractives sector resulting in the mortgaging of the country's natural resources[45]. In Kenya, it has been observed that soda ash mining in Lake Magadi has not resulted in tangible benefits in the area which continues to suffer from high poverty levels[46].

It is therefore evident that the resource curse is widespread in Africa with many countries rich in natural resources suffering from poverty and conflicts. The resource curse in Africa has been attributed to several factors including rent-seeking by elites, volatility of prices, inflexibility in labor, product, and asset markets and tensions between oil-producing and non-oil producing regions within countries[47]. Further, it has been observed that corruption permeating within oil-rich developing countries impedes transparency and accountability resulting in the resource-curse[48]. It has also been pointed out that natural resource revenue mismanagement seems to be one of the major factors contributing to a weakening in Africa's democratic processes and economic development[49]. Further, it has been asserted that oil-rich countries in Africa are highly susceptible to rent-seeking behaviour, petroleum revenue mismanagement, poor governance, socio-economic and political crisis and regional conflicts that can weaken democratic processes, stability, growth and development resulting in the resource curse[50]. Another key cause of the

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[43] Ndlovu. N., 'The Mineral Resource Curse in Zimbabwe: Extractives, Environmental Justice and Sustainable Development.' Available at *https://www.fairplanet.org/op-ed/the-mineral-resource-curse-in-zimbabwe-extractives-environmental-justice-and-sustainable-development/* (Accessed on 14/11/2023)

[44] Ibid

[45] Ibid

[46] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2020/05/Exploited-Poor-and-Dehumanised.pdf* (Accessed on 14/11/2023)

[47] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Op Cit

[48] Henri. A., 'Natural Resources Curse: A Reality in Africa.' Op Cit

[49] Ibid

[50] Ibid

resource curse in Africa is poor management of natural resources as a result of weak institutions[51].

The resource curse has had undesirable impacts on the continent including poverty, resource-based conflicts, environmental degradation and human rights violations[52]. There is need to conquer the resource curse in order to accelerate Sustainable Development in Africa.

3.0 Way Forward: Conquering the Resource Curse in Africa

In order to conquer the resource curse in Africa, there is need to improve the management of natural resources in order to reduce the risk of conflict[53]. According to UNEP, the linkages between natural resources and violent conflict are a critical challenge faced by many countries today including resource rich countries in Africa[54]. The exploitation of high-value natural resources, including oil, gas, minerals and timber, for example, has often been cited as a key factor in triggering, escalating or sustaining conflicts such as those experienced in various parts of Africa[55]. Proper management of natural resources, including land, renewables and non-renewables is essential in conquering the resource curse in Africa by avoiding, minimizing and fostering proper management of natural resource based conflicts[56]. It has correctly been asserted that resource-based conflicts are a major threat to the Sustainable Development of natural resources in Africa and usually have the result of undermining economic development, sustainability and definitely human development[57]. It is therefore important to promote sustainable exploitation,

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[51] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Op Cit

[52] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Op Cit

[53] United Nations Environment Programme., 'Natural Resource Management Manuals Launched in Support of Conflict Prevention.' Available at *https://www.unep.org/news-and-stories/press-release/natural-resource-management-manuals-launched-support-conflict* (Accessed on 14/11/2023)

[54] Ibid

[55] Ibid

[56] Ibid

[57] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Op Cit

utilisation, management and conservation of the environment and natural resources in Africa in order to curb the resource curse[58].

In addition, it is important to promote good governance and transparency in the management of natural resources in Africa. It has rightly been observed that governance remains the overarching and most critical challenge for natural resource exploitation and management in Africa[59]. Governance of natural resources in Africa is associated with problems such as corruption in the allocation of resource concessions which not only undermines governance in resource-rich countries but also entails a poor deal for their citizens; Confidentiality clauses in concession contracts which means that such contracts are not open to public scrutiny hence lack of accountability; and lack of transparency in relation to revenue flows of natural-resource rents between extractive industry companies and host governments[60]. It is therefore imperative to foster good governance of natural resources in Africa by strengthening transparency and accountability mechanisms and curbing corruption[61]. This calls for strengthening of institutions responsible for management of natural resources in Africa in order to enhance democratic space, accountability and transparency and embracing the role of the justice system in the governance of natural resources in Africa towards upholding the rule of law and promoting openness, transparency and accountability[62].

Further, there is need to foster equitable benefit sharing of natural resources in Africa. Equitable benefit sharing has been defined as the fair access to benefits that accrue from natural resources by all stakeholders including indigenous communities[63]. It has also been defined as the way in which natural resources including genetic resources may be accessed, and how the benefits that result from their use are shared between the people or countries using the

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[58] Ibid
[59] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Op Cit
[60] Ibid
[61] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Op Cit
[62] Ibid
[63] Jonge, B., 'What is Fair and Equitable Benefit Sharing?' *Journal on Agricultural and Environmental Ethics*, Vol. 24, issue 2, (2011)

resources (users) and the people or countries that provide them (providers)[64]. The concept of equitable benefit sharing envisages sharing of both monetary benefits such as sharing royalties when the resources are used to create a commercial product and non-monetary benefits such as the development of research skills and knowledge[65]. It has correctly been observed that equitable sharing of benefits accruing from natural resources in Africa is key in fighting poverty and consequently, empowering communities for overall national development[66]. The *Africa Mining Vision[67]* acknowledges that increasing attention is now being paid to the benefits derived by the communities where mining operations take place to ensure that local and national-level concerns and interests are balanced. According to the Vision, the benefits to the local community may come in various forms including revenues which accrue to the community because of its location (property rates and land rents); benefits which are the community's share of central government revenues from mining and non-income benefits such as employment for local residents; assistance to community health and educational institutions; access to the use of mine infrastructure by the general public among others[68]. Further, *Agenda 2063[69]* also enshrines the importance of equitable redistribution of returns from Africa's natural resources in fostering development in the continent. It seeks to ensure equitable access, use and sharing of benefits accruing from natural resources in the continent including land, minerals, water, forests, wildlife, fisheries, energy and genetic resources[70]. Equitable benefit sharing is therefore important in conquering the resource curse in Africa by ensuring that the

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[64] Convention on Biological Diversity., 'Introduction to Access and Benefit-Sharing.' Available at *https://www.cbd.int/abs/infokit/revised/web/all-files-en.pdf* (Accessed on 14/11/2023)

[65] Ibid

[66] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Op Cit

[67] Africa Union., 'Africa Mining Vision: February 2009.' Available at *https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf* (Accessed on 14/11/2023)

[68] Ibid

[69] Africa Union., 'Agenda 2063: The Africa we Want.' Available at *https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf* (Accessed on 14/11/2023)

[70] Ibid

benefits from natural resources are channeled to all stakeholders including local communities for economic and social development[71].

It is also imperative for African countries to review and enter into favourable resource extraction agreements with foreign Multinational Corporations (MNCs) operating in the continent. Due to unfavourable resource extraction agreements, Africa has been exploited by MNCs with the result that the Continent has received inadequate returns for its mineral and natural resource wealth[72]. It has been observed that in oil-rich developing countries, MNCs often implement various strategies such as legitimization, transfer pricing and tax avoidance to deprive countries well-endowed in natural resources from benefiting fully from their legitimate, mandated and legal share of their natural resource endowments[73]. Additionally, it has been pointed out that MNCs in Africa lack corporate social responsibility commitments including sustainably responsible exploitation of resources to support environmental preservation and sustainable growth and development[74]. In addition, MNCs have been accused of applying double standards as they are more likely to demand environmental and social mitigation efforts in the developed countries than they are likely to do in developing countries[75]. The activities of MNCs in Africa have therefore resulted in several concerns including human rights abuses, fueling of ethnic militancy, displacement of indigenous communities and environmental concerns including environmental degradation, loss of biodiversity and soil and air pollution as a result of oil spillages and unsustainable mining activities[76]. As a result, there is a need for African countries to effectively negotiate and enter into favourable resource extraction agreements with MNCs in order to safeguard the national interests

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[71] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Op Cit

[72] Ibid

[73] Henri. A., 'Natural Resources Curse: A Reality in Africa.' Op Cit

[74] Ibid

[75] Maiangwa.B & Agbiboa.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' *Africa Spectrum* 2/2013: 71-83

[76] Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review Vol. 3 (1), 2009. Pp. 111-124*

as far as benefit sharing and economic growth is concerned[77]. The *African Charter on Human and Peoples' Rights[78]* obligates African countries to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies, so as to enable the people of Africa to fully benefit from the advantages derived from their national resources[79]. African countries should therefore enter into favourable resource extraction agreements with MNCs which agreements should provide for respect for human rights, compliance with national laws, nationalization of property or revocation of contracts in case of breach of obligations by MNCs and adherence to Environmental, Social and Governance (ESG) requirements[80]. Through the foregoing among other measures, the resource curse in Africa will be conquered.

4.0 Conclusion

Africa is a continent that is blessed with abundant natural resources which are able to trigger social and economic development[81]. However, this ideal is yet to be realized with the Continent and especially, the Sub-Saharan Africa region being a classic case of the resource-curse phenomenon characterized by the abundance of natural resources, low economic development, misuse of natural resources and prevalence of conflicts[82]. The resource curse in Africa has been attributed to several factors including poor management of natural resources, weak institutions, corruption, lack of transparency and accountability, rent-seeking behaviour, poor governance, and socio-economic and political crisis[83]. The resource curse has had undesirable impacts on the continent including

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[77] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Op Cit

[78] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[79] Ibid, Article 21 (5)

[80] Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at https://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf (Accessed on 14/11/2023)

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

[82] Extractive Industries Transparency Initiative., 'The Natural Resource Curse in Sub-Saharan Africa: Transparency and International Initiatives.' Op Cit

[83] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Op Cit

poverty, resource-based conflicts, environmental degradation and human rights violations[84]. It is therefore necessary to conquer the resource curse in order to foster Sustainable Development in Africa. The resource curse in Africa can be conquered through measures such as improving the management of natural resources; promoting good governance, transparency and accountability in the management of natural resources; curbing corruption; strengthening of institutions responsible for management of natural resources; fostering equitable benefit sharing of natural resources in Africa; and entering into favourable resource extraction agreements with MNCs[85]. Conquering the Resource Curse in Africa is an ideal that needs to be urgently pursued.

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[84] Muigua. K., 'Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa.' Op Cit

[85] African Development Bank Group., 'Africa's Natural Resources: The Paradox of Plenty.' Op Cit

Fostering Sustainable Transport and Infrastructure in Africa

Abstract
The paper critically discusses the progress made towards fostering sustainable transport and infrastructure in Africa. It argues that sustainable transport and infrastructure can help Africa meet its climate and development targets. It explores some of the initiatives adopted towards embracing sustainable transport and infrastructure in Africa and challenges thereof. The paper further offers solutions towards fostering sustainable transport and infrastructure in Africa for sustainability.

1.0 Introduction
Transportation systems including roadways, public transit systems, airports, train stations, bus stations, ferry terminals, pipelines and warehouses ensure safe transport of people and goods and form a critical part of thriving, modern economies[1]. It has been pointed out that inland transport networks and nodes of international importance such as roads, railways, waterways, terminals, ports are instrumental to ensuring market access for people and goods[2]. Transportation plays an essential role in countries' competitiveness, balanced and liveable urban spatial development, access to water and energy, and food security, and is critical for social inclusion and improved quality of life[3]. It confers mobility and impacts on the development and welfare of the population through employment and income creation, connecting and providing to businesses and vital services, and therefore enhances economic development and growth[4]. Further, infrastructure plays a huge role in driving national growth, employment, and better quality of life in emerging markets and developing economies[5]. Despite the importance of the transport and

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[1] Flinders. M., 'How to Build more Sustainable Transportation Infrastructure.' Available at https://www.ibm.com/blog/transportation-infrastructure/ (Accessed on 08/11/2023)
[2] United Nations Economic Commission for Europe., 'Climate Change Impacts and Adaptation for Transport Networks and Nodes.' Available at *https://unfccc.int/sites/default/files/resource/2.12UNECE-WMO_CCImpact_Transport.pdf* (Accessed on 08/11/2023)
[3] Okoro. C., Musonda. I., & Agumba. J., 'Validity and Reliability of a Transportation Infrastructure Sustainable Performance Framework: A Study of Transport Projects in South Africa.' *Construction Economics & Building*., Volume 19, No. 2 (2019)
[4] Ibid
[5] Brickstone., 'Low-Carbon Infrastructure in Curbing Climate Change.' Available at https://brickstone.africa/low-carbon-infrastructure-in-climate-

infrastructure sector in the development agenda across the world, it has righty been observed that the industry comes at a huge cost since it may cause adverse planetary and environmental changes if left unchecked[6].

According to the International Energy Agency, transport accounts for more than a third of global carbon dioxide emissions from end-use sectors[7]. This is due to the fact that motorised transport on land, sea and air remains dependent on internal combustion engines that generally run on fossil fuels[8]. The International Institute for Sustainable Development further posits that transport is at the center of many economic and social development challenges, accounting for approximately 64% of global oil consumption, 27% of all energy use, and 23% of the world's energy-related carbon dioxide emissions[9]. The United Nations Environment Programme (UNEP) further reports that infrastructure is responsible for nearly 79% of all greenhouse gas emissions and 88 % of all adaptation costs[10]. Transport and infrastructure systems therefore produce emissions that contribute to air pollution and climate change and have serious impacts on ecosystems[11]. The sector is also responsible for many deaths as a result of emissions and accidents especially on roads[12].

As a result of the foregoing concerns, it has been argued that there is need to rethink and revamp transport and infrastructure systems in a manner that is

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change/#:~:text=Urban%20transport%20projects%2C%20such%20as,emissions%20c ompared%20to%20fossil%20fuels (Accessed on 08/11/2023)

[6] Ibid

[7] International Energy Agency., 'Transport.' Available at
https://www.iea.org/energy-system/transport (Accessed on 08/11/2023)

[8] Ibid

[9] International Institute for Sustainable Development., 'The Road to Sustainable Transport.' Available at *https://www.iisd.org/articles/deep-dive/road-sustainable-transport#:~:text=Transport%20accounts%20for%20about%2064,directly%20attributed%20to%20vehicular%20pollution.* (Accessed on 08/11/2023)

[10] United Nations Environment Programme., 'New Report Reveals how Infrastructure Defines our Climate.' Available at *https://www.unep.org/news-and-stories/press-release/new-report-reveals-how-infrastructure-defines-our-climate* (Accessed on 08/11/2023)

[11] International Institute for Sustainable Development., 'The Road to Sustainable Transport.' Op Cit

[12] Ibid

safe, affordable, accessible, efficient, and resilient, while minimizing carbon and other emissions and environmental impacts[13]. It has further been pointed out that there is need for radical changes in infrastructure planning, delivery and management in order to achieve key climate and development targets as envisaged under the Paris Agreement and Sustainable Development Goals[14]. Sustainable transport and infrastructure has therefore been suggested as a tool of enhancing low carbon development for sustainability[15].

The paper critically discusses the progress made towards fostering sustainable transport and infrastructure in Africa. It argues that sustainable transport and infrastructure can help Africa meet its climate and development targets. It explores some of the initiatives adopted towards embracing sustainable transport and infrastructure in Africa and challenges thereof. The paper further offers solutions towards fostering sustainable transport and infrastructure in Africa for sustainability.

2.0 Sustainable Transport and Infrastructure in Africa: Opportunities and Challenges

It has been argued that in order to curb the negative environmental impacts associated with transport and infrastructure systems while maintaining transport and infrastructure as a priority sector for climate action, and national growth in general, governments need to radically rethink how transport and infrastructure is planned, delivered and managed in order to make it suitable for a low emission and resilient future[16]. Sustainable and low-carbon transport and infrastructure development is therefore necessary in enhancing low carbon development since it generates fewer carbon emissions than traditional infrastructure and helps build resilience in vulnerable countries while protecting against exposure to extreme climate change events[17]. Sustainable

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[13] Ibid

[14] United Nations Environment Programme., 'New Report Reveals how Infrastructure Defines our Climate.' Op Cit

[15] Muigua. K., 'Enhancing Low Carbon Development for Sustainability.' Available at *https://kmco.co.ke/wp-content/uploads/2023/09/Enhancing-Low-Carbon-Development-for-Sustainability-.pdf* (Accessed on 08/11/2023)

[16] Brickstone., 'Low-Carbon Infrastructure in Curbing Climate Change.' Op Cit

[17] Ibid

transport and infrastructure is seen as an important tool of enhancing low carbon development for sustainability[18].

Sustainable transport and infrastructure has been defined as the provision of services and infrastructure for the mobility of people and goods—advancing economic and social development to benefit today's and future generations—in a manner that is safe, affordable, accessible, efficient, and resilient, while minimizing carbon and other emissions and environmental impacts[19]. According to UNEP, sustainable transport and infrastructure adapts to future uncertain climate conditions; contributes to the decarbonization of the economy; protects biodiversity and minimizes pollution[20]. UNEP further posits that sustainable transport and infrastructure is the only way we can ensure that people, nature and the environment thrive together[21].

It has been argued that the transport and infrastructure sector should be sustainable in four dimensions: environmental, social, institutional and economic[22]. Environmentally sustainable transport and infrastructure is planned, designed, constructed, and operated with the aim of increasing their level of climate resilience—which includes mitigating climate impact, protecting biodiversity, and minimizing pollution; socially sustainable transport and infrastructure systems considers the external effects on vulnerable populations, preserve cultural heritage, protect human rights, improve quality of life, increase the level of inclusiveness, and make transport services accessible; institutional sustainability focuses on transport and infrastructure's alignment with its country's overall objectives, such as specific paths toward decarbonization; and economic sustainability covers the

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[18] Muigua. K., 'Enhancing Low Carbon Development for Sustainability.' Op Cit

[19] International Institute for Sustainable Development., 'The Road to Sustainable Transport.' Op Cit

[20] United Nations Environment Programme., 'New Report Reveals how Infrastructure Defines our Climate.' Op Cit

[21] Ibid

[22] Milani. L., Mohr. D., & Sandri. N., 'Built to Last: Making Sustainability a Priority in Transport Infrastructure.' Available at *https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/built-to-last-making-sustainability-a-priority-in-transport-infrastructure* (Accessed on 08/11/2023)

transport and infrastructure's long-term financial viability and its contribution to job creation and economic growth[23].

It has correctly been observed that resilient and sustainable transport and infrastructure systems can withstand climate shocks, recover and resume operations while adapting to change and are thus crucial for a more inclusive world and shared prosperity[24]. It is therefore important to enhance the sustainability and resilience of transport and infrastructure services.

Sustainable transport and infrastructure is also at the heart of the United Nation's 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs)[25]. The 2030 Agenda for Sustainable Development seeks to achieve sustainable transport systems; and quality and resilient infrastructure[26]. SDG 11 seeks to foster sustainable cities and communities through measures such as providing access to safe, affordable, accessible and sustainable transport systems for all, improving road safety, notably by expanding public transport, with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons[27]. SDG 9 further seeks to promote resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation[28]. Among the targets under SDG 9 is Developing quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all; and facilitating sustainable and resilient infrastructure development in developing countries through enhanced financial, technological and technical support to African countries, least developed countries, landlocked developing countries and small island developing

[23] Ibid

[24] United Nations Conference on Trade and Development., 'Resilient and Sustainable Transport is a Pre-Condition for an Inclusive World of Shared Prosperity.' Available at https://sdgpulse.unctad.org/sustainable-transport/ (Accessed on 08/11/2023)

[25] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (Accessed on 08/11/2023)

[26] Ibid

[27] Ibid, SDG 11.2

[28] Ibid, SDG 9

states[29]. It has been asserted that infrastructure, including transport infrastructure, directly and indirectly influences the attainment of all the SDGs, including 92 % of the 169 individual targets[30].

Fostering sustainable transport and infrastructure is an important agenda in Africa. Climate change is already posing a serious threat to Africa's economic and social development[31]. It has been pointed out that many African countries are already among the poorest on earth; if anthropogenic climate change continues, economic conditions will deteriorate significantly, dashing millions of people's hopes for a better life[32]. Sustainable transport and infrastructure can help the continent attain economic growth and social progress while confronting climate change through reduction of greenhouse gas emissions[33]. It has been argued that as African economies continue to grow and expand, the transport and infrastructure sector becomes even more critical for promoting a people-centered, socio-economic development agenda[34]. Planning for affordable, safe and clean transport systems is a smart and cost-effective way to address people's needs and the impact of rapid urbanization across Africa[35].

The World Bank correctly notes that Africa's development is highly dependent on adequate, reliable and sustainable transport and infrastructure including road systems[36]. It advocates for the development of climate-resilient transport

[29] Ibid

[30] United Nations Conference on Trade and Development., 'Resilient and Sustainable Transport is a Pre-Condition for an Inclusive World of Shared Prosperity.' Op Cit

[31] Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2023/08/Reflections-on-Confronting-Climate-Change-in-Africa.pdf* (Accessed on 08/11/2023)

[32] Hochfeld. C., & Bongardt. D., 'Leapfrogging to Sustainable Transport in Africa.' Available at *https://www.international-climate-initiative.com/fileadmin/iki/Dokumente/Publikationen/Projekte/16_I_203/2023_Leapfrogging-to-Sustainable-Transport-in-Africa_EN.pdf* (Accessed on 08/11/2023)

[33] Ibid

[34] The World Bank.,' Sustainable, Safe and Efficient Transport for the People of Africa.' Available at *https://www.worldbank.org/en/news/press-release/2013/12/10/sustainable-safe-and-efficient-transport-for-the-people-of-africa* (Accessed on 08/11/2023)

[35] Ibid

[36] The World Bank., 'Enhancing the Climate Resilience of Africa's Infrastructure: The Roads and Bridges Sector.' Available at

and infrastructure systems in Africa in order to meet the continent's economic, social and environmental development goals[37]. It has been pointed out that the transport sector has an important role to play in the reduction of the continent's emissions with Africa still highly reliant on petroleum which accounts for around a quarter of Africa's energy supply and is the most important energy source on the continent[38]. For example, Africa has all the raw materials needed for vehicle electrification, its potential for generating renewable electricity is immense, many cities and urban quarters have yet to be built, and the population is young and open to digital technologies – all which are viable conditions for creating modern, net-zero mobility[39].

Africa Union's *Agenda 2063*[40] acknowledges the importance of sustainable transport and infrastructure in Africa's economic development. Agenda 2063 identifies that infrastructure gap remains a key constraint to Africa's development and provision of basic services[41]. It seeks to expand Africa's infrastructure including railway and road networks, port facilities and other transport infrastructure to enhance connectivity, spur trade and economic growth and create jobs and putting in place the appropriate funding arrangements and instruments[42]. Agenda 2063 further seeks to ensure that every citizen in Africa has affordable and sustainable access to quality transport and other services[43]. It further seeks to ensure that all urban mass transport will operate on renewable and low to zero emissions fuels[44].

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https://www.worldbank.org/en/topic/transport/publication/enhancing-the-climate-resilience-of-africas-infrastructure-the-roads-and-bridges-sector (Accessed on 08/11/2023)

[37] Ibid

[38] Hochfeld. C., & Bongardt. D., 'Leapfrogging to Sustainable Transport in Africa.' Op Cit

[39] Ibid

[40] Africa Union., 'Agenda 2063: The Africa we Want.' Available at *https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf* (Accessed on 08/11/2023)

[41] Ibid

[42] Ibid

[43] Ibid

[44] Ibid

However, it has been asserted that the sustainability of transport and infrastructure in Africa is hampered by factors such as inadequate finance, governance and policy problems, planning inefficiencies and limited technical capacity[45]. Further, it has been asserted that many African countries and cities are now growing without a proper urban transport and infrastructure development plan which results in little emphasis on public or mass transport, a sprawl of urban slums, a massive influx of imported cars on a limited and weak infrastructure, paralyzing congestion, widespread pollution, high rates of car accidents and fatalities, and less road safety for pedestrians[46]. Further, greenhouse gas emissions from the transport sector in Africa are growing at a fast rate due to high urbanization rate, quantity of imported cars per year, and low standards for acceptable vehicle emissions[47]. It is therefore imperative to embrace sustainable transport and infrastructure in Africa.

3.0 Way Forward

There is need to embrace sustainable and low carbon transport and infrastructure in Africa. Low-carbon transport and infrastructure systems are critical to creating a more equitable, resilient and healthy future[48]. Further, sustainable transport and infrastructure can enhance better compliance with environmental, health and safety regulations, lower fuel costs, promote more reliable and efficient maintenance procedures and increase asset availability, better asset performance and longer asset lifespans[49]. It has been asserted that fostering low carbon transport can be achieved through avoiding demand by transportation, shifting transportation towards cleaner modes and adopting efficient technologies[50]. Achieving these goals requires policies that address all

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[45] Okoro. C., Musonda. I., & Agumba. J., 'Validity and Reliability of a Transportation Infrastructure Sustainable Performance Framework: A Study of Transport Projects in South Africa.' Op Cit

[46] The World Bank.,' Sustainable, Safe and Efficient Transport for the People of Africa.' Op Cit

[47] Ibid

[48] Brickstone., 'Low-Carbon Infrastructure in Curbing Climate Change.' Op Cit

[49] Flinders. M., 'How to Build more Sustainable Transportation Infrastructure.' Op Cit

[50] United Nations Economic Commission for Latin America and the Carribean., 'Towards Low-Carbon Transportation Infrastructures.' Available at https://repositorio.cepal.org/server/api/core/bitstreams/23644ccf-39a8-44b6-a99b-9e2abc732b94/content (Accessed on 09/11/2023)

emission sources associated with transport and infrastructure[51]. It has also been asserted that transformation towards sustainable transport and infrastructure calls for integrated approaches that bring together multiple stakeholders around shared objectives[52]. Such approaches should promote holistic, end-to-end analysis of different dimensions, including vulnerability risks and environmental impacts, that can help in the systemic identification and development of integrated solutions towards sustainable transport and infrastructure[53].

One of the key ways through which this can be achieved is through scientific advances and the rapid deployment of new technologies and innovations in the transport and infrastructure sector which are essential for the transition to sustainability at the scale and speed required[54]. Scientific advances and technologies such as built-in safety features, environmentally friendly fuels and engines, widespread digitalization, apps that process real time information, autonomous vehicles and intelligent transport systems have become central features of the transport and infrastructure innovation landscape[55]. Such advances have enabled low carbon infrastructure projects such as railway infrastructure; urban transport projects including metros and light rail projects which reduce car usage; and renewable energy projects including solar, wind, and hydropower which are essential in transitioning the transport and infrastructure sector towards sustainability[56]. It has been asserted that the transport sector in Africa and other parts of the world can embrace sustainability through the use of low and zero emission, energy efficient, affordable modes of transport, including electric and alternative fuel vehicles, as well as domestic fuels[57]. Science and technology can revolutionize

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[51] Ibid
[52] United Nations., 'Sustainable Transport, Sustainable Development. Interagency Report for Second Global Sustainable Transport Conference. 2021.' Available at https://sdgs.un.org/sites/default/files/2021-10/Transportation%20Report%202021_FullReport_Digital.pdf (Accessed on 09/11/2023)
[53] Ibid
[54] Ibid
[55] Ibid
[56] Muigua. K., 'Enhancing Low Carbon Development for Sustainability.' Op Cit
[57] Office of the Energy Efficiency & Renewable Energy., 'Sustainable Transportation and Fuels.' Available at https://www.energy.gov/eere/sustainable-transportation-

the transport and infrastructure sector in Africa through the development and adoption of hybrid electric vehicles, battery electric vehicles, solar electric vehicles, fuel cell vehicles, improved diesel vehicles, alternative fuel technologies, material substitution technologies, smart traffic infrastructure/intelligent transport systems and the use of information technologies for traffic management[58]. There is need to embrace science and technology in order to foster sustainable transport and infrastructure in Africa. In addition, sustainability can be enhanced in the transport and infrastructure sector through the use of sustainable construction materials. It has been pointed out that materials such as net-zero carbon dioxide concrete elements, carbon dioxide free steel with improved corrosion resistance, or fit-out materials with reduced volatile organic compound emissions are preferable and can enhance the sustainability of transport and infrastructure systems[59]. Further, an increased adoption of green construction materials including fly ash based bricks, Reinforced Cement Concrete (RCC) blocks, cellular lightweight concrete, bamboo-based materials and bagasse boards; efficient lighting system; and adoption of nature-based infrastructure can aid in the reduction of greenhouse gases and improved efforts towards tackling climate change toward sustainability in Africa[60]. Further, it also imperative that transport and infrastructure projects should be awarded to bidders with proven track record in areas such positive sustainability impact, energy efficiency and environmental standards, efficient use of natural and renewable capital, and employment local workers in order to enhance sustainability[61]. There is also need to enhance the reuse and recycling construction waste in order to foster sustainability[62].

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andfuels#:~:text=Sustainable%20transportation%20refers%20to%20low,as%20well% 20as%20domestic%20fue ls. (Accessed on 09/11/2023)

[58] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Available at *https://thesciencepolicyforum.org/articles/perspectives/role-of-science-technology-and-innovation-inaddressing-climate-change-a-perspective/* (Accessed on 09/11/2023)

[59] Milani. L., Mohr. D., & Sandri. N., 'Built to Last: Making Sustainability a Priority in Transport Infrastructure.' Op Cit

[60] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

[61] Milani. L., Mohr. D., & Sandri. N., 'Built to Last: Making Sustainability a Priority in Transport Infrastructure.' Op Cit

[62] Ibid

Further, it is important to enhance the resilience of Africa's transport and infrastructure systems including roads and bridges. It has been correctly pointed out that such infrastructure is particularly vulnerable to climate stressors such as higher temperatures, increased precipitation, or flooding[63]. Climate-related damage to road, bridges and other vital infrastructure in Africa often causes frequent disruptions to the movement of people and goods, with direct consequences on economic productivity[64]. It is therefore necessary for African countries to enhance the climate resilience of their infrastructure through measures such as adequate maintenance and investing in sustainable and long lasting infrastructure[65].

Finally, there is need to address structural, legal, policy and capacity challenges which hinder the adoption of sustainable transport and infrastructure in Africa. It has been asserted that the sustainability of transport and infrastructure in Africa is hampered by factors such as lack of finance, governance and policy problems, planning inefficiencies and technical capacity[66]. The United Nations observes that these challenges have resulted in large gaps between developed and developing countries and between urban and rural areas in embracing sustainable transport and infrastructure which gaps could widen unless deliberate efforts are made to close them[67]. It advocates for measures such as increased scientific and technological cooperation between developed and developing countries, innovations in governance at the institutional and policy levels, effective legislation and regulation at the national and sub national levels, capacity building, sustainable procurement and international agreements and standards[68]. There is also need for enhanced financing for sustainable transport and infrastructure from a range of sources including multilateral, private and

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[63] The World Bank., 'Enhancing the Climate Resilience of Africa's Infrastructure: The Roads and Bridges Sector.' Op Cit

[64] Ibid

[65] Ibid

[66] Okoro. C., Musonda. I., & Agumba. J., 'Validity and Reliability of a Transportation Infrastructure Sustainable Performance Framework: A Study of Transport Projects in South Africa.' Op Cit

[67] United Nations., 'Sustainable Transport, Sustainable Development. Interagency Report for Second Global Sustainable Transport Conference. 2021.' Op Cit

[68] Ibid

public sources[69]. Through the foregoing among other measures, sustainable transport and infrastructure will be fostered in Africa.

4.0 Conclusion

The transport and infrastructure sector is essential in fostering economic and social development across the world[70]. However, the sector is also a major cause of environmental and social challenges including climate change as a result of greenhouse gas emissions and deaths as a result of accidents especially on roads[71]. Sustainable transport and infrastructure is therefore seen as a means of ensuring that the sector is safe, affordable, accessible, efficient, and resilient, while minimizing carbon and other emissions and environmental impacts associated with transport and infrastructure[72]. However, the sustainability of transport and infrastructure in Africa is hampered by factors such as inadequate finance, governance and policy problems, planning inefficiencies and technical capacity[73]. Measures that can be adopted towards fostering sustainable transport and infrastructure in Africa include embracing low carbon transport and infrastructure, fostering science, technology and innovation; use of sustainable construction materials; enhancing the resilience of Africa's transport and infrastructure systems; increased scientific and technological cooperation between African countries and developed countries; effective legislation and regulation; capacity building and enhanced financing for sustainable transport and infrastructure[74]. Fostering Sustainable Transport and Infrastructure in Africa is necessary, and possible.

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[69] Ibid

[70] Okoro. C., Musonda. I., & Agumba. J., 'Validity and Reliability of a Transportation Infrastructure Sustainable Performance Framework: A Study of Transport Projects in South Africa.' Op Cit

[71] International Institute for Sustainable Development., 'The Road to Sustainable Transport.' Op Cit

[72] Ibid

[73] Okoro. C., Musonda. I., & Agumba. J., 'Validity and Reliability of a Transportation Infrastructure Sustainable Performance Framework: A Study of Transport Projects in South Africa.' Op Cit

[74] United Nations., 'Sustainable Transport, Sustainable Development. Interagency Report for Second Global Sustainable Transport Conference. 2021.' Op Ci

Preparing for the Future: ADR and Arbitration from an African Perspective

Abstract

The paper argues a case for embracing ADR and arbitration from an African perspective. It points out that ADR mechanisms have been part and parcel of African societies since time immemorial. The paper discusses the place of ADR processes in African societies. It interrogates how these mechanisms were applied in conflict management and the principles which guided them towards this end. The paper also critically examines the current practice of ADR in Africa and highlights some of the underlying concerns. It also proposes measures towards embracing ADR and arbitration from an African perspective.

1.0 Introduction

Alternative Dispute Resolution (ADR) denotes a wide range of dispute management techniques that function outside formal court processes[1]. ADR therefore entails a set of processes that are used to manage conflicts without resort to courts[2]. The term ADR encompasses many dispute resolution techniques including negotiation, mediation, arbitration, conciliation, adjudication, early neutral evaluation, expert determination, minitrials, traditional justice systems among others[3]. The *Charter of the United Nations*[4] provides the legal basis for the application of ADR mechanisms at the global level. It stipulates 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[5]. ADR mechanisms have also been recognized at the national level in some countries. The Constitution of Kenya urges courts and tribunals to promote ADR mechanisms including

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[1] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[2] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[3] Kerbeshian. L., 'ADR: To be Or…' *North Dakota Law Review*, Volume 70, No. 2

[4] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[5] Ibid, Article 33 (1)

reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[6].

The growth of ADR has transformed the administration of civil justice[7]. ADR offers numerous advantages in the administration of justice including a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice[8]. As a result it has been argued that ADR performs convenient and useful works that cannot be done, or cannot easily be done, through formal justice systems[9]. ADR mechanisms possess certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes[10]. These features make ADR mechanisms viable in enhancing access to justice. ADR mechanisms are able to address most of the challenges which clog formal justice processes such as costs, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow[11].

ADR holds a special place in Africa. ADR mechanisms have been practiced in Africa for many centuries[12]. However, as a result of colonization, these mechanisms were disregarded in favour of western justice systems[13]. ADR mechanisms are now being widely embraced in Africa in addition to formal

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[6] Constitution of Kenya, 2010., Article 159 (2) (c)

[7] Main. T., 'ADR: The New Equity.' Available at
https://www.researchgate.net/profile/Thomas-
Main/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/AD
R-The-new-equity.pdf (Accessed on 13/10/2023)

[8] Ibid

[9] Ibid

[10] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[11] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

[12] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

[13] Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at https://www.ajol.info/index.php/mlr/article/view/186176 (Accessed on 13/10/2023)

justice systems[14]. However, it has been observed that the current practice of ADR in Africa is heavily modernized and fails to fully capture African cultural values and conflict management practices[15]. On this basis, it has been argued that there is need to Africanize conflict management processes in order to fully capture the spirit of conflict management inherent in African societies[16].

The paper argues a case for embracing ADR and arbitration from an African perspective. It points out that ADR mechanisms have been part and parcel of African societies since time immemorial. The paper discusses the place of ADR processes in African societies. It interrogates how these mechanisms were applied in conflict management and the principles which guided them towards this end. The paper also critically examines the current practice of ADR in Africa and highlights some of the underlying concerns. It also proposes measures towards embracing ADR and arbitration from an African perspective.

2.0 ADR and Arbitration in African Societies

Before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines[17]. It has been observed that conflicts are a common occurrence in any human interactions due to incompatibility of goals or misalignment of interests among other

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[14] Muigua. K., 'The Modernisation of other ADR Processes in Africa: Experience from Kenya and her 2010 Constitution.' Available at *http://kmco.co.ke/wp-content/uploads/2018/12/The-Modernisation-of-Other-ADR-Processes-in-Africa-Experience-From-Kenya-and-Her-2010-Constitution-SOAS-Conference-Paper-Kariuki-Muigua-4th-DECEMBER-2018.pdf* (Accessed on 13/10/2023)

[15] Ibid

[16] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at *http://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Movingfrom-Alternative-to-Appropriate-Dispute-Resolution-1.pdf* (Accessed on 13/10/2023)

[17] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf* (Accessed on 13/10/2023)

causes[18]. Conflicts were therefore a common phenomenon in African societies. The major sources of conflict in African societies were land, chieftaincy, personal relationship issues, family property, honour, murder, and matrimonial fall-outs among others[19].

It has been argued that the process of conflict management is largely influenced by culture[20]. Differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture[21]. Culture therefore plays an important role in conflict management. African societies had their own traditional methods and mechanisms of preventing, managing and resolving conflicts[22]. It has been observed that these societies had frameworks in place for the resolution of conflicts and for preventing their escalation into violence, thus threatening the social fabric[23]. It has been pointed that the process of conflict management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people[24].

African societies upheld norms and values geared towards promoting social cohesion and smooth running of the community[25]. These values include respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty and peaceful co-existence[26]. Conflicts were therefore seen as a threat to the social fabric that holds the community together[27]. As a result, there was

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[18] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

[19] Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Tr aditional_African_Society (Accessed on 13/10/2023)

[20] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

[21] Ibid

[22] Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

[23] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[24] Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

[25] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Journal of Sustainable Development in Africa, Volume 17, No.1, 2015

[26] Ibid

[27] Ibid

need for expeditious and efficient management of conflicts and for preventing their escalation into violence, a situation which could threaten the social fabric[28]. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[29]. These mechanisms gave prominence to communal needs over individual needs[30].

African societies therefore developed conflict management strategies that were designed to uphold the values and norms that held such societies together. Conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques which were administered by institutions such as the council of elders[31]. These techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation[32]. The mechanisms adopted towards conflict prevention, management and resolution in African societies were largely effective and respected, and their decisions were binding on all parties, since the identity of an individual was linked to that of the community[33]. There was thus an impetus to comply with decisions for the well-being of the community[34]. In addition, social ties, values, norms and beliefs and the threat of excommunication from society provided elders with legitimacy and sanctions to ensure their decisions were complied with[35].

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[28] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[29] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

[30] Ibid

[31] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[32] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[33] Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

[34] Ibid

[35] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

However, colonialism resulted in subjugation of African conflict management strategies[36]. The indigenous practices and institutions on conflict management were largely weakened and even destroyed in many African societies, since the colonial powers introduced formal justice processes such as law courts, which came to pronounce judgments rather than resolve conflicts according to the African concepts of justice[37]. Conflicts that were hitherto handled through traditional amicable settlements practices, with emphasis on reconciliation and the restoration of social harmony, were now being handled on the basis of punishment of the conflicting parties[38]. The introduction of western justice systems resulted in disregard for traditional dispute resolution mechanisms as evidenced by reforms such as the introduction of the repugnancy clause in Kenya[39]. Traditional justice systems could only be applied in Kenya to the extent that they were not repugnant to the western conception of 'justice and morality[40].'

However, there has been progress towards reintroduction of African conflict management strategies. The Constitution of Kenya mandates tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[41]. It has been pointed out that ADR mechanisms such as arbitration are enjoying a thriving present and a promising future in Africa[42]. ADR techniques can enhance access to justice by strengthening dispute management systems and bridging the gap between formal legal systems and traditional modes of African justice[43]. They may have particular value in stabilization and state building efforts when judicial

[36] Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' Op Cit
[37] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit
[38] Ibid
[39] Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)
[40] Ibid
[41] Constitution of Kenya, 2010., Article 159 (2) (c)
[42] Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at https://hsfnotes.com/africa/2022/11/25/2022-soasarbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/ (Accessed on 13/10/2023)
[43] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

institutions are weak and social tensions are high[44]. It has been observed that the values inherent in African societies which informed the process of conflict management remain virtually unchanged[45]. It is thus imperative to embrace ADR and arbitration from an African perspective in order to fully capture the spirit of conflict management envisaged by African societies.

3.0 Current Practice of ADR and Arbitration in Africa: Promises and Pitfalls

ADR in Africa has risen as an increasingly popular alternative to the formal legal channels, particularly in managing civil disputes, promising efficiency and increasing the perception of justice[46]. Problems such as costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal knowhow have continued to clog the formal justice systems in most African countries[47]. As a result of these problems, it has been observed that many African countries are still struggling to establish functional, timely, and trusted judicial systems[48]. These problems have resulted in lack of confidence and hindered realization of the right of access to justice[49]. ADR has emerged as an increasingly popular channel outside formal procedures to resolve disputes in timely manner, while restoring the parties' sense of justice[50].

ADR mechanisms are being used in countries across Africa because the techniques used, which include negotiation, conciliation, mediation and arbitration, fit comfortably within traditional concepts of African justice, particularly its core value of reconciliation[51]. There has been growth of

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[44] Ibid

[45] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[46] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

[47] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op Cit

[48] Ibid

[49] Ibid

[50] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[51] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

institutions in Africa offering ADR services especially arbitration and mediation[52]. African countries are also becoming preferred seats for ADR processes in the international arena such as international commercial arbitration and international commercial mediation[53]. Further, there have been progress towards institutionalizing and fusing ADR mechanisms with formal justice processes in some African countries[54]. This is geared towards recognizing and affirming ADR processes and establishing a clear interface between them and the formal justice processes[55]. For example, in Kenya, mediation has been fused with the formal justice system through the Court-Annexed Mediation (CAM) programme[56]. CAM is geared towards promoting management of disputes in a reconciliatory and cost-effective manner and helping to restore broken relationships[57]. Further, in Kenya, the *Alternative Dispute Resolution Bill[58]* has been introduced into parliament. The Bill seeks to provide a legal framework for the management of civil disputes through ADR mechanisms such as conciliation, mediation and traditional dispute resolution mechanisms[59]. It seeks to achieve certain objectives inherent in the African conceptions of justice including promoting a conciliatory approach to dispute

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[52] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' *https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf* (Accessed on 13/10/2023)

[53] Muigua. K., 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration.' Available at *https://kmco.co.ke/wp-content/uploads/2020/12/Looking-into-the-Future-Making-Kenya-a-Preferred-Seat-for-International-Arbitration-Kariuki-Muigua-Ph.D.-28TH-DECEMBER-2020.pdf* (Accessed on 13/10/2023)

[54] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf (Accessed on 13/10/2023)

[55] Ibid

[56] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

[57] Business Daily., 'Judiciary Counts gains of Court Annexed Mediation' available at *https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/judiciary-counts-gains-ofcourt-annexed-mediation-3420850* (Accessed on 13/10/2023)

[58] Republic of Kenya., 'The Alternative Dispute Resolution Bill, 2021.' Available at *http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf* (Accessed on 13/10/2023)

[59] Ibid

resolution, enhancing community and individual involvement in dispute resolution and fostering peace and cohesion[60].

Other African countries are also having a positive experience with ADR including Ghana which has been hailed for enacting the most comprehensive ADR legislation in Africa[61]. The Alternative Dispute Resolution Act of Ghana sets out the legal framework for settlement of disputes by arbitration, mediation and customary arbitration[62]. It also establishes an Alternative Dispute Resolution Centre[63]. The Act also upholds the binding nature of ADR outcomes including mediation agreements which are recognized as binding and enforceable as court judgments[64]. The Act also embraces customary arbitration a move geared towards upholding customary management of disputes in line with African conceptions of justice[65]. As a result of these measures, it has been asserted that ADR mechanisms are enjoying a thriving present and a promising future in Africa[66].

However, despite the progress towards promoting ADR mechanisms in Africa, it has been observed that most of the ADR mechanisms including arbitration, mediation and adjudication are largely influenced by the western conceptions of justice[67]. The practice of ADR as we know it today originated and developed within specific cultural, ideological and political contexts inherent in the West and therefore, its application in non-Western societies especially Africa may turn out to be counter-productive since the latter exhibit

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[60] Ibid

[61] Onyema. E., 'The New Ghana ADR Act 2010: A Critical Overview.' *Arbitration International*, Volume 28, No. 1 (2012)

[62] Republic of Ghana., 'Alternative Dispute Resolution Act, 2010.' Available at https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324#:~:text=AN%20ACT%20to%20provide%20for,ASSENT%3A%2031st%20May%2C%202010. (Accessed on 13/10/2023)

[63] Ibid

[64] Ibid, S 82

[65] Ibid, Part III

[66] Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

[67] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

markedly different social, historical and political conditions[68]. One of the most important distinctions between the institutional settings of Western societies and African societies has to do with the former's focus on the individual rather than the collective as the unit of social organization and public policy as envisaged in African societies[69]. As a result, it has been argued that the transfer of ADR can be politically driven and readily used to justify the imposition of Western values and ideals on post-colonial cultures and societies of the developing world including Africa[70]. Further, it has been argued that the current practice of ADR in Africa might be used to benefit the interests of a few including national elites and multinational corporations[71]. ADR mechanisms such as arbitration in Africa are now largely associated with formal justice systems due to the aspect of court involvement and emerging challenges of costs and delays[72]. Further, it has been argued that the institutionalizing and fusion of ADR mechanisms with formal justice processes could result in the loss of some of the key attributes of these mechanisms such as informality, confidentiality and privacy which were pivotal for their success[73].

Despite the foregoing concerns, ADR mechanisms including arbitration if properly harnessed, have the potential to enhance access to justice especially for the poor and marginalized in Africa[74]. It is therefore imperative to embrace ADR and arbitration from an African perspective in order to fully capture the spirit of conflict management inherent in African societies for enhanced access to justice.

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[68] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 13/10/2023)

[69] Ibid

[70] Ibid

[71] Ibid

[72] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers Limited, 4th Edition, 2022

[73] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[74] Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf (Accessed on 13/10/2023)

4.0 Way Forward

ADR mechanisms including arbitration have been part and parcel of the African culture since time immemorial[75]. These mechanisms were the first point of call whenever a dispute arose in African societies and were administered by institutions such as the council of elders who ensured compliance with outcomes[76]. It has been observed that conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques[77]. These mechanisms were considered 'Appropriate' and not 'Alternative' in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion[78]. It is therefore imperative to consider and embrace ADR mechanisms in Africa as 'Appropriate' and not 'Alternative' in the quest towards access to justice[79].

It is also imperative to embrace the spirit of conflict management inherent in African societies while fostering ADR mechanisms. It has been asserted that African communities developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[80]. These mechanisms gave prominence to communal needs over individual needs[81]. The purpose of conflict management in African societies was therefore to foster peace, reconciliation and restoration of social harmony[82]. ADR techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation[83]. However, the current practice of ADR in Africa

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[75] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

[76] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[77] Ibid

[78] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

[79] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[80] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

[81] Ibid

[82] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[83] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

through mechanisms such as arbitration and some forms of mediation has shifted focus from the true purpose of conflict management that was upheld in African societies[84]. Some of the ADR mechanisms such as arbitration have become coercive resulting in settlement of disputes as opposed to resolving disputes[85]. Some ADR mechanisms in their current form therefore lack the ability to foster reconciliation and restoration of parties' relationships which was the true purpose of conflict management in African societies[86]. This is due to the fact that the current practice of ADR in Africa was transplanted from the West without considering the underlying social, historical and political conditions in African societies[87]. It is therefore important to (re)focus ADR mechanisms in Africa to the true purpose of conflict management upheld in African societies which is reconciliation and restoration of parties' relationships[88].

Further, while the progress made towards legitimizing and institutionalizing ADR mechanisms in Africa including arbitration, mediation and traditional justice systems is meritorious, it is imperative to ensure that this is done in a manner which preserves the key features of these mechanisms[89]. This process is important in providing elaborate legal and policy framework and guidelines for the application of ADR mechanisms and further linking these mechanisms to formal justice systems[90]. It is also vital in upholding ADR mechanisms as part of the justice system[91]. However, it has been pointed that this process could result in the loss of some of the salient features of ADR mechanisms such as voluntariness, confidentiality and party autonomy[92]. These features are the

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[84] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

[85] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[86] Ibid

[87] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

[88] Ibid

[89] Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

[90] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[91] Ibid

[92] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' Alternative Dispute Resolution (2017): 130

hallmarks of ADR and losing them will hinder the viability and efficacy of ADR mechanisms in access to justice. It is therefore crucial to preserve the key features of ADR mechanisms in modern legal practice in order to ensure their viability in promoting access to justice[93]. Further, it is essential to establish a clear interface between ADR mechanisms and formal courts through measures such as formulating clear referral systems providing for referral of disputes from courts to ADR and vice versa[94].

Finally, there is need to continue embracing ADR in Africa and putting in place measures that will foster the uptake of ADR mechanisms. Government support is vital in promoting ADR in Africa by putting in place adequate legal regimes and infrastructure to enhance the uptake of ADR mechanisms[95]. Governments can further enhance the role of ADR mechanisms in Africa by designing laws that advocate for these mechanisms and institutionalizing ADR mechanisms in a manner which preserves their key attributes such as flexibility, informality, privacy and confidentiality[96]. It is also vital to enhance the capacity of ADR practitioners including arbitrations, mediators and Traditional Dispute Resolution (TDR) practitioners through education, training and mentorship[97]. This will enhance their skills and ability to manage disputes through ADR mechanisms in a manner that safeguards the key concepts of justice such as human rights[98]. There is also need for continued public sensitization and enhancing access to information on ADR in order to boost support and accelerate the uptake of ADR mechanisms in Africa[99].

These measures are integral in fostering ADR and arbitration from an African perspective.

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[93] Ibid

[94] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

[95] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf* (Accessed on 14/10/2023)

[96] Ibid

[97] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[98] Ibid

[99] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

5.0 Conclusion

ADR mechanisms have been practiced in Africa for many centuries[100]. These mechanisms were considered 'Appropriate' and not 'Alternative' in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion.[101] ADR techniques fitted comfortably within traditional concepts of African justice, particularly its core values of reconciliation and restorative justice[102]. However, the current practice of ADR in Africa has shifted focus from the true conceptions of justice inherent in African societies[103]. This is a result of transplanting ADR mechanisms from the West into African societies without considering the underlying social, historical and political conditions in African societies[104]. Some ADR techniques have therefore become coercive resulting in settlement of disputes as opposed to resolving disputes.[105] It is thus vital to embrace ADR and arbitration from an African perspective. This can be achieved by reframing ADR mechanisms as 'Appropriate' and not 'Alternative' in Africa, embracing the spirit of conflict management inherent in African societies and its focus on reconciliation and restorative justice, preserving the key attributes of ADR mechanisms while legitimizing and institutionalizing such mechanisms and promoting ADR mechanisms in Africa as an ideal avenue for enhanced access to justice[106]. The time is now to prepare for the future by embracing ADR and arbitration from an African perspective.

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[100] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

[101] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

[102] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[103] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

[104] Ibid

[105] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[106] Ibid

Strengthening Ethics in Arbitration in Africa

Abstract
The paper critically discusses the role of ethics in arbitration. It argues that ethics play a fundamental role in enhancing the viability of arbitration as a dispute management mechanism. The paper explores some of the ethical concerns in arbitration in Africa. It also suggests measures towards strengthening ethical practice in arbitration in Africa.

1.0 Introduction

Arbitration is one of the Alternative Dispute Resolution (ADR) mechanisms[1]. ADR refers to a set of mechanisms that are applied to manage disputes without resort to adversarial litigation[2]. It encompasses various processes including negotiation, mediation, arbitration, conciliation, adjudication and Traditional Dispute Resolution Mechanisms (TDRMs) among others[3]. ADR mechanisms have been hailed for their attributes which makes them viable in enhancing access to justice. Such features include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes[4]. These processes are recognized at the global level under the *Charter of the United Nations* which stipulates that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[5]. They have also been upheld at the national level in some countries including Kenya whereby the Constitution mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[6].

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[1] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

[2] Ibid

[3] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[4] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-inKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf* (Accessed on 11/10/2023)

[5] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33 (1)

[6] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

Arbitration refers to a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute[7]. It has also been defined as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution[8]. Arbitration has developed as the preferred mode of management of disputes especially those that are transnational in nature[9]. This is due to the fact that it has a transnational applicability and guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems[10]. It also guarantees enforcement of decisions through the *New York Convention* which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration[11].

It has been pointed out that arbitration in Africa enjoys a thriving present and a promising future[12]. Africa boasts well established, leading international arbitration institutions which offer specialised arbitral services for a full range of international disputes[13]. These institutions are playing an important role in developing regional centres, which will be key to meeting the growing need for dispute resolution services on the continent[14]. Further, arbitration among other ADR mechanisms have been practiced in Africa for many centuries which sets the foundation for these processes to thrive in the continent[15].

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[7] World Intellectual Property Organization., 'What is Arbitration' Available at *https://www.wipo.int/amc/en/arbitration/what-is-arb.html* (Accessed on 11/10/2023)

[8] Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

[9] Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIALARBITRATION-IN-AFRICA.pdf* (Accessed on 11/10/2023)

[10] Moses, 'The Principles and Practice of International Commercial Arbitration' 2 nd Edition, 2017, Cambridge University Press

[11] United Nations Commission on International Trade Law., '*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.' (New York, 1958)

[12] Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at *https://hsfnotes.com/africa/2022/11/25/2022-soas-arbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/* (Accessed on 11/10/2023)

[13] Ibid

[14] Ibid

[15] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

Despite the efficacy of ADR mechanisms including arbitration in enhancing access to justice, it has been argued that there is need for regulations, rules and best practices to ensure that ADR is practiced appropriately towards attaining the ideal of Appropriate Dispute Resolution[16]. Further, it has been pointed out that regulation of ADR through a code of conduct, ethics and etiquette will protect users of the various mechanisms from professional malpractices that may be perpetuated by practitioners[17].

The paper critically discusses the role of ethics in arbitration. It argues that ethics play a fundamental role in enhancing the viability of arbitration as a dispute management mechanism. The paper explores some of the ethical concerns in arbitration in Africa. It also suggests measures towards strengthening ethical practice in arbitration in Africa.

2.0 The Role of Ethics in Arbitration

Due to the finality and binding nature of arbitral awards, which are often significantly shielded from judicial review, it has been argued that transparency and trust in the conduct of the arbitration proceedings are necessary to ensure the legitimacy of the process and the awards rendered[18]. The parties must have confidence that the Arbitrator has the necessary experience, is impartial, independent, possesses the relevant qualifications, is fair-minded and will be able to effectively dispense justice in awarding a fair and just award[19]. As a result, it has been observed that the quality and success of an arbitration is as good as the quality of the arbitrators involved in it[20]. The quality and credibility of an arbitrator are therefore vital for the success of the arbitration proceedings. The fundamental principles in arbitration that are vital in ensuring the success of arbitration proceedings include the impartiality, *ethics* and independence of arbitrators during the arbitral process[21].

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[16] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb. L.J.* 979-990 (2001)

[17] Ibid

[18] Rajoo. D., 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations.' *Contemporary Asia Arbitration Journal, Vol. 6, No. 2,* pp 329-347 (2013)

[19] Ibid

[20] Ibid

[21] Ibid

The practice of arbitration raises several ethical concerns ranging from the particular ethical behavioral choices made by the actors inside an arbitration, including the arbitrators, lawyers (or other representatives), parties, and witnesses, to the institutions who choose, administer, and promote arbitration and courts[22]. In addition to such behavioral choices, there are ethical issues relating to how arbitral choices and decisions are made when compared to other available methods of managing disputes such as litigation[23]. Further, the choice of arbitration and conduct of arbitral proceedings could result in several ethical concerns[24].

It has been argued that ethical requirements in arbitration including independence, confidentiality, competence, the rules on conflict of interests and costs and fees are aimed at maintaining the integrity and ensuring the success of arbitration proceedings[25]. The ethical requirement of independence ensures that an arbitrator is able to arrive at decisions independently basing the conclusions on reality and objectivity[26]. Confidentiality allows parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute without concerns of such information leaking to third parties[27]. The rules on conflict of interest in arbitration and other ADR processes are aimed at ensuring impartiality and preventing bias in management of disputes which could arise due to involvement by the arbitrator with the subject matter of the dispute or relationship between the arbitrator and either of the participants in the proceedings[28]. This is in line with

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[22] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not.' *University of Miami Law Review*, Volume 56, N0. 4 (2002)

[23] Ibid

[24] Ibid

[25] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at *http://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf* (Accessed on 11/10/2023)

[26] Harding. K., 'Arbitration - The Role of Ethics and its Nature.' Available at *https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/64.3/AMDM1998013* (Accessed on 11/10/2023)

[27] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

[28] Ibid

the principles of natural justice and the right to a fair hearing[29]. Competence as an ethical issue is also vital for successful outcomes in arbitration. It ensures that arbitrators have the requisite expertise and qualifications require to sufficiently discharge their duties[30]. This is necessary in arbitration since it guarantees that arbitrators will follow due process, conduct proceedings in compliance with rules of evidence and write sound and reasoned awards[31]. The rules on costs and fees are designed to foster appropriateness and reasonableness of fees charged by arbitrators[32].

Ethics therefore play a paramount role in arbitration. Due to this fact, there is need for arbitrators, counsel and parties to be aware of how ethics affect arbitral proceedings and, consequently, their rights and obligations in those proceedings[33]. Ethics in arbitration give confidence to parties that the process will meet their expectations for fairness, transparency, cost effectiveness and finality in managing disputes[34]. Complying with ethics can also guard arbitrators from proceedings concerning professional misconduct by providing a standard by which the arbitrator's performance can be measured and judged in the event of a complaint being made[35]. It is therefore imperative to strengthen ethics in arbitration.

3.0 Strengthening Ethics in Arbitration in Africa: Progress and Challenges

There has been progress towards strengthening ethics in arbitration as envisaged by several codes and institutional rules on ethics. The International Bar Association (IBA) has formulated guidelines on conflicts of interest in international arbitration[36]. The guidelines apply to international commercial

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[29] Ibid

[30] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

[31] Ibid

[32] Ibid

[33] Rogers. C., 'The Ethics of International Arbitrators.' Available at *https://www.international-arbitration-attorney.com/wp-content/uploads/International-Arbitration-Doctrine-49international_arbitration.pdf* (Accessed on 11/10/2023)

[34] Ibid

[35] Ibid

[36] International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Available at

arbitration and international investment arbitration and are designed to assist parties, practitioners, arbitrators, institutions and courts in dealing with the fundamental ethical concerns of impartiality and independence[37]. Among the fundamental principles encapsulated in the guidelines is impartiality and independence[38]. According to the guidelines, every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated[39]. The guidelines further seek to address the ethical concern of conflict of interest. They require an arbitrator to decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent[40]. According to the guidelines, the rules on conflict of interest are aimed at fostering confidence in the arbitral process[41]. The IBA guidelines also envisage the ethical duty of disclosure. They require an arbitrator to disclose any facts or circumstances that may, in the eyes of the parties, give rise to doubts as to his or her impartiality or independence prior to accepting appointment or a soon as the arbitrator becomes aware of such facts or circumstances[42].

The IBA guidelines also govern parties to an arbitration and require them to disclose any relationship, direct or indirect, with the arbitrator[43]. Disclosure of such relationships is aimed at reducing the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment[44]. The IBA guidelines are important in strengthening ethics in arbitration by providing specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts

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https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (Accessed on 12/10/2023)

[37] Ibid

[38] Ibid, Part 1

[39] Ibid

[40] Ibid

[41] Ibid

[42] Ibid

[43] International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Op Cit

[44] Ibid

of interest, or should or should not be disclosed[45]. The IBA guidelines represent an attempt to formulate a code of ethics in arbitration at the international level. The guidelines have gained wide acceptance within the international arbitration community[46].

At the Institutional level, the *Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members*[47] sets out professional and moral principles to govern the conduct of members of the Chartered Institute of Arbitrators while discharging their mandate. The Code requires members to maintain integrity and fairness while managing disputes and withdraw from acting if they can longer fulfill this obligation[48]. The Code further requires members to disclose all interests, relationships and matters likely to affect their independence and impartiality before and throughout the arbitration process[49]. It also requires members to be competent and only accept appointments to manage disputes only when they are appropriately qualified or experienced[50]. In addition, the Code requires arbitrators to ensure that parties are adequately informed of all the procedural aspects of the arbitration process[51]. It further requires members to maintain trust and confidence of the dispute resolution process[52]. The Code is therefore an important source of professional conduct, ethics, integrity and etiquette for members of the Chartered Institute of Arbitrators. It governs ethical issues in arbitration including integrity, fairness, conflict of interest, competence, trust and confidence.

The London Court of International Arbitration (LCIA) has also made progress towards strengthening ethics in arbitration vide its arbitration rules which

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[45] Ibid
[46] Ibid
[47] Chartered Institute of Arbitrators., 'Code of Professional and Ethical Conduct for Members.' Available at *https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-for-members.pdf* (Accessed on 11/10/2023)
[48] Ibid, Rule 2
[49] Ibid, Rule 3
[50] Ibid, Rule 4
[51] Ibid, Rule 5
[52] Ibid, Rule 8

contain general guidelines for the parties' legal representatives[53]. This has been described as the first attempt to set out an ethical framework for regulating the conduct of counsel in international arbitration at an institutional level[54]. The guidelines define the standards of ethical conduct expected of counsel appearing before the LCIA or its tribunal[55]. The guidelines prohibit legal representatives from engaging in certain conduct including activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, knowingly making any false statement to the arbitral tribunal or the LCIA Court, knowingly procuring or assisting in the preparation of or relying upon any false evidence, knowingly concealing or assisting in the concealment of any document (or any part thereof) which is ordered to be produced by the arbitral tribunal, and deliberately initiating or attempting to initiate any unilateral contact with a member of the arbitration tribunal in relation to the arbitration proceedings[56]. These guidelines are binding upon the parties' legal representatives pursuant to article 18.5 of the LCIA rules[57]. They are aimed at promoting good and ethical conduct for parties' legal representatives appearing before the LCIA.

Further, arbitral institutions in Africa have made progress towards strengthening ethics in arbitration by formulating rules and guidelines to govern ethical conduct in arbitration proceedings. The Nairobi Centre for International Arbitration (NCIA) has developed a code of conduct for arbitrators[58]. The Code requires an arbitrator, when approached with an appointment, to conduct reasonable enquiries with regard to potential conflict of interest that may arise from his or her appointment for that particular matter

[53] London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Available at *https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx* (Accessed on 11/10/2023)
[54] Dattilo. V., 'Ethics in International Arbitration: A Critical Examination of the LCIA General Guidelines for the Parties' Legal Representatives.' Available at *https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2369&context=gjicl* (Accessed on 11/10/2023)
[55] Ibid
[56] London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Op Cit
[57] Ibid, article 18.5
[58] Nairobi Centre for International Arbitration., 'Code of Conduct for Arbitrators, 2021.' Available at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf (Accessed on 12/10/2023)

that may affect impartiality and independence[59]. It requires an arbitrator to accept appointment only where certain requirements have been met. This is where an arbitrator is fully satisfied that he is independent of the parties at the time of the appointment, and is able to remain so until final award has been rendered, able to discharge his duties without bias, has adequate knowledge of the language of the proceedings, has adequate experience and ability for the case at hand, and is able to give to the proceedings the time and attention which parties are reasonably entitled to expect[60].

The Code also requires arbitrators to conduct proceedings with integrity and fairness[61]. Arbitrators are also required to disclose any interest or relationship that affects impartiality or creates an unfavorable appearance of partiality or bias[62]. The Code is also aimed at fostering appropriateness in communication between the tribunal and parties[63]. It forbids an arbitrator from discussing the case with any party in the absence of the other party[64]. The Code also safeguards the ethical requirements of honesty, trust and confidentiality and requires arbitrators to keep confidential all matters relating to the proceedings[65]. Further, it requires arbitrators to make their decisions in a just, independent and deliberate manner[66]. The Code also aims at strengthening ethics in terms of fees charged by arbitrators and requires them to adopt and adhere to the NCIA Schedule of Fees[67]. The NCIA Code of Conduct for Arbitrators is therefore vital in strengthening ethics in arbitration. It requires arbitrators to observe fundamental standards of ethical conduct[68].

The Arbitration Foundation of Southern Africa has also designed a Code of Conduct that stipulates ethical principles and standards to govern

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[59] Ibid, Principle 1
[60] Ibid
[61] Ibid, Principle 2
[62] Ibid, Principle 3
[63] Ibid, Principle 4
[64] Ibid
[65] Ibid, Principle 5
[66] Ibid, Principle 6
[67] Ibid, Principle 8
[68] Nairobi Centre for International Arbitration., 'Code of Conduct for Arbitrators, 2021.' Op Cit

arbitrators[69]. The Code requires an arbitrator to always discharge his or her duties in such manner as to ensure a fair administration of justice between the parties[70]. Further, it requires an arbitrator to only accept appointment where the arbitrator is satisfied that he or she can act impartially and independently in that matter and disclose any matter that impair the ability to act independently and impartially[71]. The Code also stipulates the ethical duty of an arbitrator to act diligently and efficiently, and always with due courtesy to the parties and their witnesses[72]. Further, it enshrines the duty of confidentiality and requires the arbitrator to ensure that the proceedings remain confidential unless the parties agree otherwise[73]. The Code also envisages the ethical duty of an arbitrator to ensure efficient management of disputes and requires an arbitrator to devote sufficient time and proper attention to the matter and employ procedures which avoid unnecessary cost or delay and which promote the efficient management of disputes[74].

The Kigali International Arbitration Centre vide its arbitration rules also aims at strengthening ethical practice in arbitration[75]. The rules require an arbitrator to be and remain at all times independent and impartial and not act as the advocate of the parties[76]. The rules further require the Centre, in confirming or appointing arbitrators, to have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such consideration as are likely to secure an impartial and independent arbitrator[77]. They also require the Centre to consider whether the arbitrator has sufficient availability and ability to determine the case in a prompt and efficient manner appropriate to

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[69] Arbitration Foundation of Southern Africa., 'Code of Conduct.' Available at https://arbitration.co.za/domestic-arbitration/code-of-conduct/ (Accessed on 12/10/2023)
[70] Ibid
[71] Ibid
[72] Ibid
[73] Ibid
[74] Ibid
[75] Kigali International Arbitration Centre., 'Arbitration Rules, 2012.' Available at https://kiac.org.rw/wp-content/uploads/2023/06/KIAC-arbitration-rules.pdf (Accessed on 12/10/2023)
[76] Ibid, article 16
[77] Ibid

the nature of arbitration[78]. Before appointment or confirmation, a prospective arbitrator is required to sign a statement of acceptance, availability, impartiality and independence[79]. The arbitrator is also required to disclose to the Centre any facts or circumstances that may give rise to justifiable doubts as to his or her impartiality[80]. Where these ethical requirements have not been met, the rules allow parties to challenge the appointment of an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed[81].

It is therefore evident that progress has been made towards embracing ethics in arbitration in Africa. However, several ethical problems are still being witnessed in arbitration practice in Africa. There have been instances where the ethical duty of confidentiality has been breached resulting in information pertaining arbitration proceedings being leaked to third parties thus affecting the integrity of proceedings[82]. There have also been cases where the competence of some arbitrators has been questioned resulting in challenges against arbitral awards and setting aside of such awards in some instances[83]. Indeed, most arbitral laws in Africa including the Arbitration Act of Kenya allows an award to be challenged in cases where such an award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration[84]. In addition, there have been cases where arbitrators have been accused of bias and favoritism towards some parties in the conduct of arbitral proceedings and the final outcome in the arbitral award[85]. Another pertinent

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[78] Ibid

[79] Ibid

[80] Ibid

[81] Ibid

[82] Nairobi Centre for International Arbitration., 'Confidentiality in Arbitration: Evaluating Legal and Ethical Dilemmas.' Available at https://ncia.or.ke/wp-content/uploads/2022/10/Confidentiality-in-Arbitration-Evaluating-Legal-and-Ethical-Dilemmas-1.pdf (Accessed on 12/10/2023)

[83] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

[84] Arbitration Act, No.4 of 1995, S 35 (2) (iv)

[85] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

ethical problem has been in relation to arbitral costs and fees. In some instances, arbitrators have been accused of charging exorbitant fees thus defeating one of the key purposes of arbitration which is fostering cost effective management of disputes[86]. There is need to address these challenges by strengthening ethics in arbitration in Africa.

4.0 Way Forward

There is need to Africanize conflict management processes in order to fully capture the values and ethics inherent in African societies[87]. The process of conflict management is largely influenced by culture[88]. African societies have since time immemorial ascribed to values aimed at promoting social cohesion[89]. Such values include peaceful coexistence, harmony, truth, honesty, unity, cooperation, forgiveness and respect[90]. Conflicts in African societies were thus viewed as a threat to peaceful coexistence and harmony[91]. African societies thus adopted conflict management strategies that were aimed at amicable management of conflicts in order to preserve the social fabric which tied such communities together[92]. These included informal negotiation, mediation, reconciliation and arbitration that were administered by institutions such as the council of elders[93]. Conflict management processes in African societies therefore adhered to the values and ethics that were held

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[86] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[87] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at http://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf (Accessed on 12/10/2023)

[88] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

[89] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa* , Volume 17, No.1, 2015

[90] Ibid

[91] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

[92] Ibid

[93] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallenges-and-opportunities-1.pdf (Accessed on 12/10/2023)

sacrosanct including honesty, truth, peace, unity, harmony, integrity, cooperation, respect and forgiveness[94]. It is therefore vital to Africanize conflict management and embrace Africa-focused arbitration in order to fully capture the values and ethics inherent in African societies[95]. Africa-focused arbitration especially in the context of international arbitration has the ability to acknowledge the current socio-economic concerns in the continent and foster management of disputes in manner that takes into account local circumstances, values and ethics[96].

It is also vital to enforce ethical standards and conduct among arbitrators. Ethical codes and standards formulated by various arbitral institutions have been criticized as being merely soft law norms which lack enforcement[97]. It is therefore important to ensure that such codes and standards are enforced in order to strengthen ethics in arbitration. It has been pointed out that the primary regulators of arbitral conduct and ethics are the appointing institutions and parties through challenge procedures[98].

Further, arbitrators, counsel and parties should be encouraged and advised to adhere to the rules of conduct, ethics, integrity and etiquette while discharging their mandate[99]. Arbitrators should be encouraged to act with impartiality and integrity in management of disputes and avoid conflict of interest in order to promote the right to a fair hearing[100]. They should also only accept appointments in situations where they are competent to manage the dispute in question and charge fees according to the scale and schedules stipulated by

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[94] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit
[95] Suedi. A., 'The need for "Africa-focused" Arbitration and Reform of Tanzania's Arbitration Act.' Available at https://www.iisd.org/itn/en/2020/10/05/the-need-for-africa-focused-arbitration-and-reform-of-tanzanias-arbitration-act-amne-suedi/ (Accessed on 12/10/2023)
[96] Ibid
[97] Hacking. L., & Berry. S., 'Ethics in Arbitration: Party and Arbitral Misconduct.' Available at https://www.lordhacking.com/Documentation/Hacking%20&%20Berry%20-%20Ethics%20in%20Arbitration%20April%202016.pdf (Accessed on 12/10/2023)
[98] Ibid
[99] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit
[100] Ibid

respective institutions in case of institutional arbitration and reasonably in case of ad hoc arbitration[101]. Counsel appearing before arbitral tribunals should also embrace ethical conduct by refraining from activities including acts intended to unfairly obstruct the arbitration or to jeopardise the finality of any award, knowingly making any false statement to the arbitral tribunal, knowingly procuring or assisting in the preparation of or relying upon any false evidence, knowingly concealing or assisting in the concealment of any document (or any part thereof) which is ordered to be produced by the arbitral tribunal, and deliberately initiating or attempting to initiate any unilateral contact with a member of the arbitration tribunal in relation to the arbitration proceedings[102]. Parties' also have a duty to foster ethics in arbitration by acting in a courteous and respectful manner towards each other and the arbitral tribunal, disclosing all material facts to aid the tribunal in arriving at a just determination and avoiding making unilateral contact with the tribunal or influencing the tribunal in order to get a favourable outcome[103]. These measures are essential in strengthening ethics in arbitration.

There is also need foster competence by promoting standards and accreditation for arbitrators. It has been argued that this approach will enhance accountability, efficiency and competence of arbitrators and promote public confidence in arbitration[104]. Arbitral institutions in Africa should therefore continue enhancing training, licencing and accreditation of arbitrators in accordance with universally accepted standards while also bearing in mind local circumstances and needs[105]. This will be an important step in strengthening ethics in arbitration in Africa since it will ensure the availability of competent arbitrators who will be expected to adhere to the rules of conduct and ethics stipulated by the respective arbitral institutions.

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[101] Ibid

[102] London Court of International Arbitration., 'LCIA Arbitration Rules 2020.' Op Cit

[103] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

[104] Aloo, L.O. & Wesonga, E.K., 'What is there to Hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010,' *Alternative Dispute Resolution,* Vol. 3, No. 2 (Chartered Institute of Arbitration-Kenya, 2015).

[105] Ibid

Finally, there is need to enhance access to justice in Africa through ADR mechanisms including arbitration. The advantages of ADR mechanisms such as party autonomy, privacy, confidentiality, and the ability to foster expeditious and cost effective management of disputes makes them viable mechanisms for management of disputes compared to other processes such as litigation[106]. It has been pointed out that ADR mechanisms such as arbitration are enjoying a thriving present and a promising future in Africa[107]. It is therefore vital to encourage the uptake of ADR mechanisms such as arbitration and continue refining them by addressing ethical concerns among other underlying issues in order to enhance their suitability as 'Appropriate' Dispute Resolution mechanisms[108].

These measures among others are needed in order to strengthen ethics in arbitration in Africa.

5.0 Conclusion

Ethical requirements in arbitration including independence, confidentiality, competence, the rules on conflict of interests and costs and fees are aimed at maintaining the integrity and ensuring the success of arbitration proceedings[109]. Ethics in arbitration give confidence to parties that the process will meet their expectations for fairness, transparency, cost effectiveness and finality in managing disputes[110]. There has been progress towards strengthening ethics in arbitration as envisaged by several codes and institutional rules on ethics. However, several ethical issues are still prevalent in arbitral practice in Africa especially those related to confidentiality, conflict of interest, competence, bias and costs and fees[111]. It is imperative to address these challenges in order to strengthen ethics in arbitration in Africa. This can be achieved by Africanizing conflict management and embracing Africa-

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[106] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[107] Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit
[108] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit
[109] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit
[110] Rogers. C., 'The Ethics of International Arbitrators.' Op Cit
[111] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

focused arbitration[112]; enforcing ethical standards and conduct among arbitrators; encouraging arbitrators, counsel and parties to adhere to the rules of conduct and ethics; fostering competence by promoting standards and accreditation for arbitrators; and enhancing access to justice in Africa through ADR mechanisms including arbitration[113]. Strengthening ethics in arbitration in Africa is a desirable outcome that must be pursued.

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[112] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit
[113] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

Upholding Ethics, Integrity and Best Practice in Mediation

Abstract

Alternative Dispute Resolution (ADR) mechanisms are growing in Africa. These mechanisms are increasingly being embraced in management of disputes and are now being viewed as 'Appropriate' and not 'Alternative' in management of disputes. As ADR mechanisms including mediation continue to grow, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. The paper critically discusses the need for standardization of mediation practice in Kenya by adopting best practices. It examines some of the challenges facing mediation practice in Kenya. It is also explores measures adopted towards fostering best practices in mediation at both the global and national level. The paper further suggests recommendations aimed at upholding ethics, integrity and best practice in mediation.

1.0 Introduction

Mediation is one of the mechanisms classified under Alternative Dispute Resolution (ADR)[1]. The concept of ADR entails a set mechanisms for that are applied in managing disputes that may be linked to but function outside formal court litigation processes[2]. ADR has also been defined a set of processes that are applied to manage disputes without resort to adversarial litigation[3]. It encompasses various processes including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[4].

ADR mechanisms are recognized at the global level under the *Charter of the United Nations* which states that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[5]. Further, in Kenya, ADR mechanisms are

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[1] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

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

[3] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[4] Ibid

[5] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33 (1)

recognized under the Constitution which mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[6]. ADR mechanisms are viewed as ideal in enhancing access to justice due to their attributes which include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes[7].

Mediation as an ADR process has been defined as method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information, and thus aiding in the process of reaching an agreement[8]. It has been observed that mediation is a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock[9]. Parties therefore involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock[10]. It has been asserted that a mediator does not have the power to impose a resolution, but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own agreement[11].

Mediation has certain advantages which makes the process viable in managing disputes. Its key features towards this end include informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and cost effective management of disputes[12]. It has also the ability to preserve relationships due to its potential to address the root causes of the conflict thus negating the need for future conflict or conflict

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[6] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

[7] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-inKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf* (Accessed on 17/10/2023)

[8] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

[9] Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

[10] Ibid

[11] Ibid

[12] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

management[13]. Mediation alongside other ADR mechanisms have been practiced in Africa for many centuries[14]. These mechanisms were considered as 'Appropriate' and not 'Alternative' in management of disputes in Africa since they were able to safeguard values that were inherent in African societies and foster reconciliation, peace and social cohesion[15].

It has correctly observed that mediation alongside other ADR mechanisms are growing in Africa due to the general acceptance across the board of ADR processes as ideal in dispute management and adoption of measures such as Court Annexed Mediation in Kenya[16]. Consequently, as ADR mechanisms including mediation continue to grows, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. The paper critically discusses the need for standardization of mediation practice in Kenya by adopting best practices. It examines some of the challenges facing mediation practice in Kenya. It is also explores measures adopted towards fostering best practices in mediation at both the global and national level. The paper further suggests recommendations aimed at upholding ethics, integrity and best practice in mediation.

2.0 Ethics, Integrity and Best Practices in Mediation

Ethics, integrity and best practices are fundamental in mediation. They serve various functions such as guiding the conduct of mediators, informing parties to the mediation process about the standards they should expect during the process and promoting public confidence in mediation as a conflict

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[13] Ibid

[14] Ibid

[15] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at *https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf* (Accessed on 17/10/2023)

[16] The World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans.' Available at *https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans* (Accessed on 17/10/2023)

management process[17]. Various standards have been developed towards enhancing ethics, integrity and best practices in mediation.

2.1 Impartiality

Impartiality in mediation requires a mediator to refrain from exhibiting favoritism or prejudice towards any party or any position taken by a party in mediation[18]. A mediator is expected to remain impartial throughout the course of the mediation[19]. Further, impartiality requires a mediator to be aware of and avoid the potential for bias based on circumstances such as the parties' backgrounds, personal attributes, or conduct during the session, or based on any pre-existing knowledge of or opinion about the merits of the dispute being mediated[20]. In the event that a mediator is unable to conduct the mediation process in an impartial manner, he or she is expected to withdraw from conducting the mediation[21].

2.2 Conflict of Interest

A mediator is expected to avoid any conflict of interest during the conduct of the mediation. Conflict of interest in mediation may arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any party to the mediation, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality[22]. In order to avoid such situations, a mediator is expected to disclose all actual and potential conflicts of interest known to him or her[23]. Further, the mediator is expected to disclose instances of conflict of interest that may arise during the course of the mediation[24]. The rules on conflict of

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[17] Law Council of Australia., 'Ethical Guidelines for Mediators.' Available at https://lawcouncil.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical (Accessed on 18/10/2023)
[18] JAMS Mediation Services., 'Mediators Ethics Guidelines.' Available at https://www.jamsadr.com/mediators-ethics/ (Accessed on 18/10/2023)
[19] Ibid
[20] Ibid
[21] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit
[22] McCorkkle. S., 'The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct.' 23 *Conflict Resol*. Q. 165 (2005-2006)
[23] Ibid
[24] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

interest are aimed at preventing bias in mediation and fostering fairness and integrity of the mediation process[25].

2.3 Competence

Competence requires a mediator to know the limits of his or her ability; to avoid taking on disputes that he or she is not equipped to handle; and to communicate candidly with the parties about his or her background and professional experience[26]. Competence in mediation comprises of appropriate knowledge and skills which would normally be acquired through training, education, and experience[27]. It has been asserted that a person who agrees to act as a mediator holds out to the parties an appropriate level of expertise and competence to mediate effectively[28]. As a result, a mediator is expected to avoid taking disputes in cases where such a mediator is not competent and withdraw from acting in cases where he or she can longer competently manage the dispute[29]. Competence is vital in ensuring the integrity and appropriateness of the mediation process.

2.4 Privacy and Confidentiality

Privacy and confidentiality are among the key attributes of mediation[30]. These features require mediators to safeguard the privacy of the mediation process by refraining from disclosing any matter that arose during the mediation including information about how the parties acted in the mediation process, the merits of the case, any settlement offers or agreed outcomes unless the parties agree otherwise[31]. Privacy and confidentiality are central to mediation since they allow parties to freely engage in candid, informal discussions of their interests towards reaching the best possible resolution of their dispute

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[25] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at *https://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf* (Accessed on 18/10/2023)

[26] Hoffman. D., 'Ten Principles of Mediation Ethics.' Available at https://blc.law/wp-content/uploads/2016/12/2005-07-mediation-ethics-branchmainlanguagedefault.pdf (Accessed on 18/10/2023)

[27] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

[28] Ibid

[29] Ibid

[30] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

[31] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

without concerns of such information leaking to third parties[32]. Mediators therefore have a duty to maintain privacy and confidentiality and not disclose any information to third parties unless in situations where such disclosure is allowed[33]. Privacy and confidentiality are cardinal in upholding ethics, integrity and best practice in mediation.

2.5 Quality of the Mediation Process

A mediator has an ethical duty to safeguard the quality of the mediation. He or she should ensure that the mediation proceedings are conducted in a satisfactory manner by encouraging mutually respectful behaviour among the parties[34]. A mediator should further be diligent and ensure procedural fairness in order to foster the quality of the mediation[35]. In addition, the mediator should discourage conduct by the parties which may undermine the quality of the mediation proceedings and terminate such proceedings where the parties' conduct undermine the quality of the mediation[36].

2.6 Costs and Fees

Mediators have an ethical duty to ensure full and fair disclosure of any costs and fees that the parties will incur during the mediation[37]. In order to ensure integrity and best practice in regards to fees, a mediator is required to obtain an agreement from the parties about the fees and charges payable for the mediation and about how those fees and charges are to be apportioned between them[38]. Further, a mediator should not charge fees based on the outcome of a mediation or calculated in a way that could influence the manner in which the mediator conducts the mediation[39]. A mediator is therefore

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[32] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' *University of Miami Law Review*, Volume 56, No.4
[33] Ibid
[34] Fullerton. R., 'The Ethics of Mediation-Arbitration.' Available at https://www.richardfullerton.com/ethics_article.pdf (Accessed on 18/10/2023)
[35] Ibid
[36] Ibid
[37] Hoffman. D., 'Ten Principles of Mediation Ethics.' Op Cit
[38] Mediation Training Institute, East Africa., 'Charging for Mediation.' Available at https://mtieastafrica.org/mediation-centre/charges-for-services/ (Accessed on 18/10/2023)
[39] Ibid

expected to ensure appropriateness and reasonableness of fees in order to uphold the integrity of the mediation[40].

2.7 Termination of Mediation

In order to uphold integrity and best practice in mediation, a mediator has an ethical duty to terminate the mediation proceedings in cases where a party is abusing the process or where there is no reasonable prospect for a resolution[41]. A mediator may also terminate mediation proceedings if he or she is of the view that a resolution is being reached that to the mediator appears unenforceable or illegal having regard to the circumstances of the dispute and the competence of the mediator for making such an assessment[42]. Termination of mediation proceedings is a key measure towards upholding ethics, integrity and best practice in mediation by preventing abuse of the mediation process and outcomes that may be illegal or unenforceable[43].

3.0 Enforcing Ethics, Integrity and Best Practices in Mediation

There has been progress towards enforcing the foregoing standards on ethics, integrity and best practices in mediation as set out in various laws, codes and institutional rules on mediation. The United Nations Commission on International Trade Law (UNCITRAL) envisages the use of mediation in management if disputes arising in the context of international commercial relations and has formulated mediation rules towards this end[44]. The *UNCITRAL Mediation Rules* contain salient provisions geared towards upholding ethics, integrity and best practice in mediation[45]. They stipulate appointment of a mediator with relevant professional expertise and qualifications and ability to conduct the mediation[46]. They also envisage the appointment of an independent and impartial mediator[47]. The rules also

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[40] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[41] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

[42] Ibid

[43] Ibid

[44] United Nations Commission on International Trade Law Mediation Rules, 2021., Available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf* (Accessed on 18/10/2023)

[45] Ibid

[46] Ibid, Article 3 (4) (a)

[47] Ibid, Article 3 (4) (d)

require a mediator to maintain fair treatment of the parties while conducting mediation proceedings[48]. Further, the rules require all parties to the mediation to maintain confidentiality in relation to all information relating to the mediation, including, if relevant, the settlement agreement unless otherwise agreed by the parties or where disclosure is required by the law[49].

Upholding ethics, integrity and best practice in mediation is also a fundamental requirement under the United Nations Convention on International Settlement Agreements Resulting from Mediation (*Singapore Convention*)[50]. The Convention provides the legal framework for enforcement of international settlement agreements resulting from mediation across jurisdictions[51]. The Convention sets out several grounds that may warrant refusal to grant relief in terms of enforcing an international settlement agreement resulting from mediation[52]. Such grounds include where there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement[53]. In addition, this may arise where there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's *impartiality* or *independence* and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement[54]. It is therefore important to uphold ethics, integrity and best practice in mediation in order to ensure enforcement of international settlement agreements resulting from mediation under the Singapore Convention.

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[48] Ibid, Article 4 (2)

[49] Ibid, Article 6

[50] United Nations General Assembly., 'United Nations Convention on International Settlement Agreements Resulting from Mediation.' A/73/496., Available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (Accessed on 18/10/2023)

[51] Ibid

[52] Ibid, Article 5

[53] Ibid, Article 5 (1) (e)

[54] Ibid, Article 5 (1) (f)

The *International Chamber of Commerce (ICC) Mediation Rules*[55] also give prominence to ethics, integrity and best practice in mediation. The rules require a prospective mediator to sign a statement of acceptance, availability, impartiality and independence before appointment or confirmation[56]. A prospective mediator is also required to disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the mediator's impartiality[57]. These provisions are aimed at upholding the ethical standards of independence and impartiality in mediation. Further, in order to uphold competence, the rules require the Centre to consider the attributes of the prospective mediator including skills, training, qualifications, experience and the ability to conduct the mediation when confirming or appointing a mediator[58]. The rules also require the mediator to treat parties with fairness and impartiality while conducting the mediation[59]. In addition, the rules require each party to act in good faith throughout the mediation in order to uphold ethics, integrity and best practice[60]. The ICC mediation rules also uphold the ethical duty of confidentiality and require the proceedings and any settlement agreement to be kept private and confidential and not be disclosed unless by an agreement of the parties or where disclosure is required by applicable law[61].

The *London Court of International Arbitration (LCIA) Mediation Rules*[62] also seek to uphold ethics, integrity and best practice in mediation. In order to uphold competence, the rules require a prospective mediator to disclose his or her

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[55] International Chamber of Commerce., 'Mediation Rules, in force as from 1st January 2014.' Available at *https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf* (Accessed on 18/10/2023)

[56] Ibid, Article 5 (3)

[57] Ibid

[58] Ibid, Article 5 (4)

[59] Ibid, Article 7 (3)

[60] Ibid, Article 7 (4)

[61] Ibid, Article 9

[62] The London Court of International Arbitration., Mediation Rules effective 1st October 2020., Available at https://www.lcia.org/Dispute_Resolution_Services/lcia_mediation_rules_2020.aspx (Accessed on 18/10/2023)

qualifications and past and present professional positions[63]. A prospective mediator is also required to disclose any circumstances that may give rise to any justifiable doubts as to his or her impartiality or independence[64]. In addition, the rules require all parties to a mediation to uphold confidentiality and privacy[65]. This is to be achieved by ensuring that all mediation sessions are private and are only attended by the mediators, the parties, parties' representatives and witnesses[66]. Further, disclosure of any information regarding the mediation, any settlement terms or the outcome of the mediation is precluded unless agreed by the parties or required by law[67].

The *Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators[68]*, also sets out fundamental ethical guidelines and best practices for persons appointed to mediate disputes under the *NCIA Mediation Rules[69]*. Among the fundamental ethical requirements under the NCIA Code of Conduct for Mediators is independence and impartiality[70]. Before accepting an appointment to act, a prospective mediator is required to disclose anything within his or her knowledge that may materially affect the mediator's impartiality[71]. The Code of conduct further requires a mediator to avoid conflict of interest or the appearance of a conflict of interest during and after mediation[72]. Conflict of interest in mediation may arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and either of the participants in the mediation process[73]. The Code further requires a mediator to ensure that he or she has requisite

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[63] Ibid, Article 4.1

[64] Ibid

[65] Ibid, Article 12

[66] Ibid, Article 12.1

[67] Ibid, Article 12.3

[68] Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, available at *https://ncia.or.ke/wp-content/uploads/2021/07/5.-NCIA-CODE-OF-CONDUCT-FOR-MEDIATORS2021.pdf* (Accessed on 18/10/2023)

[69] Nairobi Centre for International Arbitration (NCIA)., Mediation Rules, 2015., Available at *https://ncia.or.ke/wp-content/uploads/2021/02/mediation_rules_2016.pdf* (Accessed on 18/10/2023)

[70] Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, Op Cit

[71] Ibid

[72] Ibid

[73] Ibid

competence required to mediate effectively before accepting appointment[74]. Such competence in mediation can be acquired through education, training, experience and cultural understandings[75]. In addition, the Code requires mediators to promote confidentiality, quality and fairness while conducting the mediation[76].

Upholding ethics, integrity and best practice is also envisaged under the *Kigali International Arbitration Centre Mediation Rules*[77]. The rules require every prospective mediator to disclose any facts or circumstances which might affect or call into question his or her impartiality, independence or may be perceived to create a conflict of interest[78]. Disclosure is also expected if such facts or circumstances arise in the course of the mediation[79]. Further, under the rules, a mediator is expected to conduct the process with fairness to all parties and ensure that all parties have adequate opportunities to be heard[80]. In addition, in order to ensure integrity and best practice in mediation, the rules require a mediator to terminate the process if the mediator determines that a settlement cannot be reached[81]. Another fundamental ethical requirement under the rules is confidentiality. The rules require every person involved in the mediation, including the parties, the mediator, and the Centre, to keep confidential all documents, information and materials as well as all terms of any settlement in connection with the mediation unless the parties expressly agree in writing or where disclosure is required under law[82].

It is thus evident that there has been progress towards upholding ethics, integrity and best practice in mediation. However, some ethical dilemmas are likely to arise in mediation. It has been asserted that the impartiality of mediators is often challenged by prior relationships with the parties or their

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[74] Ibid
[75] Ibid
[76] Ibid
[77] Kigali International Arbitration Centre., 'Mediation Rules, 2015.' *https://kiac.org.rw/wp-content/uploads/2023/06/Mediation-Rules.pd*f (Accessed on 19/10/2023)
[78] Ibid, Article 7
[79] Ibid
[80] Ibid, Article 8 (2)
[81] Ibid, Article 9 (1) (b)
[82] Ibid, Article 12 (1)

emotional reactions to the parties' behavior during mediation[83]. Further, mediators often face the ethical dilemma of maintaining confidentiality in cases of possible illegal actions of the parties or the potential of unfair settlement, or where disclosure will convince the party to accept a settlement proposal[84]. Further, since mediation is premised on voluntariness, ethical challenges may arise in cases of lack of consent due to coercion, mental disturbance or lack of information[85]. Further, it has been observed that most mediators are often torn in between impartiality and the temptation to give solutions or direct the process toward more fair solutions and the tension between staying neutral and providing necessary professional legal or therapeutic advice[86].

It has also been argued that ethical problems may arise where mediation is used by the parties to gain information, win time, or intimidate the other party[87]. Mediators also often face competence challenges since in certain cases the skills that the dispute demands go beyond the mediator's training and often involve interpreting psychological or emotional aspects of conflict[88]. In addition, in processes such as Court Annexed Mediation in Kenya, a mediator may face ethical concerns between the parties' interests for fair and efficient process and pressure from the court to finish the case in time[89]. Ethical problems may also arise in respect of costs and fees of mediation in instances where mediators charge exorbitant fees thus defeating the essence of

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[83] Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Available at *https://www.beyondintractability.org/bksum/bush-dilemmas* (Accessed on 19/10/2023)

[84] Ibid

[85] Burns. R., 'Some Ethical Issues Surrounding Mediation.' Available at *https://www.researchgate.net/publication/228187058_Some_Ethical_Issues_Surrounding_Mediation#:~:text=A%20progressively%20larger%20portion%20of,of%20mediation%20without%20much%20change*. (Accessed on 19/10/2023)

[86] Ibid

[87] Ibid

[88] Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf* (Accessed on 19/10/2023)

[89] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

mediation of facilitating cost effective management of disputes[90]. It is necessary to address these concerns in order to uphold ethics, integrity and best practice in mediation.

4.0 Way Forward

In order to uphold ethics, integrity and best practice in mediation, it is imperative to enhance training and standards among mediators. It has been asserted that training of mediators can help them recognize the existence and importance of ethical dilemmas in mediation and generate responses to them in specific situations[91]. In addition, training is vital in making mediators familiar with the standards of practice, with what are appropriate and inappropriate responses to ethical dilemmas[92]. It has further been asserted that there is a need for the mediators to continually engage in continuous professional development seminars to enable them appreciate the relevant skills that they must acquire in their journey to becoming effective mediators[93]. These skills include the ability to identify and address any psychological dimensions of the conflict in the mediation process[94]. Training is thus vital in enabling mediators uphold ethics, integrity and best practice in mediation.

Further, it vital for mediation service providers such as mediation centres and institutions to facilitate adherence to ethical standards, integrity and best practices in mediation[95]. Ethical codes and standards formulated by various ADR bodies including mediation centres and institutions have been criticized as being merely soft law norms which lack enforcement[96]. It is therefore

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[90] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[91] Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Op Cit

[92] Ibid

[93] Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation.' Op Cit

[94] Ibid

[95] Anderson. D., 'The Importance of Ethics in the Practice of Mediation.' Available at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5776&context=sol_research (Accessed on 19/10/2023)

[96] Hacking. L., & Berry. S., 'Ethics in Arbitration: Party and Arbitral Misconduct.' Available   at https://www.lordhacking.com/Documentation/Hacking%20&%20Berry%20-%20Ethics%20in%20Arbitration%20April%202016.pdf (Accessed on 19/10/2023)

important to ensure that such codes and standards are enforced in order to uphold ethics, integrity and best practice in mediation. It has been pointed out that the primary regulators of ethical conduct, integrity and best practice in ADR are the appointing institutions and parties through challenge procedures[97]. Mediation centres and bodies can therefore foster ethics, integrity and best practice in mediation through exercising due diligence while appointing mediators in order to avoid cases of impartiality and conflict of interest and ensure competence, fostering institutional oversight during the mediation to ensure compliance with ethics and best practice, facilitating communication between the parties and addressing allegations of ethical breaches during mediation[98].

Mediators also have a role to ensure that the mediation process is conducted in a manner that upholds ethics, integrity and best practice. Mediators should ensure that they adhere to the rules of ethics, integrity and best practice in mediation[99]. This includes avoiding conflict of interest, being impartial during the mediation process, accepting appointments only in cases where they are competent, conducting the mediation process with fairness and integrity and maintaining the confidentiality of the process[100]. Advocates and parties' representatives in mediation also have a duty to uphold ethics, integrity and best practice by acting with diligence , competence and honesty[101]. They have a duty to be courteous towards each other and to also avoid misleading the mediator[102]. . Parties also have a duty to uphold ethics, integrity and best practice in mediation by acting in a courteous and respectful manner towards each other and the mediator and disclosing all material facts to aid in the negotiations and resolution of the dispute[103].

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[97] Ibid

[98] Anderson. D., 'The Importance of Ethics in the Practice of Mediation.' Op Cit

[99] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

[100] Ibid

[101] Anderson. D., 'The Importance of Ethics in the Practice of Mediation.' Op Cit

[102] Ibid

[103] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb*. L.J. 979-990 (2001)

In addition to the foregoing measures, it is important to continue enhancing access to justice in Africa through ADR mechanisms including mediation. Mediation alongside other ADR mechanisms have been part and parcel of the African culture since time immemorial and were always the first point of call whenever a dispute arose[104]. These mechanisms were able to safeguard the values and ethics inherent in African societies including peace, reconciliation, and restoration of social harmony[105]. They were therefore considered as 'Appropriate' and not 'Alternative' in management of disputes[106]. There is need to (re)focus mediation and other ADR mechanisms in Africa in a manner that fosters the true spirit of conflict management inherent in African societies which is reconciliation and restoration of parties' relationships[107]. This will be integral in realizing the potential of ADR as 'Appropriate' Dispute Resolution in Africa[108].

5.0 Conclusion

ADR mechanisms including mediation are growing in Africa due to the general acceptance across the board of ADR processes as ideal in dispute management[109]. Consequently, as ADR mechanisms including mediation continue to grows, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. Some of the standards adopted towards upholding ethics, integrity and best practice in mediation include impartiality, rules on conflict of interest, competence, privacy and confidentiality, quality of the mediation process and rules on costs and fees[110]. However, several ethical problems may arise in mediation which may affect impartiality, confidentiality, competence, quality

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[104] Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf (Accessed on 19/10/2023)

[105] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[106] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[107] Ibid

[108] Ibid

[109] The World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans.' Op Cit

[110] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

and integrity of the mediation process[111]. It is therefore necessary to uphold ethics, integrity and best practice in mediation. This can be achieved through enhancing training and standards for mediators, facilitating adherence to ethical standards, integrity and best practices in mediation by mediation centres and institutions, encouraging mediators to conduct mediation proceedings in a manner that upholds ethics, integrity and best practice[112]. It is also important to continue enhancing access to justice in Africa through ADR mechanisms including mediation in a manner that fosters the true spirit of conflict management inherent in African societies which is reconciliation and restoration of parties' relationships[113]. Upholding ethics, integrity and best practice in mediation is practicable.

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[111] Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Op Cit

[112] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[113] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

Promoting Green and Sustainable Procurement in Kenya

Abstract

This paper critically discusses the concepts of green and sustainable procurement in Kenya. It argues that green and sustainable procurement is vital in the Sustainable Development agenda in Kenya due to its ability to foster sustainable production and consumption and mitigate the environmental impacts arising from the supply of goods and services. The paper examines the progress made towards realizing green and sustainable procurement in Kenya. It also explores challenges facing the attainment of green and sustainable procurement in Kenya. The paper further suggests recommendations towards promoting green and sustainable procurement in Kenya.

1.0 Introduction

Procurement has been defined as a careful, usually documented process resulting in delivery of goods or services within a set time period[1]. Procurement has also been defined as the process encompassing all activities associated with acquiring and managing the organisation's supply inputs[2]. According to the World Trade Organization (WTO), procurement relates to the process by which a state agency or an organization acquires a product or service for its own use[3]. Further, the *Public Procurement and Asset Disposal Act[4]* of Kenya defines procurement as the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing

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[1] Mak. J., 'What is Procurement?' Available at *http://www.rfpsolutions.ca/articles/Jon_Mak_IPPC6_What_is_Procurement_3Mar2014.pdf* (Accessed on 19/12/2023)

[2] National Library of Medicine., 'Theories about Procurement and Supply Chain Management.' Available at https://www.ncbi.nlm.nih.gov/books/NBK286086/ (Accessed on 19/12/2023)

[3] World Trade Organization., 'Government Procurement.' Available at *https://unctad.org/system/files/official-document/edmmisc232add27_en.pdf* (Accessed on 19/12/2023)

[4] Public Procurement and Asset Disposal Act, No. 33 of 2015, Laws of Kenya Government Printer, Nairobi

in the supply chain system[5]. Procurement therefore essentially refers to the process of sourcing, acquiring, and paying for goods and services[6].

Procurement can be categorized in various forms including direct procurement, indirect procurement, goods procurement and services procurement[7]. It has been pointed out that procurement plays a significant role in finance because it ensures that state entities and organizations expenditures on goods and services align with their financial goals and objectives[8]. It also plays a critical role in controlling costs and minimizing financial risks[9]. In addition, it has also been observed that procurement helps businesses save money, maintain quality, manage risks, enhance supplier relationships, and improve overall efficiency[10]. Procurement is therefore an important process in the development agenda of any nation.

It has been asserted that public procurement represents approximately 14 per cent of Gross Domestic Product (GDP) in developed countries and nearly 30 per cent of GDP in developing countries[11]. Given the magnitude of such spending, in combination with the pressing need for sustainable production and consumption, it has been pointed out that Sustainable Public Procurement (SPP) has become imperative[12]. Further, in light of environmental challenges

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[5]Ibid, S 2

[6] Reich. A., 'What Is Procurement? Types, Processes and Tech.' Available at https://www.order.co/blog/procurement/define-procurement/ (Accessed on 19/12/2023)

[7] Georgiev. N., 'What is Procurement?: 4 Types of Procurement and Technology.' Available at *https://www.bluecart.com/blog/what-is-procurement* (Accessed on 19/12/2023)

[8] Emeritus., 'Is Procurement Important? What are its Different Types? A Complete Guide.' Available at https://emeritus.org/blog/finance-what-is-procurement/#:~:text=Procurement%20plays%20a%20significant%20role,costs%20and%20minimizing%20financial%20risks. (Accessed on 19/12/2023)

[9] Ibid

[10] Aggarwal. S., 'Why Is Procurement Important in Business?.' Available at https://www.linkedin.com/pulse/why-procurement-important-business-sanjeev-aggarwal/ (Accessed on 19/12/2023)

[11] United Nations Forum on Sustainability Standards., 'Scaling up Voluntary Sustainability Standards through Sustainable Public Procurement and Trade Policy.' Available at https://unctad.org/system/files/official-document/unfss_4th_2020_en.pdf (Accessed on 19/12/2023)

[12] Ibid

such as climate change, pollution, and loss of biodiversity which can be caused or worsened by the supply of goods and services, ecologically responsible business practices including green procurement has become a clarion call in both public and private sectors[13].

This paper critically discusses the concepts if green and sustainable procurement in Kenya. It argues that green and sustainable procurement is vital in the Sustainable Development agenda in Kenya due to its ability to foster sustainable production and consumption and mitigate the environmental impacts arising from the supply of goods and services. The paper examines the progress made towards realizing green and sustainable procurement in Kenya. It also explores challenges facing the attainment of green and sustainable procurement in Kenya. The paper further suggests recommendations towards promoting green and sustainable procurement in Kenya.

2.0 Delimiting Green and Sustainable Procurement

Green or environmental procurement has been defined as the integration of environmental considerations into purchasing policies, programmes, and actions[14]. It has also been described as the involvement of the purchasing function in supply chain management activities such as Life-Cycle Analysis (LCA) and environment design that facilitates recycling, reuse and resource reduction[15]. Green procurement can also mean the acquisition of products and services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose[16]. Green procurement therefore considers raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance or disposal of the product or service[17]. Green

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[13] Ibid

[14] Large. R., Thomsen. C., 'Drivers of Green Supply Management Performance: Evidence from Germany.' *Journal of Purchasing and Supply Management*., Volume 17, Issue 3, (2011)

[15] Appolloni. A., 'Green Procurement in the Private Sector: A State of the Art Review Between 1996 and 2013.' *Journal of Cleaner Production*., (2014) 1-12

[16] Green Purchasing and the Supply Chain., Available at https://louisville.edu/purchasing/sustainability/greenpurchasingsupplychain (Accessed on 20/12/2023)

[17] Ibid

procurement can therefore be understood as a process whereby organisations or public authorities meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organization or the public authority, but also to society and the economy, while minimising or mitigating damage to the environment[18]. It has been observed that green purchasing/green procurement is increasingly being recognised as an effective means of addressing and reducing negative environmental impacts related to product production and consumption around the world[19].

Sustainable procurement on the other hand has been described as the pursuit of Sustainable Development objectives through the purchasing and supply process, and involves balancing environmental, social and economic objectives[20]. It has also been defined as procurement that is consistent with the principles of Sustainable Development, such as ensuring a strong, healthy and just society, living within environmental limits, and promoting good governance[21]. Further, sustainable procurement can also refer to a conscious process where organisations meet their needs in a way that achieves value for money on a whole life basis by generating benefits to the spending organisations, society and economy, whilst minimising damage to the environment[22]. Sustainable procurement can also be described as the process

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[18] Anggraen. K., & Melgar. M., 'Green Public Procurement for Sustainable Horticulture: A Policy Brief.' Available at *https://www.cscp.org/wp-content/uploads/2021/07/GOALAN_GPP_Policy_Brief.pdf* (Accessed on 20/12/2023)

[19] Ho. L., Dickinson. N., & Chan. G., 'Green Procurement in the Asian Public Sector and the Hong Kong Private Sector.' Available at https://doi.org/10.1111/j.1477-8947.2010.01274.x (Accessed on 20/12/2023)

[20] Walker. H., & Philips. W., 'Sustainable Procurement: Emerging Issues.' Available at *https://www.researchgate.net/profile/Helen-Walker-5/publication/254959498_Sustainable_procurement_Emerging_issues/links/54d9e9a80cf2970e4e7d191f/Sustainable-procurement-Emerging-issues.pdf* (Accessed on 20/12/2023)

[21] Walker. H., & Brammer. S., 'Sustainable Procurement in the United Kingdom Public Sector.' Available at https://web.archive.org/web/20190428091155id_/https://purehost.bath.ac.uk/ws/files/415713/2007-15.pdf (Accessed on 20/12/2023)

[22] Maina. J., 'State Should Set Good Example by Promoting Sustainable Procurement.' Available at https://www.standardmedia.co.ke/amp/opinion/article/2001450226/state-should-set-good-example-by-promoting-sustainable-procurement (Accessed on 20/12/2023)

of integrating Environmental, Social, and Governance considerations (ESG) into purchasing decisions and supply chain management[23]. It goes beyond the normal focus on cost and quality of products and services and takes into account the broader impacts of procurement activities on human lives, the planet, and prosperity[24].

Sustainable procurement aims to balance economic goals with social responsibility and environmental stewardship, in order to foster long-term sustainability throughout the supply chain[25]. It has been asserted that sustainable procurement primarily involves balancing three essential concepts being environment/eco-friendly concerns, including energy performance, waste reduction, product lifespan, protection of resources; social concerns including respect for human rights, good working conditions, inclusivity, diversity; and economic issues including cost, product and service quality, and delivery timeframes[26].

From the foregoing, certain differences emerge between green and sustainable procurement. It has been asserted that sustainable procurement takes a broader approach, considering social, environmental, and economic factors in the procurement process, while green procurement primarily focuses on the environmental aspects[27]. In addition, it has been pointed out that sustainable procurement places significant emphasis on social responsibility, including fair labor practices, respect for human rights, and diversity, whereas green procurement primarily concentrates on environmental impacts[28]. Sustainable

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[23] 'Difference between Green Procurement and Sustainable Procurement'., Available at
https://cloudopex.com/blog/green-procurement-and-sustainable-procurement/#:~:text=Sustainable%20procurement%20and%20green%20procurement%20are%20two%20related%20but%20distinct,focuses%20on%20reducing%20environmental%20impacts (Accessed on 20/12/2023)
[24] Ibid
[25] Ibid
[26] Sustainable Procurement: Definition, State of Play and Advantages., Available at https://www.manutan.com/blog/en/glossary/sustainable-procurement-what-it-means-the-state-of-play-and-the-advantages-it-offers#:~:text=Sustainable%20procurement%20refers%20to%20procurement,sustainable%20development%20and%20social%20responsibility. (Accessed on 20/12/2023)
[27] 'Difference between Green Procurement and Sustainable Procurement.' Op Cit
[28] Ibid

procurement also seeks to foster economic viability and long-term value creation in the procurement process while green procurement focuses on fostering environmental viability in the procurement process[29].

Despite their differences, both green procurement and sustainable procurement are at the heart of the Sustainable Development agenda. It has been asserted that transforming public procurement practices by embracing green and sustainable procurement can play a key role in achieving a greener and more sustainable future in multiples ways by evaluating the total cost of ownership over the product's life cycle, including energy use, maintenance, and disposal costs rather than prioritizing the lowest price, which can lead to the selection of products and services that are not environmentally-friendly; and incorporating environmental and social sustainability criteria into procurement processes, including energy efficiency, carbon footprint, fair labor practices, and local sourcing[30]. According to the World Bank, given the central position that procurement occupies in public spending, procurement can be a lever to implement a whole-of-economy approach to climate change, by aligning purchasing decisions with sustainability and climate goals, engaging with suppliers to drive positive change, and promoting innovation and transparency throughout the supply chain[31]. By embedding green and sustainable considerations into procurement processes, governments and organizations can drive innovation, promote responsible consumption, and pave the way for a more sustainable future[32].

It has further been asserted that emerging economies can leverage their large purchasing power in promoting a more sustainable and inclusive growth through the adoption of green and sustainable public procurement policies[33].

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[29] Ibid

[30] Jabbour. J et al., 'How can Green Public Procurement Contribute to a More Sustainable Future.' Available at https://blogs.worldbank.org/governance/how-can-green-public-procurement-contribute-more-sustainable-future (Accessed on 20/12/2023)

[31] Ibid

[32] Ibid

[33] SDG 12 Hub., 'Roundtable on Sustainable Public Procurement as a Tool for Paris Agreement at COP 28.' Available at https://www.oneplanetnetwork.org/news-and-events/news/roundtable-sustainable-public-procurement-tool-paris-agreement-cop28 (Accessed on 20/12/2023)

Given their substantial purchasing power, governments in both developed and developing countries have enormous leverage to stimulate and drive markets for sustainable production and consumption when they make a determined effort to purchase 'green' and 'sustainable' products and services[34]. It has been argued that adopting green and sustainable procurement not only improves the efficiency of public procurement but also uses the public market power to bring about significant environmental and socioeconomic benefits in any given country[35]. It is therefore important for all countries to promote green and sustainable procurement in order to foster sustainability.

3.0 Green and Sustainable Procurement in Kenya

Green and sustainable procurement is at the heart of the *United Nation's 2030 Agenda for Sustainable Development*[36]. Sustainable Development Goal (SDG) 12 seeks to foster sustainable consumption and production patterns in all countries[37]. One of the targets under SDG 12 is to promote public procurement practices which are sustainable, in accordance with national policies and priorities[38]. It has been argued that green and sustainable public procurement can influence the attainment of nearly all the SDGs[39]. It can enhance the acquisition of green and sustainable products and services that are crucial in realizing the SDGs in areas such as food security, health, education, energy, clean water and sanitation, and infrastructure[40]. Green and sustainable public procurement can also positively influence SDG 13 (taking urgent action to combat climate change) by ensuring that environmental considerations such

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[34] Poliautre. D., 'Green Procurement: A Guide for Local Government.' *Sustainable Energy for Environment & Development Programme.*, Volume 2, No. 10 (2012)

[35] Ibid

[36] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed 21/12/2023)

[37] Ibid, SDG 12

[38] Ibid, SDG 12.7

[39] Nordic Council of Ministers., 'Sustainable Public Procurement and the Sustainable Development Goals.' Available at https://norden.diva-portal.org/smash/get/diva2:1554600/FULLTEXT01.pdf (Accessed on 21/12/2023)

[40] Ibid

as energy and water efficiency are included in tenders for products or services[41].

According to the United Nations Environment Programme (UNEP), leveraging the enormous purchasing power wielded by public procurement, which is estimated to be 12% of GDP in developed countries and up to 30 % of GDP in developing countries, by promoting public procurement practices that are green and sustainable, in accordance with national policies and priorities, plays a key role in achieving Sustainable Consumption and Production (SDG 12) and in addressing the three pillars of Sustainable Development[42]. From an environmental perspective; sustainable procurement allows governments to reduce greenhouse gas emissions, improve resource efficiency and support recycling; from a social dimension, the positive social results of green and sustainable procurement include poverty reduction, improved equity and respect for core labour standards; from an economic perspective, green and sustainable procurement can generate income, reduce costs, support the transfer of skills and technology and promote innovation by domestic producers[43]. UNEP further asserts that shifting public spending towards more green and sustainable goods and services can help drive markets in the direction of innovation and sustainability, thereby enabling the transition to a green economy and achievement of the Sustainable Development agenda[44]. Green and sustainable public procurement is therefore integral in the sustainable development agenda.

At the continental level, the *Africa Union's Agenda 2063*[45] also embraces the role of green and sustainable procurement in the realization of the vision of an integrated, prosperous and peaceful Africa, driven by its own citizens and

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[41] Ibid

[42] United Nations Environment Programme., 'Sustainable Public Procurement.' Available at https://www.unep.org/explore-topics/resource-efficiency/what-we-do/sustainable-public-procurement#:~:text=SPP%20Implementation%20Guidelines%3A%20UNEP%20has, of%20Sustainable%20Public%20Procurement%20criteria. (Accessed on 21/12/2023)

[43] Ibid

[44] Ibid

[45] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 21/12/2023)

representing a dynamic force in the international arena[46]. One of the key aspirations of Agenda 2063 is fostering environmentally sustainable and climate resilient economies and communities in Africa[47]. Agenda 2063 identifies the need for sustainable consumption and production patterns in the realization of this aspiration and urges all African countries to develop and implement policies and standards including environmental laws and regulations and *green procurement* for sustainable production and consumption practices(Emphasis added)[48]. Promoting green and sustainable procurement is vital in the realization the vision of Agenda 2063.

At the national level, the Constitution of Kenya enshrines Sustainable Development as one of the national values and principles of governance which binds all state organs, state officers, public officers and all persons[49]. The Constitution therefore envisions the procurement process in Kenya to be guided by the principles of Sustainable Development. The Constitution further requires the procurement of public goods and services to be done in accordance with a system that is fair, equitable, transparent, competitive and cost-effective[50].

The *Public Procurement and Asset Disposal Act*[51] was enacted to give effect to Article 227 of the Constitution on procurement of public goods and services; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. The Act requires public procurement and asset disposal by state organs and public entities in Kenya to be guided by certain values and principles including the national values and principles provided for under Article 10 of the Constitution; maximisation of value for money; and promotion of local industry, Sustainable Development and protection of the environment[52]. The Act therefore embraces the ideas of green and sustainable procurement by requiring environment and Sustainable

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[46] Ibid
[47] Ibid
[48] Ibid
[49] Constitution of Kenya, 2010., Article 10 (2) (d)
[50] Ibid, Article 227 (1)
[51] Public Procurement and Asset Disposal Act., No. 33 of 2015, Laws of Kenya, Preamble
[52] Ibid, S 3

Development considerations to guide the procurement process in Kenya. In particular, the Act requires the procurement of public goods and services in Kenya to comply with specific requirements aimed at promoting green and sustainable procurement[53]. It provides that an accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.[54] Such requirements include the need to factor in the socio-economic impact of the goods, works and services; the need for goods, works and services to be environment-friendly; and cost effectiveness of goods, works and services[55].

In addition, the *Public Procurement and Asset Disposal Regulations[56]* also seek to promote green and sustainable procurement in Kenya. The Regulations require user departments in procurement entities while submitting requisitions to the head of the procurement function for processing, to ensure that the requisitions are accompanied by, inter alia, as applicable: environmental and social impact assessment reports[57]. The Regulations further provide that the documents, procedures and approvals required for waste disposal management shall be obtained from the relevant public agencies allowing a procuring entity to dispose those items that are harmful and unfriendly to the environment[58]. It has correctly been pointed out that there is need for all public entities in Kenya to uphold the provisions of the Public Procurement and Asset Disposal Act and the Public Procurement and Asset Disposal Regulations and work towards ensuring that both the processes of procurement of goods and disposal of waste are not only environmentally

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[53] Ibid, S 60
[54] Ibid, S 60 (1)
[55] Ibid, S 60 (3)
[56] Public Procurement and Asset Disposal Regulations, 2020, Kenya Gazette Supplement No. 53 (Legislative Supplement No. 37), Legal Notice No. 69, Laws of Kenya
[57] Ibid, Regulation 71(2) (c).
[58] Ibid, Regulation 193 (2)

friendly but are also cost effective and contribute towards the realization of the Sustainable Development agenda in Kenya[59].

Despite the appropriateness of green and sustainable procurement, it has been observed that the concept is yet to be fully embraced in developing countries like Kenya in both the private and public sectors[60]. It has been noted that the adoption of green and sustainable procurement in Kenya has been slow resulting in lower diffusion rate in Kenya[61]. In addition, it has been argued that in as much as the government and other stakeholders may want to promote green and sustainable procurement in Kenya as demonstrated by the enactment of laws such as the Public Procurement and Asset Disposal Act, some organizations may be reluctant given that they see an opportunity in non-conformance[62]. Organizations may shun away from green and sustainable procurement due to factors such as perceived added costs involved, poor management practices, poor policy communication, limited established environmental and sustainability criteria for products and services, lack of practical tools and information, and lack of clear interpretation of the concept of green and sustainable procurement[63]. There is need to promote green and sustainable procurement in Kenya in order to foster Sustainable Development. Green and sustainable public procurement also offers numerous benefits for both the public and private sector including enhanced economic performance, competitive advantage through innovation, improved public image, lower

[59] Muigua. K., 'Promoting Sustainable Consumption and Production Patterns in Kenya for Development.' Available at https://kmco.co.ke/wp-content/uploads/2020/11/Promoting-Sustainable-Consumption-and-Production-Patterns-in-Kenya-for-Development-Kariuki-Muigua-Ph.D.pdf (Accessed on 21/12/2023)
[60] Nderitu. M., & Ngugi… K., 'Effects of Green Procurement Practices on an Organization Performance in Manufacturing Industry: Case Study of East African Breweries Limited.' Available at https://business.ku.ac.ke/images/stories/research/dr_ngugi/EFFECTS_OF_GREEN_%20PROCUREMENT_PRACTICES.pdf (Accessed on 21/12/2023)
[61] Muraguri. E., Waweru. E., & Musyimi. P., 'Application and Practice of Sustainable Procurement in Kenya.' *International Journal of Innovative Science, Engineering & Technology,* Vol. 2, Issue 12, December 2015
[62] Ibid
[63] Ibid

waste management costs, energy and resources conservation, and risk reduction among others[64].

4.0 Way Forward

In order to foster green and sustainable procurement in Kenya, there is need to integrate environmental, economic and social dimensions in the procurement processes in both public and private sectors. It has been argued that sustainability can be achieved in the procurement process by incorporating the elements of Sustainable Development which are environmental protection, economic development and social progress[65]. It is therefore imperative to ensure that all procurement decisions embrace and contribute to the realization of the broader environmental, economic and social policy goals in countries[66]. Procurement processes and decisions at all levels should therefore consider environment/eco-friendly concerns, including energy performance, waste reduction, product lifespan, protection of resources; social concerns including respect for human rights, good working conditions, inclusivity, diversity; and economic issues including cost, product and service quality, and delivery timeframes[67]. It has further been asserted that public entities and private organizations can identify green products and services by considering factors such as raw materials acquisition, manufacturing, packaging, distribution, re-use and disposal in order embrace such products and services[68].

It is also vital to foster education, training and awareness, and capacity building on green and sustainable procurement in order to encourage public entities, organizations, employers and employees to embrace these ideas[69]. It has been asserted that education and training can enhance knowledge level and skills in handling green procurement tools and systems, information

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[64] Ibid

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

[66] United Nations Forum on Sustainability Standards., 'Scaling up Voluntary Sustainability Standards through Sustainable Public Procurement and Trade Policy.' Op Cit

[67] Sustainable Procurement: Definition, State of Play and Advantages., Op Cit

[68] Poliautre. D., 'Green Procurement: A Guide for Local Government.' Op Cit

[69] Muraguri. E., Waweru. E., & Musyimi. P., 'Application and Practice of Sustainable Procurement in Kenya.' Op Cit

management and resource allocation in green and sustainable procurement[70]. Education, training and capacity building can also enhance the uptake of Information, and Communications Technology (ICT) software that supports green and sustainable procurement practices such as the use of e-procurement[71]. Education, training and capacity building is therefore important in promoting green and sustainable procurement in Kenya.

Finally, it is necessary to enforce laws, regulations, policies and standards aimed at promoting green and sustainable procurement in Kenya including the Public Procurement and Asset Disposal Act and the Public Procurement and Asset Disposal Regulations. It has been argued that in order to realize green and sustainable procurement in Kenya, enforcement mechanism shall be necessary, including managing suppliers' relationships, monitoring and evaluation, product content restrictions, eco-labelling, disclosure requirements, quality assurance certifications, compliance audits, awards and sanctions[72]. According to UNCTAD, enforcement procedures, such as monitoring, conformity assessment, complaints handling and sanctions are necessary in order to achieve green and sustainable procurement especially in the public sector[73]. It is therefore necessary to ensure enforcement and compliance with measures aimed at fostering green and sustainable procurement in Kenya.

Through the foregoing initiatives, green and sustainable procurement will be promoted in Kenya.

5.0 Conclusion

Green procurement and sustainable procurement is at the heart of the Sustainable Development agenda. SDG 12.7 seeks to promote public

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[70] Nderitu. M., & Ngugi… K., 'Effects of Green Procurement Practices on an Organization Performance in Manufacturing Industry: Case Study of East African Breweries Limited.' Op Cit

[71] Ibid

[72] Maina. J., 'State Should Set Good Example by Promoting Sustainable Procurement.' Op Cit

[73] United Nations Forum on Sustainability Standards., 'Scaling up Voluntary Sustainability Standards through Sustainable Public Procurement and Trade Policy.' Op Cit

procurement practices which are sustainable, in accordance with national policies and priorities[74]. Shifting public spending towards more green and sustainable goods and services can help drive markets in the direction of innovation and sustainability, thereby enabling the transition to a green economy and achievement of the Sustainable Development agenda[75]. The Public Procurement and Asset Disposal Act and the Public Procurement and Asset Disposal Regulations of Kenya envisage the idea of green and sustainable procurement. However, the achievement of green and sustainable procurement in Kenya is hindered by factors such as perceived added costs involved, poor management practices, poor policy communication, limited established environmental and sustainability criteria for products and services, lack of practical tools and information, and lack of clear interpretation of the concept of green and sustainable procurement[76]. It is imperative to address these challenges in order to promote green and sustainable procurement in Kenya. Green and sustainable procurement in Kenya can be realized through integrating environmental, economic and social dimensions in the procurement processes in both public and private sectors, foster education, training, awareness and capacity building on green and sustainable procurement, and enforcement of laws, regulations, policies and standards aimed at promoting green and sustainable procurement[77]. Promoting green and sustainable procurement in Kenya is necessary for the realization of the Sustainable Development agenda.

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[74] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., SDG 12.7

[75] United Nations Environment Programme., 'Sustainable Public Procurement.' Op Cit

[76] Muraguri. E., Waweru. E., & Musyimi. P., 'Application and Practice of Sustainable Procurement in Kenya.' Op Cit

[77] Ibid; Poliautre. D., 'Green Procurement: A Guide for Local Government.' Op Cit; United Nations Forum on Sustainability Standards., 'Scaling up Voluntary Sustainability Standards through Sustainable Public Procurement and Trade Policy.' Op Cit

Managing Environmental Conflicts through Alternative Dispute Resolution

Abstract

This paper critically discusses the role of Alternative Dispute Resolution (ADR) mechanisms in managing environmental conflicts. It defines environmental conflicts and examines their nature and causes. It also explores the viability of ADR mechanisms in managing environmental conflicts noting to highlight the advantages and drawbacks thereof. The paper argues that ADR mechanisms can be a viable tool in managing environmental conflicts and fostering sustainability. It proposes initiatives towards strengthening the role of ADR mechanisms in managing environmental conflicts.

1.0 Introduction

It has been correctly observed that conflicts are a common occurrence in human relationships and interactions[1]. They are an inevitable part of living because they are related to situations of scarce resources, division of functions, power relations and role-differentiation[2]. The term conflict generally refers to a situation in which two or more parties perceive that they possess mutually incompatible goals[3]. It has also been defined as a process of social interaction involving a struggle over claims to resources, power and status, beliefs, and other preferences and desires[4]. It has been pointed out that conflict centers on incompatibilities, an expressed struggle, and interdependence among two or more parties[5]. Incompatibility refers to mutually exclusive or diametrically

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[1] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at *https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf* (Accessed on 18/01/2024)

[2] Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at *https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR-403/Conflict.ConflictManagementinOrganizations.pd*f (Accessed on 18/01/2024)

[3] Demmers. J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

[4] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[5] Putnam. L., 'Definitions and Approaches to Conflict and Communication.' Available at

https://www.researchgate.net/profile/L_Putnam/publication/292654875_Definitio

opposed goals, values, or beliefs[6]. Conflict can therefore be understood as the interaction of interdependent people who perceive incompatibility and the possibility of interference from others as a result of this incompatibility[7].

Conflicts are an undesirable phenomenon in any given society. It has been posited that conflicts can affect peace, sustainability and development[8]. Conflicts can result in deaths and injuries, population displacement, the destruction of assets, and the disruption of social and economic systems[9]. As a result, it has been argued that development is not feasible in a conflict situation[10]. According to the United Nations, conflicts are major threat to the achievement of Sustainable Development[11]. It posits that the Sustainable Development Goals (SDGs) have an intrinsic relationship to peace and stability[12]. As a result, there is need for effective and expeditious management of conflicts in order to spur Sustainable Development[13].

Conflict management refers to the processes and techniques adopted towards stopping or preventing overt conflicts and aiding the parties involved to reach

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ns_and_approaches_to_conflict_and_communication/links/6483440ab3dfd73b776fe
6ef/Definitions-and-approaches-to-conflict-and-communication.pdf (Accessed on 18/01/2024)

[6] Ibid

[7] Ibid

[8] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[9] Mahler. D. G., & Vishwanath. T., 'When the Consequences of Conflicts Last Generations: Intergenerational Mobility in Iraq and Vietnam.' Available at https://blogs.worldbank.org/dev4peace/when-consequences-conflicts-last-generations-intergenerational-mobility-iraq-and-vietnam#:~:text=They%20include%20deaths%20and%20injuries,of%20social%20and %20economic%20systems. (Accessed on 18/01/2024)

[10] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaRevised-version-of-20.10.14.pdf* (Accessed on 18/01/2024)

[11] United Nations., 'No Peace, No Sustainable Development: A Vicious Cycle that We Can Break.' Available at *https://www.un.org/en/chronicle/article/no-peace-no-sustainable-development-vicious-cycle-we-can-break* (Accessed on 18/01/2024)

[12] Ibid

[13] Ibid

a durable and peaceful solution to their differences[14]. Conflict management therefore involves handling all stages of a conflict as well as the mechanisms used in addressing conflicts[15]. It has been pointed out that the purpose of conflict management, whether undertaken by the parties in conflict or whether involving the intervention of an outside party, is to affect the entire structure of a conflict situation so as to contain the destructive components in the conflict process (such as hostility and use of violence) and help the parties possessing incompatible goals to find some solution to their conflict[16]. In addition, it has been argued that effective conflict management succeeds in minimizing disruption stemming from the existence of a conflict, and providing a solution that is satisfactory and acceptable[17]. Various approaches and techniques can be adopted towards managing conflicts ranging from the most informal negotiations between the parties themselves through increasing formality and more directive interventions from external sources to a full court hearing with strict rules of procedure[18].

It has been argued that conflict management could result in settlement through the use of mechanisms such as litigation and arbitration which are highly coercive, power based and involve a lot of compromise in addressing the conflict[19]. Settlement mechanisms can be effective in providing an immediate solution to a conflict but fail to address underlying issues leaving the likelihood of conflicts remerging in future[20]. Conflict management could also result in resolution through the use of Alternative Dispute Resolution (ADR) processes such as mediation, negotiation and facilitation which are non-coercive, non-power based and focus on the needs and interest of parties[21]. Resolution mechanisms result in mutually satisfying outcomes that address the root causes of conflicts therefore creating long lasting outcomes[22].

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[14] Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies,* Volume 2, No. 2, 1997
[15] Ibid
[16] Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Op Cit
[17] Ibid
[18] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[19] Ibid
[20] Ibid
[21] Ibid
[22] Ibid

This paper critically discusses the role of ADR mechanisms in managing environmental conflicts. It defines environmental conflicts and examines their nature and causes. It also explores the viability of ADR mechanisms in managing environmental conflicts noting to highlight the advantages and drawbacks thereof. The paper argues that ADR mechanisms can be a viable tool in managing environmental conflicts and fostering sustainability. It proposes initiatives towards strengthening the role of ADR mechanisms in managing environmental conflicts.

2.0 Environmental Conflicts: Definition and Causes

The environment is a major cause of conflicts. It has been observed that nearly every community finds itself embroiled in occasional disputes over public land use, private land development, water quality or quantity, air quality, protection of habitats and species, waste disposal, use and management of natural resources, environmental hazards among other issues[23]. Environmental conflicts are therefore a common occurrence. It has been posited that what is often at stake in such conflicts are fundamental issues including individual and community health, racial and ethnic justice, the integrity or destruction of whole ecosystems, and the economic or cultural viability of human communities[24]. According to the United Nations Environment Programme (UNEP), factors such as environmental degradation, inequitable access to natural resources and the transboundary movement of hazardous materials can lead to environmental conflicts and pose a risk to national security and human health[25].

Environmental conflicts have been broadly defined as social conflicts related to the environment[26]. Further, environmental conflicts have also been defined as conflicts causes by the environmental scarcity of a resource, that means:

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[23] Dukes. F., 'What we Know About Environmental Conflict Resolution: An Analysis Based on Research.' *Conflict Resolution Quarterly.*, Volume 22, Issue 1-2

[24] Ibid

[25] United Nations Environment Programme., 'Disasters and Conflicts.' Available at https://www.unep.org/regions/europe/regional-initiatives/disasters-and-conflicts (Accessed on 18/01/2024)

[26] Scheidel. A et al., 'Environmental Conflicts and Defenders: A Global Overview.' *Global Environmental Change,* 63 (2020)

caused by a human-made disturbance of its normal regeneration rate[27]. In addition, environmental conflicts can also refer to the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests[28]. It has been argued that conflicts caused by physical, geopolitical or socio-economic resource scarcity are not environmental conflicts but traditional conflicts of resource distribution[29]. Further, it has been asserted that environmental conflicts differ, but frequently overlap, with other types of conflicts on gender, class, territory, and identity among others[30]. In addition, it has been observed that environmental conflicts such as conflicts over natural resources have always been part of human history[31]. Environmental conflicts have been classified as a subset of the larger category of public conflicts involving issues such as health and health care, race and ethnicity, economic development, and governance[32]. Environmental conflicts often involve a combination of these issues[33]. In addition, it has been observed that environmental conflicts may involve multiple jurisdictions and multiple levels of jurisdiction (including international, regional, national and local), and the conflict may be less about the resources stake than about issues of jurisdiction or precedent[34].

The causes of environmental conflicts vary across the globe and their manifestations differ considerably[35]. It has been observed that causes of environmental conflicts can range from control over vital environmental

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[27] Libiszewski. S., 'What is an Environmental Conflict?' Available at https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/What_is_Environment_Conflict_1992.pdf (Accessed on 18/01/2024)

[28] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Available at https://kmco.co.ke/wp-content/uploads/2022/09/Environmental-Conflict-Management-Institutions-and-Approaches.pdf (Accessed on 18/01/2024)

[29] Libiszewski. S., 'What is an Environmental Conflict?' Op Cit

[30] Scheidel. A et al., 'Environmental Conflicts and Defenders: A Global Overview.' Op Cit

[31] Ibid

[32] Dukes. F., 'What we Know About Environmental Conflict Resolution: An Analysis Based on Research.' *Conflict Resolution Quarterly.*, Volume 22, Issue 1-2

[33] Ibid

[34] Ibid

[35] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

resources to contestations over natural resources at the community and/or household levels[36]. In addition, it has been argued that environmental conflicts are largely due to poverty or resource scarcities, which can be demand-induced, supply-induced, or structural[37]. This view implies that the occurrence and intensity of environmental conflicts would increase as resources become scarcer, or if resources have been overused, depleted, or degraded to a certain threshold, environmental conflicts would worsen[38]. For example, it has been argued that environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world[39]. In addition, it has been argued that these conflicts are especially expected to be more devastating in poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause[40].

Environmental conflicts are a major threat to the achievement of Sustainable Development[41]. According to UNEP, while natural resources are key to achieving Sustainable Development, they are also increasingly acting as drivers of fragility, conflict and violence[42]. It further asserts that as the global population continues to rise, the global demand for natural resources continues to grow, and the impacts of climate change begin to materialize, and therefore competition over natural resources is set to intensify, a situation that could spiral into more environmental conflicts[43]. In addition, it has been contended that natural resource- based conflicts also are, directly and indirectly connected to and/or impact human development factors and

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[36] Ibid

[37] Scheidel. A et al., 'Environmental Conflicts and Defenders: A Global Overview.' Op Cit

[38] Ibid

[39] Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," *International Security* 19, No. 1 (1994): 5-40 at p. 6

[40] Ibid

[41] United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' Available at *https://www.unep.org/topics/fresh-water/disasters-and-climate-change/environment-security/environmental-cooperation-and#:~:text=International%20law%2C%20environment%20and%20conflict,and%20relian ce%20on%20conflict%20resources.* (Accessed on 18/01/2024)

[42] Ibid

[43] Ibid

especially the quest for social-economic development[44]. It is therefore necessary to foster effective management of environmental conflicts in order to realize Sustainable Development.

3.0 Managing Environmental Conflicts through ADR: Opportunities and Challenges

ADR is an umbrella term that encompasses a set of processes that are applied to manage disputes without resort to adversarial litigation[45]. It can also refer to a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes[46]. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[47]. ADR mechanisms have been recognized at the global level under the *Charter of the United Nations[48]*. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[49] (Emphasis added). At a national level, the *Constitution of Kenya[50]* embraces ADR mechanisms. It mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs[51].

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[44] Muigua. K., 'Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2018/08/Managing-Environmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-August-2018.pdf* (Accessed on 18/01/2024)

[45] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[46] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[47] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[48] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[49] Ibid, Article 33 (1)

[50] Constitution of Kenya, 2010., Government Printer, Nairobi

[51] Ibid, Article 159 (2) (c)

ADR mechanisms are viewed as ideal in enhancing access to justice[52]. Access to justice has been recognized as a fundamental human right[53]. It has been described as a basic principle of the rule of law[54]. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable[55]. It has been correctly observed that international standards recognize access to justice as both a basic human right and a means to protect other universally recognized human rights[56]. Access to justice is at the heart of the United Nation's 2030 Agenda for Sustainable Development which acknowledges that sustainable peace and development cannot be achieved without justice[57]. Sustainable Development Goal (SDG) 16 seeks to foster Peace, Justice and Strong Institutions with states committing to provide access to justice for all, recognizing it as a key indicator of peaceful and inclusive societies[58]. At a national level, the Constitution of Kenya recognizes access to justice as a fundamental human right[59]. It requires the state to ensure access to justice for all persons and that if any fee is required, it shall be reasonable and shall not impede access to justice[60].

Despite the recognition of access to justice as a basic human right at the global and national levels, it has been pointed out that the right of access to justice especially in developing countries has hitherto been hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts

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[52] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[53] United Nations., 'Access to Justice.' Available at *https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/* (Accessed on 19/01/2024)
[54] Ibid
[55] Ibid
[56] American Bar Association., 'Human Rights and Access to Justice.' Available at *https://www.americanbar.org/advocacy/rule_of_law/what-we-do/human-rights-access-to-justice/* (Accessed on 19/01/2024)
[57] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20 Sustainabl e%20Development%20web.pd*f (Accessed on 19/01/2024)
[58] Ibid, SDG 16
[59] Constitution of Kenya, 2010., Government Printer, Nairobi
[60] Ibid

and lack of legal knowhow[61]. In light of the foregoing challenges, ADR mechanisms have been advocated as a viable option in enhancing access to justice[62]. ADR processes contain certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost- effective management of disputes which makes them ideal in enhancing access to justice[63].

It has been argued that ADR mechanisms can enhance Environmental Justice by promoting effective and efficient management of environmental conflicts[64]. Environmental Justice is a concept that seeks to foster the right of every person 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[65]. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment[66]. It has been argued that enhancing access to justice in environmental matters is one of the key ways of promoting Environmental Justice[67].

ADR processes can foster Environmental Justice by enhancing access to justice in environmental matters due to their potential to promote effective and efficient management of environmental conflicts[68]. For example, it has been opined that mediation has been effectively used to manage environmental disputes in areas such as land use, natural resource management, water

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[61] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

[62] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[63] Ibid

[64] Grad. F.P., 'Alternative Dispute Resolution in Environmental Law.' *Columbia Journal of Environmental Law* Volume: 14, Issue 1

[65] Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml (Accessed on 19/01/2024)

[66] United States *Environmental Protection Agency; 'Environmental Justice.' Available at https://www.epa.gov/environmentaljustice* (Accessed on 19/01/2024)

[67] Pickup. F., 'Five Steps to Environmental Justice.' Available at *https://www.undp.org/blog/five-stepsenvironmental-justice* (Accessed on 19/01/2024)

[68] Grad. F.P., 'Alternative Dispute Resolution in Environmental Law.' Op Cit

resources, energy, air quality among others[69]. In addition, it has been posited that ADR has been used with varying degrees of success in policy-making, standard setting, the determination of development choices, and in the enforcement of environmental standards[70].

The role of ADR mechanisms in managing environmental conflicts is recognized at both global and national levels. At the global level, the *Rio Declaration on Environment and Development*[71] envisages the use of ADR mechanisms in managing environmental conflicts. Principle 10 of the Declaration stipulates as follows:

> '*Environmental issues are best handled with the <u>participation of all concerned citizens, at the relevant level</u>. 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 <u>participate in decision-making processes</u>. States <u>shall facilitate and encourage public awareness and participation</u> by <u>making information widely available</u>. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (Emphasis added)[72].*

It has been argued that principle 10 of the Rio Declaration encourages the use of ADR processes in managing environmental conflicts through its emphasis on three pillars of environmental governance: *information related to dangers to the environment should be available to the public, the public should participate in the decision-making process, methods and channels of accessing to justice should be available to all individuals*[73]. ADR mechanisms such as mediation can realize

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[69] Ibid

[70] Ibid

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

[72] Ibid, Principle 10

[73] Alkhayer. J., 'Role of ADR Methods in Environmental Conflicts in the light of Sustainable Development.' Available at *https://iopscience.iop.org/article/10.1088/1755-1315/1084/1/012057/pdf* (Accessed on 19/01/2024)

these pillars by promoting participation, consensus building and access to justice in environmental matters[74].

In addition, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*[75] also encourages the use of ADR techniques in managing environmental conflicts. The Convention urges states to pursue the management of disputes through negotiation or by any other means of dispute settlement acceptable to the parties to the dispute[76]. It also permits parties to pursue binding methods like arbitration and adjudication if the amicable methods have failed[77].

Further, the *Paris Agreement*[78] also represents global efforts towards managing an environmental conflict through ADR mechanisms It aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change[79]. Adoption of the Paris Agreement saw the application of ADR mechanisms especially negotiation to respond to climate change which is a major environmental problem[80]. The 2015 United Nations Climate Change Conference (COP 21) in Paris saw 195 nations participate in *negotiating* a framework to curb emissions and take common action on climate change (Emphasis added)[81].

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[74] Ibid

[75] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters., Available at
https://unece.org/DAM/env/pp/documents/cep43e.pdf (Accessed on 19/01/2024)

[76] Ibid, Article 16

[77] Ibid

[78] Paris Agreement., United Nations, 2015., Available at
https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 19/01/2024)

[79] Ibid, Article 2 (1) (a)

[80] Dani. R., 'Role of Alternative Dispute Resolution in Environmental Disputes.' Available at *https://viamediationcentre.org/readnews/NTE3/Role-of-Alternative-Dispute-Resolution-in-Environmental-Disputes* (Accessed on 19/01/2024)

[81] Ibid

Further, at a national level, the *Environment and Land Court Act[82]* of Kenya encourages the Environment and Land Court (ELC) to embrace the use of ADR mechanisms to manage environmental conflicts[83]. The Act provides that the ELC may 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 Constitution[84]. In addition, the *Community Land Act of Kenya[85]* also encourages settlement of disputes relating to community land through ADR methods including traditional dispute and conflict resolution mechanisms where it is appropriate to do so[86]. In particular, the Act recognizes the use of mediation and arbitration in managing disputes relating to community land[87].

The role of ADR mechanisms in managing environmental conflicts is therefore well entrenched in law. It has been argued that certain benefits of ADR processes make them suited for use in resolving environmental problems[88]. For instance, the processes that permit the greatest degree of party autonomy, such negotiation, conciliation, and mediation, are informal, cost-effective, and give parties the freedom to come up with their own creative and long-term solutions to environmental problems[89]. For example, it has been argued that ADR mechanisms can aid parties to environmental conflicts, such as those involving the implementation of environmental projects, to come up with creative remedies over and above traditional remedies available in litigation[90]. Therefore, instead of cancelling projects, parties through ADR processes such as negotiation and mediation can agree and come up with mutually acceptable

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[82] Environment and Land Court Act., No. 19 of 2011, Government Printer, Nairobi

[83] Ibid, Article 20

[84] Ibid, Article 20 (1)

[85] Community Land Act., No. 27 of 2016., Government Printer, Nairobi

[86] Ibid, S 39 (1)

[87] Ibid, S 40 & 41

[88] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

[89] Ibid

[90] Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Available at https://www.acctm.org/docs/The%20Potential%20For%20Mediation%20to%20Res olve%20Environmen tal%20_CONNOR-Higgs_.pdf (Accessed on 19/01/2024)

solutions such as effective mitigation measures taking into account their respective needs and concerns[91].

ADR mechanisms can also promote effective management of environmental conflicts by encouraging consensus building and participatory approaches towards conflict management[92]. It has been pointed out that ADR mechanisms especially mediation can foster community involvement in the conflict management process through the use of peace committees, Non-Governmental Organisations, religious bodies, among other bodies within communities[93]. This process can facilitate effective management of conflicts by addressing the root causes of such conflicts[94]. Therefore, in case of environmental conflicts, mediation affords parties an opportunity to sustain or improve their relationships which is important especially in cases of environmental projects such as those related to energy, water and infrastructure whose completion may be for the larger good of every person involved[95]. By encouraging participation and consensus building, ADR mechanisms encourage amicable management of environmental conflicts and provide the basis for sustained relationships which is especially important where environmental projects are involved[96].

From the foregoing, it is evident that ADR mechanisms are viable in managing environmental conflicts. Further, in light of climate change concerns and the need to transition towards green economies, it has been argued that ADR mechanisms will be increasingly useful in managing environmental and

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[91] Ibid

[92] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Available at https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf (Accessed on 19/01/2024)

[93] Muigua. K., 'Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya.' Available at http://kmco.co.ke/wp-content/uploads/2019/09/Natural-Resource-ConflictsAddressing-Inter-Ethnic-Strife-Through-Environmental-Justice-in-kenya-Kariuki-Muigua-7th-September2019.pdf (Accessed on 19/01/2024)

[94] Ibid

[95] Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

[96] Ibid

sustainability disputes such as those concerning renewable energy, carbon reduction, waste management, electrification, sustainable transport and infrastructure among others[97].

ADR mechanisms play crucial role in managing specific types of environmental conflicts and problems. For example, it has been argued that negotiation plays a critical role in environmental resource management which is vital step in minimizing environmental conflicts[98]. Negotiation as an ADR mechanism often involves a discussion between two or more parties with conflicting interests aiming to reach an agreement[99]. Negotiation has been at the heart of environmental conflict management and has resulted in the adoption of numerous global, continental and regional instruments aimed at addressing specific environmental problems and issues including climate change, conservation of biodiversity, pollution, and the management of specific natural resources including land, forests, water and wetlands, wildlife, the blue economy among others[100].

In addition, mediation has been advanced as a vital tool in preventing and resolving environmental and natural resources conflicts[101]. It has been observed that natural resources such as land, timber, water as well as extractive resources have played an important role in igniting and prolonging conflict particularly in fragile states where management and oversight of such resources is often weak[102]. Mediation is seen as a viable tool in managing such conflicts by focusing on a broad range of benefits tied to natural resources,

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[97] World Intellectual Property Organization., 'WIPO Alternative Dispute Resolution for Green Technology and Sustainability.' Available at https://www.wipo.int/amc/en/center/specific-sectors/greentechnology-sustainability/ (Accessed on 19/01/2024)

[98] Eshragh. F., Pooyandeh. M., & Marceau. D., 'Automated Negotiation in Environmental Resource Management: Review and Assessment.' *Journal of Environmental Management*., Volume 162, No. 1 (2015)

[99] Ibid

[100] International Institute for Sustainable Development., 'Negotiations.' Available at https://enb.iisd.org/negotiations (Accessed on 19/01/2024)

[101] United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Available at https://www.unep.org/news-and-stories/press-release/mediation-can-prevent-resolve-natural-resources-disputes-new-un (Accessed on 19/01/2024)

[102] Ibid

including employment opportunities, revenue, services, access and infrastructure[103]. Attributes of mediation including voluntary participation and agreement, confidentiality of exchanges among parties, the search of mutually satisfactory solutions have been identifies as well suited for the multi-party complex context of environmental conflicts[104].

Finally, arbitration can provide an avenue for the effective and efficient management of complex environmental conflicts such as those related to climate change and energy[105]. Arbitration allows parties to select a third party with requisite knowledge and experience in such matters in order to promote effective management of their conflict[106]. Further, due to its transnational applicability, arbitration can be effectively utilized in managing environmental conflicts involving parties from different jurisdictions[107] . It has been observed that environmental conflicts may involve parties from different nationalities since the effects of issues such as pollution and climate change may spread across different states[108]. Such disputes cannot be managed by national courts due to jurisdictional concerns[109]. ADR mechanisms such as arbitration and mediation are able to promote management of such disputes since they apply across multiple jurisdictions and further guarantee enforcement of decisions[110].

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[103] Ibid

[104] Kaufman. S., 'Mediation in Environmental Disputes.' Available at https://www.eolss.net/sample-chapters/c14/E1-40-03-03.pdf (Accessed on 19/01/2024)

[105] Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' Available at http://kmco.co.ke/wp-content/uploads/2022/04/The-Viability-of-Arbitration-inmanagement-of-Climate-Change-Related-Disputes-in-Kenya-11th-April-2022.pdf (Accessed on 19/01/2024)

[106] Ibid

[107] Ibid

[108] Elborough. L., 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change.' Available at http://www.nzlii.org/nz/journals/NZJlEnvLaw/2017/5.pdf (Accessed on 19/01/2024)

[109] Ibid

[110] Ibid

It therefore emerges that ADR techniques are viable in managing environmental conflicts. However, it has been contended that ADR processes have not been given an adequate chance within the framework of environmental conflict management[111]. UNEP posits that despite their viability, ADR mechanism such as negotiation and mediation are often underutilized in the context of conflicts involving natural resources[112]. It is also necessary to address some of the challenges inherent in ADR mechanisms such as power imbalances, enforceability challenges and lack of urgent protection measures such as injunctions in order to encourage the use of these processes in managing environmental conflicts[113].

4.0 Way Forward

ADR mechanisms can promote effective and efficient management of environmental conflicts. They allow parties to enjoy autonomy over the process and outcome and have the ability to foster expeditious, cost-effective, flexible and non-complex management of disputes[114]. They also allow parties to come up with creative remedies over and above traditional remedies available in litigation[115]. It is therefore necessary to embrace ADR processes in order to foster effective management of environmental conflicts.

It is also important to continuously modify the legal and institutional framework on ADR at all levels including national levels in order to enhance the uptake of these mechanisms in environmental conflicts[116]. ADR mechanisms such as mediation and arbitration have been well embraced in some kind of disputes especially those that are commercial in nature[117].

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[111] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

[112] United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

[113] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

[114] Muigua. K. & Kariuki. F., 'Towards Environmental Justice in Kenya.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-January2015.pdf (Accessed on 19/01/2024)

[115] Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

[116] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

[117] Ibid

However their role in environmental conflict management is yet to be fully entrenched[118]. By continuously refining the legal and institutional framework on ADR, these mechanisms can become more utilized in managing environmental among other types of conflicts[119].

It is also necessary for States to encourage the use of ADR mechanisms in environmental governance and conflict management[120]. States play a fundamental role in environmental governance and are often responsible for formulating laws, policies and best approaches towards managing the environment[121]. Through this role, states and their institutions can encourage the use of ADR mechanisms in environmental governance and management[122]. For example, the Constitution of Kenya urges the state to encourage public participation in the management, protection and conservation of the environment[123]. It has correctly been pointed out that fostering public participation which is a fundamental principle in the Environmental Justice debate involves the use of ADR processes such as negotiation and mediation[124]. Therefore by encouraging the use of ADR mechanisms in environmental governance and conflict management, the state can fulfil its obligations in respect of the environment including the need to promote public participation in the management, protection and conservation of the environment[125].

In addition, state institutions such as the Judiciary also have a role to play in promoting the use of ADR mechanisms in managing environmental conflicts. For example, in Kenya the Environment and Land Court Act[126]encourages the Environment and Land Court (ELC) to embrace the use of ADR mechanisms

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[118]United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

[119] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

[120] Ibid

[121] Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

[122] Ibid

[123] Constitution of Kenya., 2010., Article 69 (1) (d) Government Printer, Nairobi

[124] Grad. F., 'Alternative Dispute Resolution in Environmental Law.' *Columbia Journal of Environmental Law*, Volume: 14 Issue: 1

[125] Ibid

[126] Environment and Land Court Act., No. 19 of 2011, Government Printer, Nairobi

to manage environmental conflicts[127]. The Act provides that the ELC may 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 Constitution[128]. In addition, the Act provides that where an ADR mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled[129]. The ELC can therefore foster the use of ADR mechanisms in managing environmental conflicts by referring cases to ADR. It has been argued that the ELC can adopt and implement environmental ADR by promoting supervised ADR (also referred to as court annexed ADR) or judicial referral of a dispute to an appropriate ADR process[130]. Courts therefore have an important role to play in promoting the use of ADR in managing environmental conflicts.

Finally, it has been contended that the suitability of ADR mechanisms in managing environmental conflicts can be enhanced by addressing the inadequacies inherent in some ADR mechanisms such as lack of formal recognition and enforcement of outcomes[131]. As a result, there is a need for all countries to enact sound legal and policy frameworks for effective utilization of ADR to ensure full access to justice in all areas[132]. This will promote legitimization of ADR mechanisms thus enabling their advantages to be realized across different sectors including environmental governance[133]. For example, in Kenya, adoption of the *Alternative Justice Systems Framework*

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[127] Ibid, S 20

[128] Ibid, S 20 (1)

[129] Ibid, S 20 (2)

[130] Ingonga. R. M., 'Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya' *Journal of Conflict Management and Sustainable Development*, Volume 2 (1) (2018)

[131] Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' *Journal of the Indian Law Institute*, Volume 59, No.1, 2017

[132] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf (Accessed on 19/01/2024)

[133] Ibid

Policy[134] is a vital step in mainstreaming ADR mechanisms and enhancing their uptake in managing a wide range of conflicts including environmental conflicts[135].

The foregoing measures among others are necessary in order to promote efficient management of environmental conflicts through ADR.

5.0 Conclusion

Environmental conflicts are a major threat to the achievement of Sustainable Development[136]. These conflicts are directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development[137]. It is therefore necessary to foster effective management of environmental conflicts in order to realize Sustainable Development. ADR mechanisms are ideal in managing environmental conflicts. These techniques encourage participation and consensus building and can enable parties to craft creative and long-term solutions to environmental problems[138]. However, despite their advantages, ADR processes have not been given an adequate chance within the framework of environmental conflict management[139]. In addition, certain challenges such as power imbalances, enforceability challenges and lack of urgent protection measures such as injunctions could potentially limit the suitability of ADR mechanisms in managing environmental conflicts[140]. It is imperative address such concerns in order to enhance management of environmental conflicts

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[134] The Judiciary of Kenya., 'Alternative Justice Systems Framework Policy.' Available at https://www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_ Kenya.pdf (Accessed on 19/01/2024)

[135] Muigua. K., 'Mainstreaming Alternative Justice Systems in Africa.' Available at https://kmco.co.ke/wp-content/uploads/2023/11/Mainstreaming-Alternative-Justice-Systems-in-Africa.pdf (Accessed on 19/01/2024)

[136] United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' Op Cit

[137] Muigua. K., 'Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya.' Op Cit

[138] Ibid

[139] Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

[140] Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

through ADR. This can be achieved through enhancing the uptake of ADR processes in environmental conflicts, strengthening the legal and institutional framework on ADR at all levels, encouraging the use of ADR mechanisms in environmental governance and management by the state and its institutions, and addressing the underlying concerns in ADR such as enforceability challenges and power imbalances[141]. Managing environmental conflicts through ADR is a noble and achievable endeavour towards Sustainable Development.

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[141] Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' Op Cit; Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit; Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

Climate Finance beyond COP 28: Operationalizing the Loss and Damage Fund

Abstract

The paper critically discusses the role of the Loss and Damage Fund in the climate finance agenda. It argues that the Loss and Damage Fund is necessary in expanding the landscape of climate finance and assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change. The paper critically examines the progress made towards actualizing the Loss and Damage Fund at COP 28. It argues a case for operationalizing the Loss and Damage Fund in order to enhance the future of climate finance.

1.0 Introduction

Climate finance refers to local, national, regional, continental and global financing of public and private investment that seeks to support mitigation of and adaptation to climate change[1]. Climate finance has also been defined as finance for activities aimed at mitigating or adapting to the impacts of climate change[2]. The United Nations defines climate finance as local, national or transnational financing drawn from public, private and alternative sources of financing that seeks to support mitigation and adaptation actions that will address climate change[3]. Climate finance can therefore be understood as the flow of funds to all activities, programmes or projects intended to help address climate change through both mitigation and adaptation across the world[4].

Climate finance is very essential in enhancing the global response to climate change. Climate finance is needed for mitigation, because large-scale

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[1] Hong. H., Karolyi. G. A., & Scheinkman. J.A., 'Climate Finance.' *Review of Financial Studies*, Volume 33, Issue 3 (2020)

[2] The London School of Economics and Political Science., 'What is Climate Finance?' Available at https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-finance-and-where-will-itcomefrom/ (Accessed on 25/12/2023)

[3] United Nations Climate Change., 'Introduction to Climate Finance.' Available at https://unfccc.int/topics/introduction-to-climate-finance (Accessed on 25/12/2023)

[4] Muigua. K., 'Unlocking Climate Finance for Development.' Available at https://kmco.co.ke/wp-content/uploads/2023/08/Unlocking-Climate-Finance-for-Development.pdf (Accessed on 25/12/2023)

investments are required to significantly reduce emissions[5]. Further, climate finance is equally important for adaptation, as significant financial resources are needed to adapt to the adverse effects and reduce the impacts of climate change[6]. Climate finance is therefore necessary in combating climate change since the adaptation and mitigation processes vital in enhancing national, regional and global response to climate change require funding[7].

It has been correctly pointed out that the concept of climate finance is premised on the principle of *'common but differentiated responsibility and respective capabilities'* which calls upon developed countries to provide financial resources to assist developing countries to respond to climate change(Empasis added).[8] The principle of common but differentiated responsibility and respective capabilities has been embraced under the *United Nations Framework Convention for Climate Change* (UNFCCC)[9] and *the Paris Agreement[10]* which urge developed countries to take the lead in mobilizing and unlocking climate finance[11].This principle recognizes that the contribution of countries to climate change and their capacity to prevent it and cope with its consequences vary enormously[12]. It has been pointed out that climate change has had uneven and unequal burdens across the globe with nations and communities that contribute the least to climate change suffering the most from its consequences[13]. However, such countries which are often developing countries and small island nations lack adequate financial resources to prepare

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[5] United Nations Climate Change., 'Introduction to Climate Finance.' Op Cit
[6] Ibid
[7] Climate Finance., 'Climate Finance Essential for Mitigating and Adapting to Climate Change.' Available at https://www.iberdrola.com/sustainability/what-is-climate-finance (Accessed on 25/12/2023)
[8] United Nations Climate Change., 'Introduction to Climate Finance.' Op Cit
[9] United Nations Framework Convention on Climate Change., Available at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/con veng.pdf (Accessed on 25/12/2023)
[10] Paris Agreement., Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 25/12/2023)
[11] Ibid, Article 11 (1)
[12] Ibid
[13] Sultana. F., 'Critical Climate Justice' Available at https://www.farhanasultana.com/wpcontent/uploads/Sultana-Critical-climate-justice.pdf (Accessed on 25/12/2023)

for and cope with the impacts of climate change[14]. Climate finance is therefore seen as a vital tool in enhancing the capacity of developing countries and small island nations to respond to climate change[15].

The paper critically discusses the role of the Loss and Damage Fund in the climate finance agenda. It argues that the Loss and Damage Fund is necessary in expanding the landscape of climate finance and assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change. The paper critically examines the progress made towards actualizing the Loss and Damage Fund at COP 28. It argues a case for operationalizing the Loss and Damage Fund in order to enhance the future of climate finance.

2.0 Examining the Loss and Damage Fund

The Loss and Damage Fund was launched at the 2022 United Nations Climate Change Conference/ Conference of the Parties of the UNFCCC (COP 27) when parties agreed to set up funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage[16]. The objective of the Loss and Damage Fund is to establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources, and that these new arrangements complement and include sources, funds, processes and initiatives under and outside the UNFCCC and the Paris Agreement[17]. The COP 27 decision also stipulates ways of operationalizing the Loss and Damage Fund including establishing

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[14] Hill. A.,& Babin. M 'Why Climate Finance is Critical for Accelerating Global Action.' Available at https://www.cfr.org/in-brief/why-climate-finance-critical-accelerating-global-action (Accessed on 25/12/2023)

[15] Ibid

[16] UNFCCC., 'Decision -/CP.27 -/CMA.4: Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage.' Available at https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf (Accessed on 25/12/2023)

[17] Ibid, Paragraph 2

institutional arrangements, modalities, structure, governance and terms of reference for the fund, defining the elements of the new funding arrangements, identifying and expanding sources of funding and ensuring coordination and complementarity with existing funding arrangements[18]. It further establishes a Transitional Committee to operationalize the new funding arrangements for responding to loss and damage and the associated fund[19]. The Committee made recommendations based on, inter alia, elements for operationalization of the Loss and Damage Fund for consideration and adoption by the Conference of the Parties at COP 28[20].

According to the United Nations Environment Programme (UNEP), the establishment of the Loss and Damage Fund was the culmination of decades of pressure from climate-vulnerable developing countries[21]. UNEP observes that the fund aims to provide financial assistance to nations most vulnerable and impacted by the effects of climate change[22]. It has been asserted that the Loss and Damage Fund acknowledges that climate change has caused widespread adverse impacts and related losses and damages to nature and people beyond natural climate variability[23]. The United Nations points out that some development and adaptation efforts have reduced climate vulnerability, but the rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt[24]. Loss and damage arising from the adverse impacts of climate change can include those related to extreme weather events but also slow onset events, such as sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of

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[18] Ibid, Paragraph 5

[19] Ibid, paragraph 4

[20] Ibid

[21] United Nations Environment Programme., 'What you Need to Know about the COP 27 Loss and Damage Fund.' Available at https://www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund (Accessed on 25/12/2023)

[22] Ibid

[23] United Nations Climate Change., 'Loss and Damage.' Available at https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction#loss-and-damage (Accessed on 25/12/2023)

[24] Ibid

biodiversity and desertification[25]. According to UNEP, loss and damage refers to the negative consequences that arise from the unavoidable risks of climate change, like rising sea levels, prolonged heatwaves, desertification, the acidification of the sea and extreme events, such as bushfires, species extinction and crop failures[26].

The Loss and Damage Fund has been hailed as an important milestone in the climate justice agenda[27]. The concept of climate justice acknowledges that climate change has had uneven and unequal burdens across the globe with nations and communities that contribute the least to climate change suffering the most from its consequences[28]. It has correctly been pointed out that some countries mainly the large industrialised economies of Europe and North America have benefitted much more from the industries and technologies that cause climate change than have developing nations in places such as Africa, Asia, the Caribbean Islands and the Pacific Islands which due to an unfortunate mixture of economic and geographic vulnerability, continue to shoulder the brunt of the burdens of climate change despite their relative innocence in causing it[29]. The impacts of climate change including extreme flooding, intense droughts, rising sea levels, and unpredictable weather damage are more severe in developing countries resulting in both economic and non-economic loss and damage including loss of lives, damage to infrastructure and displacement of people[30]. Climate justice focuses on how climate change impacts people differently, unevenly and disproportionately and seeks to address the resultant injustices in fair and equitable way[31]. The Loss and Damage has been hailed for recognizing the injustices caused by

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[25] Ibid

[26] United Nations Environment Programme., 'What you need to know about the COP27 Loss and Damage Fund.' Op Cit

[27] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Available at https://greenly.earth/en-us/blog/company-guide/what-is-the-cop27-loss-and-damage-fund (Accessed on 25/12/2023)

[28] Sultana. F., 'Critical Climate Justice' Op Cit

[29] Giles. M., 'The Principles of Climate Justice at CoP27.' Available at https://earth.org/principles-ofclimatejustice/#:~:text=That%20response%20should%20be%20based,the%20consequences%20of%20clim ate%20change (Accessed on 25/12/2023)

[30] Ibid

[31] Sultana. F., 'Critical Climate Justice' Op Cit

climate change whose impacts are more severe in developing countries[32]. It has been described as a response to the climate injustice and climate debt, owed by the developed countries to the developing countries[33]. It aims to help developing nations deal with loss and damage resulting from the effects of climate change[34].

The Loss and Damage Fund is therefore important in the climate finance agenda. It has been asserted that the establishment of the Loss and Damage Fund will add a third pillar to the global climate finance landscape which will now comprise of mitigation (funding to reduce emissions), adaptation (funding to minimize the negative impacts of emissions) and loss and damage (funding to address the harms caused by emissions)[35]. The Loss and Damage Fund will help vulnerable nations to rebuild the necessary physical and social infrastructure to deal with the negative consequences that arise from the unavoidable risks of climate change including rising sea levels, extreme heat waves, desertification, forest fires and crop failures[36]. Further, it has been argued that the Loss and Damage Fund will help governments rebuild homes, hospitals and roads, avoid new debt burdens, and provide social protection to help communities bridge crises and avoid incidences of poverty after climate disasters[37]. The Loss and Damage Fund is therefore important since its establishment will expand the climate finance landscape.

However, operationalization of the Loss and Damage Fund is likely to face several hurdles. Among the key concerns is the ability of the Fund to meet the urgent and immediate need for new, additional, predictable and adequate financial resources while ensuring that existing development and climate financing for other priorities is not diverted[38]. It has been argued that there is

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[32] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Op Cit

[33] Wyns. A., 'COP 27 Establishes Loss and Damage Fund to Respond to Human Cost of Climate Change.' *The Lancet Planetary Health*, Volume 7, Issue 1 (2023)

[34] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Op Cit

[35] Reliefweb., 'A Loss and Damage Fund: Two Big Challenges.' Available at https://reliefweb.int/report/world/loss-and-damage-fund-two-big-challenges (Accessed on 18/09/2023)

[36] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Op Cit

[37] Wyns. A., 'COP 27 Establishes Loss and Damage Fund to Respond to Human Cost of Climate Change.' Op Cit

[38] Reliefweb., 'A Loss and Damage Fund: Two Big Challenges.' Op Cit

a real danger that the supposed 'new and additional' funding will not be new and additional at all since it will simply be <u>drawn from existing aid budgets</u> and taken from other areas thus hindering other climate change priority areas including mitigation and adaptation[39].

In addition, there are unresolved questions over who will provide finance and which countries will receive it[40]. There have been suggestions that the Fund should be drawn from developed countries which have an obligation to fulfill their climate finance commitments in accordance with the principle of common but differentiated responsibility and respective capabilities while others have suggested that there is need to find new, scaled up sources of funding such as innovative 'polluter pays' style instruments levied at a national level, such as a national carbon tax, and that high emitting industries could also contribute to the Fund[41]. It has been asserted there is no clarity over where the Loss and Damage Fund will be drawn from and how the Fund will be aligned with existing UNFCCC funds[42]. It is further not clear whether all developing countries will be beneficiaries of the Fund or only those that are highly vulnerable to the impacts of climate change[43]. It is therefore imperative to define the scope of the Loss and Damage Fund in order to enhance its effectiveness.

Finally, there are concerns over efficiency of the Loss and Damage Fund in providing much needed climate finance to countries affected by climate disasters[44]. Existing climate finance institutions and funds, such as the Green Climate Fund and the Adaptation Fund, often have elaborate application processes, and take years to distribute funds[45]. It has been argued that establishing the Fund under existing entities within the UNFCCC such as the

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[39] Ibid

[40] Rumble. O, & Gilder. A., 'Who, What, Where? The Loss and Damage Fund's Unresolved Questions.' https://africanarguments.org/2023/07/who-what-where-the-loss-and-damage-funds-unresolved-questions/ (Accessed on 19/09/2023)

[41] Ibid

[42] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Op Cit

[43] Rumble. O, & Gilder. A., 'Who, What, Where? The Loss and Damage Fund's Unresolved Questions.' Op Cit

[44] Wyns. A., 'COP 27 Establishes Loss and Damage Fund to Respond to Human Cost of Climate Change.' Op Cit

[45] Ibid

Green Climate Fund is likely to encumber the Loss and Damage Fund with the institutional, legal, and procedural challenges that have plagued other existing funds and thus prevent vulnerable countries from expeditious access to funds needed to address loss and damage related to climate change[46]. Further, it has also been argued that establishing the Fund as a new entity under the financial mechanisms of the UNFCCC will result in further fragmentation of the climate finance landscape[47]. The current environment of climate finance is now dispersed across dozens of multilateral and bilateral providers, each with their own requirements, procedures and processes a situation which places significant burden on vulnerable countries who find it difficult to access finance[48]. It is therefore imperative to address the foregoing concerns in order to ensure the efficacy and efficiency of the Loss and Damage Fund and fulfill its objective of assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage that arises from the impacts of climate change[49].

3.0 Operationalizing the Loss and Damage Fund

At COP 28, parties of the UNFCCC reached a historic agreement on the operationalization of the Loss and Damage fund and funding arrangements[50]. The decision sets out the purpose of the Fund which is to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events[51]. The Agreement invites the World Bank to operationalize the Fund as a World Bank hosted financial

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[46] Rumble. O, & Gilder. A., 'Who, What, Where? The Loss and Damage Fund's Unresolved Questions.' Op Cit

[47] Ibid

[48] Reliefweb., 'A Loss and Damage Fund: Two Big Challenges.' Op Cit

[49] UNFCCC., 'Decision -/CP.27 -/CMA.4: Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage.' Op Cit

[50] United Nations Climate Change., 'Operationalization of the New Funding Arrangements, including a Fund, for Responding to Loss and Damage referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4.' Available at https://unfccc.int/documents/636558 (Accessed on 25/11/2023)

[51] Ibid

intermediary fund for an interim period of four years[52]. According to the Agreement, the Loss and Damage Fund will endeavour to assist those countries that are vulnerable to the adverse impacts of climate change in mobilizing external finance to strengthen their efforts to respond to loss and damage while supporting both the achievement of international goals on Sustainable Development and the eradication of poverty[53].

The Decision sets out the scope of the Fund which is to provide finance for addressing a variety of challenges associated with the adverse effects of climate change, such as climate-related emergencies, sea level rise, displacement, relocation, migration, insufficient climate information and data, and the need for climate-resilient reconstruction and recovery[54]. The Fund will focus on priority gaps within the current landscape of institutions, including global, regional and national institutions, that are funding activities related to responding to loss and damage[55]. In relation to the legal status of the Loss and Damage, the COP 28 decision sets out that the Fund will possess international legal personality and appropriate legal capacity as is necessary for the exercise of its functions, the fulfilment of its objectives and the protection of its interests, in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property, and to institute legal proceedings in defence of its interests[56]. In addition, in terms of the relationship of the Fund to the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, the COP 28 decision provides that the Fund will be designated as an entity entrusted with the operation of the Financial Mechanism of the Convention, which also serves the Paris Agreement, and will be accountable to and function under the guidance of the Conference of the Parties (COP) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement[57].

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[52] Ibid

[53] Ibid

[54] United Nations Climate Change., 'Operationalization of the New Funding Arrangements, including a Fund, for Responding to Loss and Damage referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4.' Op Cit

[55] Ibid

[56] Ibid

[57] Ibid

The COP 28 decision further stipulates that the Loss and Damage Fund will be governed and supervised by a Board that is its decision-making body[58]. The Board will have responsibility for setting the strategic direction of the Fund and for the Fund's governance and operational modalities, policies, frameworks and work programme, including relevant funding decisions[59]. Further, in terms of eligibility, the COP 28 decision sets out that developing countries that are particularly vulnerable to the adverse effects of climate change are eligible to receive resources from the Fund[60]. The Fund is intended to promote and strengthen national responses for addressing loss and damage through pursuing country-led approaches, including through effective involvement of relevant institutions and stakeholders, in particular women, vulnerable communities and Indigenous Peoples[61]. In order to foster access to financial resources by developing countries, the COP28 decision requires the Fund to develop simplified procedures and criteria for fast-tracked screening to determine functional equivalency with internationally recognized standards of national and/or regional funding entities' safeguards and standards to manage funded programmes and projects in country, as appropriate[62]. In addition, in terms of financial inputs, the COP 28 outcome provides that the Fund is able to receive contributions from a wide variety of sources of funding, including grants and concessional loans from public, private and innovative sources, as appropriate[63]. In relation to financial instruments, the COP 28 outcome provides that the Fund will provide financing in the form of grants and highly concessional loans on the basis of the Board's policy for the provision of grants, concessional resources and other financial instruments, modalities and facilities[64]. In addition, the Fund may deploy a range of additional financial instruments that take into consideration debt sustainability (grants, highly concessional loans, guarantees, direct budget support and policy-based finance, equity, insurance mechanisms, risk-

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[58] Ibid

[59] United Nations Climate Change., 'Operationalization of the New Funding Arrangements, including a Fund, for Responding to Loss and Damage referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4.' Op Cit

[60] Ibid

[61] Ibid

[62] Ibid

[63] Ibid

[64] Ibid

sharing mechanisms, pre-arranged finance, performance-based programmes and other financial products, as appropriate) to augment and complement national resources for addressing loss and damage[65]. The COP 28 outcome also requires programmes, projects and other activities financed by the Fund to be regularly monitored for impact, efficiency and effectiveness[66].

The cop 28 outcome is therefore important in operationalizing the Loss and Damage Fund and expanding the landscape of climate finance[67]. Operationalization of the Fund has been described as an essential tool to deliver climate justice[68]. It is therefore necessary to implement the COP 28 outcome in order to operationalize the Loss and Damage Fund. In addition, it has been asserted that the loss and damage funds should be new and additional – and come as grants not loans in order to fulfill the purpose of the Fund[69]. It is also imperative for the world to close the climate financing gap. It has been highlighted that the current climate change funding pledges fall far short of what is actually required to mitigate the worst impacts of climate change and to deal with the unavoidable consequences[70]. Developed countries have failed to deliver on an agreed climate finance target of $100 billion annually by 2020 resulting in inadequacy, imbalance and unpredictability of climate finance flows to developing countries thus affecting implementation of mitigation and adaptation measures in developing countries[71]. There is an apprehension that the Loss and Damage Fund may suffer from the same fate of inadequate funding thus affecting the response to climate change in vulnerable countries[72]. The world urgently needs to find more resources for

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[65] Ibid

[66] Ibid

[67] United Nations., 'COP 28 Talks Open in Dubai with Breakthrough Deal on Loss and Damage Fund.' Available at https://turkiye.un.org/en/254449-cop28-talks-open-dubai-breakthrough-deal-loss-and-damage-fund (Accessed on 25/12/2023)

[68] Ibid

[69] Ibid

[70] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Op Cit

[71] Kone. T., 'For Africa to meet its Climate Goals, Finance is Essential.' Available at https://climatepromise.undp.org/news-and-stories/africa-meet-its-climate-goals-finance-essential (Accessed on 25/12/2023)

[72] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Op Cit

mitigation, adaptation and loss and damage so that climate change will not erode humanity's chances to deliver on the <u>Sustainable Development Goals</u>[73]. Finally, it is imperative to confront the global problem of climate change by addressing its root cause through reducing greenhouse gas emissions[74]. Unless this is achieved, more countries will continue to face the devastating effects of climate change[75]. This calls for all countries especially the developed countries which are the largest contributors to global greenhouse emissions to comply with their climate commitments under the Paris Agreement as set out in their Nationally Determined Contributions (NDCs)[76]. Through this, the threat of climate change will be minimized and the Loss and Damage Fund will only be required in extreme cases[77].

The Loss and Damage Fund holds immense promises in enhancing the global response to climate change. It can unlock climate finance and foster climate justice[78]. There is need to operationalize the Fund in order to provide financial assistance to nations most vulnerable and impacted by the effects of climate change towards climate justice[79].

4.0 Conclusion

The Loss and Damage Fund is designed to provide financial assistance to nations most vulnerable and impacted by the effects of climate change[80]. It recognizes the injustices caused by climate change whose impacts are more severe in developing countries[81]. Its adoption will add a third pillar to the global climate finance landscape alongside mitigation and adaptation[82]. The

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[73] United Nations Environment Programme., 'What you need to know about the COP27 Loss and Damage Fund.' Op Cit

[74] United Nations Environment Programme., 'What you need to know about the COP27 Loss and Damage Fund.' Op Cit

[75] Ibid

[76] Mace. M., 'Mitigation Commitments under the Paris Agreement and the Way Forward.' *Climate Law*, No. 6 of 2016, pp 21-39

[77] United Nations Environment Programme., 'What you need to know about the COP27 Loss and Damage Fund.' Op Cit

[78] Ibid

[79] Ibid

[80] United Nations Environment Programme., 'What you need to know about the COP27 Loss and Damage Fund.' Op Cit

[81] Anderson. K., 'What is the COP 27 Loss and Damage Fund?' Op Cit

[82] Reliefweb., 'A Loss and Damage Fund: Two Big Challenges.' Op Cit

COP 28 outcome is a key milestone towards the operationalization of the Loss and Damage Fund[83]. There is need to implement the outcome in order to reap the benefits presented by the Loss and Damage Fund. In addition, it is imperative to close the global climate financing gap and address the root causes of climate change in order to effectively confront climate change[84]. Operationalizing the Loss and Damage Fund is an important global agenda that needs to be achieved in order to unlock climate finance and foster climate justice.

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[83] United Nations Climate Change., 'Operationalization of the New Funding Arrangements, including a Fund, for Responding to Loss and Damage referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4.' Op Cit
[84] United Nations Environment Programme., 'What you need to know about the COP27 Loss and Damage Fund.' Op Cit

Transitioning from Fossil Fuels to Clean Energy

Abstract

This paper critically discusses the need to transition from fossil fuels to clean energy. It argues that energy transition has become an imperative in light of global challenges including climate change and scarce energy supplies. It examines the role of fossil fuels in the global threat of climate change. The paper further discusses the efficacy of initiatives adopted at national, regional, continental and global levels towards transitioning from fossil fuels to clean energy. It also highlights the challenges facing the global transition from fossil fuels to clean energy. The paper further proposes reforms aimed at accelerating the transition from fossil fuels to clean energy.

1.0 Introduction

Energy transition involves the long-term structural change to energy systems[1]. It refers to the change in the composition (structure) of primary energy supply, the gradual shift from a specific pattern of energy provision to a new state of an energy system[2]. Energy transition has also been described as the global energy sector's shift from fossil-based systems of energy production and consumption including oil, natural gas and coal to renewable energy sources like wind and solar, as well as lithium-ion batteries[3]. Energy transition can also refer to the shift from fossil fuels to renewable energy sources in an effort to reduce CO_2 emissions[4].

Several factors may stimulate the transition from reliance on one major energy resource to another. These factors include the depletion or shortage of local or regional energy supplies and resources[5]; increase in costs of one energy source

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[1] Nalule. V., & Leal-Arcas. R., 'Chapter 8 - Energy Decentralization and Energy Transition in Poland.' *Electricity Decentralization in the European Union* (Second Edition)., 2023 pp209-240

[2] Mazzone. A., 'Energy Transition in Isolated Communities of the Brazilian Amazon.' *The Regulation and Policy Latin American Energy Transitions*., 2020., pp 319-330

[3] S & P Global., 'What is Energy Transition?' Available at https://www.spglobal.com/en/research-insights/articles/what-is-energy-transition (Accessed on 25/12/2023)

[4] Deloitte., 'The Energy Transition Explained.' Available at https://www2.deloitte.com/nl/nl/pages/energy-resources-industrials/articles/future-of-energy-faq.html (Accessed on 25/12/2023)

[5] Solomon. B., & Krishna. K., 'The Coming Sustainable Energy Transition: History, Strategies, and Outlook.' *Energy Policy* 39 (2011) 7422-7431

followed by a corresponding decrease in the cost of another energy sources[6]; adverse environmental and health impacts of one energy source such as air and water pollution creating the desirability of alternative sources of energy[7]; and technological change and innovation resulting in more efficient sources of energy[8]. Energy transition is therefore usually determined by factors such as the availability of energy resources, the costs of obtaining energy resources as well as their usefulness, and in recent years, by efforts to protect the climate[9]. According to the United Nations Environment Programme (UNDP), the energy transition is a continuing process requiring long-term energy strategies and planning, with a country-tailored focus on applying appropriated energy technologies to reach net-zero emissions[10].

It has rightly been pointed out that facing global climate change and increasing scarcity and expense of petroleum, the world community is compelled to transition to sustainable energy systems as well as to better manage energy demand and supply[11]. Energy transition has therefore become an imperative in light of global challenges including climate change and scarce energy supplies[12].

This paper critically discusses the need to transition from fossil fuels to clean energy. It examines the role of fossil fuels in the global threat of climate change. The paper further discusses the efficacy of initiatives adopted at national, regional, continental and global levels towards transitioning from fossil fuels to clean energy. It also highlights the challenges facing the global transition from fossil fuels to clean energy. The paper further proposes reforms aimed at accelerating the transition from fossil fuels to clean energy.

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[6] Ibid

[7] Ibid

[8] Ibid

[9] Nalule. V., & Leal-Arcas. R., 'Chapter 8 - Energy Decentralization and Energy Transition in Poland.' Op Cit

[10] United Nations Development Programme., 'Energy Transition.' Available at https://www.undp.org/energy/our-work-areas/energy-transition (Accessed on 25/12/2023)

[11] Solomon. B., & Krishna. K., 'The Coming Sustainable Energy Transition: History, Strategies, and Outlook.' Op Cit

[12] Ibid

2.0 Fossil Fuels and Climate Change

Fossil fuels is a generic term that refers to non-renewable energy sources such as coal, coal products, natural gas, derived gas, crude oil, petroleum products and non-renewable wastes[13]. These fuels originate from plants and animals that existed in the geological past[14]. Fossil fuels are made from decomposing plants and animals[15]. These fuels are found in Earth's crust and contain carbon and hydrogen, which can be burned for energy. Coal, oil, and natural gas are examples of fossil fuels[16].

Fossil fuels have been a major source of global energy supply for many decades. According to the International Energy Agency (IEA), fossil fuels including coal, oil and natural gas have accounted for almost 80 per cent of global energy supply for many decades[17]. It has been asserted that fossil fuels including coal, oil, and natural gas have been powering economies for over 150 years, and currently supply about 80 percent of the world's energy[18]. It has correctly been pointed out that fossil fuels have always had the major share in the global primary energy consumption and will continue to hold the position in the foreseeable future as more unconventional fossil fuels are explored[19]. Fossil fuels therefore hold an important position in the global energy mix.

Despite their importance in global energy supply, the extraction and burning of fossil fuels has serious environmental consequences including climate change[20]. It has been pointed out that when fossil fuels are burned, the stored carbon and other greenhouse gases are released into the atmosphere[21]. An

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[13] European Commission., 'Glossary: Fossil Fuel.' Available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Fossil_fuel (Accessed on 26/12/2023)

[14] Ibid

[15] National Geographic., 'Fossil Fuels.' Available at https://education.nationalgeographic.org/resource/fossil-fuels/ (Accessed on 26/12/2023)

[16] Ibid

[17] International Energy Agency., 'World Energy Outlook: 2023.' Available at https://iea.blob.core.windows.net/assets/42b23c45-78bc-4482-b0f9-eb826ae2da3d/WorldEnergyOutlook2023.pdf (Accessed on 26/12/2023)

[18] Environmental and Energy Study Institute., 'Fossil Fuels.' Available at https://www.eesi.org/topics/fossil-fuels/description (Accessed on 26/12/2023)

[19] Yildiz. I., 'Fossil Fuels.' *Comprehensive Energy Systems.*, (2018), Volume 1., pp 521-567

[20] Ibid

[21] Environmental and Energy Study Institute., 'Fossil Fuels.' Op Cit

excess buildup of greenhouse gases in the atmosphere as a result of burning of fossil fuels has resulted in dramatic changes to Earth's climate—a trend that will worsen as more fossil fuels are burned[22]. It has been pointed out that the production and use of fossil fuel for electricity and transportation among other uses is not only contributing to climate change, but is also causing health problems, destroying natural ecosystems, and releasing toxins such as mercury and arsenic into communities[23].

It has been asserted that emissions from fossil fuels are the dominant cause of global warming and climate change[24]. The United Nations correctly opines that fossil fuels including coal, oil and natural gas are by far the largest contributor to global climate change, accounting for over 75 per cent of global greenhouse gas emissions and nearly 90 per cent of all carbon dioxide emissions[25]. It is therefore important to transition from fossil fuels to clean energy in order to confront climate change. It has been pointed out that increased production and use of fossil fuels is not compatible with a safe and liveable future[26]. As a result, it has been argued that in order to protect the health and lives of present and future generations, the world needs a rapid, equitable phase-out of fossil fuels[27].

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[22] Ibid

[23] The National Wildlife Federation., 'Reducing Fossil Fuel Reliance.' Available at https://www.nwf.org/Home/Our-Work/Climate/Climate-Change/Fossil-Fuels (Accessed on 26/12/2023)

[24] Fossil fuels and Climate Change: The Facts., Available at https://www.clientearth.org/latest/news/fossil-fuels-and-climate-change-the-facts/#:~:text=What%20is%20the%20link%20between,temperature%20has%20increased%20by%201C (Accessed on 26/12/2023)

[25] United Nations., 'Causes and Effects of Climate Change.' Available at https://www.un.org/en/climatechange/science/causes-effects-climate-change (Accessed on 26/12/2023)

[26] Amnesty International., 'Global: Fossil Fuel Production will be Double the Level Needed to Limit Global Warming to 1.5°C.' Available at https://www.amnesty.org/en/latest/news/2023/11/global-fossil-fuel-production-will-be-double-the-level-needed-to-limit-global-warming-to-1-5c/ (Accessed on 26/12/2023)

[27] The Global Climate & Health Alliance., 'Health and Fossil Fuels: A Rapid and Just Transition.' Available at https://climateandhealthalliance.org/initiatives/fossil-fuel-phaseout/ (Accessed on 26/12/2023)

3.0 Transitioning from Fossil Fuels to Clean Energy: Progress and Setbacks
The need to transition from fossil fuels to clean energy is acknowledged in several legal and policy instruments.

The *United Nations Framework Convention on Climate Change (UNFCCC)*[28] acknowledges the need to transition from fossil fuels to clean energy. The UNFCCC states that countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of *fossil fuels* and associated energy-intensive products are highly vulnerable to climate change[29]. The UNFCCC requires all countries and especially developing countries which are still highly dependent on fossil fuels to explore the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general, including through the application of new technologies in the energy sector such as renewable energy on terms which make such an application economically and socially beneficial[30]. The UNFCCC therefore sets the stage for global transition from fossil fuels to clean energy.

The *Paris Agreement*[31] aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change[32]. It has been pointed out that though the phrase 'fossil fuels' does not appear in the Paris Agreement neither to the terms 'coal', 'oil' and 'natural gas' despite these resources being responsible for most greenhouse gas emissions, the omission reflects the decision by national governments,

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[28] United Nations Framework Convention on Climate Change., United Nations 1992, Available   at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (Accessed on 26/12/2023)
[29] Ibid, Article 4
[30] Ibid
[31] Paris Agreement., United Nations, 2015., Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf   (Accessed   on 26/12/2023)
[32] Ibid, Article 2 (1) (a)

reinforced by industry lobbyists, to focus emissions reduction efforts on reducing the demand for fossil fuels, rather than limiting fossil fuel supply by discouraging or even prohibiting their extraction in the first place[33]. The Paris Agreement therefore envisages the transition from fossil fuels to clean energy in order to reduce global greenhouse gas emissions. Implementation of the Paris Agreement is necessary in shifting towards a net-zero emissions world[34]. The transition from fossil fuels is also envisioned under the *United Nations 2030 agenda for Sustainable Development*[35]. Sustainable Development Goal (SDG) 7 seeks to ensure access to affordable, reliable, sustainable and modern energy for all[36]. Among the targets under SDG 7 include ensuring universal access to affordable, reliable and modern energy services; substantially increasing the share of renewable energy in the global energy mix; doubling the global rate of improvement in energy efficiency; and enhancing international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology[37]. Achieving the targets under SDG 7 is necessary in transitioning from fossil fuels to clean energy including renewable sources of energy. In addition SDG 12 seeks to foster sustainable consumption and production patterns[38]. Among the targets under SDG 12 is to rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner

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[33] Council on Foreign Relations., 'To Tackle Climate Change, Keep Fossil Fuels in the Ground.' Available at https://www.cfr.org/article/tackle-climate-change-keep-fossil-fuels-ground (Accessed on 26/12/2023)

[34] United Nations., 'The Paris Agreement.' Available at https://www.un.org/en/climatechange/paris-agreement (Accessed on 26/12/2023)

[35] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 26/12/2023)

[36] Ibid, SDG 7

[37] Ibid

[38] Ibid, SDG 12

that protects the poor and the affected communities[39]. Regulation of fossil fuel subsidies has been identified as key measure geared towards shifting from fossil fuels to clean energy[40]. Transitioning from fossil fuels to clean energy is therefore an essential part of the Sustainable Development agenda.

Transitioning from fossil fuels to clean energy is also an important agenda in Africa. Africa Union's *Agenda 2063*[41] posits that the Continent faces enormous energy challenges that include low generation capacity and efficiency, high costs, unstable and unreliable energy supplies, low access to modern energy, insufficient energy infrastructure, and lack of institutional and technical capacity to harness huge resources partly due to dependence on fossil fuels for generation of electricity[42]. Among the aspirations under Agenda 2063 is to create environmentally sustainable and climate resilient economies and communities in Africa through measures such as the adoption of renewable sources of energy[43]. Agenda 2063 portrays the vision of a Continent where renewable energy (wind, solar, hydro, bioenergy, ocean tidal waves, geothermal and other renewables) will claim more than half of the energy consumption for households, businesses and organizations[44]. Implementing Agenda 2063 is thus necessary in order to transition from fossil fuels to clean energy in Africa.

At the regional level, the *East African Community Climate Change Policy*[45] stipulates the importance of transitioning from fossil fuels to clean energy within the East African Community (EAC). According to the Policy, energy is the driver of social and economic development in the EAC region, and most

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[39] Ibid, SDG 12.c

[40] World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Available at https://www.wri.org/insights/4-ways-shift-fossil-fuels-clean-energy (Accessed on 26/12/2023)

[41] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 26/12/2023)

[42] Ibid

[43] Ibid

[44] Ibid

[45] East African Community., 'EAC Climate Change Policy Framework.' Available at https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework (Accessed on 26/12/2023)

of the EAC partner states depend on imported fossil based fuel (oil)[46]. The Policy acknowledges that the use of fossil oil is unsustainable due to its high emission factor that is a major contributor to global warming and climate change[47]. It further states that the search for alternative source of energy exacerbated by climate change usually leads to use of fossil based fuel to generate electricity for industrial needs that are also economically costly to the region[48]. The Policy seeks to increase the availability and accessibility of sustainable, reliable and affordable renewable energy resources in the EAC and urges member states to embrace measures such as scaling up investment in renewable energy technologies to provide access to affordable cleaner energy, improve efficiency in use of biomass energy especially for rural communities; developing appropriate alternative energy sources, policies and measures to increase energy efficiency; devising a precautionary approach to the development of bio-fuels for mitigation and energy in view of food security issues; and improving energy efficiency and promoting clean energy technologies including; hydropower, solar and wind[49]. It is necessary for member states of the EAC to actualize the provisions of this Policy in order to transition from fossil fuels to clean energy.

At the national level, the *Energy Act[50]* of Kenya embraces the transition from fossil fuels to clean energy sources including renewable energy. The Act defines renewable energy as non-fossil energy generated from natural non-depleting resources including but not limited to solar energy, wind energy, biomass energy, biological waste energy, hydro energy, geothermal energy and ocean and tidal energy[51]. It urges the state to develop, promote and manage the use of renewable sources of energy in Kenya and establishes the Rural Electrification and Renewable Energy Corporation which is tasked to fulfill that mandate[52]. In addition, the *Climate Change Act[53]* requires the state to embrace climate change response measures and actions such as enhancing

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[46] Ibid, Part 3.2.4 (i)
[47] Ibid
[48] Ibid
[49] Ibid
[50] Energy Act., No. 1 of 2019., Laws of Kenya., Government Printer, Nairobi
[51] Ibid, S 2
[52] Ibid, S 43 & 44
[53] Climate Change Act., No. 11 of 2016., Laws of Kenya., Government Printer, Nairobi

energy conservation, efficiency and use of renewable energy in industrial, commercial, transport, domestic and other uses[54]. Further, the *National Energy Policy*[55] identifies key challenges in the energy sector in Kenya including reliance on fossil fuels which results in high electricity costs[56]. It further acknowledges that there is increasing concern about spiralling degradation of the environment as exemplified by increased local air pollution and acid precipitation from ever growing fossil fuel combustion[57]. It also identifies the depletion of energy resources including fossil fuels as a major concern in the energy sector in Kenya[58]. The Policy urges the country to move towards renewable sources of energy. It correctly points out that renewable energy, derived from the naturally occurring resources including geothermal, hydro, solar, wind, ocean energy, biomass, biofuels, biogas and municipal waste can supply the country's energy needs and those of future generations in a sustainable way if effectively harnessed through careful planning and advanced technology[59]. In addition, the Policy asserts that renewable energy has potential to enhance energy security, mitigate climate change, generate income, create employment and generate foreign exchange savings[60]. It is thus imperative to transition from fossil fuels to clean energy including renewable energy in Kenya.

From the foregoing, it is evident that the need to transition from fossil fuels to clean energy is recognized at the global, continental, regional and national levels. There has been some progress towards transitioning from fossil fuels to clean energy. The IEA points out that although demand for fossil fuels has been strong in recent years, there are signs of a change in direction[61]. According to the IEA, alongside the deployment of low-emissions alternatives, the rate at which new assets that use fossil fuels are being added to the energy

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[54] Ibid, S 13 (3) (j)
[55] Ministry of Energy., 'National Energy Policy.' Available at https://kplc.co.ke/img/full/BL4PdOqKtxFT_National%20Energy%20Policy%20October%20%202018.pdf (Accessed on 26/12/2023)
[56] Ibid
[57] Ibid
[58] Ibid
[59] Ibid
[60] Ibid
[61] International Energy Agency., 'World Energy Outlook: 2023.' Op Cit

system has slowed[62]. The IEA however warns that even as demand for fossil fuels falls, energy security challenges will remain since the process of adjustment to changing demand patterns will not necessarily be easy or smooth[63]. It is therefore important to ensure that the transition from fossil fuels to clean energy is done in manner that fosters energy security.

The transition from fossil fuels to clean energy recently received a major boost at the 2023 United Nations Climate Change Conference/ Conference of the Parties of the UNFCCC (COP 28) when states adopted the global stock take decision[64]. The COP 28 decision underlines the urgent need to address, in a comprehensive and synergetic manner, the interlinked global crises of climate change and biodiversity loss in the broader context of achieving the Sustainable Development Goals, as well as the vital importance of protecting, conserving, restoring and sustainably using nature and ecosystems for effective and sustainable climate action[65]. The decision affirms the commitment of member states to accelerate climate action in this critical decade on the basis of the best available science, reflecting equity and the principle of *common but differentiated responsibilities and respective capabilities* in the light of different national circumstances and in the context of Sustainable Development and efforts to eradicate poverty(Emphasis added)[66]. It further emphasizes that finance, capacity-building and technology transfer are critical enablers of climate action[67]. It requires states to embrace collective progress towards achieving the purpose and long-term goals of the Paris Agreement through measures such as transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science[68]. It also requires countries to phase out inefficient fossil fuel subsidies that do

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[62] Ibid

[63] Ibid

[64] United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stock take' Available at https://unfccc.int/documents/636584 (Accessed on 26/12/2023)

[65] Ibid

[66] Ibid

[67] Ibid

[68] Ibid

not address energy poverty or just transitions, as soon as possible towards strengthening climate action[69].

The cop 28 decision has been lauded as signaling the 'beginning of the end' of the fossil fuel era[70]. It has been asserted that the decision lays the ground for a swift, just and equitable transition, underpinned by deep emissions cuts and scaled-up finance[71]. The COP 28 decision urges all countries to take actions towards achieving, at a global scale, a tripling of renewable energy capacity and doubling energy efficiency improvements by 2030[72]. It further urges countries to accelerate efforts towards the phase-down of unabated coal power, phasing out inefficient fossil fuel subsidies, and other measures that drive the transition away from fossil fuels in energy systems, in a just, orderly and equitable manner, with developed countries continuing to take the lead[73]. The COP 28 outcome is a major milestone in transitioning away from fossil fuels and towards renewables and energy efficiency[74]. It is therefore necessary for all countries to implement the outcome of COP 28 in order to ensure that the transition from fossil fuels to clean energy is done in manner that fosters justice and equity[75].

Transitioning from fossil fuels to clean energy is therefore an important global agenda. However, this transition faces certain hurdles. It has been observed that fossil fuel subsidies provided to companies in the fossil fuel sector continue to encourage the production and use of these sources of energy[76]. In addition, developing countries continue to face challenges accessing

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[69] Ibid

[70] United Nations Climate Change., 'COP28 Agreement Signals "Beginning of the End" of the Fossil Fuel Era.' Available at https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era (Accessed on 26/12/2023)

[71] Ibid

[72] Ibid

[73] Ibid

[74] European Parliament., 'COP28 Climate Talks Agree on Transitioning Away from Fossil Fuels.' Available at *https://www.europarl.europa.eu/news/en/press-room/20231205IPR15686/cop28-climate-talks-agree-on-transitioning-away-from-fossil-fuels* (Accessed on 26/12/2023)

[75] United Nations., 'Climate and Environment.' Available at https://news.un.org/en/story/2023/12/1144742 (Accessed on 26/12/2023)

[76] The National Wildlife Federation., 'Reducing Fossil Fuel Reliance.' Op Cit

technology and finance to invest in clean energy sources including renewable energy hence continued reliance on fossil fuels[77]. It is imperative to address these among other challenges in order to accelerate the global transition from fossil fuels to clean energy.

4.0 Way Forward

In order to transition from fossil fuels to clean energy, there is need to eliminate fossil fuel subsidies[78]. According to the United Nations Environment Programme (UNEP), the production and use of fossil fuels in many countries is encouraged through large subsidies[79]. These subsidies are undesirable since they contribute to air pollution and congestion, are a drain on national budgets, often do not reach the poorest households, crowd-out investment in clean energy, and encourage excessive energy consumption[80]. The IEA observes that the transition to clean energy alternatives remains a challenge in countries where fossil fuel subsidies have still not been phased out[81]. Fossil fuel subsidies are also undesirable since they distort markets and are often ultimately paid by consumers through higher taxes or consumer prices, especially in importing regions[82]. Fossil fuel subsidies are therefore a major hindrance in the global transition towards clean energy. The COP 28 decision urges all countries to phase out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible towards strengthening climate action[83]. It is therefore important for all countries to face out fossil fuel subsidies in order to embrace the transition towards clean energy.

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[77] Muigua. K., 'Accelerating Energy Transition in Kenya.' Available at https://kmco.co.ke/wp-content/uploads/2023/09/Accelerating-Energy-Transition-in-Kenya.pdf (Accessed on 26/12/2023)

[78] World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Op Cit

[79] United Nations Environment Programme., 'Fossil Fuel Subsidy Reform.' Available at https://www.unep.org/explore-topics/green-economy/what-we-do/economic-and-fiscal-policy/fiscalpolicy/policy-analysis-3 (Accessed on 26/12/2023)

[80] Ibid

[81] International Energy Agency., 'World Energy Outlook: 2023.' Op Cit

[82] Ibid

[83] United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Op Cit

In addition, it is necessary for all countries to scale up investments in clean energy including renewable sources of energy. It has correctly been opined that generating renewable energy creates far lower emissions than burning fossil fuels[84]. Transitioning from fossil fuels, which currently account for the lion's share of global greenhouse gas emissions, to renewable energy is key to addressing the climate crisis across the globe[85]. Countries should therefore transition towards renewable sources of energy such as wind, solar, hydropower, geothermal and tidal energy which are prevalent throughout the globe[86]. The economic, societal and environmental benefits of renewable sources of energy are numerous. Renewable sources of energy are available in abundance, cheaper and are a healthier option for people and the planet[87]. Countries should therefore enhance investments in renewable sources of energy due to their numerous advantages.

It is also important for developed countries to support the transition to clean energy sources in developing countries through finance, technology development and transfer and capacity-building[88]. The COP 28 outcome emphasizes that finance, capacity-building and technology transfer are critical enablers of climate action across all sectors including energy transition[89]. The principle of '*common but differentiated responsibility and respective capabilities*' enshrined in global climate change instruments including the UNFCCC calls upon developed countries to take the lead in fostering climate action through initiatives such as climate finance and technology transfer to developing

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[84] United Nations., 'What is Renewable Energy.' Available at https://www.un.org/en/climatechange/what-is-renewable-energy (Accessed on 26/12/2023)

[85] Ibid

[86] Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Available at https://kmco.co.ke/wp-content/uploads/2023/06/Adopting-Green-Energy-for-a-Bright-Tomorrow.pdf (Accessed on 26/12/2023)

[87] United Nations., 'Climate Action.' Available at https://www.un.org/en/climatechange/howcommunities-are-embracing-renewable-energy (Accessed on 26/12/2023)

[88] United Nations Climate Change., 'COP28 Agreement Signals "Beginning of the End" of the Fossil Fuel Era.' Op Cit

[89] United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Op Cit

countries[90]. Developed countries should therefore enhance climate funding, technology transfer and capacity building in developing countries geared towards transitioning from fossil fuels to clean energy.

Further, it is necessary to improve access to electricity and clean cooking[91]. It has been pointed out that household energy needs entail two components: access to clean cooking facilities and access to electricity[92]. However, access to electricity remains a challenge in many regions of the world especially Africa. The IEA estimates that nearly 600 million people or an equivalent of 43 per cent of the Continent's population lack access to electricity[93]. It further points out that less than a fifth of African countries have targets to reach universal electricity access by 2030[94]. It has further been pointed out that the Sub-Saharan region of Africa has the lowest rate of access to electricity with just nearly half of the population having access to electricity compared to the global access rate of nearly 90 per cent[95]. In addition, it has been noted that many people across the world lack access to clean energy sources such as electricity and use polluting, inefficient fuels such as firewood for household chores such as cooking[96]. Progress remains slow in promoting clean cooking facilities especially in Africa with bio-energy sources such as charcoal, wood fuel and dung being the most common source of energy in Kenya especially among the

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[90] United Nations Framework Convention on Climate Change., United Nations 1992., Op Cit

[91] World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Op Cit

[92] Muigua. K., 'Towards Energy Justice in Kenya.' Available at https://kmco.co.ke/wp-content/uploads/2020/02/Towards-Energy-Justice-in-Kenya-00000005.pdf (Accessed on 26/12/2023)

[93] International Energy Agency., 'Access to Electricity.' Available at https://www.iea.org/reports/sdg7- data-and-projections/access-to-electricity (Accessed on 26/12/2023)

[94] Ibid

[95] United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at https://unctad.org/publication/commoditiesglance-special-issue-access-energy-sub-saharanafrica#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time (Accessed on 26/11/2023)

[96] Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

rural population[97]. Lack of access to electricity and clean cooking facilities encourages the use of fossil fuels a situation which contributes to environmental problems including climate change[98]. It is imperative for all countries to enhance access to electricity and clean cooking facilities through measures such as lowering electricity tariffs, promoting rural electrification and enhancing access to clean energy sources for purposes of cooking such as Liquefied Petroleum Gas (LPG)[99]. Fostering access to electricity and clean cooking facilities will enhance the transition from fossil fuels to clean energy.

Finally, it is important for all countries to achieve energy efficiency and security[100]. According to the IEA, energy efficiency is an essential component of energy transitions which provides some of the quickest and most cost-effective CO2 mitigation options while lowering energy bills and strengthening energy security[101]. The IEA further posits that energy efficiency is the single largest measure to avoid energy demand in the Net Zero Emissions by 2050 Scenario[102]. In addition, most efficiency measures result in cost savings to consumers, lowering energy bills and helping cushion the effects of unexpected price spikes, a situation that was witnessed after Russia's invasion of Ukraine[103]. Energy security on the other hand refers to the uninterrupted availability of energy sources at an affordable price[104]. Long-term energy security mainly deals with timely investments to supply energy in line with economic developments and environmental needs while short-term energy security focuses on the ability of the energy system to react promptly to sudden changes in the supply-demand balance[105]. Energy efficiency and energy security are vital components of global energy transition towards clean energy by ensuring the availability, affordability and security

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[97] Ibid

[98] Ibid

[99] Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Op Cit

[100] World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Op Cit

[101] International Energy Agency., 'Energy Efficiency.' Available at https://www.iea.org/energy-system/energy-efficiency-and-demand/energy-efficiency (Accessed on 26/12/2023)

[102] Ibid

[103] Ibid

[104] International Energy Agency., 'Energy Security.' Available at https://www.iea.org/topics/energy-security (Accessed on 26/11/2023)

[105] Ibid

of energy sources[106]. In the absence of energy efficiency and security, the transition towards clean energy cannot be effectively realized a situation that could result in the continued use of fossil fuels[107]. It is therefore desirable for all countries to achieve energy efficiency and security in order to transition from fossil fuels to clean energy.

The foregoing among other measures are pertinent in transitioning from fossil fuels to clean energy.

5.0 Conclusion

The extraction and burning of fossil fuels has serious environmental consequences including climate change[108]. It has been observed that fossil fuels including coal, oil and natural gas are by far the largest contributors to global climate change, accounting for over 75 per cent of global greenhouse gas emissions and nearly 90 per cent of all carbon dioxide emissions[109]. It is therefore important to transition from fossil fuels to clean energy in order to confront climate change. There has been progress towards transitioning from fossil fuels to clean energy at the global, continental, regional and national levels through measures such as embracing renewable sources of energy.* These efforts received a major boost at COP 28 when countries committed to transition away from fossil fuels in energy systems, in a just, orderly and equitable manner and phase out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible towards strengthening climate action[110]. However, the transition from fossil fuels to clean energy is hindered by factors such as fossil fuel subsidies and inadequate resources and technology in developing countries[111]. In order to effectively transition from fossil fuels to clean energy there is need for all countries to eliminate fossil fuel subsidies[112]; scale up investments in clean energy

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[106] Ibid
[107] Ibid
[108] Yildiz. I., 'Fossil Fuels.' Op Cit
[109] United Nations., 'Causes and Effects of Climate Change.' Op Cit
[110] United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Op Cit
[111] Muigua. K., 'Accelerating Energy Transition in Kenya.' Op Cit
[112] United Nations Environment Programme., 'Fossil Fuel Subsidy Reform.' Op Cit

including renewable sources of energy[113]; accelerate finance, technology development and transfer and capacity-building to developing countries[114]; improve access to electricity and clean cooking[115]; and foster energy efficiency and security[116]. Transitioning from fossil fuels to clean energy is an important agenda that needs to be fast-tracked for climate action and Sustainable Development.

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[113] United Nations., 'What is Renewable Energy?.' Op Cit

[114] United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Op Cit

[115] World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Op Cit

[116] [116] International Energy Agency., 'Energy Efficiency.' Op Cit

Achieving Good Health and Well-Being for All

Abstract

Health is both a basic human right in itself and an essential means for the realisation of other human rights. Achieving good health and well-being is therefore of fundamental importance as envisaged under Sustainable Development Goal 3. This paper critically discusses the progress made towards achieving good health and well-being for all. It examines the legal framework on the right to health at the global, regional and national levels and its efficacy in fostering good health and well-being for all. The paper further discusses some of the key challenges hindering the realization of the right to health and offers proposals towards achieving good health and well-being for all.

1.0 Introduction

The Constitution of the World Health Organization (WHO) defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity[1]. According to the WHO, the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition[2]. It further posits that the health of all peoples is fundamental to the attainment of peace, security and development and is dependent upon the fullest co-operation of individuals and states[3].

According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), the right to health extends beyond access to health care and includes a wide range of factors that can help everyone to lead a health life[4]. These include safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, healthy working and environmental conditions, health related education and information, and gender equality[5].

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[1] Constitution of the World Health Organization., Available at
https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf (Accessed on 01/11/2023)

[2] Ibid

[3] Ibid

[4] Office of the United Nations High Commissioner for Human Rights., 'The Right to Health.' Available at
https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf (Accessed on 01/11/2023)

[5] Ibid

The OHCHR further asserts that the right to health contains freedoms which include the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment; and entitlements which include the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health, the right to prevention, treatment and control of diseases, access to medical services, maternal, child and reproductive health and equal and timely access to basic health services[6].

The right to health is also at the heart of the *United Nation's 2030 Agenda for Sustainable Development*[7]. Sustainable Development Goal (SDG) 3 aims to ensure health lives and promote well-being for all at all ages[8]. SDG 3 makes a bold commitment to end the epidemics of AIDS, tuberculosis, malaria and other communicable diseases by 2030[9]. It also aims to achieve universal health coverage, and provide access to safe and affordable medicines and vaccines for all among other targets[10].

Health is therefore a fundamental human right. It has correctly been observed that health is both a basic human right in itself and an essential means for the realisation of other human rights[11]. Good health is one of the many aspects of human well-being that is necessary for the enjoyment of all other human rights[12]. Good health and well-being also plays a pivotal role in empowering people to pursue other activities that will enhance their welfare[13]. It is therefore one of the cornerstones for the enhancement and improvement of overall wellbeing and human development since it enables human beings to

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[6] Ibid

[7] United Nations., 'Transforming our World: the 2030 Agenda for Sustainable Development.' Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (Accessed on 01/11/2023)

[8] Ibid

[9] Ibid

[10] Ibid

[11] Nampewo. Z., Mike. J., & Wolff. J., 'Respecting, Protecting and Fulfilling the Human Right to Health.' *International Journal of Equity in Health*, Volume 21, No. 36 (2022)

[12] Ibid

[13] Ibid

undertake social, economic and cultural activities as well partake in civil and political activities[14].

Achieving good health and well-being is therefore of fundamental importance as envisaged under SDG 3. According to the United Nations Development Programme (UNDP), good health is essential to Sustainable Development and the 2030 Agenda for Sustainable Development reflects the complexity and interconnectedness of the two[15]. This paper critically discusses the progress made towards achieving good health and well-being for all. It examines the legal framework on the right to health at the global, regional and national levels and its efficacy in fostering good health and well-being for all. The paper further discusses some of the key challenges hindering the realization of the right to health and offers proposals towards achieving good health and well-being for all.

2.0 Legal Framework on the Right to Health
The right to health is enshrined under various legal instruments at the global, regional and national levels.

2.1 Global Legal Framework
At the global level, the *Universal Declaration of Human Rights (UDHR)[16]*provides that everyone has the right to a standard of living adequate for the *health and well-being* of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (emphasis added)[17]. Further, the UDHR provides that women and children are entitled to special care and assistance in relation to the right to health and that all children, whether born in or out of wedlock, shall enjoy the same social protection[18]. It has been

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[14] Ibid

[15] United Nations Development Programme., 'Goal 3: Good Health and Well-Being.' Available at https://www.undp.org/sustainable-development-goals/good-health (Accessed on 02/11/2023)

[16] United Nations General Assembly., 'Universal Declaration of Human Rights,' 10 December 1948, 217 A (III)

[17] Ibid, Article 25 (1)

[18] Ibid

asserted that the UDHR sets a common standard for the achievement of fundamental human rights and freedoms including the right to health for all people and all nations[19]. The UDHR has inspired and paved the way for the universal protection of human rights including the right to health and has led to the adoption of numerous human rights treaties, applied today on a permanent basis at global and regional levels[20].

The right to health is also enshrined under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)[21]*. The ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[22]. It further requires states to undertake various steps towards the full realization of the right to health including those necessary for the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness[23]. The ICESCR therefore identifies the various dimensions of the right to health including both physical and mental health and various key domains pertinent to the achievement of this right including the healthy development of the newborn and the child; and public health measures to promote environmental health and to prevent epidemic, endemic, occupational and other diseases[24]. The scope, content and nature of state obligations in relation to the right to health as set out under the ICESCR has been expounded by the Committee on Economic, Social and Cultural Rights

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[19] United Nations., 'Universal Declaration of Human Rights.' Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed on 02/11/2023)
[20] Ibid
[21] United Nations General Assembly, 'International Covenant on Economic, Social and Cultural Rights.' 16 December 1966, A/RES/2200.
[22] Ibid, Article 12 (1)
[23] Ibid, Article 12 (2)
[24] Ibid

(CESCR) under *General Comment No. 14 on the Right to the Highest Attainable Standard of Health*[25].

General Comment No. 14 on the Right to the Highest Attainable Standard of Health acknowledges that health is a fundamental human right indispensable for the exercise of other human rights[26]. It further provides that every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity[27]. General Comments No. 14 also acknowledges that the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement which among other rights and freedoms address integral components of the right to health[28]. It requires states to foster the progressive realization of the essential elements of the right to health including availability, accessibility, acceptability and quality while ensuring non-discriminatory and gender-based approach[29]. General Comment No. 14 is therefore important in ensuring respect, protection and fulfillment of the right to health for all persons.

The *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*[30] highlights that in situations of poverty, women have the least access to food, *health*, education, training and opportunities for employment and other needs[31]. The Convention requires states to ensure that women have access to specific educational information to help to ensure the *health and well-being* of families, including information and advice on family planning[32].

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[25] United Nations Committee on Economic, Social and Cultural Rights (CESCR), '*General Comment No. 14: The Right to the Highest Attainable Standard of Health.* '(Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

[26] Ibid, Paragraph 1

[27] Ibid

[28] Ibid, paragraph 3

[29] Ibid, Paragraph 12

[30] United Nations General Assembly, 'Convention on the Elimination of All Forms of Discrimination against Women,' 18 December 1979, A/RES/34/180

[31] Ibid, Preamble

[32] Ibid, Article 10 (h)

Further, in the field of employment, CEDAW requires states to accord women protection of health and to safety in working conditions, including the safeguarding of the function of reproduction[33]. CEDAW further requires states parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning[34]. In addition, it requires state parties to ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation[35]. CEDAW also requires state parties to ensure that the rights set out extend to all women including those in the rural areas by ensuring that they have, inter alia, access to adequate health care facilities, including information, counselling and services in family planning[36]. CEDAW is therefore an important legal instrument geared towards elimination of all forms of discrimination against women in various fields and realization of their fundamental human rights and freedoms including the right to health.

The *Convention on the Rights of the Child[37]* is geared towards the protection of fundamental rights and freedoms of children and requires state parties to ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, *health*, in the number and suitability of their staff, as well as competent supervision[38]. It further requires state parties to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-

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[33] Ibid, Article 11 (f)
[34] Ibid, Article 12 (1)
[35] Ibid, Article 12 (2)
[36] Ibid, Article 14 (2) (b)
[37] United Nations General Assembly., 'Convention on the Rights of the Child,' 20 November 1989, Available at
https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/crc.pdf (Accessed on 02/11/2023)
[38] Ibid, Article 3 (3)

being and physical and mental health[39]. Of specific importance, the Convention recognizes the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health[40]. It requires states parties shall to ensure that no child is deprived of his or her right of access to such health care services[41]. In order to achieve the right to health for all children, the Convention requires state parties to take appropriate measures: to diminish infant and child mortality; to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; to ensure appropriate pre-natal and post-natal health care for mothers; to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; and to develop preventive health care, guidance for parents and family planning education and services[42]. Realizing the provisions of the Convention on the Rights of the Child can enhancement achievement of good health and well-being for all children.

2.2 Regional Legal Framework

At the regional level, African countries have subscribed to a robust normative legal framework on the right to health. At its core is the *African Charter on Human and Peoples' Rights*[43] which enshrines the right of every person to enjoy the best attainable state of physical and mental health[44]. The Charter further requires African countries to take the necessary measures to protect the health

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[39] Ibid, Article 17
[40] Ibid, Article 24 (1)
[41] Ibid
[42] Ibid, Article 24 (2)
[43] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[44] Ibid, Article 16 (1)

of their people and to ensure that they receive medical attention when they are sick[45].

In addition, the *African Charter on the Rights and Welfare of the Child[46]* requires African countries to undertake several measures towards achieving good health and well-being for all children in the continent including reducing infant and child mortality rate; ensuring the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; ensuring the provision of adequate nutrition and safe drinking water; combating disease and malnutrition within the framework of primary health care through the application of appropriate technology; ensuring appropriate health care for expectant and nursing mothers; developing preventive health care and family life education and provision of service; integrating basic health service programmes in national development plans; and ensuring the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of basic service programme for children[47].

Further, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[48]* requires state parties to ensure that the right to health of women, including sexual and reproductive health is respected and promoted[49]. This includes the right of women to control their fertility; to decide whether to have children, the number of children and the spacing of children; to choose any method of contraception; to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections,

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[45] Ibid, Article 16 (2)

[46] African Union., 'African Charter on the Rights and Welfare of the Child.' Available at *https://au.int/sites/default/files/treaties/36804-treaty african_charter_on_rights_welfare_of_the_child.pdf* (Accessed on 02/11/2023)

[47] Ibid, Article 14 (2)

[48] African Union., 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).' Available at https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf (Accessed on 02/11/2023)

[49] Ibid, Article XIV (1)

including HIV/AIDS, in accordance with internationally recognised standards and best practices; and to have family planning education[50]. Further, the Protocol requires state parties to take all appropriate measures towards achieving good health and well-being for all women in Africa including providing adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas; establishing and strengthening existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding; and protecting the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus[51]. It also enshrines the right of women to live in healthy and sustainable environment which is vital in achieving good health and well-being[52].

Finally, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa[53]* recognizes the right to health for older persons in Africa and requires states to ensure that they access health services that meet their specific needs[54]. It further requires states to take reasonable measures to facilitate access to health services and medical insurance cover for older persons within available resources and to ensure the inclusion of geriatrics (medical care for older persons) and gerontology (the study of aging including physical, mental, social and societal implications) in the training of health care personnel[55].

Actualizing the provisions of the foregoing regional instruments can enhance the achievement of good health and well-being for all in Africa.

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[50] Ibid

[51] Ibid, Article XIV (2)

[52] Ibid, Article XVIII

[53] African Union., 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.' Available at *https://au.int/sites/default/files/pages/32900-file-protocol_on_the_rights_of_older_persons_e.pdf* (Accessed on 02/11/2023)

[54] Ibid, Article 15 (1)

[55] Ibid, Articles 15 (2) & (3)

2.3 National Legal Framework

The right to health has also been embraced in Kenya. The *Constitution of Kenya*[56] enshrines the right of every person to the highest attainable standard of health, which includes the right to health care services, including reproductive health care[57]. The Constitution further provides that a person shall not be denied emergency medical treatment[58]. In addition, the Constitution contains provisions geared towards fostering the right to health for all groups of persons including children[59], minorities and marginalized persons[60], consumers[61] and older persons[62]. The Constitution further enshrines 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[63]. It has been asserted the right to health is closely related to the state of the environment hence achieving good health and well-being is also dependent upon realization of the right to a clean, healthy and sustainable environment[64]. A safe, clean, healthy and sustainable environment

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[56] Constitution of Kenya, 2010., Government Printer, Nairobi

[57] Ibid, Article 43 (1) (a)

[58] Ibid, Article 43 (2)

[59] Article 53. Children

(1) Every child has the right—

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment

and punishment, and hazardous or exploitative labour

[60] Article 56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised

groups—e) have reasonable access to water, *health services* and infrastructure

[61] Article 46. Consumer rights

(1) Consumers have the right—

(a) to goods and services of reasonable quality;

(c) to the protection of their *health*, safety, and economic interests.

[62] 57. Older members of society

The State shall take measures to ensure the rights of older persons—

(d) to receive reasonable care and assistance from their family and the State

[63] Ibid, Article 42

[64] Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Available at https://kmco.co.ke/wp-content/uploads/2023/06/Realizing-the-

is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, *health*, food, water and sanitation[65].

Another fundamental legal instrument geared towards achieving good health and well-being for all in Kenya is the *Health Act*[66]. The Health Act was enacted to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes[67]. The objectives of the Act include establishing a national health system which encompasses public and private institutions and providers of health services at the national and county levels and facilitate in a progressive and equitable manner, the highest attainable standard of health services; protecting, respecting, promoting and fulfilling the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment; protecting, respecting, promoting and fulfilling the rights of children to basic nutrition and health care services contemplated in Articles 43 (1) (c) and 53 (1) (c) of the Constitution; protecting, respecting, promoting and fulfilling the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health; and recognizing the role of health regulatory bodies established under any written law and to distinguish their regulatory role from the policy making function of the national government[68]. The Act stipulates that it is a fundamental duty of the state to observe, respect, protect, promote and fulfill the right to the highest attainable standard of health including reproductive health care and emergency medical treatment[69]. It requires the state to fulfill this duty by developing policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person; ensuring the prioritization and adequate investment in research for health to promote technology and innovation in

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Right-to-a-Clean-Healthy-and-Sustainable-Environment.pdf (Accessed on 02/11/2023)

[65] Ibid

[66] Health Act, No. 21 of 2017, Laws of Kenya

[67] Ibid, Preamble

[68] Ibid, S 3

[69] Ibid, S 4

health care delivery; ensuring the realization of the health related rights and interests of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities and members of particular ethnic, religious or cultural communities; ensuring the provision of a health service package at all levels of the health care system, which shall include services addressing promotion, prevention, curative, palliative and rehabilitation, as well as physical and financial access to health care; and ensuring adequate investment in research for health to promote technology and innovation in health care delivery[70].

The Health Act upholds the right of every person in Kenya to the highest attainable standard of health which shall include progressive access for provision of promotive, preventive, curative, palliative and rehabilitative services[71]. In addition, the Act provides that every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the Constitution and the Act[72]. Further, it requires the national and county governments to ensure the provision of free and compulsory vaccination for children under five years of age and maternity care[73]. The Health Act also sets out several rights and duties that are pertinent in realizing the right to health including reproductive health, emergency treatment, health information, consent, information dissemination and confidentiality[74].

In addition to the Constitution and the Health Act, other key legal and policy instruments on health in Kenya include the *Public Health Act[75]*; the *Kenya Health Policy 2014-2030[76]* which aims to attain the highest standard of health in the country by the year 2030; and the *Kenya Universal Health Coverage Policy 2020-*

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[70] Ibid, S 4

[71] Ibid, S 5 (1)

[72] Ibid, S 5 (2)

[73] Ibid, S 5 (3)

[74] Ibid, Part II

[75] Public Health Act, Cap 242, Laws of Kenya

[76] Kenya Health Policy 2014-2030., Available at https://publications.universalhealth2030.org/uploads/kenya_health_policy_2014_to_2030.pdf (Accessed on 02/11/2023)

2030[77] that aims to accelerate attainment of Universal Health Coverage (UHC) in Kenya.

3.0 Achieving Good Health and Well-Being for All: Successes and Challenges

SDG 3 identifies key measures that are vital in fostering the right to health and achieving good health and wellbeing for all[78]. These include reducing the global maternal mortality ratio to less than 70 per 100,000 live births; ending preventable deaths of newborns and children under 5 years of age, with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1,000 live births and under-5 mortality to at least as low as 25 per 1,000 live births; ending the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combating hepatitis, water-borne diseases and other communicable diseases; reducing by one third premature mortality from non-communicable diseases through prevention and treatment and promoting mental health and well-being; strengthening the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol; reducing global deaths and injuries from road traffic accidents[79]. Further it urges states to ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes; achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all; substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination; support the research and development of vaccines and medicines for the communicable and noncommunicable diseases that primarily affect developing countries; substantially increase health financing and the recruitment, development, training and retention of the health workforce in developing countries; and strengthen the capacity of

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[77] Kenya Universal Health Coverage Policy 2020-2030., Available at *http://guidelines.health.go.ke:8000/media/Kenya_Universal_Health_Coverage_Policy_2020_ _2030.pdf* (Accessed on 02/11/2023)

[78] United Nations., 'Transforming our World: the 2030 Agenda for Sustainable Development.' SDG 3

[79] Ibid

all countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks[80].

The United Nations observes that there has been global progress towards meeting some of the targets of SDG 3 towards achieving good health and well-being for all[81]. It notes that 146 out of 200 countries have already met or are on the track to meet the under-5 mortality target; effective HIV treatment has cut global AIDS-related deaths by 52% since 2010 and at least one neglected tropical disease has been eliminated in 47 countries[82]. The UNDP further notes that the world has made great progress against several leading causes of death and disease; life expectancy has increased dramatically; infant and maternal mortality rates have declined; and that AIDS and malaria related deaths have declined[83]. The *Sustainable Development Goals Report*[84] also indicates that gains are evident in many areas of health, including reproductive, maternal and child health, immunization coverage and treatment of communicable diseases, though progress is marred by huge regional disparities[85].

Progress towards achieving good health and well-being is also evident in some countries including Kenya. A report by the State Department for Economic Planning on the progress made towards achievement of SDG 3 shows that Kenya has made some significant progress in key areas including skilled deliveries at health facilities, improvement in antenatal care coverage, improvement in child immunization coverage, decrease in health diseases and conditions including tuberculosis, malaria and HIV/AIDS, improvement in health infrastructure, increased financing of healthcare and increase in health insurance coverage due to the government policy on Universal Healthcare Coverage which has led to a general increase in the uptake of National Health

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[80] Ibid

[81] United Nations., 'SDG 3: Ensure Healthy Lives and Promote Well-Being for All at All Ages.' Available at https://sdgs.un.org/goals/goal3 (Accessed on 02/11/2023)

[82] Ibid

[83] Ibid

[84] United Nations., 'The Sustainable Development Goals Report: 2022.' Available at https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf (Accessed on 02/11/2023)

[85] Ibid

Insurance Fund (NHIF)[86]. Further, it has been noted that Kenya has made some progress and key reforms towards achieving Universal Health Care including free maternity services in all public health facilities; free primary health care in all public primary healthcare facilities; equipment of major public hospitals across the country with modern diagnostic equipment; adoption of health insurance subsidies through NHIF targeting disadvantaged groups; and the provision of infrastructure and equipment to health facilities across county governments such as new wards, ambulances, and additional health workers among other initiatives[87].

However, despite this progress, several challenges at the global, regional and national level continue to impede realization of the right to health and achievement of SDG 3 on good health and well-being for all. It has been reported that the outbreak of the COVID-19 pandemic posed and continues to pose challenges to people's health and wellbeing globally and is impeding progress in meeting SDG 3 targets[88]. Before the pandemic, notable gains were evident in many areas of health across the globe, including reproductive, maternal and child health, immunization coverage and treatment of communicable diseases, though progress was marred by huge regional disparities[89]. However, the outbreak of the pandemic severely disrupted essential health services across the world, triggered an increase in the prevalence of anxiety and depression, lowered global life expectancy, derailed progress towards ending HIV, tuberculosis and malaria, and halted two decades of work towards making health coverage universal[90]. Combating COVID-19 effectively and other global health challenges is essential in achieving good health and well-being for all.

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[86] State Department for Economic Planning., 'Is Kenya on Track Towards Achievement of SDG 3? An analysis of Health Indicators in Kenya.' Available at https://www.planning.go.ke/wp-content/uploads/2022/02/UHC-REPORT-ammended-1.pdf (Accessed on 02/11/2023)

[87] Government of Kenya., 'Beyond The Conference: Kenya's Progress Towards Affordable and Accessible Health Care.' Available at https://vision2030.go.ke/beyond-the-conference-kenyas-progress-towards-affordable-and-accessible-health-care/ (Accessed on 02/11/2023)

[88] United Nations., 'The Sustainable Development Goals Report: 2022.' Op Cit

[89] Ibid

[90] Ibid

Further, it has been pointed out that developing countries continue to face challenges in achieving good health and well-being for all due to economic hardships[91]. Achieving the targets of SDG 3 requires significant resources to be invested in infrastructure, facilities, personnel and research and development which may be out of reach for developing countries[92]. As a result, the health sector in some countries continues to face challenges including underequipped health facilities; inability of the infrastructure in place to meet existing demands; and inadequate human resource, thereby limiting the ability of citizens to access quality and affordable health care services, among others[93]. Further, incidences of poverty in some countries hinder the realization of SDG 3 by limiting the ability of people to access health services. It has been pointed out that as a result of poverty, children growing up in socioeconomically disadvantaged neighborhoods face greater direct physical challenges to health status and health-promoting behaviours; they also often experience emotional and psychological stressors, such as family conflict and instability arising from chronically inadequate resources[94].

Further, achieving good health and well-being for all continues to be a challenge especially for women. It has been pointed out that women and men have different health-care needs, but an equal right to live healthily[95]. However, for many women and girls, gender discrimination systematically undermines their access to health care, for reasons that include fewer financial resources and constraints on mobility among others[96]. This is compounded by additional burdens imposed by gender disparities which limit their ability to

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[91] World Bank., 'Measuring Progress in SDGs.' Available at
https://thedocs.worldbank.org/en/doc/274691605003514448-
0050022020/original/12ISSMEASURINGPROGRESSINSDG3HEALTH.pdf
(Accessed on 03/11/2023)
[92] Ibid
[93] Muigua. K., 'Ensuring Healthy Lives and Well-being for All Kenyans.' Available at
https://kmco.co.ke/wp-content/uploads/2020/12/Ensuring-Healthy-Lives-and-
Wellbeing-for-All-Kenyans-Kariuki-Muigua-December-2020.pdf   (Accessed   on
03/11/2023)
[94] Ibid
[95] United Nations Women., 'SDG 3: Ensure Healthy Lives and Promote Well-Being for
All at All Ages.' Available at https://www.unwomen.org/en/news/in-
focus/women-and-the-sdgs/sdg-3-good-health-well-being   (Accessed   on
03/11/2023)
[96] Ibid

stay healthy including long hours spent on domestic work, unsafe work environments and gender-based violence, with mechanisms for prevention and protection often being inadequate[97]. Women face peculiar health concerns as a result of pregnancy and child birth which need to be met in order to foster their good health and well-being[98].

Finally, environmental challenges including climate change, degradation and pollution continue to pose a risk to the right to health around the world. UNDP posits that climate change and environmental degradation have potentially serious implications for social and economic development, including health[99]. It observes that health systems in many countries are highly vulnerable to the shocks caused by epidemic outbreaks, conflict and climate events[100]. Further climate change could result in poverty a situation that may hinder the ability of people to access health services and further increases susceptibility to health risks including malaria and diarrhea due to global warming[101]. It can also result in water scarcity undermining the ability of people to access clean water and sanitation which is vital in achieving good health and well-being[102]. Further, environmental degradation as a result of air and water pollution as well as poor management of hazardous chemicals and waste can undermine good health and well-being and result in health hazards and diseases[103]. In addition, natural disasters and environmental shocks can have substantial impact on health, including deaths, injuries, diseases, disabilities, psychosocial problems and other indirect effects with damage to health facilities and disruption to the delivery of health services over extended periods of time[104].

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[97] Ibid

[98] Ibid

[99] United Nations Development Programme., 'UNDP Support to the Implementation of Sustainable Development Goal 3.' Available at https://www.undp.org/sites/g/files/zskgke326/files/publications/SDG-3%20Health.pdf (Accessed on 03/11/2023)

[100] Ibid

[101] Ibid

[102] Ibid

[103] United Nations Environment Programme., 'Goal 3: Good Health and Well-Being.' Available at https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-3 (Accessed on 03/11/2023)

[104] Ibid

It is therefore vital to combat climate change and foster the right to a clean and healthy environment in order to achieve good health and well-being for all.

4.0 Way Forward

In order to achieve good health and well-being for all, it is important for all countries to foster Universal Health Coverage (UHC). UHC means that all people have access to the full range of quality health services they need, when and where they need them, without financial hardship[105]. According to the WHO, UHC covers the full continuum of essential health services, from health promotion to prevention, treatment, rehabilitation, and palliative care across the life course[106]. UHC is vital in fostering the right to health and enhancing the economic and social development of all nations[107]. It has been pointed out that to deliver UHC, opportunities exist to ensure equity in access to health services – everyone who needs services gets them; the quality of health services are good enough to improve the health of those receiving services; people are protected against financial-risk, ensuring that the cost of using services does not put people at risk of financial harm; and accountability to translate commitments relating to access, quality, and financial protection into action through transparency and citizen participation[108]. Countries should therefore pursue UHC including enhancing health insurance coverage in order to achieve good health and well-being for all.

In addition, there is need to improve health infrastructure in all countries. The importance of quality health services, both as a development goal in its own right and a foundation for achieving inclusive growth and other development goals, is widely recognized[109]. It is therefore essential for countries to invest in

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[105] World Health Organization., 'Universal Health Coverage (UHC).' Available at https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(uhc) (Accessed on 03/11/2023)
[106] Ibid
[107] Ibid
[108] Amref Health Africa., 'Universal Health Coverage (UHC).' Available at https://amref.org/kenya/our-work/pillar-2-innovative-health-services-solutions/universal-health-coverage/ (Accessed on 03/11/2023)
[109] African Development Bank Group., 'Strategy for Quality Health Infrastructure in Africa 2022-2030.' Available at https://www.afdb.org/sites/default/files/documents/publications/strategy_for_quality_health_infrastructure_in_africa_2022-2030.pdf (Accessed on 03/11/2023)

health infrastructure including health facilities, medicine and modern technology and equipment.

Further, it is also pertinent to enhance human resource development in the health sector. It has correctly been observed that proper management of human resources is critical in providing high quality health care[110]. However, this is often not achieved in most countries including Kenya as evidenced by the frequent cases of strikes by health care providers which are attributed to factors such as limited career opportunities, insufficient workforce, and low remuneration among others[111]. Effective human resources management strategies are greatly needed to achieve better outcomes in the health sector around the world[112]. It is thus important for countries to pursue strategies including recruiting and continuously training more health workers in order to ensure adequate staff in the sector; having a clear policy and guidelines on how to protect and compensate health workers including a specific medical policy given their exposure in the line of duty; and avoid frequent strikes in order to enhance health human resources[113].

It is also imperative to increase health financing. WHO posits that health financing is a core function of health systems that can enable progress towards universal health coverage by improving effective service coverage and financial protection[114].Carefully designed and implemented health financing policies can help enhance accessibility, affordability and quality of health services[115]. It has been asserted that there is an urgent need to accelerate health financing in Africa in order to foster the right to health and achieve good

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[110] Kabene. S et al., 'The Importance of Human Resources Management in Health Care: A Global Context.' *Human Resources for Health.*, Volume 4, No. 20 (2006)

[111] Muigua. K., 'Ensuring Healthy Lives and Well-being for All Kenyans.' Op Cit

[112] Kabene. S et al., 'The Importance of Human Resources Management in Health Care: A Global Context.' Op Cit

[113] State Department for Economic Planning., 'Is Kenya on Track Towards Achievement of SDG 3? An analysis of Health Indicators in Kenya.' Op Cit

[114] World Health Organization., 'Health Financing.' Available at https://www.who.int/health-topics/health-financing#tab=tab_1 (Accessed on 03/11/2023)

[115] Ibid

health and well-being for all[116]. Under the *Abuja Declaration*[117], African countries committed themselves to allocate at least 15% of their annual budgets to the improvement of the health sector[118]. It is therefore imperative to realize the target of the Abuja Declaration in order to enhance health financing and improvement of the health sector in Africa. Countries should further embrace health financing through initiatives such as strengthening health financing structures, pursuing Public Private Partnerships and introducing supportive and flexible statutory and regulatory laws to support the health financing reforms and outcomes[119].

It is also paramount for the world and countries to effectively combat illnesses and diseases. The COVID-19 pandemic posed and continues to pose challenges to people's health and wellbeing globally and is impeding progress in meeting SDG 3 targets[120]. Further, the world has struggled with health issues including HIV, tuberculosis and malaria which hinder achievement of good health and well-being for all[121]. It is therefore important for countries to strengthen preparedness for pandemics and other emergencies[122]. Such measures include ensuring equitable access to safe and effective vaccines; awareness campaigns on healthy living to reduce incidences of non-communicable diseases; and enhancing supportive and synergistic community investments in related sectors such as economic empowerment, water, sanitation and hygiene[123].

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[116] Munyua. A., & Olalere. N., 'Public Financing for Health in Africa: 15% of an Elephant is not 15% of A Chicken.' Available at https://www.un.org/africarenewal/magazine/october-2020/public-financing-health-africa-when-15-elephant-not-15-chicken (Accessed on 03/11/2023)

[117] African Union., 'Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases.' Available at https://au.int/sites/default/files/pages/32894-file-2001-abuja-declaration.pdf (Accessed on 03/11/2023)

[118] Ibid

[119] State Department for Economic Planning., 'Is Kenya on Track Towards Achievement of SDG 3? An analysis of Health Indicators in Kenya.' Op Cit

[120] United Nations., 'The Sustainable Development Goals Report: 2022.' Op Cit

[121] Ibid

[122] World Health Organization., '10 Global Health Issues to Track in 2021.' Available at https://www.who.int/news-room/spotlight/10-global-health-issues-to-track-in-2021 (Accessed on 03/11/2023)

[123] State Department for Economic Planning., 'Is Kenya on Track Towards Achievement of SDG 3? An analysis of Health Indicators in Kenya.' Op Cit

Another key measure in achieving good health and well-being for all is fostering research and development. Health research and development is important to the health sector since it provides health practitioners and health system investors with innovation and associated evidence for prevention interventions, effective treatments and care pathways[124]. It is therefore important to ensure the prioritization and adequate investment in research for health in order to promote technology and innovation in health care delivery[125]. Further, it has been observed that there is need for countries to strengthen and support research in health especially on emerging diseases and support evidence based research that would inform full rollout of UHC strategies[126].

In addition, it is essential to foster gender equality in the health sector in order to achieve good health and well-being for all especially women and girls. Women face peculiar health concerns as a result of pregnancy and child birth which need to be met in order to foster their good health and well-being[127].However, for many women and girls, gender discrimination systematically undermines their access to health care, for reasons that include fewer financial resources and constraints on mobility among others[128]. In addition to SDG 3, SDG 5 urges countries to ensure that women have universal access to sexual and reproductive health and reproductive rights[129]. It is therefore vital for countries to foster laws and practices which enhance women's access to sexual and reproductive health-care services in order to realize their good health and well-being[130].

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[124] Mallender. J., 'Health Research and Development: An Overview.' Available at https://www.economicsbydesign.com/health-research-and-development-an-overview/ (Accessed on 03/11/2023)

[125] Muigua. K., 'Ensuring Healthy Lives and Well-being for All Kenyans.' Op Cit

[126] State Department for Economic Planning., 'Is Kenya on Track Towards Achievement of SDG 3? An analysis of Health Indicators in Kenya.' Op Cit

[127] United Nations Women., 'SDG 3: Ensure Healthy Lives and Promote Well-Being for All at All Ages.' Op Cit

[128] Ibid

[129] United Nations., 'Transforming our World: the 2030 Agenda for Sustainable Development.' Op Cit

[130] United Nations Women., 'SDG 3: Ensure Healthy Lives and Promote Well-Being for All at All Ages.' Op Cit

Finally, is vital to realize the right to a clean, healthy and sustainable environment in order to achieve good health and well-being for all. The United Nations Environment Programme correctly states that a clean environment is essential for human health and well-being[131]. Environmental problems including climate change and environmental degradation as a result of air and water pollution as well as poor management of hazardous chemicals and waste can undermine good health and well-being and result in health hazards and diseases[132]. It is therefore essential for countries to realize the right to a clean, healthy and sustainable environment in order to achieve good health and well-being for all. Countries should therefore address concerns which affect the attainment of the right to a clean, healthy and sustainable environment such as climate change, unsustainable management and use of natural resources, environmental degradation, pollution and poverty[133]. Countries should further pursue Sustainable Development in order to achieve environmental sustainability, economic growth and social progress[134]. Sustainable Development has the ability to strike a balance between anthropocentric and ecocentric approaches towards the right to a clean, healthy and sustainable environment by promoting human rights such as the right to food, the right to clean water and sanitation, the right to affordable and clean energy and the right to health while simultaneously ensuring sound environmental protection and management[135]. Through the foregoing among other measures, countries will be able to achieve good health and well-being for all.

5.0 Conclusion

Achieving good health and well-being for all is essential to Sustainable Development as reflected under the 2030 Agenda for Sustainable

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[131] United Nations Environment Programme., 'Goal 3: Good Health and Well-Being.' Op Cit

[132] Ibid

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

[134] Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' International Sustainable Development Law., Vol 1

[135] Muigua.K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

Development[136]. There has been global progress towards meeting some of the targets of SDG 3 towards achieving good health and well-being for all as evidenced by gains in many areas of health, including reproductive, maternal and child health, immunization coverage and treatment of communicable diseases[137]. However, problems such as the COVID-19 pandemic, economic disparities between nations, poverty, gender inequalities and environmental problems including climate change and environmental degradation continue to threaten the achievement of good health and well-being for all[138]. In order to fully achieve good health and well-being for all, there is need for countries to embrace measures including fostering Universal Health Coverage, improving health infrastructure, increasing health financing, combating illnesses and diseases, fostering research and development, promoting gender equality in the health sector and realizing the right to a clean, healthy and sustainable environment[139]. Achieving good health and well-being is an imperative that can be actualized at the national, regional and global level for Sustainable Development.

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[136] United Nations Development Programme., 'Goal 3: Good Health and Well-Being.' Op Cit

[137] United Nations., 'The Sustainable Development Goals Report: 2022.' Op Cit

[138] Ibid

[139] Muigua. K., 'Ensuring Healthy Lives and Well-being for All Kenyans.' Op Cit

Embracing Trade Policy Instruments for Climate Action

Abstract
Trade has been advocated as one of the tools and sectors of the economy that can spur climate action. The United Nations Conference on Trade and Development (UNCTAD), posits that trade-related measures can help drive both climate and Sustainable Development actions across the globe. This paper critically examines the role of trade in the climate action agenda. It argues a case for embracing trade policy instruments for climate action. The paper highlights examples of trade policy instruments and discusses how they can foster effective response towards climate change. It also discusses the progress made towards embracing trade policy instruments for climate action and challenges thereof. The paper further offers recommendations towards embracing trade policy instruments for climate action.

1.0 Introduction

Responding to climate change has become a clarion call in the wake of the devastating impacts of climate change on both developed and developing countries. Climate change continues to be a major global concern that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda[1]. Adverse impacts of climate change including intense droughts, water scarcity, severe wild fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world threatening the achievement of Sustainable Development[2]. As a result, tackling climate change has become a top policy agenda at local, national, regional and global levels[3]. Sustainable Development Goal 13 under the United Nations 2030 Agenda for Sustainable

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[1] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

[2] United Nations., 'What is Climate Change?' Available at https://www.un.org/en/climatechange/what-is-climate-change (Accessed on 18/12/2023)

[3] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at https://www.un.org/en/desa/forumclimatechangeandscience-and-technology-innovation (Accessed on 18/12/2023)

Development urges all countries to take urgent action to combat climate change and its impacts[4].

It has been argued that efficient climate action requires involvement of all sectors of the economy towards a holistic development strategy involving both private and public sector responses[5]. Trade has been advocated as one of the tools and sectors of the economy that can spur climate action[6]. Trade has been defined as an exchange, voluntary in nature between two parties in requirement of each other's resources being goods and services[7]. According to the United Nations Conference on Trade and Development (UNCTAD), trade-related measures can help drive both climate and sustainable development actions across the globe[8].

This paper critically examines the role of trade in the climate action agenda. It argues a case for embracing trade policy instruments for climate action. The paper highlights examples of trade policy instruments and discusses how they can foster effective response towards climate change. It also discusses the progress made towards embracing trade policy instruments for climate action and challenges thereof. The paper further offers recommendations towards embracing trade policy instruments for climate action.

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[4] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 18/12/2023)

[5] Bellon. M., & Massetti. E., 'Economic Principles for Integrating Adaptation to Climate Change into Fiscal Policy.' Available at https://www.elibrary.imf.org/view/journals/066/2022/001/article-A001-en.xml#:~:text=Summary,private%20and%20public%20sector%20responses. (Accessed on 18/12/2023)

[6] World Trade Organization., 'Trade Policy Tools for Climate Action.' Available at https://www.wto.org/english/res_e/booksp_e/tptforclimataction_e.pdf (Accessed on 18/12/2023)

[7] The Economic Times., 'What is Trade.' Available at https://economictimes.indiatimes.com/definition/trade (Accessed on 18/12/2023)

[8] Caribbean News Global., 'COP 28: UNCTAD and Partners to Advance Pro-Development Climate Goals.' Available at https://caribbeannewsglobal.com/cop-28-unctad-and-partners-to-advance-pro-development-climate-goals/ (Accessed on 18/12/2023)

2.0 The Role of Trade in Climate Action

It has been argued that trade has an important role to play in the global response to climate change, providing economies with tools to draw on in their efforts to mitigate climate change and to adapt to its consequences[9]. Trade plays a fundamental role in helping countries transition to low carbon economies[10]. It has been rightly observed that in order to effectively confront climate change, to provide all people with clean and affordable energy and to reduce dependency on fossil fuels substantially, both developed and developing countries will have to restructure their economies to low carbon economies[11]. For this profound restructuring to happen, major investments in low carbon technology are needed, in addition to significant changes in life styles[12]. It has been observed that this process of technological innovation or dissemination of low carbon technologies will largely depend on international trade and investment of both private and public actors[13]. As a result, international trade can favour the pursuit of climate change goals.

According to UNCTAD, trade-led development can bolster climate action using coordinated and inclusive approaches to accelerate a global just transition to a low-carbon economies[14]. It further asserts that trade can be a powerful tool to accelerate the energy transition and support resilient development pathways with low emissions[15]. In addition, trade can facilitate access to environmentally preferable goods and services and to technologies and know-how critical to boosting innovation and building capabilities to support climate change mitigation and adaptation efforts in all countries[16]. It has been asserted that clean technologies are at the heart of

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[9] World Trade Organization., 'Trade Policy Tools for Climate Action.' Op Cit
[10] Ibid
[11] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Available at https://www.ecologic.eu/sites/default/files/publication/2015/meyer-ohlendorf_gerstetter-09-trade-and-climate-change_0.pdf (Accessed on 18/12/2023)
[12] Ibid
[13] Ibid
[14] Caribbean News Global., 'COP 28: UNCTAD and Partners to Advance Pro-Development Climate Goals.' Op Cit
[15] Ibid
[16] Ibid

Sustainable Development and the global response to climate change[17]. Trade is a major factor in fostering access to clean technologies[18].

According to the World Trade Organization (WTO), trade and trade policies, in conjunction with relevant policies and international cooperation, can help to alleviate some of the impacts of climate change, including on food security, by contributing to enhancing economic resilience[19]. WTO further posits that international trade can help support climate change strategies, such as prevention and reduction of, and preparedness for, climate risk, as well as recovery and rehabilitation from climate disasters[20]. In addition, trade can also contribute to strengthening food security during climate-induced supply-side disruptions[21]. WTO also points out that trade can facilitate the acquisition and deployment of technologies that can contribute to climate change adaptation especially in countries most vulnerable to climate shocks[22].

Trade can also contribute to climate action through the reduction of trade-related emissions[23]. It has been observed that trade-related emissions, those associated with the global production and distribution of goods and services, contribute to roughly a quarter of all carbon dioxide emissions[24]. Therefore trade policies and instruments are needed in order to reduce trade-related emissions towards enhancing the global response on climate change[25].

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[17] International Institute for Sustainable Development., 'Trade Policy Tools and Instruments for Addressing Climate Change and Sustainable Development.' Available at https://www.iisd.org/system/files/publications/trade_tools_climate_sd.pdf (Accessed on 18/12/2023)

[18] Ibid

[19] World Trade Organization., 'World Trade Report 2022: Climate Change and International Trade.' Available at https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_ch2_e.pdf (Accessed on 18/12/2023)

[20] Ibid

[21] Ibid

[22] Ibid

[23] Caribbean News Global., 'COP 28: UNCTAD and Partners to Advance Pro-Development Climate Goals.' Op Cit

[24] Ibid

[25] Ibid

The role of trade in climate action is recognized under the United Nation's 2030 agenda for Sustainable Development. The agenda identifies international trade as an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of Sustainable Development across all the Sustainable Development Goals including climate action[26]. SDG 17 seeks to accelerate international trade through measures such as promoting a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the WTO; and providing trade-related capacity building for developing countries in order to enable countries pursue the Sustainable Development agenda including climate action[27].

At the continental level, the *African Union Climate Change and Resilient Development Strategy and Action Plan[28]* acknowledges the role of trade in climate action. It points out that there is potential for the African Continental Free Trade Area (AfCFTA) to enable Africa's response to climate change through targeted trade-related measures[29]. These measures include the exemption of environmental goods and technologies such as turbines and photovoltaic systems from sensitive and exclusion lists; prioritisation of the liberalisation of trade in environmentally related services; giving due attention to the harmonisation and strengthening of environmental standards and regulation under the relevant provisions of the AfCFTA Protocol on Trade in Goods and Protocol on Trade in Services as well as within the framework of the African Quality Standards Agenda; and the mainstreaming of climate friendly considerations into the negotiations on investment, intellectual property rights, competition policy and e-commerce[30].

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[26] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1.,' Op Cit

[27] Ibid, SDG 17

[28] African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032)., Available at https://au.int/sites/default/files/documents/41959-docCC_Strategy_and_Action_Plan_2022-2032_08_02_23_Single_Print_Ready.pdf (Accessed on 18/12/2023)

[29] Ibid

[30] Ibid

At the regional level, the *East African Community Climate Change Policy Framework*[31] also recognizes the role of trade in climate action. It urges member states to address technology transfer barriers, including rules of trade tariffs, intellectual property rights and technical trade barriers such as standards, eco-labeling in order to enhance the role of trade in climate action within the East African region[32].

At the national level, the *National Climate Change Framework Policy*[33] of Kenya focuses on the link between sustainable national development in Kenya and climate change across all sectors of the economy including trade. According to the Policy, a robust, diversified and climate resilient trade sector is imperative for Kenya to attain low carbon climate resilient development[34]. The Policy acknowledges that the trade sector depends on products and services developed by other sectors of the economy, and therefore any adverse climate change impacts of such sectors, will likely impact trade[35]. For example, the Policy acknowledges that the agriculture, manufacturing and transportation sectors, which are key cogs for internal and international trade, are highly vulnerable to climate variability and extreme weather events[36]. Therefore, according to the Policy, a successful trade sector will require building resilience across the entire economy of Kenya[37].

Trade is therefore vital in climate action. There is need to embrace trade policy instruments at the national, regional, continental and global levels in order to strengthen the response towards climate change.

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[31] East African Community., 'EAC Climate Change Policy Framework.' Available at *https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework* (Accessed on 18/12/2023)

[32] Ibid

[33] Republic of Kenya., 'Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy.' Available at *https://www.undp.org/sites/g/files/zskgke326/files/migration/ke/0540af2c4328bfbad3dd0f5da 6f817f450428f6bb96dc4e2c5d9647085794f93.doc* (Accessed on 18/12/2023)

[34] Ibid

[35] Ibid

[36] Ibid

[37] Ibid

3.0 Embracing Trade Policy Instruments for Climate Action: Opportunities and Challenges

It has been pointed out that several trade-related measures, policies and instruments are of value in combating climate change and fostering Sustainable Development. These include liberalisation of trade in environmental goods and services, standards and labels, subsidies for fossil fuels, international investment protection treaties, technology transfer and border adjustment measures[38].

For example, liberalization of trade in low-carbon goods and services plays a major role in disseminating low carbon technologies widely for climate action[39]. Low carbon technologies have been advocated as vital in climate action[40]. It has been argued that advanced know-how and uptake of low-carbon and environmental friendly technologies will become more readily available through liberalised trade[41]. It has also been asserted that liberalised trade is a particularly potent driver for technological innovation[42]. Trade and especially trade liberalization therefore plays an important role in accelerating the diffusion and uptake of environmental goods and low-carbon technologies towards climate action[43].

In addition, technical standards and labelling have been identified as another major issue at the interlinkage of trade and climate action[44]. Standards set a threshold for the performance of a product, while labels describe the characteristics of the product, enabling the consumer to make an informed

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[38] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[39] Ibid

[40] Muigua. K., 'Enhancing Low Carbon Development for Sustainability.' Available at https://kmco.co.ke/wp-content/uploads/2023/09/Enhancing-Low-Carbon-Development-for-Sustainability-.pdf (Accessed on 18/12/2023)

[41] Hu. X., 'The Impacts of the Trade Liberalization of Environmental Goods on Power System and CO2 Emissions.' *Energy Policy*, Volume 140, May 2020

[42] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[43] Hu. X., 'The Impacts of the Trade Liberalization of Environmental Goods on Power System and CO2 Emissions.' Op Cit

[44] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

choice when purchasing a product[45]. It has been observed that standards and labels offer opportunities for strengthening climate protection, for example by fostering consumer awareness and more transparency along global value chains in the trade sector[46]. Therefore, standards and labels promote climate-friendly consumption and production patterns[47]. In addition, they can also create market access opportunities for those with comparative advantages in environmental friendly and low-carbon products and services[48]. It has been argued that countries can facilitate trade and apply efficiency standards and labelling regulations at the same time, if they embrace certification and accreditation processes that are in line with the International Organization for Standardization (ISO) towards the dissemination of environmental friendly producs[49].

Further, international investment protection treaties have been pointed out as key trade policy instruments for climate action[50]. It has been pointed out that many investor/state disputes over the years have originated from measures to mitigate the environmental impacts of economic activities by investors in host states[51]. In light of the environmental and climate concerns resulting from investment practices, the international investment regime is now embracing sustainable practices including the incorporation of Environmental, Social and Governance (ESG) clauses in investment treaties[52]. It has been noted that many Bilateral Investment Treaties (BITs) are incorporating ESG matters including specific provisions on the protection of the environment, climate action and

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[45] Ibid

[46] International Centre for Trade and Sustainable Development., 'Trade Elements in Countries' Climate Contributions under the Paris Agreement.' Available at *https://euagenda.eu/upload/publications/untitled-81229-ea.pdf* (Accessed on 18/12/2023)

[47] Ibid

[48] Ibid

[49] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[50] Ibid

[51] BRILL., 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda.' *Journal of World Investment & Trade*., No. 24 of 2023., pp 766-791

[52] Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Available at https://kmco.co.ke/wp-content/uploads/2023/07/Bilateral-Investment-Treaties-and-Environmental-Social-and-Governance-in-Africa-1.pdf (Accessed on 18/12/2023)

Sustainable Development[53]. According to UNCTAD states need to fast-track International Investment Agreements (IIA) reform to make it more aligned with climate action as well as other public policy imperatives through approaches such as making individual IIAs climate-responsive by ensuring that only low-carbon and sustainable investments are covered and by safeguarding the right and duty of states to regulate in the public interest which can be coupled with provisions aimed at promoting and facilitating sustainable investment[54].

It has also been pointed out that reduction of fossil fuel subsidies can be a key trade policy instrument for climate action[55]. It has correctly been observed that subsidies have significant impacts on the promotion of climate-friendly energy in both developed and developing countries[56]. This is true both for subsidies granted for the use of climate-friendly technology and the reduction of subsidies for fossil sources of energy[57]. According to the United Nations Environment Programme (UNEP), reducing fossil fuel subsidies is essential for promoting green economies and reducing carbon emissions[58]. UNEP points out that the production and use of fossil fuels in many countries is encouraged through large subsidies[59]. These subsidies are undesirable since they contribute to air pollution and congestion, are a drain on national budgets, often do not reach the poorest households, crowd-out investment in

[53] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Available at *https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf* (Accessed on 18/12/2023)
[54] Ibid
[55] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit
[56] Ibid
[57] Ibid
[58] United Nations Environment Programme., 'Indicator 12. c.1.' Available at *https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-12-9#:~:text=Reducing%20fossil%20fuel%20subsidies%20is,countries%20reporting%20on%20this%20indicator*. (Accessed on 18/12/2023)
[59] United Nations Environment Programme., 'Fossil Fuel Subsidy Reform.' Available at *https://www.unep.org/explore-topics/green-economy/what-we-do/economic-and-fiscal-policy/fiscal-policy/policy-analysis-3* (Accessed on 18/12/2023)

clean energy, and encourage excessive energy consumption[60]. Trade policies geared towards reforming such subsidies can help reduce pollution and improve human health, free up public revenues, which can be used to implement green economy policies and support other development priorities including climate action[61]. Reduction of fossil fuel subsidies is therefore an important trade policy instrument for climate action.

Technology transfer is also a critical trade policy instrument for climate action. It is well acknowledged that wide dissemination of climate-friendly technologies is key for effectively tackling climate change especially in developing countries[62]. The *United Nations Framework Convention on Climate Change* (UNFCCC) which is the principle global legal instrument on climate change requires all parties to promote and cooperate in the development, application and diffusion, including transfer, of technologies that control, reduce or prevent anthropogenic emissions of greenhouse gases[63]. The UNFCCC further obliges the developed country parties to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other parties, particularly developing country parties, to enable them to implement the provisions of the Convention[64]. The *Paris Agreement* also acknowledges the importance of technology for the implementation of climate change mitigation and adaptation actions and requires parties to fully realize technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions[65]. Effective trade policies can enhance the transfer of climate friendly technologies through market-based approaches, publicly funded bilateral or multilateral programs, or in the form of private-

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[60] Ibid

[61] Ibid

[62] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[63] United Nations Framework Convention on Climate Change., United Nations, 1992., Article 4 (1) (c) Available at https://unfccc.int/resource/docs/convkp/conveng.pdf (Accessed on 18/12/2023)

[64] Ibid, Article 4 (5)

[65] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Article 10 ., Available at *https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on* 18/12/2023)

public partnerships[66]. Technology transfer is therefore an important trade policy instrument for climate action.

In addition to the foregoing instruments, the WTO identifies other trade policy tools and measures that are pertinent in climate action. These include trade facilitation through measures such as speeding up customs clearance and the use of electronic documentation at borders in order to reduce border control delays and related energy consumption, leading to reductions of up to 85 per cent of emissions at certain land border crossings;[67]embracing green government procurement policies which can significantly reduce greenhouse gas emissions while producing major economic benefits, such as new green jobs and enhanced energy efficiency;[68] use of international standards to avoid regulatory fragmentation when upgrading energy efficiency regulations in order to reduce domestic energy consumption and related GHG emissions by excluding the most polluting goods from the markets;[69]accelerating mitigation efforts, supporting adaptation and assisting disaster recovery by reviewing domestic regulations and restrictions for providers of climate-related services;[70] helping accelerate the transition to green economies by rebalancing tariff policies that may inadvertently benefit carbon-intensive sectors; reforming and repurposing environmentally harmful and market-distorting subsidies; supporting the diffusion of climate-related technologies and equipment by facilitating and increasing trade finance, such as loans and guarantees;[71] improving how food and agricultural markets function, while contributing to climate action, by easing trade in food; protecting economies from the spread of disease and pests exacerbated by climate change by strengthening sanitary and phytosanitary systems; and reducing policy fragmentation and compliance costs by improving coordination of climate-

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[66] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit
[67] World Trade Organization., 'Trade Policy Tools for Climate Action.' Op Cit

[68] Ibid
[69] Ibid
[70] Ibid
[71] Ibid

related, non-discriminatory internal taxes, including carbon pricing and equivalent policies[72].

Trade policy instruments are therefore essential in enhancing climate action. Despite their importance, several challenges hinder the effective use of trade policy instruments and measures in climate action. For example effective technology transfer is hindered by Intellectual Property Rights (IPR) and inadequate funding especially in developing countries[73]. Further, it has been argued that many developing countries fear that reducing tariffs on low carbon and environmental friendly technologies will be to the benefit of developed countries only which are the main producers of environmentally friendly technologies with developing countries being the net importers of such technologies[74]. It has further been asserted that standards and labelling as trade policy instruments for climate action raise challenges about the underlying methodologies for calculating the amount of a product's embedded carbon, which in turn would have considerable trade implications[75]. Challenges could also occur in relation to the costs involved for producers and market access implications, especially for smaller producers[76]. In addition, it has been contended that most IIAs do not distinguish between low-carbon and high-carbon investments and generally cover investments across all sectors and typically offer high levels of protection hence the need to fast track IIA reform to make it more aligned with climate action[77]. It has also been asserted that governments in both developing and developed countries are often under pressure to maintain subsidies for fossil fuels since such subsidies are vital in helping to secure access to energy especially for the poor[78]. It is imperative to address the foregoing among other challenges in order to effectively embrace trade policy instruments for climate action.

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[72] Ibid

[73] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[74] Ibid

[75] International Centre for Trade and Sustainable Development., 'Trade Elements in Countries' Climate Contributions under the Paris Agreement.' Op Cit

[76] Ibid

[77] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

[78] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

4.0 Way Forward

In order to effectively embrace trade policy instruments for climate action, there is need to accelerate technology transfer specially to developing countries. It has correctly been pointed out that developing countries continue to face problems in developing, accessing and deploying technologies as part of their response on climate change[79]. It has been asserted that wide dissemination of climate-friendly technologies is key for effectively tackling climate change in both developing and developed countries[80]. According to UNCTAD, trade can facilitate access to environmentally preferable goods and services and to technologies and know-how critical to boosting innovation and building capabilities to support mitigation and adaptation efforts in all countries[81]. It is therefore imperative for all countries to embrace technology transfer as a trade policy instrument for climate action. This calls for several interventions in order to ease technology transfer including addressing intellectual property barriers to technology transfer, capacity building, enhanced innovation, easing domestic regulations and financial and technical support for developing countries[82].

In addition, there is need to fast track reform of IIAs. These agreements have been identified as key trade policy instruments through which Foreign Direct Investments are channeled into the global economy especially in developing countries[83]. It has been asserted that most investors move from the developed world to invest in the developing regions of the world which are rich in natural resources such as the African continent, a continent endowed with immense

[79] United Nations Climate Change., 'What is Technology Development and Transfer?.' Available at *https://unfccc.int/topics/what-is-technology-development-andtransfer#:~:text=In%201992%2C%20when%20countries%20established,that%20reduce%20emissions%20o f%20GHGs* (Accessed on 19/12/2023)

[80] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[81] Caribbean News Global., 'COP 28: UNCTAD and Partners to Advance Pro-Development Climate Goals.' Op Cit

[82] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[83] Muigua. K., 'Africa's Role in the Reform of International Investment Law and the Investor State Dispute Settlement (ISDS) System.' Available at *https://kmco.co.ke/wp-content/uploads/2020/08/Africas-Role-in-the-Reform-of-International-Investment-law-and-the-Investor-State-Dispute-Settlement-ISDS-System-Kariuki-Muigua-August-2020.pdf* (Accessed on 19/12/2023)

natural and human resources as well as great cultural, ecological and economic diversity[84]. However, in light of the environmental and climate concerns resulting from investment practices especially in the developing world, there is a growing international consensus that more is needed from international investment treaties and the regime in general, if they are to have a meaningful future, or any future at all, and this consensus is increasingly revolving around the Sustainable Development paradigm[85]. UNCTAD posits that states need to fast-track IIAs reform to make it more aligned with climate action[86]. It is therefore important for countries especially in the developing world to accelerate the reform of IAAs as trade policy instruments in order to foster their role in climate action through measures such as the incorporation of Environmental, Social and Governance (ESG) clauses in investment treaties[87].

There is also need for governments to rethink and consider the reduction of fossil fuel subsidies in order to enhance climate action[88]. It has been argued that governments' support measures, such as subsidies, can help correct market inefficiencies and enhance social welfare[89]. However, if not well designed, such measures can distort production and trade, reduce economic efficiency, exacerbate negative spillovers and damage the environment[90]. It has been pointed out that this is relevant for sectors including in fossil fuels, agriculture, fisheries, transport and water supply[91]. According to the WTO, reforming and repurposing subsidies could offer substantial environmental benefits and foster climate action[92]. It has been argued that reducing fossil fuel subsidies is essential for promoting green economies and reducing carbon

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[84] Ibid

[85] Ibid

[86] United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Op Cit

[87] Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Op Cit

[88] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit

[89] World Trade Organization., 'Trade Policy Tools for Climate Action.' Op Cit

[90] Ibid

[91] Ibid

[92] Ibid

emissions[93]. Governments should therefore consider reducing fossil fuel subsidies as a trade policy instrument for climate action.

Further, it is imperative for both the public and private sectors to embrace standards and labels as trade policy instruments for climate action. It has been asserted that standards and labels promote climate-friendly consumption and production patterns by fostering consumer awareness and more transparency along global value chains in the trade sector[94]. It has been argued that one powerful way for companies to communicate about their climate action is through the use of climate labels[95]. Credible labels provide instant and full transparency to the customer, spelling out the steps that an organization has taken to reduce their emissions and the global climate action projects they have supported[96]. ISO has developed a number of standards that play an essential role in climate action, helping to monitor climate change, quantify greenhouse gas emissions and promote good practice in environmental management[97]. These include the ISO 14000 family of standards for environmental management systems, which details practical tools for organizations to manage the impact of their activities on the environment and address global challenges including climate change, biodiversity loss, and resource depletion[98]. Organizations can therefore embrace standards and labels as trade policy instruments for climate action.

Finally, there is need to embrace internal taxation and carbon pricing as a trade policy instrument for climate action. It has been observed that carbon pricing, such as taxes on carbon-intensive goods, can be an effective tool in reducing

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[93] United Nations Environment Programme., 'Indicator 12. c.1.' Op Cit

[94] International Centre for Trade and Sustainable Development., 'Trade Elements in Countries' Climate Contributions under the Paris Agreement.' Op Cit

[95] Bors. K., & Fischer. C., 'A New Generation of Labels Provides Companies a Credible Way to Talk About Climate Action.' Available at *https://www.southpole.com/blog/a-new-generation-of-labels-provides-companies-a-credible-way-to-talk-about-climate-actio*n (Accessed on 19/12/2023)

[96] Ibid

[97] International Organization for Standardization., 'ISO 14001:2015: Environmental Management Systems.' Available at https://www.iso.org/standard/60857.html (Accessed on 19/12/2023)

[98] Ibid

global greenhouse gas emissions[99]. In addition, it has been noted that most Nationally Determined Contributions (NDCs) submitted by governments to achieve emission reduction targets under the Paris Agreement consider the use of domestic carbon pricing schemes[100]. According to the UNFCCC, carbon pricing curbs greenhouse gas emissions by placing a fee on emitting and/or offering an incentive for emitting less[101]. The price signal created shifts consumption and investment patterns, making economic development compatible with climate protection[102]. It has been noted that carbon pricing can take various forms including Emission Trading System also known as cap and trade which refers to a tradable permit system for greenhouse gas emissions that sets a limit (the cap) on the greenhouse gas emissions that can be emitted;[103] Emission Reduction Funds which are taxpayer funded schemes in which a government buys credits created by emission reduction projects;[104] and a carbon tax on fossil fuel usage which creates a price signal felt across an entire economy, thereby incentivizing a move away from carbon-intensive production[105]. Carbon pricing has been described as one of the most cost-effective and flexible way to achieve emission reduction[106]. It is therefore necessary for countries to embrace carbon pricing as a trade policy instrument for climate action.

The foregoing measures are essential towards embracing trade policy instruments for climate action.

5.0 Conclusion

Trade has been identified as one of the tools and sectors of the economy that can spur climate action[107]. According to UNCTAD, trade-related measures can help drive both climate and sustainable development actions across the

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[99] World Trade Organization., 'Trade Policy Tools for Climate Action.' Op Cit
[100] Ibid
[101] United Nations Climate Change., 'About Carbon Pricing.' Available at https://unfccc.int/about-us/regional-collaboration-centres/the-ciaca/about-carbon-pricing#Which-types-of-carbon-pricing-exist?- (Accessed on 19/12/2023)
[102] Ibid
[103] Ibid
[104] Ibid
[105] Ibid
[106] Ibid
[107] World Trade Organization., 'Trade Policy Tools for Climate Action.' Op Cit

globe[108]. Some of the key trade policy instruments that can spur climate action include trade liberalization, standards and labelling, international investment protection treaties, and technology transfer[109]. However, the efficacy of these instruments in climate action is hindered by several barriers including challenges to technology transfer, concerns about the methodologies adopted in developing standards and labels, and lack of reform of IAAs[110]. In order to effectively embracing trade policy instruments for climate action, it is necessary to accelerate technology transfer especially to developing countries, fast track reform of IIAs to embrace climate considerations, reduce fossil fuel subsidies in order to enhance climate action, embrace standards and labels such as the ISO 14000 family of standards, and adopt internal taxation and carbon pricing systems[111]. There is a wide range of trade policy instruments available in both the public and private sectors which need to be effectively embraced for climate action.

Embracing Trade Policy Instruments for Climate Action is the way to go in our quest for Sustainable Development.

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[108] Caribbean News Global., 'COP 28: UNCTAD and Partners to Advance Pro-Development Climate Goals.' Op Cit
[109] Meyer-Ohlendorf. N., & Gerstetter. C., 'Trade and Climate Change: Triggers or Barriers for Climate Friendly Technology Transfer and Development?' Op Cit
[110] Ibid
[111] World Trade Organization., 'Trade Policy Tools for Climate Action.' Op Cit

Placing Health at the Centre of Climate Action

Abstract

The impacts of climate change are being felt across different sectors including health. Climate change has been described as the single biggest health threat facing humanity. The paper critically discusses the link between climate change and health. It argues that climate change is a major threat to human health and well-being. It examines the impacts of climate change on human health and well-being as well as global health systems. The paper proposes measures towards placing health at the centre of climate action in order to ensure good health and well-being for all.

1.0 Introduction

Climate change has been highlighted as the most defining challenge facing humanity[1]. It is a major global concern that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda[2]. The United Nations 2030 Agenda for Sustainable Development acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development[3]. Adverse impacts of climate change such including intense droughts, water scarcity, severe wild fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world threatening the achievement of Sustainable Development[4]. It has been pointed out that if left unchecked, climate change will undo a lot of the development progress made over the past

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[1] United Nations., 'What is Climate Change?' Available at https://www.un.org/en/climatechange/what-is-climate-change (Accessed on 08/12/2023)

[2] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

[3] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda %20for%20Sustainable%20Development%20web.pdf (Accessed on 08/12/2023)

[4] United Nations., 'What is Climate Change?' Op Cit

years and will also provoke mass migrations that will lead to instability and wars[5].

Due to its adverse impacts, tackling climate change has become a top policy agenda at local, national, regional and global levels[6]. The *United Nations Framework Convention on Climate Change* (UNFCCC) acknowledges the vulnerability of all countries to the effects of climate change and calls for special efforts to ease the consequences, especially in developing countries which lack the resources to do so on their own[7]. Further, Sustainable Development Goal 13 urges all countries to take urgent action to combat climate change and its impacts[8]. Climate action is being accelerated across the world with countries embracing adaptation and mitigation techniques towards confronting climate change[9]. Adaptation entails adjustments in ecological, social or economic systems in response to actual or expected climatic stimuli and their effects[10]. It refers to changes in processes, practices and structures to moderate potential damages or to benefit from opportunities associated with climate change[11]. Adaptation techniques can range from building flood defences, setting up early warning systems for cyclones,

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[5] United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at https://www.un.org/sustainabledevelopment/climate-change/ (Accessed on 08/12/2023)

[6] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at https://www.un.org/en/desa/forum-climatechangeandscience-and-technology-innovation (Accessed on 08/12/2023)

[7] United Nations Framework Convention on Climate Change., United Nations, 1992., Available at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (Accessed on 08/12/2023)

[8] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' SDG 13, Op Cit

[9] Muigua. K., 'Taking Urgent Action to Combat Climate Change.' Available at https://kmco.co.ke/wp-content/uploads/2023/09/Taking-Urgent-Action-to-Combat-Climate-Change.pdf (Accessed on 08/12/2023)

[10] United Nations Climate Change., 'Adaptation and Resilience.' Available at https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction#:~:text=Loss%20and%20damage%20arising%20from,forest%20degradation%2C%20loss%20of%20biodiversity (Accessed on 08/12/2023)

[11] Ibid

switching to drought-resistant crops, to redesigning communication systems, business operations and government policies[12]. Climate change mitigation involves reducing greenhouse gas emissions and stopping the problem of climate change from growing[13]. It involves approaches such as embracing renewable sources of energy including solar, wind and hydro power; adopting climate smart agricultural practices; fostering green transport and infrastructure and promoting sustainable waste management[14]. Mitigation envisages transforming key sectors of the economy including energy, industry, transport, food, agriculture and forestry systems in order to reduce greenhouse gas emissions and limit global temperature rise[15].

The impacts of climate change are being felt across different sectors including health. According to the United Nations, climate change is the single biggest health threat facing humanity[16]. As a result, it has been argued that there is need place health at the centre of climate action[17].

The paper critically discusses the link between climate change and health. It argues that climate change is a major threat to human health and well-being. It examines the impacts of climate change on human health and well-being as well as global health systems. The paper proposes measures towards placing health at the centre of climate action in order to ensure good health and well-being for all.

2.0 Climate Change and Health

According to the United Nations, the impacts of climate change are already harming health, through air pollution, diseases, extreme weather events,

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[12] Ibid

[13] United Nations Climate Change., 'Introduction to Mitigation.' Available at https://unfccc.int/topics/introduction-to-mitigation (Accessed on 08/12/2023)

[14] Ibid

[15] United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

[16] United Nations., 'Causes and Effects of Climate Change.' Available at https://www.un.org/en/climatechange/science/causes-effects-climate-change#:~:text=Climate%20change%20is%20the%20single,grow%20or%20find%20sufficient%20food. (Accessed on 08/12/2023)

[17] Ibid

forced displacement, pressures on mental health, and increased hunger and poor nutrition in places where people cannot grow or find sufficient food[18]. The World Health Organization (WHO) also identifies climate change as a fundamental threat to human health[19]. According to WHO, climate change affects the physical environment as well as all aspects of both natural and human systems – including social and economic conditions and the functioning of health systems[20]. WHO further asserts that climate change is a threat multiplier, undermining and potentially reversing decades of health progress across the world[21]. It has rightly been pointed out that as climatic conditions change, more frequent and intensifying weather and climate events are observed, including severe storms, extreme heat, floods, droughts and wildfires[22]. WHO points out that these weather and climate hazards affect health both directly and indirectly, increasing the risk of deaths, noncommunicable diseases, the emergence and spread of infectious diseases, and health emergencies[23]. Climate change is therefore a threat health to human health and well-being since it affects the food we eat, the water we drink, the air we breathe, and the weather we experience[24].

It has been argued that as the global climate crisis worsens, its devastating impacts on human health and well-being will also accelerate[25]. Climate change is increasing heat-related illnesses and deaths; changing the patterns of

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[18] Ibid

[19] World Health Organization., 'Climate Change and Health.' Available at https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health (Accessed on 08/12/2023)

[20] Ibid

[21] Ibid

[22] Ibid

[23] Ibid

[24] United States Environmental Protection Agency., 'Climate Impacts on Human Health.' Available at https://climatechange.chicago.gov/climate-impacts/climate-impacts-human-health#:~:text=Climate%20change%20increases%20the%20risk,or%20liver%20and%20kidney%20damage (Accessed on 08/12/2023)

[25] The World Bank., 'Health and Climate Change.' Available at https://www.worldbank.org/en/topic/health/brief/health-and-climate-change#:~:text=This%20is%20critical%20as%20the,gas%20(GHG)%20emissions%20globally (Accessed on 08/12/2023)

infectious disease transmission, making deadly disease outbreaks and pandemics more likely; worsening maternal and child health outcomes; and intensifying health impacts from extreme weather events such as floods, droughts, wildfires, and windstorms[26]. Further, it has been pointed out that climate shocks and growing stresses such as changing temperature and precipitation patterns, drought, floods and rising sea levels contribute to environmental degradation and affect social determinants of physical and mental health[27]. It has been argued that all aspects and determinants of health are affected by climate change, from clean air, water and soil to food systems and livelihoods[28]. Climate change is rapidly affecting access to basic human needs including food, safe drinking water and sanitation, and clean air therefore affecting both physical and mental health[29]. Climate change is therefore affecting health through direct impacts such as heat waves, droughts, heavy storms, and sea-level rise, and indirect impacts including vector-borne and airways diseases, food and water insecurity, undernutrition, and forced displacements[30].

Climate change is also affecting global health systems. It has been pointed out that the climate crisis exerts significant strains on health systems, simultaneously increasing demand for health services whilst also impairing the system's ability to respond[31]. Further, according to WHO, climate change is impacting the health workforce and infrastructure, reducing capacity to provide universal health coverage (UHC)[32].

From the foregoing, it is evident that climate change is major threat to health. The WHO projects that between the years 2030 and 2050, climate change is expected to cause approximately 250, 000 additional deaths per year, from health problems such as undernutrition, malaria, diarrhoea and heat stress

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[26] Ibid
[27] World Health Organization., 'Climate Change and Health.' Op Cit
[28] Ibid
[29] The World Bank., 'Health and Climate Change.' Op Cit
[30] Pan American Heath Organization., 'Climate Change and Health.' Available at https://www.paho.org/en/topics/climate-change-and-health (Accessed on 08/12/2023)
[31] The World Bank., 'Health and Climate Change.' Op Cit
[32] World Health Organization., 'Climate Change and Health.' Op Cit

alone[33]. It further estimates that the direct damage costs to health as result of climate change (excluding costs in health-determining sectors such as agriculture and water and sanitation) to be between US$ 2–4 billion per year by 2030[34]. It has rightly been pointed out that the severity of health risks as a result of climate change will depend on the ability of public health and safety systems to address or prepare for these changing threats, as well as factors such as an individual's behavior, age, gender, and economic status[35]. It has been argued that people in developing countries may be the most vulnerable to health risks as a result of climate change[36]. The WHO also asserts that areas with weak health infrastructure mostly in developing countries will be the least able to cope with health risks associated with climate change without assistance to prepare and respond[37].

Placing health at the centre of climate action is therefore an urgent concern. If left unaddressed, the climate crisis threatens to undo years of progress in development, global health and poverty reduction, and to further widen existing health inequalities between and within populations[38]. It also severely jeopardizes the realization of UHC in various ways, including by compounding the existing burden of disease and by exacerbating existing barriers to accessing health services, often at the times when they are most needed[39]. In addition, it has been asserted that the negative health effects of climate change could drive nearly 40 million people globally into extreme poverty by the year 2030[40]. It is therefore necessary for all countries to place health at the centre of climate action.

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[33] Ibid

[34] Ibid

[35] United States Environmental Protection Agency., 'Climate Impacts on Human Health.' Op Cit

[36] Ibid

[37] World Health Organization., 'Climate Change and Health.' Op Cit

[38] Ibid

[39] Ibid

[40] The World Bank., 'Impact of Climate Change on Health: The Cost of Inaction.' Available at https://www.worldbank.org/en/news/video/2023/11/30/health-impacts-of-climate-change (Accessed on 08/12/2023)

3.0 Placing Health at the Centre of Climate Action: Progress and Setbacks

The right to health is at the heart of the United Nation's 2030 Agenda for Sustainable Development[41]. SDG 3 aims to ensure health lives and promote well-being for all at all ages[42]. SDG 3 makes a bold commitment to end the epidemics of AIDS, tuberculosis, malaria and other communicable diseases by 2030[43]. It also aims to achieve universal health coverage, and provide access to safe and affordable medicines and vaccines for all among other targets[44]. SDG 3 acknowledges threats to the climate and the environment as key determinants in achieving good health and well-being for all under the Sustainable Development agenda[45]. It has been pointed out that the 2030 Agenda for Sustainable Development provides an opportunity to address health, human rights, humanitarian responses, climate change and other development challenges in a more integrated manner than ever before[46]. The United Nations Development Programme (UNDP) urges countries to embrace integrated development solutions to addressing the links between health, environmental degradation and climate change[47].

It has been pointed out that countries are placing health at the centre of climate action by incorporating the themes and targets of SDG 3 in their) envisaged under the Paris Agreement[48]. Many countries through their NDCs are increasingly prioritising SDG 3 targets such as ending epidemics and communicable diseases, fostering access to Universal Health Care and medicines by linking them to climate-induced health risks prevention,

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[41] United Nations., 'Transforming our World: the 2030 Agenda for Sustainable Development.' Op Cit

[42] Ibid, Sustainable Development Goal 3

[43] Ibid

[44] Ibid

[45] Ibid

[46] United Nations Development Programme., 'UNDP Support to the Implementation of Sustainable Development Goal 3.' Available at
https://www.undp.org/sites/g/files/zskgke326/files/publications/SDG-3%20Health.pdf
(Accessed on 08/12/2023)

[47] Ibid

[48] United Nations., 'Discussion on SDG and NDC Implementation: Country Trends and Examples from the NDC Partnership.' Available at
https://www.un.org/sites/un2.un.org/files/technical_brief_ndc_synergies_conference.pdf
(Accessed on 08/12/2023)

contingency health strategy development, and communicable diseases prevention as key strategies for climate action[49]. Climate change adaptation actions now include those prioritizing health and SDG 3 such as enhancing vaccination and prevention against water and vector borne diseases, and increasing access to clean drinking water; increasing health facilities; and building of infrastructure that protects against heat such as ventilation or shaded areas[50].

At the regional level, climate change has been identified as a key threat to health in Africa. It has been argued that African countries will suffer health consequences related to the effects of climate change since their people are among the most vulnerable to climatic change in the world[51]. This vulnerability is due in part to existing problems of poverty, weak institutions and armed conflict in the Continent which limit the capacity of African countries to deal with the additional health problems posed by climate change[52]. The impacts of climate change on health in Africa are manifested through health problems including malnutrition, Neglected Tropical Diseases (NTDs), diarrhoea, malaria, and meningitis[53]. These diseases have been identified as climate sensitive and their impacts are likely to worsen in light of the growing climate crisis in Africa[54].

In light of the foregoing concerns, Africa Union's *Agenda 2063* identifies climate change as key threat to Sustainable Development in Africa[55]. It seeks

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[49] Ibid

[50] Gonzales-Zuniga., 'SCAN (SDG & Climate Action Nexus) tool: Linking Climate Action and the Sustainable Development Goals.' Available at *https://ambitiontoaction.net/wp-content/uploads/2018/10/Methods_note_final.pdf* (Accessed on 08/12/2023)

[51] Climate for Development-Africa. Programme., 'Climate Change and Health in Africa: Issues and Options.' Available at *https://archive.uneca.org/sites/default/files/PublicationFiles/policy_brief_12_climate_change_ and_health_in_africa_issues_and_options.pdf* (Accessed on 08/12/2023)

[52] Ibid

[53] Ibid

[54] Ibid

[55] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 08/12/2023)

to foster environmentally sustainable and climate resilient economies and communities in Africa across all sectors including health[56]. Agenda 2063 also seeks to expand access to quality health care services in Africa[57]. It further posits that by the year 2063, every citizen in Africa will have full access to affordable and quality health care services, universal access to sexual and reproductive health and rights information, and these services will be available to all women, including young women, adolescents, women with disability, those living with AIDS and all vulnerable groups[58]. It also seeks to combat diseases and illnesses prevalent in the continent including HIV/AIDS, Malaria and Tuberculosis[59]. Achieving the health targets envisaged under Agenda 2063 requires placing health at the centre of climate action.

In addition, the *Africa Heath Strategy* seeks to realize an integrated, inclusive and prosperous Africa free from its heavy burden of disease, disability and premature deaths[60]. The strategy seeks to achieve this vision by strengthening health systems performance, increasing investments in health, improving equity and addressing social determinants of health to reduce priority disease burdens[61]. It also identifies strategic approaches required to achieve its vision which include sustainable improvement in health system performance, leadership and good governance, health financing, expanding social protection to address equity, prioritizing human resources for health, enhancing access to essential medicines, promoting commodity security, strengthening supply systems, and fostering health research and innovation[62]. It has been argued that African governments, coordinating bodies, and other organisations need to address the impact of climate change on health in Africa

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[56] Ibid

[57] Ibid

[58] Ibid

[59] Ibid

[60] Africa Union., 'Africa Health Strategy 2016 – 2030.' Available at *https://au.int/sites/default/files/documents/24098-au_ahs_strategy_clean.pdf* (Accessed on 08/12/2023)

[61] Ibid

[62] Ibid

in order to achieve the health targets of the Continent including those set out under the Africa Health Strategy[63].

The *African Union Climate Change and Resilient Development Strategy and Action Plan* also asserts that the realization of Africa's Agenda 2063 cannot be possible without proactive collective Continental efforts aimed at addressing the impacts and encumbrances of climate change, which hampers Africa's integration and development[64]. It acknowledges the effects of climate change on health in Africa[65]. For example, the Strategy posits that a substantial increase in the magnitude of heat waves is projected for most of Africa, with potential effects for health and agriculture[66]. It further asserts that there are increasing climate change threats for ecosystems, biodiversity, human health, food and water security and socio-economic development in Africa due to climate hazards such as increasing temperatures, rising sea levels, extended dry seasons, changing precipitation patterns and more extreme weather events[67]. According to the Strategy, human health in Africa will be negatively affected by climate change and its impacts, which can modify the transmission of diseases such as cholera, malaria meningitis, and zoonotic diseases such as Ebola and coronaviruses[68]. It further asserts that the death rate from climate change is 60 to 80% higher in Africa than it is in the next most vulnerable region (Southeast Asia) due to pre-existing vulnerabilities and the weakened ability of the Continent to adapt to the impacts of climate change[69]. Consequently, the Strategy projects that there will be up to 70,000 additional deaths in Africa by 2030 because of climate change, with malaria and diarrhoea

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[63] Climate for Development-Africa. Programme., 'Climate Change and Health in Africa: Issues and Options.' Available at
https://archive.uneca.org/sites/default/files/PublicationFiles/policy_brief_12_climate_change_and_health_in_africa_issues_and_options.pdf (Accessed on 08/12/2023)
[64] Africa Union., 'African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032).' Available at
https://au.int/sites/default/files/documents/42276-doc-CC_Strategy_and_Action_Plan_2022-2032_23_06_22_ENGLISH-compressed.pdf (Accessed on 09/12/2023)
[65] Ibid
[66] Ibid
[67] Ibid
[68] Ibid
[69] Ibid

responsible for the largest proportions of these deaths[70]. In addition, the Strategy points out that climate change-induced floods and cyclones can lead to contamination of water supplies, increasing the prevalence of vector borne diseases in Africa[71]. Placing health at the centre of climate action is a priority agenda under the Strategy[72]. It seeks to integrate climate action and health through measures such as transitioning to renewable energy sources due to their direct health benefits in terms of air quality, fostering food security to address the challenges of malnutrition in Africa, protecting and restoring Africa's ecosystems in order to prevent the occurrence and risk of zoonotic and vector-borne diseases, an mainstreaming climate change considerations (including gender, youth and indigenous knowledge considerations) and updated NDC policy actions across sectoral policies including health[73]. The African Union Climate Change and Resilient Development Strategy and Action Plan is pivotal in placing health at the centre of climate action in Africa. There is need to actualize the Strategy in order to foster an integrated approach towards health and climate action in Africa.

At the national level, the *Health Act*[74] of Kenya requires the national health system to ensure that measures for managing environmental risk factors to curtail occurrence and distribution of diseases are put in place and implemented[75]. Such measures include the reduction of morbidity and mortality of waterborne, food-borne and vector transmitted diseases, and mitigating the health effects of climate change[76]. In addition, the *Kenya Health Policy*[77] acknowledges that climate change is a national, regional and global health challenge with adverse impacts on the health sector. The policy seeks to attain the highest possible standard of health for all Kenyans in a responsive manner and sets out the need to address the challenges in the health sector in

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[70] Ibid

[71] Ibid

[72] Ibid

[73] Ibid

[74] Health Act., No. 21 of 2017., Laws of Kenya.

[75] Ibid, S 68 (2)

[76] Ibid, 68 (2) (b)

[77] Kenya Health Policy 2014-2030., Available at *https://publications.universalhealth2030.org/uploads/kenya_health_policy_2014_to_2030.pdf* (Accessed on 11/12/2023)

Kenya including the impacts of climate change[78]. *Kenya's Updated Nationally Determined Contribution*[79] also places health at the centre of climate action. The NDC mentions specific adaptation measures focused on health such as conducting a vulnerability and risk assessment of different climate risks on human health; developing a public awareness and social mobilisation strategy on climate change and health impacts and developing health programmes, protocols and guidance to manage new climate change related impacts on the health sector[80].

It is therefore evident that there has been some progress towards placing health at the centre of climate action. These efforts have received a major boost following the adoption of the United Nations Climate Change Conference (COP28) Declaration on Climate and Health[81]. The Declaration expresses concern about the negative impacts of climate change on health and stresses the importance of addressing the interactions between climate change and human health and wellbeing in the context of the UNFCCC and the Paris Agreement, as the primary international, intergovernmental fora for the global response to climate change[82]. There is need for all countries to implement the Declaration in order to place health at the centre of climate action.

Despite the foregoing efforts, climate change continues to a major threat to health in all countries. If left unaddressed, the climate crisis threatens to undo years of progress in development, global health and poverty reduction, and to further widen existing health inequalities between and within populations[83].

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[78] Ibid

[79] United Nations Framework on Climate Change Secretariat., 'Kenya's Updated Nationally Determined Contribution (NDC).' Available at *https://unfccc.int/sites/default/files/NDC/2022-06/Kenya%27s%20First%20%20NDC%20%28updated%20version%29.pd*f (Accessed on 11/12/2023)

[80] Ibid

[81] World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Available at *https://www.who.int/publications/m/item/cop28-uae-declaration-on-climate-and-health* (Accessed on 11/12/2023)

[82] Ibid

[83] World Health Organization., 'Climate Change and Health.' Op Cit

Placing health at the centre of climate action is therefore an urgent global concern.

4.0 Way Forward

In order to place health at the centre of climate action, it is imperative for countries to ensure that health is central to climate change mitigation and adaptation policies[84]. The COP 28 Declaration on Climate and Health urges countries to strengthen the development and implementation of policies that maximize the health gains from mitigation and adaptation actions and prevent worsening health impacts from climate change, including through close partnerships with Indigenous Peoples, local communities, women and girls, children and youth, healthcare workers and practitioners, persons with disabilities and the populations most vulnerable to the health impacts of climate change[85]. It is also vital for all countries through their NDCs to prioritise SDG 3 targets such as ending epidemics and communicable diseases, fostering access to Universal Health Care and medicines by linking them to climate-induced health risks prevention, contingency health strategy development, and communicable diseases prevention as key strategies for climate action[86].

In addition, it is important for countries to pursue climate change adaptation actions prioritizing health and SDG 3 such as enhancing vaccination and prevention against water and vector borne diseases, and increasing access to clean drinking water; increasing health facilities; and building of infrastructure that protects against heat such as ventilation or shaded areas[87]. There is also need for countries to pursue adaptation interventions such as urgent nutrition support, surveillance systems, and emergency response centers in order to cushion the health sector against the adverse impacts of

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[84] Ibid

[85] World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

[86] United Nations., 'Discussion on SDG and NDC Implementation: Country Trends and Examples from the NDC Partnership.' Op Cit

[87] Gonzales-Zuniga., 'SCAN (SDG & Climate Action Nexus) Tool: Linking Climate Action and the Sustainable Development Goals.' Op Cit

climate change[88]. It has also been pointed out that key intervention strategies required to place health at the centre of climate action include strengthening health systems to predict, detect, prepare, and respond to climate risks and disasters, by, for example, building climate-informed surveillance and early-warning systems, increasing health workforce capacity in climate-health, and climate proofing healthcare infrastructure[89].

Another key measure towards placing health at the centre of climate action is reducing greenhouse gas emissions from the health sector. It has rightly been observed that the health sector is not only affected by climate change but also contributes to the magnitude of the crisis, being responsible for around 5 percent of global greenhouse gas emissions[90]. It is therefore essential for all countries to ensure that their health sectors and health systems transition to low-carbon, high-quality service delivery, such as through clean, renewable energy for infrastructure and fleets, and low-carbon medicines and equipment[91]. The COP 28 Declaration on Climate and Health also urges all countries to embrace measures to curb emissions and reduce waste in the health sector, such as by assessing the greenhouse gas emissions of health systems, and developing action plans, nationally determined decarbonization targets, and procurement standards for national health systems, including supply chains[92]. Curbing greenhouse emissions in the health sector is therefore an important approach in placing health at the centre of climate action.

It is also pertinent to ensure that the health sector and health systems are climate resilient. A climate resilient health system is one that is capable to anticipate, respond to, cope with, recover from and adapt to climate-related shocks and stress, so as to bring sustained improvements in population health, despite an unstable climate[93]. Climate resilient health systems provide an

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[88] The World Bank., 'Health and Climate Change.' Op Cit

[89] Ibid

[90] Rodriguez-Jimenez., 'The Carbon Footprint of Healthcare Settings: A Systematic Review.' Available at https://doi.org/10.1111/jan.15671 (Accessed on 11/12/2023)

[91] The World Bank., 'Health and Climate Change.' Op Cit

[92] World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

[93] Mosadeghrad. A. M., et al., 'Strategies to Strengthen a Climate-Resilient Health System: A Scoping Review.' *Globalization & Health.*, Volume 19, No. 62 (2023)

opportunity for sustainable human development due to their ability to reduce the effects of climate change on health while promoting better health[94]. WHO urges countries to build better, more climate-resilient and environmentally sustainable health systems by ensuring that core services, environmental sustainability and climate resilience are central components of UHC and primary health care; supporting health systems to leapfrog to cheaper, more reliable and cleaner solutions, while decarbonizing high-emitting health systems; and mainstreaming climate resilience and environmental sustainability into health service investments, including the capacity of the health workforce[95].

Further, there is need to accelerate the realization of the SDGs. It has rightly been argued that climate change is rapidly affecting most of the SDGs especially those relating to access to basic human needs including food, safe drinking water and sanitation, energy, and clean air therefore affecting both physical and mental health[96]. Actualizing the SDGs and the Sustainable Development agenda can help countries confront climate change while fostering good health and well-being for all. Countries should therefore pursue policies that work towards accelerating achievement of the SDGs, including SDG3; by reducing poverty and hunger; improving health and livelihoods; strengthening social protection systems, promoting food security and improved nutrition, fostering access to clean sources of energy, safe drinking water, and sanitation and hygiene for all; and work towards achieving UHC[97].

Finally, there is need to combat inequalities within and among countries in the health sector through measures such as accelerating health financing[98]. It has been pointed out that people in developing countries may be the most vulnerable to health risks as a result of climate change[99]. Further, WHO also

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[94] Ibid

[95] World Health Organization., 'Climate Change and Health.' Op Cit

[96] The World Bank., 'Health and Climate Change.' Op Cit

[97] World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

[98] Ibid

[99] United States Environmental Protection Agency., 'Climate Impacts on Human Health.' Op Cit

asserts that areas with weak health infrastructure mostly in developing countries will be the least able to cope with health risks associated with climate change without assistance to prepare and respond[100]. Finance for health and climate change has been identified as vital in helping developing countries and vulnerable populations to implement health-relevant adaptation and mitigation actions[101]. However, health systems and actors face challenges in accessing finance for health and climate change activities, particularly in low- and middle-income countries[102]. This challenge underscores the need to better leverage synergies at the intersection of climate change and health in order to improve the efficiency and effectiveness of finance flows[103]. The COP 28 Declaration on Climate and Health proposes measures towards unlocking climate finance for health including encouraging the scaling up of investments in climate and health from domestic budgets, multilateral development banks, multilateral climate funds, health financing institutions, philanthropies, bilateral development agencies, and private sector actors; encouraging international finance providers, including development banks, to strengthen the synergies between their climate and health portfolios, and enhance their support for country-led projects and programs in the health-climate nexus; sharing learnings and best practices on financing and implementing climate-health interventions, and develop a common understanding of existing needs for climate-health finance, grounded in country priorities and needs; and improving monitoring, transparency and evaluation efforts of climate finance, as relevant, including for climate-health initiatives, in order to strengthen common understanding of its efficiency and effectiveness, and to maximize the delivery of positive health outcomes[104]. There is need to unlock climate finance for health in order to place health at the centre of climate action.

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[100] World Health Organization., 'Climate Change and Health.' Op Cit

[101] World Health Organization., 'Climate Change and Health.' Available at https://www.who.int/teams/environment-climate-change-and-health/climate-change-and-health/country-support/finance-for-health-and-climate-change (Accessed on 11/12/2023)

[102] Ibid

[103] World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

[104] Ibid

Through the foregoing initiatives, countries will be able to place health at the centre of climate action.

5.0 Conclusion

Climate change is major threat to health. All aspects and determinants of health are affected by climate change, from clean air, water and soil to food systems and livelihoods[105]. The impacts of climate change are already harming health, through air pollution, diseases, extreme weather events, forced displacement, pressures on mental health, and increased hunger and poor nutrition in places where people cannot grow or find sufficient food[106]. The climate crisis is also exerting significant strains on health systems, simultaneously increasing demand for health services whilst also impairing the system's ability to respond[107]. It is therefore imperative to place health at the centre of climate action. Efforts to place health at the centre of climate action have received a major boost following the adoption of the COP 28 Declaration on Climate and Health which promises to accelerate mitigation and adaptation actions in the health sector[108]. There is need for countries to implement the Declaration and adopt measures towards placing health at the centre of climate action. This can be achieved by ensuring that health is central to climate change mitigation and adaptation policies; pursuing climate change adaptation actions prioritizing health and SDG 3; reducing greenhouse gas emissions from the health sector; ensuring that the health sector and health systems are climate resilient; accelerating the realization of the SDGs; and unlocking climate finance for health[109]. Placing health at the centre of climate action is an urgent and achievable national, regional and global agenda.

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[105] World Health Organization., 'Climate Change and Health.' Op Cit

[106] United Nations., 'Causes and Effects of Climate Change.' Op Cit

[107] The World Bank., 'Health and Climate Change.' Op Cit

[108] World Health Organization., 'COP 28 UAE Declaration on Climate and Health.' Op Cit

[109] Ibid; World Health Organization., 'Climate Change and Health.' Op Cit; The World Bank., 'Health and Climate Change.' Op Cit

Tackling Climate Change through Science and Technology

Abstract
This paper critically explores the role of science and technology in tackling climate change. It argues that science and technology can enhance the global response to climate change. The paper examines ways through which countries have embraced science and technology to combat climate change. It further explores some of the problems hindering effective use of science and technology in the global response to climate change. Finally, the paper proposes reforms towards enhanced use of science and technology in tackling climate change.

1.0 Introduction

Climate change has been described as the most defining challenge of our time[1]. It is a major global concern that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda[2]. The United Nations 2030 Agenda for Sustainable Development acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development[3]. The impacts of climate change such as intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world threatening the achievement of Sustainable Development[4]. It has been argued that if left unchecked, climate change will undo a lot of the development progress made over the past years and will also provoke mass migrations that will lead to instability and wars[5].

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[1] United Nations., 'What is Climate Change?' Available at
https://www.un.org/en/climatechange/what-is-climate-change (Accessed on 25/10/2023)
[2] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021
[3] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1
[4] United Nations., 'What is Climate Change?' Op Cit
[5] United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at
https://www.un.org/sustainabledevelopment/climate-change/ (Accessed on 25/10/2023)

As a result of the foregoing concerns, tackling climate change has become a top policy agenda, at local, national, and global levels[6]. There have been global calls on governments and all other stakeholders to put in place measures towards responding to the threat of climate change and ensuring that economies are climate resilient[7]. Tackling climate change is one of the fundamental goals under the United Nation's 2030 Agenda for Sustainable Development with Sustainable Development Goal 13 calling upon countries to take urgent actions towards combating climate change and its impacts[8].

The world is tackling climate change through two fundamental approaches: mitigation and adaptation[9]. Mitigation involves reducing greenhouse gas emissions and stopping the problem of climate change from worsening[10]. Adaptation on the other hand involves learning how to live with the existing threat of climate change and protecting humanity from the future effects of climate change[11]. It has been observed that the reality of global climate change has heightened the critical importance of science and technological innovation to achieve the Sustainable Development Goals[12]. Science and technology can therefore enhance climate change mitigation and adaptation[13].

This paper critically explores the role of science and technology in tackling climate change. It argues that science and technology can enhance the global response to climate change. The paper examines ways through which

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[6] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at *https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation* (Accessed on 25/10/2023)

[7] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

[8] United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

[9] World Vision., 'How is the World Responding to Climate Change?' Available at https://www.worldvision.com.au/docs/default-source/school-resources/how-is-the-worldrespondingto-climate-change.pdf?sfvrsn=32021b89_0 (Accessed on 25/10/2023)

[10] Ibid

[11] Ibid

[12] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Op Cit

[13] Ibid

countries have embraced science and technology to combat climate change. It further explores some of the problems hindering effective use of science and technology in the global response to climate change. Finally, the paper proposes reforms towards enhanced use of science and technology in tackling climate change.

2.0 Role of Science and Technology in Tackling Climate Change

As the impacts of climate change continue to intensify, both developed and developing countries must embrace innovative strategies to strengthen their response to this threat[14]. The United Nations asserts that the reality of global climate change has heightened the critical importance of science and technological innovation to strengthen the global response to this problem and achieve the SDGs[15]. It further opines that an effective and sustainable response to climate change demands the best, most up-to-date scientific assessments of the issue, made in a holistic and multi-disciplinary way[16]. Science and technology can enhance the global response to climate change by strengthening adaptive capacity of countries[17].

It has been pointed out that despite scientific and technological innovations being among the key drivers of climate change, they can play a positive role by being at the forefront in the global battle against climate change[18]. Scientific and technological innovations, especially the discovery and use of fossil fuels, have contributed to climate change but they have also allowed humanity to become aware of our impact on the planet and develop scientific and

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[14] Ospina. A., & Heeks. R., 'ICTs and Climate Change Adaptation: Enabling Innovative Strategies.' Available at https://www.unapcict.org/sites/default/files/2019-01/ICTs%20and%20Climate%20Change%20Adaptation.pdf (Accessed on 26/10/2023)

[15] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Op Cit

[16] Ibid

[17] Ospina. A., & Heeks. R., 'ICTs and Climate Change Adaptation: Enabling Innovative Strategies.' Op Cit

[18] Telecom Review., 'How ICTs Can Tackle the Climate Crisis.' Available at https://www.telecomreview.com/articles/reports-and-coverage/3733-how-icts-can-tackle-the-climate-crisis#:~:text=The%20biggest%20impact%20ICT%20players,solutions%20that%20reduce%20energy%20use (Accessed on 26/10/2023)

technological responses to address the climate crisis[19]. Science is therefore essential for understanding climate change and technology is critical in tackling the problem[20].

The role of science and technology in tackling climate change is enshrined in various legal and policy instruments on climate change at the global, regional and national levels. The *United Nations Framework Convention on Climate Change (UNFCCC)* which is the principle global legal instrument on climate change requires all parties to promote and cooperate in the development, application and diffusion, including transfer, of technologies that control, reduce or prevent anthropogenic emissions of greenhouse gases[21]. The UNFCCC further obliges the developed country parties to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other parties, particularly developing country parties, to enable them to implement the provisions of the Convention[22]. The UNFCC therefore sets the centre stage for the use of science and technology in tackling climate change by advocating for climate technology development and transfer.

The *Kyoto Protocol* was adopted in 1997 in order to operationalize the UNFCCC by committing industrialized countries and economies in transition to limit and reduce greenhouse gas emissions in accordance with agreed individual targets[23]. The Protocol requires all parties to cooperate in the promotion of effective modalities for the development, application and diffusion of, and

[19] Sky News., 'Climate Change: Seven Technology Solutions that Could Help Solve Crisis.' Available at https://news.sky.com/story/climate-change-seven-technology-solutions-that-could-help-solve-crisis-12056397 (Accessed on 26/10/2023)
[20] Allison. S., & Miller. T., 'Why Science Needs the Humanities to Solve Climate Change.' Available at https://uci.edu/brilliant/human-experience/humanities/science-needs-the-humanities-to-solve-climate-change.php (Accessed on 26/10/2023)
[21] United Nations Framework Convention on Climate Change., United Nations, 1992., Article 4 (1) (c) Available at https://unfccc.int/resource/docs/convkp/conveng.pdf (Accessed on 26/10/2023)
[22] Ibid, Article 4 (5)
[23] United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Available at *https://unfccc.int/resource/docs/convkp/kpeng.pdf* (Accessed on 26/10/2023)

take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies in particular to developing countries[24]. It further requires parties to cooperate in scientific and technical research towards tackling climate change[25].

The *Paris Agreement*[26] further envisages the use of science and technology in confronting climate change. The Agreement recognizes the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge[27]. It also requires countries to cooperate towards tackling climate change through measures such as strengthening scientific knowledge on climate, including research, systematic observation of the climate system and early warning systems, in a manner that informs climate services and supports decision-making[28]. In addition, the Paris Agreement acknowledges the importance of technology for the implementation of mitigation and adaptation actions and requires parties to fully realize technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions[29].

The role of science and technology in tackling climate change is therefore upheld by global legal instruments on climate change including the UNFCCC, the Kyoto Protocol and the Paris Agreement. Implementing the provisions of these instruments is important in enhancing the use of science and technology in tackling climate change.

In Africa, the *Science, Technology and Innovation Strategy for Africa*[30] recognizes the role of science, technology and innovation in policy debate in areas including biosafety, climate change mitigation and adaptation, biodiversity

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[24] Ibid, Article 10 (c)

[25] Ibid, Article 10 (d)

[26] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 26/10/2023)

[27] Ibid, Preamble

[28] Ibid, Article 7 (7) (c)

[29] Ibid, Article 10

[30] Africa Union., 'Science, Technology and Innovation Strategy for Africa, 2024.' Available at *https://au.int/sites/default/files/documents/38756-doc-stisa_science_tech_innovation_strategy.pdf* (Accessed on 26/10/2023)

and environment regulation. It requires Africa to embrace science, technology and innovation in tackling climate change in order to build its response capacities and capabilities and leverage existing relationships with relevant partners outside the Continent[31].

Further, the African Union *Agenda 2063* envisages the use of science and technology to tackle climate change in Africa and requires African countries to transition to low carbon economies through approaches such as climate smart agriculture and energy development[32]. Agenda 2063 captures the ideal of environmentally sustainable and climate resilient economies and communities in Africa which is to be achieved through measures such as clean technologies including renewable energy[33]. It also envisages the use of space based technologies to combat climate change in Africa through climate forecast among other measures[34].

The role of science and technology in tackling climate change in Africa is also espoused under the *Nairobi Declaration on the African Process for Combating Climate Change*[35]. The Declaration requires African countries and the international community to increase support to Africa in the areas of technology development and transfer including support for South-South transfer of scientific knowledge, in particular indigenous knowledge in order to strengthen the response to climate change in Africa[36]. It also requires African countries to scale up capacity building in science and technology in order to enhance climate change mitigation and adaptation in the continent[37]. According to the Nairobi Declaration, extensive technology transfer, acquisition and diffusion and a much increased rate of innovation are needed

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[31] Ibid

[32] Africa Union., 'Agenda 2063: The Africa we Want.' Available at
https://au.int/sites/default/files/documents/33126-doc-
framework_document_book.pdf (Accessed on 26/10/2023)

[33] Ibid

[34] Ibid

[35] United Nations Environment Programme., 'Nairobi Declaration on the African Process for Combating Climate Change.' Available at
https://wedocs.unep.org/bitstream/handle/20.500.11822/25791/Nairobi_Decl_climate.pdf?sequence=1&isAllowed=y (Accessed on 26/10/2023)

[36] Ibid

[37] Ibid

in order to effectively tackle climate change in Africa[38]. The Nairobi Declaration envisages enhancing technology development and transfer, including hard technologies such as drip irrigation, water harvesting, drought-resistant crop varieties, renewable energy technologies, building technologies; and soft technologies such as knowledge, systems, procedures, best practices in order to tackle climate change in Africa[39].

Actualizing the provisions of Agenda 2063; the Science, Technology and Innovation Strategy for Africa, 2024; and the Nairobi Declaration on the African Process for Combating Climate Change will foster the use of science and technology in responding to climate change in Africa.

In Kenya, the *Climate Change Act[40]* also upholds the role of science and technology in tackling climate change. One of the key objects of the Act is to promote low carbon technologies, improve efficiency and reduce emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development in Kenya[41]. The Act requires the response to climate change in Kenya as enshrined under National Climate Change Action Plan to be informed by scientific knowledge on climate change and technology and innovations relevant to climate change[42]. The Act also requires Kenya to strengthen its approaches to climate change research and development training and technology transfer in order to enhance the response to climate change[43]. The Climate Change Act has since been amended by the *Climate Change (Amendment) Act 2023[44]* in order to enhance climate change mitigation and adaption measures in Kenya through the concept of carbon markets and trading. Carbon trading can accelerate technologies and projects geared towards reduction of greenhouse gas emissions in Kenya[45].

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[38] Ibid

[39] Ibid

[40] Climate Change Act, No. 11 of 2016, Laws of Kenya

[41] Ibid, S 3 (2) (g)

[42] Ibid, S 13 (5) (a)

[43] Ibid

[44] Climate Change (Amendment) Act, 2023, Government Printer, Nairobi

[45] Amboko. J., 'Kenya's Plan to Unlock Carbon Credit Market.' Available at https://www.businessdailyafrica.com/bd/economy/kenya-s-plan-to-unlock-carbon-credit-market--4357006 (Accessed on 26/10/2023)

Further, the *Science, Technology and Innovation Act*[46] is an Act of Parliament to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes[47]. The Act aims to achieve several objectives including fostering the development of scientific, technological and innovation activities in Kenya in relation to the economic and social policies of the Government, and the country's international commitments; and promoting the adoption and application of scientific and technological knowledge and information necessary in attaining national development goals[48]. Strengthening synergies between the Science, Technology and Innovation Act and the Climate Change Act and the institutions established under the two laws can enhance the role of science and technology in tackling climate change in Kenya through scientific research, technological development and innovation among other measures.

From the foregoing, it is evident that the role of science and technology in tackling climate change has been recognized and enshrined under the laws on climate change at the global, continental and national levels. Actualizing the provisions of these laws will enhance the global, continental and national responses to climate change through science and technology.

3.0 Tackling Climate Change through Science and Technology: Progress and Challenges

It has been observed that science and technology have enhanced the response to the global threat of climate change through various ways including emissions reduction which involves tackling climate change by reducing greenhouse gas emissions; sequestration which entails removing carbon dioxide from the atmosphere into permanent geological, biological or oceanic reservoirs; adaptation through responding to and coping with climate change as it occurs, in either a planned or unplanned way; and solar geoengineering through large-scale engineered modifications to limit the amount of sunlight

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[46] Science, Technology and Innovation Act., No. 28 of 2013, Laws of Kenya
[47] Ibid
[48] Ibid

reaching the earth, in an attempt to offset the effects of ongoing greenhouse gas emissions[49].

Further, science and technology are enhancing low carbon development in various sectors[50]. Low carbon development refers to forward-looking national economic development plans or strategies that encompass low-emission and/or climate-resilient economic growth[51]. Low carbon development has also been defined as long term climate-friendly growth strategies that can highlight a country's priority actions for climate mitigation and adaptation, and a country's role in the global effort against climate change[52]. Low-carbon development aims to achieve the goals of reducing greenhouse gas emissions, exploiting low-carbon energy, and fostering economic growth[53]. Scientific research and technological innovation have enhanced low carbon development through the development of clean and green technologies and climate smart practices in various sectors including energy, agriculture, transport, infrastructure, industry and biodiversity conservation[54].

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[49] Australian Academy of Science., 'What does Science Say About Options to Address Climate Change?' Available at https://www.science.org.au/learning/general-audience/science-climate-change/9-what-does-science-say-about-climate-change-options (Accessed on 26/10/2023)

[50] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Available at https://thesciencepolicyforum.org/articles/perspectives/role-of-science-technology-and-innovation-in-addressing-climate-change-a-perspective/ (Accessed on 26/10/2023)

[51] United Nations., 'Low Carbon Development.' Available at https://sustainabledevelopment.un.org/index.php?menu=1448#:~:text=The%20concept%20of%20low%20carbon,low%2Dcarbon%20growth%20plans (Accessed on 26/10/2023)

[52] United Nations Economic and Social Commission for Asia and the Pacific., 'Low-Carbon Development Plan.' Available at https://www.unescap.org/sites/default/files/45.%20FS-Low-Carbon-DevelopmentPlan.pdf (Accessed on 26/10/2023)

[53] Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' *Energy Procedia*, 5 (2011) 1706–1712

[54] Ibid

Science, technology and innovation have enhanced energy efficiency through the development of clean sources of energy such as renewable energy[55]. The energy sector is the central front in the battle to mitigate greenhouse gas emissions[56]. As a result, it has been rightly pointed out that cleaner technologies, including cleaner energy technologies, have an important role to play in addressing climate change[57]. Clean energy technologies especially renewable sources of energy such as solar energy (solar thermal, solar photovoltaic, high efficiency solar cells), energy from urban and industrial wastes, wind, biomass (bio-fuels, bio-gas, waste to energy) and small hydro, ocean and geothermal energy and new technologies including fuel cells and hydrogen have enhanced global efforts towards tackling climate change[58]. It has been observed that clean energy technologies such as renewable sources of energy emit little to no greenhouse gases and have made massive strides in performance and cost, making it more feasible than ever to shift the world away from burning fossil fuels at a faster pace than previously thought[59]. Further, it has been asserted that these developments have increased the economic attractiveness of low-emission energy sector transitions towards combating climate change[60]. It is therefore important to effectively embrace clean energy technologies in order to strengthen the global response to climate change.

Science and technology is also enhancing low carbon development in the transport and infrastructure sector through low carbon infrastructure and green transport models[61]. It has been estimated that approximately 79% of

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[55] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Op Cit

[56] Ibid

[57] Ibid

[58] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

[59] Irfan. U., 'This is What we Need to Invent to Fight Climate Change.' Available at https://www.vox.com/23042818/climate-change-ipcc-wind-solar-battery-technology-breakthrough (Accessed on 26/10/2023)

[60] Ibid

[61] Kennedy. C, Ibrahim. N, & Hoornweg. D., 'Low-Carbon Infrastructure Strategies for Cities.' Available at https://www.researchgate.net/profile/Nadine-Ibrahim-2/publication/262954714_Lowcarbon_infrastructure_strategies_for_cities/links/570

global greenhouse gas emissions come from infrastructure construction and operations such as power plants, buildings, and transport[62]. In order to curb this situation while maintaining infrastructure as a priority sector for climate action, and national growth in general, climate experts have argued that governments need to radically rethink how infrastructure is planned, delivered and managed in order to make it suitable for a low emission and resilient future[63]. Scientific research and technological innovation have tried to address this concern through the development of low carbon infrastructure projects such as railway infrastructure and urban transport projects including metros and light rail projects which reduce motor vehicle usage[64].

Science and technology are revolutionizing the transport and infrastructure sector through the development of hybrid electric vehicles, battery electric vehicles, solar electric vehicles, fuel cell vehicles, improved diesel vehicles, alternative fuel technologies, material substitution technologies, smart traffic infrastructure/intelligent transport systems and the use of information technologies for traffic management[65]. Further, in the infrastructure sector, there is increased adoption of green construction materials including flash based bricks, RCC blocks, cellular lightweight concrete, bamboo-based materials and bagasse boards; efficient lighting system; and adoption of nature-based infrastructure[66]. These measures have aided in the reduction of greenhouse gases and improved efforts towards tackling climate change.

Science and technology are also enhancing the response to climate change in the agriculture sector through climate smart agricultural practices which are geared towards enhancing the resilience of the agriculture sector and

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5559e08ae13eb88b9644e/Low-carboninfrastructure-strategies-for-cities.pdf (Accessed on 26/10/2023)

[62] Brickstone., 'Low-Carbon Infrastructure in Curbing Climate Change.' Available at https://brickstone.africa/low-carbon-infrastructure-in-climatechange/#:~:text=Urban%20transport%20projects%2C%20such%20as,emissions%20compared%20to%20fo ssil%20fuels (Accessed on 26/10/2023)

[63] Ibid

[64] Kennedy. C, Ibrahim. N, & Hoornweg. D., 'Low-Carbon Infrastructure Strategies for Cities.' Op Cit

[65] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

[66] Ibid

promoting food security while curbing greenhouse gas emissions[67]. Advanced farming machinery; innovative farming techniques including zero budget farming, organic farming; smart irrigation technologies including drip irrigation and sprinkler irrigation; energy efficient farming technologies; the use of nanotechnology; mechanisation of horticulture; and scientific research in agricultural extension are some of the scientific and technological approaches that are enhancing the resilience of the agricultural sector and promoting food security while reducing greenhouse gas emissions[68]. Technologies such as genetic engineering have been adopted to transfer the nitrogen fixing capabilities of legumes such as peas and beans into cereal crops so to attain higher yields, without the use of expensive fertilizers towards curbing carbon emissions and environmental pollution[69]. Scientific research and technological innovation have also increased the adoption of regenerative agricultural practices such as crop rotation, agroforestry, use of drought- and heat-resistant crops, integrated pest control systems, water harvesting and irrigation[70]. This approach has helped in fostering high-yielding, resilient, and adaptive practices in the agricultural sector[71].Science and technology have therefore played a pivotal role in tackling climate change in the agriculture sector.

Science and technology have also enhanced the response towards climate change through carbon sequestration[72]. Carbon sequestration involves removing carbon dioxide from the atmosphere and storing it into permanent geological into permanent geological, biological or oceanic reservoirs[73]. Carbon sequestration can prevent further emissions from contributing to the

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[67] The World Bank., 'Climate-Smart Agriculture.' Available at https://www.worldbank.org/en/topic/climate-smart-agriculture (Accessed on 26/10/2023)

[68] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

[69] Conrow. J., 'Borlaug's Dream is Being Realized.' Available at https://allianceforscience.org/blog/2017/04/borlaugs-dream-is-being-realized/ (Accessed on 26/10/2023)

[70] Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Available at https://climatechampions.unfccc.int/call-to-action-for-climate-resilient-sustainable-food-systems-inafrica/ (Accessed on 26/10/2023)

[71] Ibid

[72] Australian Academy of Science., 'What does Science Say About Options to Address Climate Change?' Op Cit

[73] Ibid

heating of the planet[74]. This concept happens in two forms: biologically or geologically[75]. Biological carbon sequestration happens when carbon is stored in the natural environment in 'carbon sinks', such as forests, grasslands, soil, oceans and other bodies of water. Geological carbon sequestration is an artificial process that involves removing carbon from the atmosphere and storing it in places such as underground geological formations or rocks[76]. It majorly relies on technology with recent innovations such as graphene production and carbon capture and storage showing carbon being sequestered more effectively on larger scales[77]. Carbon sequestration is therefore an important process in tackling climate change by removing carbon dioxide from atmosphere and storing it in order to mitigate its negative impacts on the planet. Science and technology are aiding in carbon sequestration.

In addition, science and technology are enhancing efforts to tackle climate change by fostering biodiversity conservation[78]. The *Convention on Biological Diversity*[79] recognizes the role of science and technology in the conservation of biodiversity and urges parties to foster and collaborate in areas such as scientific research, access to and transfer of technology and exchange of scientific information in order to enhance the conservation of biodiversity[80]. Science and technology can enhance conservation of biodiversity through remote sensing, ex-situ conservation, biotechnology, bioremediation in order to restore damaged biodiversity, and information technology among others[81].

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[74] Lal. R., 'Carbon Sequestration.' Available at https://www.researchgate.net/profile/Rattan-Lal-2/publication/6079761_Carbon_sequestration/links/55420e7b0cf224a89a3333ca/Carbon-sequestration.pdf (Accessed on 26/10/2023)

[75] Ibid

[76] Ibid

[77] Ibid

[78] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

[79] United Nations., 'Convention on Biological Diversity.' Available at https://www.cbd.int/doc/legal/cbd-en.pdf (Accessed on 26/10/2023)

[80] Ibid

[81] Wellers. D et al., 'Technology for Preserving Biodiversity.' Available at https://www.sap.com/africa/insights/viewpoints/technology-for-biology-preserving-biodiversity.html#:~:text=Sensors%20to%20detect%20and%20protect%20species%20

Finally, it has been pointed out that Artificial Intelligence (AI) is helping to reduce greenhouse gases at industrial facilities as part of the efforts towards tackling climate change[82]. AI is enhancing improvements in energy efficiency, generation and storage, redefining energy systems, unlocking the possibility of data driven power options and enabling smart city development. It has been pointed out that climate data sets are enormous and take significant time to collect, analyze, and use to make informed decisions and enact actual policy change[83]. Using AI to factor in elements of climate change that are constantly evolving can aid in making informed predictions about changes in the environment, in order to adopt mitigation efforts earlier[84]. AI is therefore one of the technological revolutions that can aid efforts towards tackling climate change.

It is therefore evident that science and technology are viable tools in tackling climate change. However, it has been observed that developing countries continue to face barriers in accessing clean and climate friendly technology[85]. Further, most countries especially in the developing world are yet to fully invest in climate science research and development hence hindering effective mitigation and adaptation efforts[86]. It is imperative to effectively embrace science and technology in order to enhance the global response on climate change.

4.0 Way Forward

There is need to embrace science and technological interventions in order to foster low carbon development towards achieving the goals of reducing

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at%20risk&text=New%20technologies%2C%20from%20robots%20and,risk%20to%20 defending%20their%20homes. (Accessed on 26/10/2023)

[82] Stantec., '9 Breakthrough Technologies for Tackling Climate Change.' Available at https://www.stantec.com/en/services/sustainability/climate-change-design-technology (Accessed on 26/10/2023)

[83] Mastrola. M., 'How AI Can Help Combat Climate Change.' Available at https://hub.jhu.edu/2023/03/07/artificial-intelligence-combat-climate-change/ (Accessed on 26/10/2023)

[84] Ibid

[85] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Op Cit

[86] Ibid

greenhouse gas emissions and fostering economic growth[87]. Science and technology have enhanced low carbon technology in various sectors such as energy through the development of renewable sources of energy; transport and infrastructure through initiatives such the development of electric cars, metros and light rail projects and use of green construction materials; and the agriculture sector through the adoption of climate smart agricultural practices[88]. Countries should therefore continue embracing science and technology in order to tackle climate change by fostering low carbon development.

It is also imperative for countries to continue advancing scientific and technological research and development on climate change[89]. This calls for enhanced financing and investments by both the public and private sectors in climate change research and development[90]. Research and development enhances the response to climate change by closing the knowledge gap through the availability of scientific data and information on climate change which can inform policy decisions and measures on climate change[91]. It has been observed that in Africa, limited understanding of the African climate system impedes the collective ability to deliver adequate early warnings and climate predictions[92]. This restricts the use of climate information by African decision makers and communities most vulnerable to current and future impacts of a changing climate[93]. As a result, tackling these significant climate knowledge gaps across Africa and the developing world requires targeted and sustained capacity development interventions in climate science research,

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[87] Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' Op Cit

[88] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

[89] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Op Cit

[90] Ibid

[91] Ibid

[92] United Nations Economic Commission for Africa., 'Climate Research for Development in Africa: Using Climate Science to Drive Africa's Development.' Available at https://repository.uneca.org/bitstream/handle/10855/43288/b11974965.pdf?sequence=1&isAllowed=y (Accessed on 27/10/2023)

[93] Ibid

development, applications and policy[94]. Climate research and development provides accurate, timely, reliable and spatially relevant information to guide appropriate climate change actions in Africa and the developing world[95]. Both developed and developing countries should accelerate research and development on climate change in order to effectively tackle the problem. Mobilizing public and private sources of finance can accelerate research and development on climate change[96].

Further, there is need for developed countries to support developing countries in their climate mitigation and adaptation efforts through technology development and transfer[97]. It has been pointed out that developing countries continue to face problems in developing, accessing and deploying technologies as part of their response on climate change[98]. Various legal instruments on climate change including the UNFCCC and the Paris Agreement calls upon developed member states to support the developing member states through climate technology development and transfer[99]. It is therefore essential for developed countries to enhance technology development and transfer to developing countries in order to boost their ability to tackle climate change. According to the UNFCCC, support needs in terms of technology development and transfer ranges from financial resources for a given technology, the strengthening of institutions and human resources for technology research and development to capacity-building and the establishment of information and awareness-raising programmes[100]. Technology development and transfer is therefore essential in enhancing the

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[94] Ibid

[95] Ibid

[96] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

[97] United Nations Climate Change., 'What is Technology Development and Transfer?.' Available at https://unfccc.int/topics/what-is-technology-development-and-transfer#:~:text=In%201992%2C%20when%20countries%20established,that%20reduce%20emissions%20of%20GHGs. (Accessed on 27/10/2023)

[98] Ibid

[99] United Nations Framework Convention on Climate Change, Article 4 (1) (c); Paris Agreement, Article 10

[100] United Nations Climate Change., 'Technology Development and Transfer.' Available at https://unfccc.int/topics/adaptation-and-resilience/groups-committees/adaptation-committee/joint-ac-and-leg-mandates/nap-support/technology-development-and-transfer (Accessed on 27/10/2023)

capacity of countries especially those in the developing world to tackle climate change through science and technology. The United Nations urges develop countries to redouble their efforts to diffuse and transfer proven technologies, for instance, in the area of energy efficiency in order to enhance climate change responses in developing countries[101]. Equally critical in technology development and transfer is international technology cooperation and focused partnerships, both to broaden the scope and to accelerate the pace of innovation[102]. It has been observed that there remains untapped potential for cooperation between developed and developing countries, as well as for South-South cooperation in the areas of technology development and transfer which needs to be realized in order to strengthen global efforts towards tackling climate change.[103]

Finally, there is need for countries to create conducive environments that will enhance the development, access and deployment of climate science and technology[104]. It has been asserted that the production and dissemination of scientific and technological knowledge thrives in the right environment. Science, technology and innovation need supportive ecosystems, right from funding opportunities, ownership, product certification, market access, to public procurement[105]. It is thus pertinent to enhance government support and create enabling legal, institutions, policy and social frameworks in order to accelerate the role of science and technology in tackling climate change[106].

These among other measures are important in strengthening the role of science and technology in tackling climate change.

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[101] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Op Cit
[102] Ibid
[103] Ibid
[104] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit
[105] Ibid
[106] Ibid

5.0 Conclusion

Science and technology can enhance the global response to climate change by strengthening adaptive capacity of countries[107]. Science and technological innovations have accelerated efforts towards tackling climate change by enhancing low carbon development in various sectors including energy, transport and infrastructure and agriculture; carbon sequestration; fostering biodiversity conservation; and enhancing availability of climate date through AI[108]. However, the viability of science and technology in tackling climate change is hindered by factors such as barriers in accessing clean and climate friendly technology and inadequate investment in research and development[109]. It is imperative for countries to embrace science and technology in combating climate change by fostering low carbon development, advancing scientific and technological research and development on climate change, accelerating technology development and transfer, and creating conducive environments that will enhance the development, access and deployment of climate science and technology[110]. Tackling climate change through science and technology is a worthy and achievable objective.

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[107] Ospina. A., & Heeks. R., 'ICTs and Climate Change Adaptation: Enabling Innovative Strategies.' Op Cit

[108] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Op Cit

[109] Ibid

[110] Verma. R., 'Role of Science, Technology and Innovation in addressing Climate Change.' Op Cit

Towards Climate Justice: Embracing Just Transition

Abstract
The paper critically discusses the role of just transition in the climate justice agenda. It examines the need for climate justice and argues that it is an urgent concern due to the disproportionate impacts of climate change especially on developing countries and indigenous communities. The paper further defines just transition and discusses how this concept can foster climate justice. It also examines challenges facing the realization of just transition and suggests solutions towards embracing just transition for climate justice.

1.0 Introduction

Climate change is now affecting every country on every continent[1]. It is disrupting national economies and affecting lives, costing people, communities and countries dearly today and even more tomorrow[2]. People all over the world are experiencing the adverse impacts of climate change, which include changing weather patterns, rising sea level, and more extreme weather events including intense droughts, catastrophic storms and flooding[3]. As a result of its significant impacts on people and the planet, climate change has been described as the most defining challenge of our time[4]. It is a major global concern that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda[5]. The United Nations 2030 Agenda for Sustainable Development acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable

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[1] United Nations., 'Climate Action.' Available at
https://www.un.org/sustainabledevelopment/climate-action/ (Accessed on 28/11/2023)

[2] Ibid

[3] Ibid

[4] United Nations., 'What is Climate Change?' Available at
https://www.un.org/en/climatechange/what-is-climate-change (Accessed on 28/11/2023)

[5] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

Development[6]. Responding to climate change has therefore become a top policy agenda, at local, national, and global levels[7].

Sustainable Development Goal 13 urges all countries to take urgent action to combat climate change and its impacts[8]. Further, in order to strengthen the global response on climate change, countries adopted the *Paris Agreement*[9] in 2015. The Agreement seeks to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels recognizing that this would significantly reduce the risks and impacts of climate change[10]. It has been pointed out that a holistic response to climate change entails both mitigative and adaptive strategies[11]. Mitigation involves actions taken to reduce or prevent greenhouse gas emissions such as practices that reduce energy consumption, prioritize renewable energy or absorb carbon from the atmosphere (such as installing solar panels or heat pumps on buildings, using public transportation and reforestation) while adaptation refers to the ecological, social or economic adjustments that can be taken to enable humanity to thrive in the face of changing climate such as planning for

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[6] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1

[7] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at https://www.un.org/en/desa/forum-climatechangeandscience-and-technology-innovation (Accessed on 28/11/2023)

[8] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' SDG 13, Op Cit

[9] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 28/11/2023)

[10] Ibid

[11] Ramsey County., 'On climate justice: Climate Change and Environmental Justice.' Available at https://www.ramseycounty.us/content/climate-justice-climate-change-and-environmental-justice#:~:text=Climate%20Justice%20is%20a%20subset,the%20impacts%20of%20climate%20change (Accessed on 28/11/2023)

emergencies, insuring that vulnerable individuals have reliable access to cooling and heating systems and planting drought tolerant crops[12].

In designing appropriate responses to climate change, it needs to be acknowledged that the people who have contributed least to the changing climate are being affected by it the most, and are likely to be less able to protect themselves from the impacts[13]. The climate crisis therefore brings enormous injustices. Effective climate action therefore envisages the participation of the people and communities most impacted by climate change including developing countries, indigenous communities, women and children as part of the climate solution in order to foster climate justice[14]. The idea of just transition has been proposed as one of the key ways of achieving climate justice[15]. The paper critically discusses the role of just transition in the climate justice agenda. It examines the need for climate justice and argues that it is an urgent concern due to the disproportionate impacts of climate change especially on developing countries and indigenous communities. The paper further defines just transition and discusses how this concept can foster climate justice. It also examines challenges facing the realization of just transition and suggests solutions towards embracing just transition for climate justice.

2.0 The Need for Climate Justice

Climate justice is a concept that frames climate change as an ethical and political issue, rather than one that is purely environmental or physical in nature[16]. This is done by relating the effects of climate change to concepts of

[12] Ibid

[13] Oxfam., 'Climate Justice.' Available at https://www.oxfam.org.au/what-we-do/climate-justice/ (Accessed on 28/11/2023)

[14] Muigua. K., 'Fostering Climate Justice for Sustainable Development.' Available at https://kmco.co.ke/wp-content/uploads/2023/07/Fostering-Climate-Justice-for-Sustainable- Development.pdf (Accessed on 28/11/2023)

[15] United Nations Development Programme., 'What is just transition? And why is it important?.' Available at https://climatepromise.undp.org/news-and-stories/what-just-transition-and-why-it-important (Accessed on 28/11/2023)

[16] United Nations Environment Programme., 'Climate Justice.' Available at https://leap.unep.org/en/knowledge/glossary/climate-justice#:~:text=Climate%20justice%20is%20a%20term,environmental%20or%20physical%20in%20nature. (Accessed on 28/11/2023)

justice, particularly environmental justice and social justice and by examining issues such as equality, human rights; collective rights, and the historical responsibilities for climate[17]. It has been observed that the climate crisis brings enormous injustices since it affects everyone, but not equally[18]. Further, it has been stated that the people and communities who have contributed least to climate change are being affected by it the most, and are likely to be less able to protect themselves from its impacts[19]. For example, it has been highlighted that developed countries mainly the large industrialised economies of Europe and North America and some Asian countries such as China continue to benefit more from the industries and technologies that cause climate change while developing nations in places such as Africa, Asia, the Caribbean Islands and the Pacific Islands which due to an unfortunate mixture of economic and geographic vulnerability, continue to shoulder the brunt of the burdens of climate change despite their relative innocence in causing it[20]. These countries are more vulnerable to adverse impacts of climate change including severe flooding, intense droughts, sea level rise, increasing temperatures and frequency and intensity of tropical cyclones, and storm surges despite their very little contribution to the climate change problem[21].

Climate justice acknowledges that while climate change is global, the poor are disproportionately vulnerable to its effects[22]. This is due to the fact that they lack the resources to afford goods and services they need to buffer themselves and recover from the effects of climate change[23]. As a result of these concerns,

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[17] Ibid

[18] Oxfam., 'Climate Justice.' Op Cit

[19] Ibid

[20] Giles. M., 'The Principles of Climate Justice at CoP27.' Available at https://earth.org/principlesofclimatejustice/#:~:text=That%20response%20should %20be%20based,the% 20consequences%20of%20clim ate%20change (Accessed on 28/11/2023)

[21] Ibid

[22] United Nations Environment Programme., 'Responding to Climate Change.' Available at *https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change* (Accessed on 28/11/2023)

[23] Ibid

there have been calls for climate justice as evidence increases of the environmental and social injustices caused or worsened by climate change[24]. Climate justice fundamentally is about paying attention to how climate change impacts people differently, unevenly, and disproportionately, as well as redressing the resultant injustices in fair and equitable ways[25]. Climate justice envisages understating climate change as an issue that relates to equity, fairness, ethics and human rights and not just an environmental phenomena[26]. It links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly[27]. The goals of climate justice are to reduce marginalization, exploitation, and oppression, and enhance equity and justice in climate action[28]. Climate justice therefore seeks to put equity and human rights at the core of decision-making and action on climate change[29].

Climate justice encapsulates various facets of justice including distributive, procedural, and justice as recognition[30]. Distributive justice involves identifying and acknowledging the disproportionate impacts that climate change is already having and will continue to have on the people, communities and countries that are least responsible for climate change but which bear the full brunt of its devastating impacts; Procedural justice aims to address distributive injustices by tackling climate change through processes that are participatory, accessible, fair and inclusive; while justice as recognition refers to the importance of centring the voices of people who have traditionally

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[24] Newell. P., 'Toward Transformative Climate Justice: An Emerging Research Agenda.' *WIREs Climate Change*., Volume 12, Issue 6 (2021)

[25] Sultana. F., 'Critical Climate Justice.' Available at https://www.farhanasultana.com/wp-content/uploads/Sultana-Critical-climate-justice.pdf (Accessed on 28/11/2023)

[26] United Nations Environment Programme., 'Climate Justice.' Available at https://leap.unep.org/knowledge/glossary/climate-justice (Accessed on 28/11/2023)

[27] Ibid

[28] Sultana. F., 'Critical Climate Justice.' Op Cit

[29] United Nations Development Programme., 'Climate Change is a Matter of Justice – Here's Why.' Available at https://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-heres-why (Accessed on 28/11/2023)

[30] Monica. T & Bronwyn. L., 'Community Lawyering and Climate Justice: A New Frontier.' *Alternative Law Journal* (47) 3 pp 199-203

been marginalised through structural inequality[31]. Climate Justice is guided by several principles including the protection and empowering of vulnerable individuals and communities, promoting public participation in decision making in climate action, fostering global collaboration in the response to climate change, achieving intergeneration equity in order to protect future generations from the effects of climate change and assigning of responsibility to nations that contribute most to global greenhouse gas emissions[32].

Climate justice is therefore an important component of the Sustainable Development agenda. It seeks to address the causes and impacts of climate change in a manner that recognizes and fosters the rights and concerns of vulnerable people, communities and countries[33]. Climate justice is therefore essential in tackling climate change. It has been rightly pointed out that climate justice is also an important aspect of just transition toward a sustainable future[34].

3.0 The Role of Just Transition in Climate Justice
Just transition has been defined as a concept that seeks to foster climate, energy and environmental justice in a manner that promotes fairness and equity in the journey towards sustainability[35]. It has also been defined as a fair and equitable process of moving towards a post-carbon society by addressing major global justice concerns such as (but not limited to) ethnicity, income, and gender within both developed and developing contexts[36]. Just transition therefore seeks to foster climate action in a manner that ensures that the whole society including all communities and social groups are brought along in the journey towards a net-zero future[37].

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[31] Ibid

[32] Giles. M., 'The Principles of Climate Justice at CoP27.' Op Cit

[33] Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' *WIREs Clim Change*, 2014

[34] United Nations Development Programme., 'Climate Change is a Matter of Justice – Here's Why.' Op Cit

[35] McCauley. D., & Heffron. R., 'Just Transition: Integrating Climate, Energy and Environmental Justice.' *Energy Policy.*, Volume 119, 2018, pp 1-7

[36] Ibid

[37] United Nations Development Programme., 'What is just transition? And why is it important?.' Op Cit

According to the International Labour Organization (ILO), just transition entails greening the economy in a manner that is fair and inclusive as possible to everyone concerned, creating decent work opportunities and leaving no one behind[38]. ILO further asserts that just transition involves maximizing the social and economic opportunities of climate action, while minimizing and carefully managing any challenges through effective social dialogue among all groups impacted, and respect for <u>fundamental labour principles and rights</u>[39]. The African Development Bank Group envisages just transition as a framework for facilitating equitable access to the benefits and sharing of the costs of Sustainable Development such that livelihoods of all people, including the most vulnerable, are supported and enhanced as societies make the transition to low carbon and resilient economies[40]. It further asserts that just transition affirms Africa's right to development and industrialization based on the Paris Agreement and its principles of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances[41].

Just transition has been described as an important principle for the delivery of all climate goals, whether mitigation or adaptation, at every level of governance[42]. Just transitions to low-carbon and climate-resilient development can create opportunities for environmental sustainability, social equity and economic prosperity[43]. Just transition offers an opportunity for countries to strengthen efforts to decarbonize, green their economies, and build climate

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[38] International Labour Organization., 'Frequently Asked Questions on Just Transition.' Available at https://www.ilo.org/global/topics/green-jobs/WCMS_824102/lang--en/index.htm (Accessed on 29/11/2023)

[39] Ibid

[40] African Development Bank Group., 'Just Transition Initiative to Address Climate Change in the African Context.' Available at https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/climate-investment-funds-cif/just-transition-initiative (Accessed on 29/11/2023)

[41] Ibid

[42] United Nations Conference on Trade and Development., 'A Global Just Transition: Climate and Development Goals in a World of Extreme Inequalities.' Available at https://unctad.org/system/files/non-official-document/UNCTAD_Just_Transition_BACKGROUND_NOTE_COP27.pdf (Accessed on 29/11/2023)

[43] African Development Bank Group., 'Just Transition Initiative to Address Climate Change in the African Context.' Op Cit

resilience[44]. It can help countries address the impacts of climate change and green their economies by bringing the public along, supporting a green jobs revolution, laying the social ground work for a resilient net-zero economy, driving local solutions and reinforcing the urgency for concerted efforts to combat climate change[45].

According to the United Nations Framework Convention on Climate Change (UNFCCC), a just transition secures the future and livelihoods of workers and their communities during the transition to a low-carbon economy[46]. UNFCCC, further points out that just transition requires guarantees for intra-, intergenerational and gender equity, racial justice, respect for the rights of indigenous peoples, impacted communities and migrants and promotes and protects human rights and ILO fundamental labour rights[47]. Shifting to a low-carbon economy can unlock new jobs and opportunities but it must be done in a way that is as socially and economically fair as possible for everyone in order to realize just transition[48]. It has been observed that in order to ensure no one is left behind, countries need just transition and economic diversification policies that are comprehensive, inclusive, and based on social dialogue and stakeholder engagement[49].

The concept of just transition is envisaged under the *Paris Agreement* which urges countries to take into account the imperatives of a *just transition* of the workforce and the creation of decent work and quality jobs in accordance with

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[44] United Nations Development Programme., 'What is just transition? And why is it important?.' Op Cit
[45] Ibid
[46] United Nations Framework Convention on Climate Change., 'Views on Different Elements of the Work
Programme on Just Transition Pathways Referred to in Paragraph 52 of Decision 1/CMA.4.'
https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202309181045---
ITF_SLOCAT_JTWP%20submission.pdf (Accessed on 29/11/2023)
[47] Ibid
[48] United Nations Framework Convention on Climate Change., 'Leaving No One Behind in the Transition Towards a Low-Carbon Economy.' Available at https://unfccc.int/news/leaving-no-one-behind-in-the-transition-towards-a-low-carbon-economy (Accessed on 29/11/2023)
[49] Ibid

nationally defined development priorities[50] (Emphasis added). The UNFCCC points out that several countries have demonstrated their efforts in integrating just transitions in their <u>long-term national strategies</u> and <u>Nationally Determined Contributions</u> (NDCs) through measures such as building resilient economies through affordable and decentralized renewable energy systems, reallocating finance to ensure benefits for people affected by transitions to sustainable economies, focusing on vulnerable groups including informal labor forces and women, and the creation of green jobs, thereby fostering low-carbon, resilient and sustainable growth[51].

The concept of just transition has the potential to foster climate justice. It has rightly been pointed out that climate change has the greatest impact on vulnerable groups and communities[52]. Just transition can therefore promote climate justice by addressing the social, economic, and environmental challenges associated with climate change at the same time[53]. In addition, it has been pointed out that just transition can enhance climate justice through the opportunities it presents to transition to a greener future through initiatives such as clean energy among others[54]. Further, in addition to climate action, a just transition framework can also advance progress towards all the SDGs especially those related to affordable and clean energy, decent work and economic growth, reduced inequalities, and responsible production and consumption therefore enhancing environmental, social and economic sustainability[55]. Just transitions to low-carbon and climate-resilient

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[50] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Op Cit

[51] United Nations Framework Convention on Climate Change., 'Financing Fair, Inclusive and Just Transitions to a Sustainable Future.' Available at https://unfccc.int/news/financing-fair-inclusive-and-just-transitions-to-a-sustainable-future (Accessed on 29/11/2023)

[52] Giles. M., 'The Principles of Climate Justice at CoP27.' Op Cit

[53] Kemei. N., 'Navigating the Path of Just Transition: Kenya's Sustainable Future.' Available at https://www.linkedin.com/pulse/navigating-path-just-transition-kenyas-sustainable-future-naomi-kemei/?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 29/11/2023)

[54] Oxfam., 'Climate Justice.' Op Cit

[55] United Nations Development Programme., 'What is just transition? And why is it important?.' Op Cit

development can therefore create opportunities for environmental sustainability, social equity and economic prosperity[56]. According to the African Development Bank, a just transition can enable African countries to achieve greater redistribution of wealth and ensure that climate action occurs alongside development[57].

Just transition can also foster climate justice by ensuring inclusivity and participation in climate action[58]. It is a key tool to ensure that the transition towards a green future happens in a fair way, leaving no one behind[59]. It can facilitate the allocation of resources to support the most affected persons and communities to alleviate the socio-economic impacts of the climate transition[60]. Just transition is also a means of ensuring efficient and effective climate change mitigation and adaptation policies and regulations that limit labour market disruptions and job losses and that support workers and companies impacted by the transition[61].

The idea of just transition can therefore promote climate justice by support of more concerted action to address the needs of people and communities that are being impacted by climate change[62]. It further ensures that costs of climate action including mitigation and adaptation strategies are not disproportionately borne by certain people[63]. Just transition can thus achieve

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[56] African Development Bank Group., 'Just Transition Initiative to Address Climate Change in the African Context.' Op Cit
[57] Ibid
[58] European Commission., 'The Just Transition Mechanism: Making Sure no One is Left Behind.' Available at *https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/finance-and-green-deal/just-transition-mechanism_en* (Accessed on 29/11/2023)
[59] Ibid
[60] Ibid
[61] International Organization of Employers., 'Climate Change and Just Transition.' Available at *https://www.ioe-emp.org/policy-priorities/climate-change-and-just-transitions* (Accessed on 29/11/2023)
[62] Smith. J., 'Global Climate Justice Activism: "The New Protagonists" and their Projects for a Just Transition.' Available at *https://web.archive.org/web/20190429063257id_/http://d-scholarship.pitt.edu/35560/1/Smith%20and%20Patterson%20Unequal%20Exchange%20Volume%20New%20Protagonists%20DScholarship.pdf* (Accessed on 29/11/2023)
[63] Ibid

climate justice by ensuring that costs of shifting to a low-carbon society as well as of the experiences of climate change are shared in a just and equitable way[64]. The concept of climate justice and initiatives to implement just transitions, begin by recognizing that climate change affects people, communities and countries differently, and that effective climate action requires a greater understanding of these differences and how they can be addressed[65]. Just transition can provide a framework for action to ensure that shifting development paths towards a sustainable, carbon-neutral economy, happens in a fair way[66]. A just transition framework recognizes people's social and economic opportunities, and specifically in a way that does not exacerbate existing social inequalities[67]. It is therefore imperative to embrace just transition in order to achieve climate justice.

Despite its efficacy in fostering climate justice, it has been pointed out several obstacles hinder the achievement of just transition including inadequate investment, inadequate national capacity, insufficient or weak policies and lack of clarity and consensus on just transition[68]. It has also been pointed out that there are common challenges facing developing countries that hold them back from realizing a just transition[69]. These challenges span the Paris Agreement means of implementation: finance, technology and capacity-building[70]. Such challenges include limited multilateral support to meet financing need, lack of fiscal space to scale up climate investments, expensive external financing, barriers to green technology transfer, and restricted energy access[71]. It is imperative to address these challenges in order to effectively embrace just transition towards climate justice.

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[64] Ibid

[65] Climate Policy., 'Just Transition and Climate Justice.' Available at https://www.tandfonline.com/journals/tcpo20/collections/Just-Transition-and-Climate-Justice (Accessed on 29/11/2023)

[66] Ibid

[67] Ibid

[68] United Nations Development Programme., 'What is just transition? And why is it important?.' Op Cit

[69] United Nations Conference on Trade and Development., 'A Global Just Transition: Climate and Development Goals in a World of Extreme Inequalities.' Op Cit

[70] Ibid

[71] Ibid

4.0 Way Forward

In order to embrace just transition, it is imperative to build a climate resilient and integrated sustainable energy sector in Africa and other regions which are vulnerable to the impacts of climate change[72]. It has been observed that Africa has rich energy and mineral resources including lithium, graphite, cobalt, nickel, copper, and rare earth minerals all of which provide new market opportunities for the green transition[73]. This coupled with the Continent's renewable energy potential means that Africa has the capacity to achieve just transition to an equitable and inclusive low-carbon future[74]. It has correctly been observed that Africa has immense potential for renewable energy including wind, solar, hydro, bioenergy, ocean tidal waves, geothermal among other renewables[75]. It has been pointed out that in order to ensure delivery of global climate change mitigation goals, developing countries will need to drive investment towards building a renewable energy infrastructure that can serve their populations into the future and not drive further climate breakdown[76]. A just transition promotes the shift towards renewable sources of energy and sustainable practices, reducing the reliance on fossil fuels and mitigating the impacts of climate change[77]. It is therefore important for developing countries to embrace just transition by promoting renewable sources of energy in order to achieve climate justice and energy justice.

It is also essential to integrate just transition initiatives in national climate action plans and adaptation plans. It has been observed that the importance of just transition is increasingly being recognized by governments worldwide

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[72] Lee. S., 'Unpacking Just Transition: What is it and How Can We Achieve it in Africa?.' Available at *https://climatepromise.undp.org/news-and-stories/unpacking-just-transition-what-it-and-how-can-we-achieve-it-africa?gad_source=1&gclid=EAIaIQobChMI7ufGuYrpggMVboVoCR2gtAn3EAAYASAAEgL8VvD_BwE* (Accessed on 29/11/2023)

[73] Ibid

[74] Ibid

[75] Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-docframework_document_book.pdf (Accessed on 29/11/2023)

[76] United Nations Conference on Trade and Development., 'A Global Just Transition: Climate and Development Goals in a World of Extreme Inequalities.' Op Cit

[77] Kemei. N., 'Navigating the Path of Just Transition: Kenya's Sustainable Future.' Op Cit

as they cite just transition principles in their short- and long-term climate plans known as Nationally Determined Contributions (NDCs) and Long-Term Strategies (LTSs)[78]. Embedding just transition strategies within short and long term climate plans like NDCs and LTS, can help governments stay focused on the urgent task at hand of rapid decarbonization, while also striving for fair and inclusive outcomes[79]. In Kenya, the *National Climate Change Action Plan*[80] enshrines the principles of just transition and seeks to foster an equitable and inclusive climate response which ensures an electricity supply mix based mainly on renewable energy that is resilient to climate change and promotes energy efficiency; encourage the transition to clean cooking that reduces the demand for biomass; and reduced exposure and vulnerability of the country, and especially of the poor and vulnerable groups, to climate disasters and shocks[81]. It is therefore necessary for countries to incorporate just transition initiatives in their NDCs and LTSs in order to achieve efficient climate outcomes. This will demonstrate commitment towards achieving climate justice while securing public support for ambitious and stronger climate action[82].

Further, there is need to unlock and align climate finance with the idea of just transition[83]. It has been argued that governments have an obligation to mobilize sustainable, affordable, predictable and long-term finance from public and private, domestic and international sources, and aligning public and private financial flows and public procurement to the objectives of a just transition[84]. According to the UNFCCC, increased climate finance is needed to

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[78] United Nations Development Programme., 'What is just transition? And why is it important?.' Op Cit

[79] Ibid

[80] Government of Kenya., 'National Climate Change Action Plan (Kenya): 2018-2022.' Nairobi: Ministry of Environment and Forestry (2018)., Available at https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/10/8737.pdf (Accessed on 29/11/2023)

[81] Ibid

[82] Lee. S., 'Unpacking Just Transition: What is it and How Can We Achieve it in Africa?.'

[83] United Nations Framework Convention on Climate Change., 'Views on Different Elements of the Work

Programme on Just Transition Pathways Referred to in Paragraph 52 of Decision 1/CMA.4.' Op Cit

[84] Ibid

effectively address the challenges and seize the opportunities of just transitions in country-specific and sector-specific pathways considering the local circumstances[85]. Climate finance has been identified as a key tool towards fostering climate justice since it recognizes the inequalities between countries with developing countries being the most vulnerable to the effects of climate change and thus requiring financial resources to aid their mitigation and adaptation programmes[86]. It is therefore imperative for all countries and especially developing countries to unlock climate finance from multiple sources including public, private and multilateral sources in order to achieve just transition by addressing the socio-economic impacts of climate change and addressing climate inequalities more broadly through efficient mitigation and adaptation strategies[87].

In addition, it is necessary to embrace and enhance technology transfer between developed and developing countries in order to enhance the capacity of the former to later to embrace just transition. It has been pointed out that developing countries have vast renewable potential, but are unable to realize it as long as they are constrained by lack of access to green technologies[88]. Without access to environmentally sound technologies, developing countries in particular least developed countries, will not be able to meet mitigation targets and will be forced to continue using carbon-intensive technologies resulting in climate and sustainability concerns[89]. Transferring low-carbon and green technologies to those most at risk of climate crisis is critical, among a range of other measures, to ensure that people can respond and adapt to the threat of climate change[90]. Technology transfer can support the climate agenda

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[85]United Nations Framework Convention on Climate Change., 'Financing Fair, Inclusive and Just Transitions to a Sustainable Future.' Op Cit

[86] Colenbrander. S et al., 'Using Climate Finance to Advance Climate Justice: The Politics and Practice of Channeling Resources to the Local Level.' *Climate Policy,* 2017

[87] United Nations Conference on Trade and Development., 'A Global Just Transition: Climate and Development Goals in a World of Extreme Inequalities.' Op Cit

[88] Ibid

[89] Ibid

[90] International Institute for Sustainable Development., 'Rethinking Technology Transfer to Support the Climate Agenda.' Available at *https://sdg.iisd.org/commentary/guest-articles/rethinking-technology-transfer-to-support-the-climate-agenda/* (Accessed on 29/11/2023)

in developing countries for energy and other sectoral transitions[91]. The Paris Agreement acknowledges the importance of technology for the implementation of mitigation and adaptation actions and urges countries to promote and facilitate enhanced action on technology development and transfer in order to support the implementation of the Agreement[92]. It is thus pertinent for developed countries to promote transfer of low-carbon technologies including green technologies in developing countries in order to support climate action in such countries[93]. Developing countries should on the other hand remove barriers to green technology transfer including Intellectual Property barriers and revise bilateral and multilateral trade agreements that present a barrier to transfer initiatives[94]

Finally, there is need to foster capacity building in order to effectively realize just transition. One of the key challenges in achieving climate justice through just transition has been identified to be inadequate national capacity on just transition initiatives[95]. Capacity building can strengthen individual and institutional capacities on just transition in key areas such as policymaking, cross-sectoral coordination, and stakeholder participation[96]. It can further enhance the ability of the public to be involved in key decisions in the journey towards just transition[97]. It has been pointed out that participation and engagement are crucial for achieving just sustainability transitions[98]. Capacity building is therefore integral in achieving just transition. It is thus necessary for all countries and especially developing states to strengthen their legal,

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[91] Ibid

[92] United Nations Framework Convention on Climate Change., 'Paris Agreement.' Article 10

[93] United Nations Conference on Trade and Development., 'A Global Just Transition: Climate and Development Goals in a World of Extreme Inequalities.' Op Cit

[94] Ibid

[95] United Nations Development Programme., 'What is just transition? And why is it important?.' Op Cit

[96] Partnership for Action on Green Economy., 'Argentina's Capacity Building on Green Jobs and Just Transition.' Available at https://www.un-page.org/news/argentinas-capacity-building-on-green-jobs-and-just-transition/ (Accessed on 29/11/2023)

[97] European Environment Agency., 'The Case for Public Participation in Sustainability Transitions.' Available at https://www.eea.europa.eu/publications/the-case-for-public-participation (Accessed on 29/11/2023)

[98] Ibid

institutional, technical, human, social and financial capacity in order to embrace just transition[99].

The above among other measures are necessary in order to achieve equitable and inclusive just transition towards climate justice.

5.0 Conclusion

Climate justice is an important component of the Sustainable Development agenda. It seeks to address the causes and impacts of climate change in a manner that recognizes and fosters the rights and concerns of vulnerable people, communities and countries[100]. The concept of just transition can foster climate justice since it seeks to foster climate, energy and environmental justice in a manner that promotes fairness and equity in the journey towards sustainability[101]. Just transition can also promote climate justice by addressing the social, economic, and environmental challenges associated with climate change at the same time[102]. Several obstacles hinder the attainment of just transition including inadequate investment, inadequate national capacity, insufficient or weak policies and lack of clarity and consensus on just transition[103]. The idea of just transition can be effectively embraced through measures such as building climate resilient and integrated sustainable energy sectors, integrating just transition initiatives in national climate action plans and adaptation plans including NDCs and LTSs, unlocking and aligning climate finance with the idea of just transition, embracing and enhancing technology transfer between developed and developing countries, capacity building and embracing public participation and stakeholder engagement in just transitions[104].

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[99] United Nations Conference on Trade and Development., 'A Global Just Transition: Climate and Development Goals in a World of Extreme Inequalities.' Op Cit

[100] Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

[101] McCauley. D., & Heffron. R., 'Just Transition: Integrating Climate, Energy and Environmental Justice.' Op Cit

[102] Kemei. N., 'Navigating the Path of Just Transition: Kenya's Sustainable Future.' Op Cit

[103] United Nations Development Programme., 'What is just transition? And why is it important?.' Op Cit

[104] United Nations Conference on Trade and Development., 'A Global Just Transition: Climate and Development Goals in a World of Extreme Inequalities.' Op Cit

In our journey Towards Climate Justice and Net zero, we must fully embrace Just Transition.

Reflections on Conflict Management and Culture

Abstract

It has correctly been argued that conflict management is largely influenced by culture. Culture therefore plays an important role in all stages of conflict management including before, during and after the conflict. This paper critically reflects on conflict management and culture. It seeks to demonstrate that culture is part and parcel of the conflict management process. The paper highlights some of the cultural influences in conflict management in Africa. It further points out some of the opportunities and challenges in relation to conflict management and culture in Africa. The paper argues a case for embracing culture towards effective conflict management in Africa.

1.0 Introduction

Conflicts have been identified as a common phenomenon in human relationships and interactions[1]. It has been pointed out that people disagree because they view situations and circumstances differently, want different things, or are naturally predisposed to disagree[2]. Conflicts are therefore seen as a clash of interests, values, actions, views or directions[3]. Conflicts often occur as a result of incompatibility of goals and interests between two or more individuals[4]. They can also occur due to misalignment of goals, actions or motivations which can be real or only perceived to exist[5]. Conflicts are an undesirable occurrence in any given society since they can affect peace, sustainability and development[6]. It has rightly been pointed out that

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[1] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf (Accessed on 16/11/2023)

[2] Food and Agriculture Organization., 'Conflict Management.' Available at https://www.fao.org/3/w7504e/w7504e07.htm (Accessed on 16/11/2023)

[3] Ibid

[4] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' International Journal of Intercultural Relations 30 (2006) 579–603

[5] Ibid

[6] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

development is not feasible in a conflict situation[7]. Effective, efficient and expeditious conflict management is therefore a desirable ideal in order to spur peace, development and sustainability[8].

Conflict management refers to the processes and techniques adopted towards stopping or preventing overt conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences[9]. Conflict management therefore involves handling all stages of a conflict as well as the mechanisms used in the management of conflicts[10]. Various approaches and techniques can be adopted towards managing conflicts ranging from the most informal negotiations between the parties themselves through increasing formality and more directive interventions from external sources to a full court hearing with strict rules of procedure[11].

It has been argued that the process of conflict management can either result in settlement or resolution of the underlying conflict[12]. Settlement in relation to conflict management refers to an agreement over the issues in a conflict which often involves a compromise[13]. Settlement often seeks to manage a conflict without discovering or rectifying the underlying causes of such a conflict[14]. Settlement mechanisms include litigation and arbitration[15]. These mechanisms have been described as highly coercive, power based and usually involve a lot of compromise in addressing the conflict[16]. Settlement mechanisms may be

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[7] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaRevised-version-of-20.10.14.pdf (Accessed on 16/11/2023)

[8] Ibid

[9] Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies*, Volume 2, No. 2, 1997

[10] Ibid

[11] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[12] Ibid

[13] Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' *Journal of Peace Research.*, Volume 32, Issue 2

[14] Ibid

[15] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[16] Ibid

effective in providing an immediate solution to a conflict but fail to address underlying issues in a conflict leaving the likelihood of conflicts remerging in future[17]. Resolution on the other hand refers to a conflict management process where the outcome is based on mutual problem-sharing whereby parties to a conflict cooperate in order to redefine their conflict and relationships[18]. Resolution mechanisms include most Alternative Dispute Resolution (ADR) techniques such as mediation, negotiation, traditional justice systems and facilitation[19]. These mechanisms are non-coercive, non-power based and focus on the needs and interest of the parties[20]. They result in mutually satisfying outcomes that address the root causes of conflicts thus creating long lasting outcomes and are therefore ideal in conflict management[21].

It has correctly been argued that conflict management is largely influenced by culture[22]. Culture therefore plays an important role in all stages of conflict management including before, during and after the conflict[23]. This paper critically reflects on conflict management and culture. It seeks to demonstrate that culture is part and parcel of the conflict management process. The paper highlights some of the cultural influences in conflict management in Africa. It further points out some of the opportunities and challenges in relation to conflict management and culture in Africa. The paper argues a case for embracing culture towards effective conflict management in Africa.

2.0 Relationship between Conflict Management and Culture
The term culture has been defined as a complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society[24]. It has also been defined as a

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[17] Ibid

[18] Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' Op Cit

[19] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[20] Ibid

[21] Ibid

[22] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

[23] Ibid

[24] Spencer-Oatey. H., 'What is Culture?.' Available at https://warwick.ac.uk/fac/soc/al/globalpad-

set of attitudes, values, beliefs, and behaviors shared by a group of people, but different for each individual, communicated from one generation to the next[25]. In addition, culture has also been described as a pattern of shared basic assumptions invented, discovered or developed by a given group as it learns to cope with its problems of external adaptation and internal integration that has worked well enough to be considered valid, and, therefore is to be taught to new members of the group as the correct way to perceive, think, and feel in relation to those problems[26]. Culture is both an individual and social construct[27]. Individual differences in culture can be observed among people in the degree to which they adopt and engage in the attitudes, values, beliefs, and behaviors that, by consensus, constitute their culture[28]. Social differences on the other hand can be deduced in relation to how different groups of people perceive the various facet of culture including attitudes, values, beliefs, and behaviors[29].

Culture has been described as essential part of conflict and conflict resolution[30]. Cultures are embedded in every conflict since conflicts arise in human relationships which relationships are defined by culture[31]. Therefore, Culture affect the ways we name, frame, blame, and attempt to tame conflicts[32]. Further, it has been pointed out that whether a conflict exists at all is a cultural question[33]. In addition, differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each

rip/openhouse/interculturalskills_old/core_concept_compilations/global_pad_-_what_is_culture.pdf (Accessed on 17/11/2023)

[25] Ibid

[26] Schein. E., 'What is Culture?' Available at https://books.google.co.ke/books?hl=en&lr=&id=acHnScKqPGIC&oi=fnd&pg=PA311&ots=3U9HvjDbCY&sig=GKUrBfKLPYS9_pW7yERfkSGHjGo&redir_esc=y#v=onepage&q&f=false (Accessed on 17/11/2023)

[27] Spencer-Oatey. H., 'What is Culture?.' Op Cit

[28] Ibid

[29] Ibid

[30] LeBaron. M., 'Culture and Conflict.' Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 17/11/2023)

[31] Ibid

[32] Ibid

[33] Ibid

culture[34]. In the context of conflict management, it has been observed that a person's cultural background will influence every aspect of the conflict process, ranging from the goals that are considered incompatible, why they are seen as so, what one chooses to do about it, and whether the outcome is considered to be satisfactory or not[35]. As a result, the nature of conflict varies across cultures where it may be emphasized in one culture and ignored in another[36].

It has been argued that culture plays two related but distinct roles in the conflict . On the one part, culture serves as the vehicle for identifying and distinguishing the groups that are likely to be parties to conflict[37]. On the other hand, culture shapes the way in which individuals perceive a conflict and respond to it[38]. Culture therefore influences the way people construct their realities and ultimately guides conflict and confrontation[39]. It also shapes people's approaches to dealing with conflict within their cultural group[40]. As a result, it has been contended that culture is inextricable from conflict, though it does not cause it[41]. For example, when disagreements arise in families, organizations, or communities, culture is always present, shaping perceptions, attitudes, behaviors, and outcomes[42].

Culture therefore plays an important role in conflict management and shapes the way in which individuals or groups frame and respond to conflicts[43]. It has been observed that some cultures especially in Western societies focus on the individual rather than the collective as the unit of social organization and

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[34] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

[35] Ibid

[36] Ibid

[37] Worchel. S., 'Culture's Role in Conflict and Conflict Management: Some Suggestions, Many Questions.' *International Journal of Intercultural Relations.*, Volume 29, Issue 6 (2005)

[38] Ibid

[39] Ibid

[40] Ibid

[41] LeBaron. M., 'Culture and Conflict.' Op Cit

[42] Ibid

[43] Ibid

public policy[44]. Such cultures often prefer confrontational approaches and conflict management characterized by adversarial techniques over non-adversarial techniques due to their focus on individuals' rights and interests[45]. Some societies on the other hand especially those in Africa and parts of Asia operate in a cultural and political landscape that gives precedence to communal rights as opposed to individual entities[46]. It has been observed that such collectivistic cultures prefer conflict management strategies that are harmony-inducing and therefore embrace non adversarial techniques towards conflict resolution[47]. Conflict management in such societies often takes the form of customary conflict resolution which focuses on restorative justice in order to build lasting relationships among conflicting parties[48].

Culture is therefore part and parcel of the process of conflict management. It has been asserted that after years of relative neglect, culture is finally receiving due recognition as a key factor in the evolution and resolution of conflicts[49]. There is need to embrace the role of culture in conflict management.

3.0 Conflict Management and Culture in Africa: Opportunities and Challenges

It has been observed that Africa has a rich history and culture which is diverse and varies not only from one country to another but also within regions and

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[44] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://www.researchgate.net/publication/228182138_Alternative_Dispute_Resolution_ADR_in_Sub-Saharan_Africa_The_Role_of_Customary_Systems_of_Conflict_Resolution_CSCR (Accessed on 17/11/2023)
[45] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit
[46] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit
[47] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit
[48] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit
[49] Avruch. K., 'Culture and Conflict Resolution.' Available at https://www.usip.org/publications/1998/11/culture-and-conflict-resolution (Accessed on 17/11/2023)

countries[50]. The culture of each ethnic group in Africa holds together the authentic social fabric of traditional practices and rites, art, music, and oral literature through which identities are built[51]. Despite the rich diversity of cultures present in Africa, it has been pointed out that there are underlying similarities shared by many African societies which, when contrasted with other cultures, reveal a wide gap of difference[52]. It has correctly been pointed out that before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines[53].

The cultures of traditional African societies, together with their value systems and beliefs have been described as close, even though they vary slightly from one another[54]. These slight variations only exist when African cultures are compared to others[55]. It has rightly been observed that the spirit of collectivism permeates almost all African communities such that they live an inclusive as against exclusive lifestyle apparent in the western world[56]. Africans are known for their philosophy of corporate existence as against the individualistic philosophy of the western world[57]. It has been observed that throughout Africa, the culture and traditions have since time immemorial emphasized harmony/togetherness over individual interest and humanness as expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa[58].

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[50] Africa Union., 'African Culture: Versatile Approach to Realize the Africa we Want.' Available at https://www.africanunion-un.org/post/african-culture-versatile-approach-to-realize-the-africa-we-want (Accessed on 17/11/2023)
[51] Ibid
[52] Idang. G., 'African Cultures and Values.' Available at https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1561-40182015000200006 (Accessed on 17/11/2023)
[53] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallenges-and-opportunities-1.pdf (Accessed on 17/11/2023)
[54] Idang. G., 'African Cultures and Values.' Op Cit
[55] Ibid
[56] Oladipupo. S., 'Rethinking the African Spirit of Collectivism as a Tool for African Empowerment.' *Human Discourse.*, Volume 2, No. 1 (2022)
[57] Ibid
[58] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

Ubuntu has been described as an African philosophy that places emphasis on '*being self through others*'[59]. It is a form of humanism which can be expressed in the phrases '*I am because of who we all are*'[60]. *Ubuntu/Utu* as expressed in African cultures was therefore geared towards upholding values for the greater good of the all community including sympathy, compassion, benevolence, solidarity, hospitality, generosity, sharing, openness, affirming, being available, kindness, caring, harmony, interdependence, obedience, collectivity and consensus[61]. *Ubuntu/Utu* seeks to deter vengeance, confrontation and retribution and on the other hand values life, dignity, compassion, humaneness harmony and reconciliation[62]. *Ubuntu/Utu* contributes to social harmony in African societies.

Based on the philosophy of *Ubuntu/Utu*, traditional African societies therefore upheld norms and values geared towards promoting social cohesion and smooth running of the community[63]. These values include respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty and peaceful coexistence[64]. African societies were therefore founded on strong moral values which discouraged vices such as adultery, stealing and other forms of immoral behaviour; religious values which upheld a moral sense of justice and truth and the knowledge of the existence of good and evil; political values as evidenced by the presence of political institutions such as the Council of E lders with heads of such institutions as respected individuals; aesthetic values premised on an African concept of aesthetics which was predicated on the fundamental traditional belief system which gave vent to the production of the art; and economic values marked by hard work and cooperation[65]. These values were the foundation of African societies and

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[59] Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Available at https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4272&context=sspapers&httpsr edir=1&referer#:~:text=Ubuntu%20can%20best%20be%20described,ngumuntu%20n gabantu%20in%20Zulu%20language. (Accessed on 17/11/2023)
[60] Ibid
[61] Ibid
[62] Ibid
[63] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa* , Volume 17, No.1, 2015
[64] Ibid
[65] Idang. G., 'African Cultures and Values.' Op Cit

cultures and were inextricably bound together in order to foster social harmony and cohesion[66]. They influenced every aspect of African societies including conflict management.

It has been observed that conflicts were a common occurrence in African societies and often arose in the basic units of society such as within families, clans, villages, locations or other small units[67]. The major sources of conflict in African societies were land, chieftaincy, personal relationship issues, family property, honour, murder, and matrimonial fall-outs among others[68]. Culture played an important role in conflict management in African societies. It has been pointed out that the process of conflict management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people[69]. Conflict management was based on the principles of equity and justice, which were well entrenched in African customs and traditions[70].

African societies viewed conflicts as a threat to the social fabric that holds the community together[71]. Consequently, there was need for expeditious and efficient management of conflicts and for preventing their escalation into violence, a situation which could threaten the social fabric[72]. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[73]. These mechanisms gave prominence to communal needs over individual needs[74].

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[66] Ibid

[67] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[68] Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Tr aditional_African_S ociety (Accessed on 18/11/2023)

[69] Ibid

[70] Ibid

[71] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[72] Ibid

[73] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal,* Ethiopia Vol. 8 (2).

[74] Ibid

Conflict management in African societies was designed to uphold the values and norms that held such societies together[75]. Conflict resolution in the traditional African societies involved the use of mechanisms such as mediation, adjudication, reconciliation, arbitration and negotiation[76]. These techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation[77]. It has been pointed out that African societies had institutional mechanisms including the Council of Elders as well as cultural sources to uphold the values of peace, tolerance, solidarity and respect for, and of, one another[78]. These structures were responsible for peace education, confidence-building, peacemaking, peacebuilding, conflict monitoring, conflict prevention, conflict management, and conflict resolution[79]. The mechanisms adopted towards conflict prevention, management and resolution in African societies were largely effective and respected, and their decisions were binding on all parties, since the identity of an individual was linked to that of the community[80]. Therefore, there was an impetus for individuals to comply with decisions for the well-being of the community[81]. In addition, social ties, values, norms and beliefs and the threat of excommunication from the society provided institutions such as the Council of Elders with legitimacy and sanctions to ensure their decisions were complied with[82].

Culture therefore played a prominent role in conflict management in African societies. Conflict management in African societies was premised on the

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[75] Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Available at https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf (Accessed on 18/11/2023)

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[78] ACCORD., 'Traditional Methods of Conflict Resolution.' Available at https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/ (Accessed on 18/11/2023)

[79] Ibid

[80] Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

[81] Ibid

[82] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

values that were held sacrosanct including peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect[83]. The philosophy of *Ubuntu/Utu* was essential in fostering social harmony and was effectively incorporated in conflict management strategies[84]. Conflict management in African societies was therefore aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs[85].

However, as a result of colonization and introduction of western justice systems, the role of culture in conflict management has largely been eroded. It has rightly been observed that one of the most important distinctions between the institutional settings of Western societies and African societies has to do with the former's focus on the individual rather than the collective as the unit of social organization and public policy as envisaged in African societies[86]. Consequently it has been argued that formal conflict management strategies can be politically driven and readily used to justify the imposition of Western values and ideals on postcolonial cultures and societies of the developing world including Africa[87]. This has resulted in the introduction of confrontational approaches to conflict management including the use of courts which are characterized by adversarial techniques over non- adversarial techniques due to their focus on individuals' rights and interests[88]. Such an approach could potentially go against the culture and fundamental values of African societies by weakening relationships and social harmony[89].

There is need to (re)embrace the role of culture in conflict management in Africa. Conflict management in African societies was premised on culture and values that held societies together including peace, harmony, truth, honesty,

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[83] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit
[84] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[85] Ibid
[86] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit
[87] Ibid
[88] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit
[89] Ibid

unity, cooperation, forgiveness, reconciliation, and respect[90]. It has been argued that Africans and African societies in general have not lost the capacity to co-exist peacefully, to commune together, to respect one another, to negotiate, to forgive and to reconcile in resolving their conflicts[91]. On the contrary, formal justice systems do not always bring about peace and co-existence in societies due to the tension between and among people in the aftermath of court battles and the likelihood of conflicts remerging in future[92]. Traditional conflict management mechanisms including negotiation, mediation and reconciliation have deep roots African communities, which still have a strong belief in the principles of common humanity, reciprocity and respect for one another and for the environment[93]. These mechanisms have thus been part and parcel of the African culture since time immemorial[94]. They were considered as 'Appropriate' and not 'Alternative' in management of disputes and were the first point of call whenever a conflict arose since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion[95].It is therefore imperative to embrace the role of culture in conflict management in Africa in order to foster effective and efficient management of disputes.

4.0 Conclusion

The process of conflict management is largely influenced by culture[96]. Culture plays an important role in all stages of conflict management including before, during and after the conflict[97]. Culture is essential part of conflict and conflict resolution and shapes the way in which individuals or groups frame and

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[90] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

[91] ACCORD., 'Traditional Methods of Conflict Resolution.' Op Cit

[92] Ibid

[93] Ibid

[94] Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at *http://kmco.co.ke/wpcontent/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-DisputeResolution-in-Kenya-Prospects-and-Challenges.pdf* (Accessed on 18/11/2023)

[95] Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society.' Op Cit

[96] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

[97] Ibid

respond to conflicts[98]. Conflict management in African societies was guided by culture and premised on the values that were held sacrosanct including peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect[99]. The philosophy of *Ubuntu/Utu* was essential in fostering social harmony and was effectively incorporated in conflict management strategies[100]. However, the role culture in conflict management has largely been eroded as a result of introduction of Western justice systems and its confrontational approaches to conflict management including the use of courts which are characterized by adversarial techniques over non-adversarial techniques due to their focus on individuals' rights and interests[101]. These mechanisms are not effective in conflict management and often sever relationships resulting in the likelihood of conflicts remerging in future[102]. There is need to embrace the role of culture in conflict management in Africa in order to foster effective and efficient management of disputes. Conflict management and culture are concepts that cannot be separated in Africa.

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[98] LeBaron. M., 'Culture and Conflict.' Op Cit

[99] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

[100] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[101] Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

[102] Ibid

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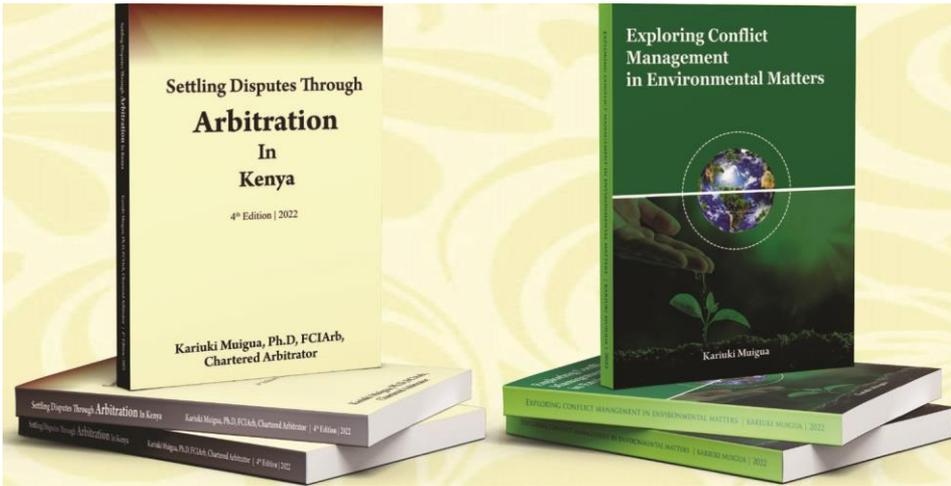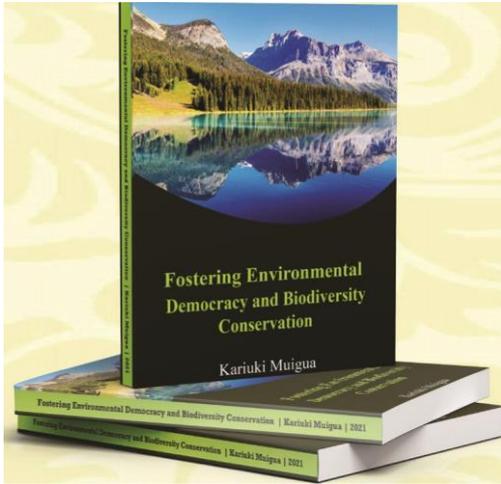
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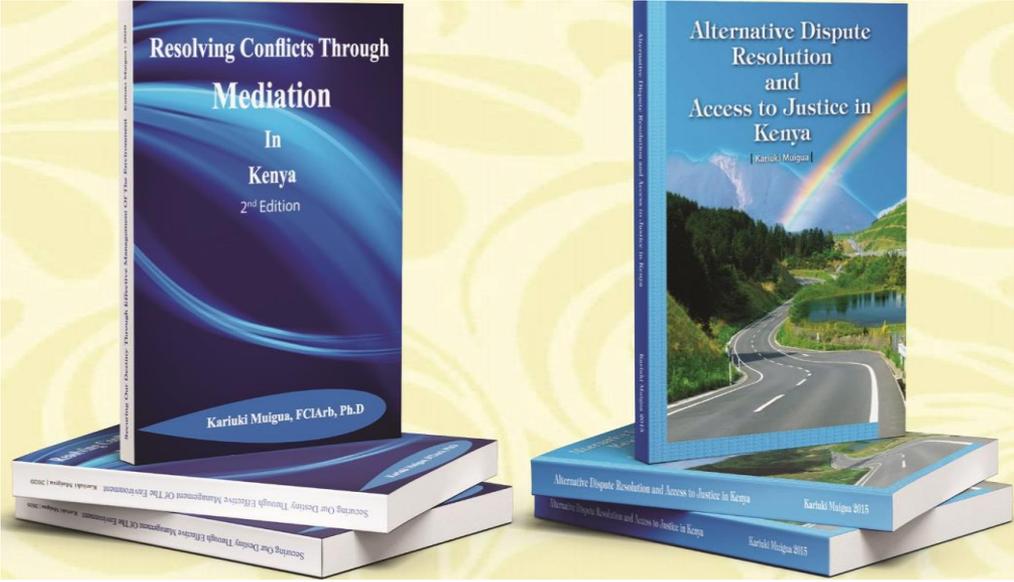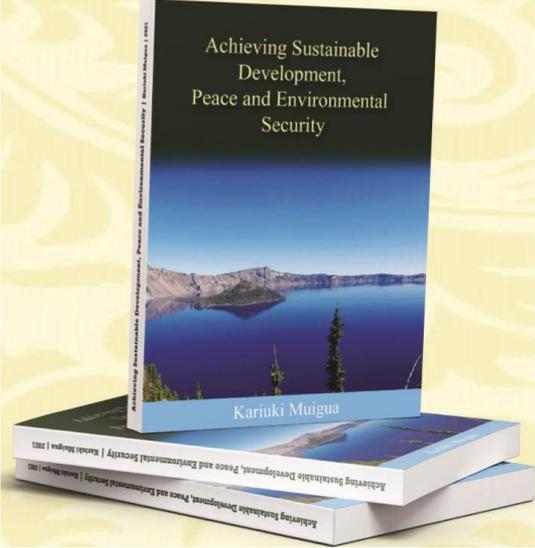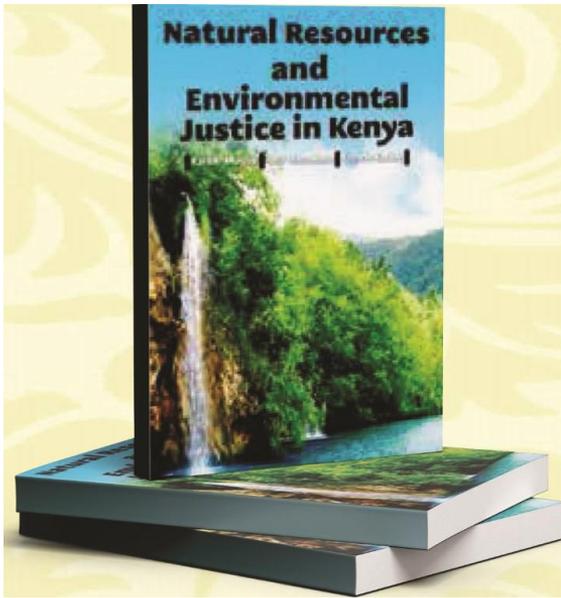**Available Call: +254 722 818 932**
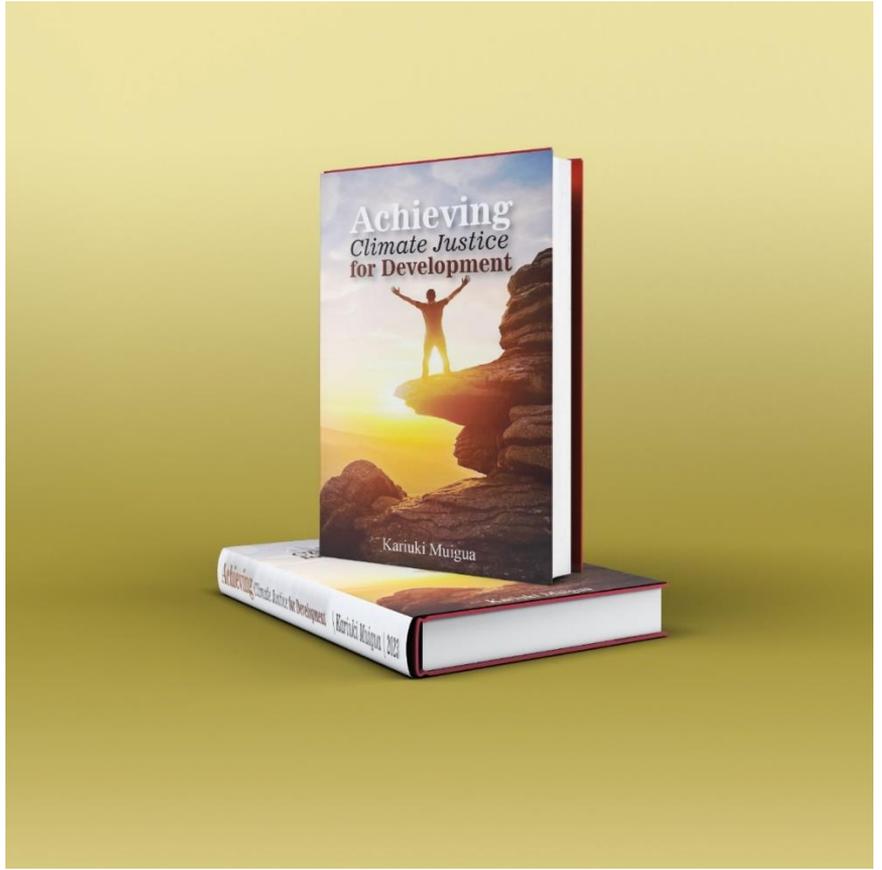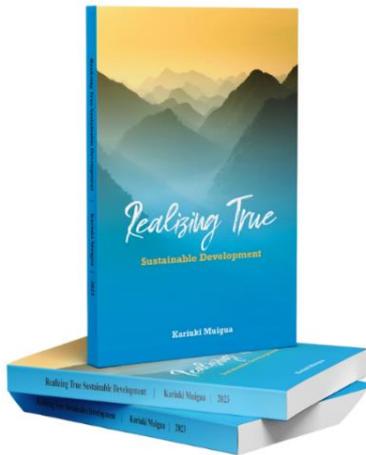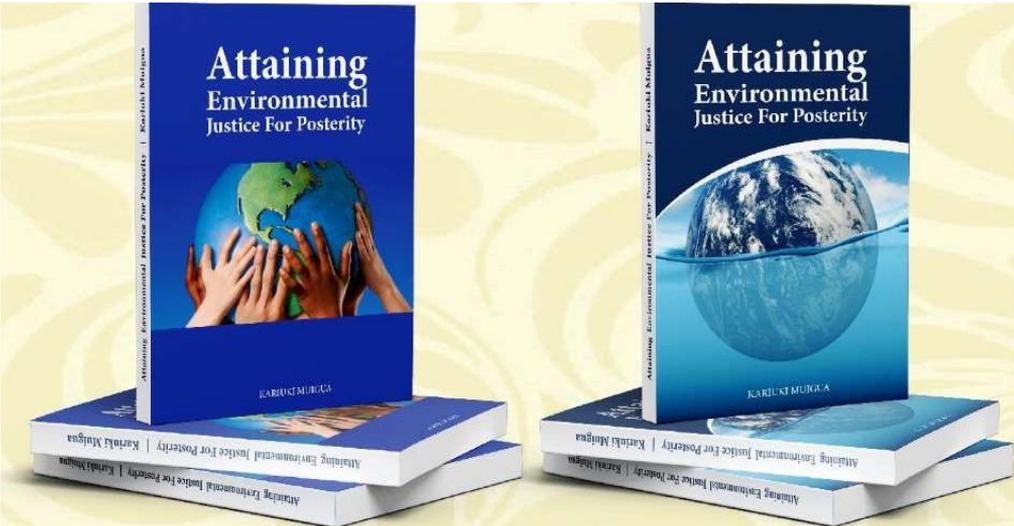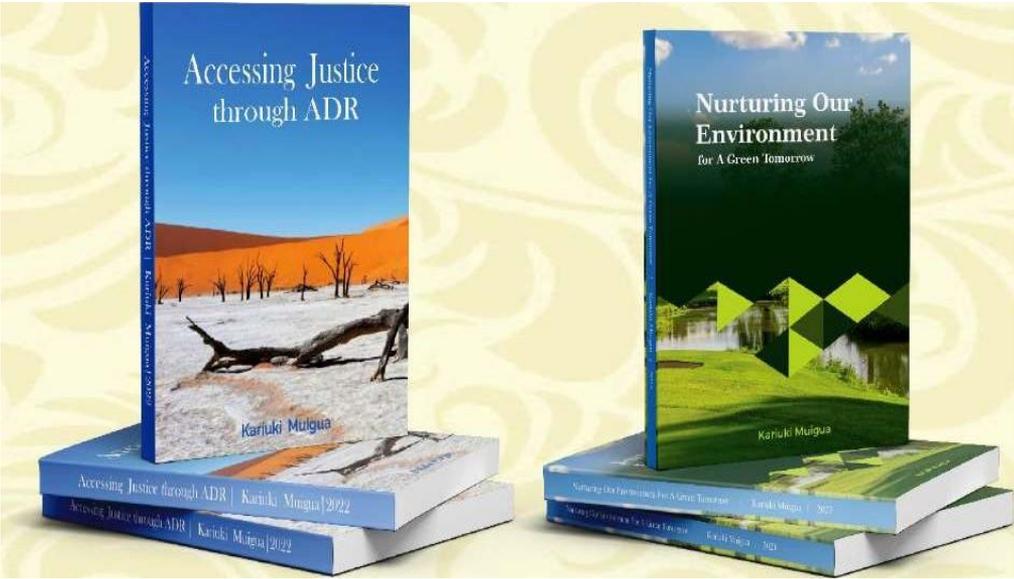
Promoting The Rule of Law for Sustainable Development is a book that brings together a collection of papers touching on the theme: Promoting the Rule of Law for Sustainable Development.

The papers covered in this volume mainly focus on Sustainability, Access to justice, Environmental Governance, Climate Justice against the backdrop of the theme Promoting the Rule of Law for Sustainable Development.

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Hon. Prof. Kariuki Muigua Ph.D; FCIArb; OGW; C. Arb is a holder of a Doctor of Philosophy (Ph.D.) degree in law from the University of Nairobi attained in 2011. He also holds a Master of Laws (LL.M) degree attained in 2005 and Bachelor of Laws (LL.B) degree awarded in 1988 both from the University of Nairobi.

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He is a Member of the Permanent Court of Arbitration (PCA) nominated by the Republic of Kenya and served as a Member of the National Environment Tribunal. He is a distinguished law scholar, Environmental Consultant, an accredited mediator and a Chartered arbitrator. He has widespread training and experience in both international and national commercial arbitration and mediation. He has received numerous awards and honours due to his exemplary work in academia and Alternative Dispute Resolution.

Chambers and Partners Global Guide 2023 ranked him in Band 1 of Dispute Resolution (Arbitrators), the ranking which recognizes the Top 6 Arbitrators in Kenya noting that he is "highly recommended as a leading lawyer". He was awarded the Outstanding Mentor Award by his mentees in recognition of his guidance, care and support. He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. His book, *Settling Disputes through Arbitration in Kenya,4th Edition;* Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022. He is the winner of ADR Practitioner of the Year Award at the AfAA Awards 2022. He is also the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. In 2022, Chambers and Partners ranked him in Band 1 of Dispute Resolution (Arbitrators) noting that "He has been involved in several ground-breaking arbitrations," "has an astute understanding of arbitration" and "is respected for litigation." He was awarded the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021 as well as the ADR Publication of the Year Award 2021 by the Chartered Institute of Arbitrators (Kenya Branch). He also received the ADR Practitioner of the Year Award 2021 by the Law Society of Kenya, Nairobi Branch at the Nairobi Legal Awards. He is a recipient of the 8th C.B. Madan Prize of 2020 for commitment and outstanding scholarly contribution to constitutionalism and the rule of law in Kenya.

Hon. Prof. Muigua PhD. has on various occasions been appointed by leading arbitral institutions including the Chartered Institute of Arbitrators (CIArb-Kenya), the Nairobi Centre for International Arbitration (NCIA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) among other institutions, as both a sole arbitrator and a member of an arbitral tribunal in arbitrations involving commercial disputes.

He is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter. He is a member of the International Bar Association (IBA), the International Commission of Jurists, Human Rights Institute of the International Bar Association, the London Court of International Arbitration (LCIA), Chartered Institute of Arbitrators (UK) and Kenya Branch, Member of Commonwealth Lawyers Association and fellow of the Institute of Certified Public Secretaries of Kenya. He served as the Branch Chairman of CIArb-Kenya from 2012 to 2015. He was elected (unopposed) to the Chartered Institute of Arbitrators (CIArb) Board of Trustees as the Regional Trustee for Africa, for the term beginning 1st January 2019 for a term of four years until 31st December 2022.

Hon. Prof. Muigua PhD. also serves as the Editor in Chief of three leading peer reviewed journals in East Africa, the *Alternative Dispute Resolution Journal,* the *Journal of Conflict Management and Sustainable Development* and *Journal of ADR & Sustainability.* The three journals have been hailed as leading publications in the fields of ADR, *Conflict Management and Sustainable Development.* The *Alternative Dispute Resolution Journal* was awarded the Arbitration Publication of the Year Award 2020 at the Africa Arbitration Awards.

He is an Advocate of the High Court of Kenya of over 35 years standing and practicing at Kariuki Muigua & Co. Advocates, a firm that specialises in environmental and commercial law litigation and *Alternative Dispute Resolution.* The firm is also listed as a leading Kenyan commercial law firm in the distinguished Martindale Hubbell Directory.

He has authored the following books: *Alternative Dispute Resolution and Access to Justice in Kenya,* (Glenwood Publishers, Nairobi, 2015); *Resolving Conflicts through Mediation in Kenya,* (Glenwood Publishers, Nairobi, 2013); *Natural Resources and Environmental Justice in Kenya,* (Glenwood Publishers, Nairobi, 2015); *Nurturing Our Environment for Sustainable Development,* (Glenwood Publishers, Nairobi, 2016); *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi) 1st Edition (2012); 2nd Edition (2012); 3rd Edition (2017); and 4th Edition (2022).

His other works include *Securing Our Destiny through Effective Management of the Environment,* (Glenwood Publishers, Nairobi-2020); *Achieving Sustainable Development, Peace and Environmental Security* (Glenwood Publishers, Nairobi, 2021); *Fostering Environmental Democracy and Biodiversity Conservation,* (Glenwood Publishers 2021); *Exploring Conflict Management in Environmental Matters* (Glenwood Publishers 2022); *Attaining Environmental Justice for Posterity, Volume 1 and 2,* (Glenwood Publishers 2022); *Accessing Justice Through ADR,* (Glenwood Publishers 2022); *Nurturing our Environment for a Green Tomorrow,* (Glenwood Publishers 2023); *Realizing True Sustainable Development,* (Glenwood Publishers 2023); *Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development,* (Glenwood Publishers 2023); *Combating Climate Change for Sustainability,* (Glenwood Publishers 2023); and *Achieving Climate Justice for Development, (Glenwood* Publishers 2023).