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Editor's Note

Welcome to Volume 4 number 3 of the Journal of Conflict Management and Sustainable Development (JCMSD). The journal continues to provide a platform where scholars can engage in discourse on conflict management topics relating to sustainable development.

The journal is peer reviewed and refereed so as to ensure the highest academic standards.

This issue carries papers dealing with themes such as: Securing Our Destiny through Effective Management of the Environment, Institutionalization of Alternative Dispute Resolution in Kenya, The Singapore Convention on International Settlement Agreements Resulting from Mediation and Judicial Review of the Law Reporting Function in Kenya.

The journal contributes to the debate touching on how to make the world a better place to live in through conflict management and sustainable development.

The sustainable development goals envisage a world without poverty, hunger and where everyone can access justice. It is an ideal world that can be achieved. We are grateful to our reviewers, editorial team and contributors who have made publication of this journal possible.

Dr. Kariuki Muigua, PhD, FCIArb (Chartered Arbitrator), Accredited Mediator.
Managing Editor,
May, 2020

Journal of Conflict Management and Sustainable Development

Volume 4 Issue 3

Securing Our Destiny through Effective Management of the Environment

*By: **Kariuki Muigua***

1. Role of Law in Environmental Management and Governance

Abstract

This paper covers the theme of effective management of the environment. It is informed by the need to manage the environment using an integrated approach in order to achieve a clean and healthy environment, environmental justice and dignity for the human beings and the environment itself.

The paper is divided into 12 sections covering areas such as: the Role of Law in Environmental Management and Governance; Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya; Role of Corporations in Environmental Conservation and Sustainable Development in Kenya; Achieving Environmental Security for Sustainable Development in Kenya; The Extractives Industry and Environmental Management in Kenya: the (Dis) Connect; Harnessing the Blue Economy: Challenges and Opportunities for Kenya; Environmental and Natural Resources and Equitable Benefit Sharing in Kenya; Adopting an Integrated Approach to Environmental Management and Conservation for Sustainable Development in Kenya; Environmental Liability Regime in Kenya and Sustainable Development; Managing Environmental and Land Related Conflicts Through Traditional Dispute Resolution Mechanisms; Effective Environmental Management and Governance for Peace Building in Kenya and Environmental Justice.

The sections cover the challenges facing environmental management in Kenya and the opportunities available towards better governance.

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* *PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP.*

The paper offers some tangible recommendations that hopefully will result in effective management of the environment using an integrated approach that involves all stakeholders and cuts across regions, disciplines and ecosystems. It is an approach that balances development with ecological sustainability.

1.1 Introduction

This paper discusses the general environmental governance and management practices and makes recommendations on how the environmental law frameworks in Kenya can be reviewed to make them more inclusive. Environmental management as used in this section, and the paper in general, includes the protection, conservation and sustainable components of the environment.[1] Environmental governance on the other hand comprises the rules, practices, policies and institutions that shape how humans interact with the environment.[2] The paper thus looks at the role of law in both concepts.

The main argument is that the law should be a means to an end and it should be no different for the environmental laws in Kenya as far as meeting the socio-economic needs of the people is concerned. This is because, as it has been argued by some authors, the law is meant to dictate the structure, boundaries, rules, and processes within which governmental action takes place.[3] This section advocates for laws that strike a balance between anthropocentric and ecocentric approaches in environmental governance and management.

The current Constitution of Kenya recognises this role of law by dint of Article 10 of the Constitution which spells out the national values and principles of governance which should bind all persons and state organs when making, interpreting or implementing any law.[4] Even courts have affirmed that '*while*

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1 Sec. 2, Environmental (Management and Coordination) Act, No. 8 of 1999, Laws of Kenya.

2 United Nations Environment Programme, "Environmental Governance," p. 2. Available athttps://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 13/1/2020].

3 Barbara A Cosens, et. al, 'The Role of Law in Adaptive Governance' (2017) 22 Ecology and society: a journal of integrative science for resilience and sustainability 1.

4 Article 10, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

interpreting the Constitution, they are to consider these national values and principles of governance. These principles include participation of the people as well as good governance, integrity, transparency and accountability. These values are supposed to be in the DNA of public officers and are to be applied when making decisions in the course of their duties'.[5]

The law is meant to not only ensure that the environment is properly managed in light of the sustainable development agenda but also that it guarantees and protects the environmental rights of the citizens. This is in line with the court's role in safeguarding the rule of law, as affirmed in the case of *Johnson Kamau Njuguna & another v Director of Public Prosecutions [2018] eKLR.*[6]

Notably, in determining environmental disputes at any stage, Kenyan courts are to be guided by the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the Environment (Management and Coordination) Act, 1999 (EMCA) as well as the broad environmental principles set out in Section 3 of the EMCA. [7] These are important tools in the interpretation of the law and adjudication of environmental disputes and these ought to be construed in a manner that promotes the letter and spirit of the above constitutional underpinnings and general principles in Section 3 of the EMCA.[8]

1.2 Environmental Governance: Meaning and Scope

Environmental governance comprises the rules, practices, policies and institutions that shape how humans interact with the environment.[9]

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5 Para. 56, John Kabukuru Kibicho & another v County Government of Nakuru & 2 others [2016] eKLR, petition No. 13 of 2016.

6 *Johnson Kamau Njuguna & another v Director of Public Prosecutions [2018] eKLR*, Judicial Review 9 of 2018, para. 17; See also Constitution of Kenya 2010, Articles 20, 22 & 23.

7 Sec. 3 (5), Environment (Management and Coordination) Act, No. 8 of 1999, Laws of Kenya.

8 Para. 23, Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR, petition No. 32 of 2017.

9 United Nations Environment Programme, "Environmental governance," available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 13/1/2020].

Environmental governance has been defined as the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes.[10]

One scholar has convincingly argued that environmental governance is best understood as the establishment, reaffirmation or change of institutions to resolve conflicts over environmental resources.[11] In this broader context, conflict refers to a conflict of interest, not necessarily to an open conflict, between involved parties.

It has been suggested that good governance includes: *Participation*; *Rule of law*; *Transparency*; *Responsiveness*; *Consensus oriented*; *Equity and inclusiveness*; *Effectiveness and efficiency*; and *Accountability*.[12] Good environmental governance takes into account the role of all actors that impact the environment, including governments, Non-Governmental Organisations (NGOs), the private sector and civil society, who must all cooperate to achieve effective governance that can help us move towards a more sustainable future.[13]

It is against these definitions of the term 'governance' that this section seeks to discuss what the law making process and its implementation should entail, especially in respect of environmental governance laws in Kenya.

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10 Lemos, M. C., & Agrawal, A., "Environmental governance," *Annu. Rev. Environ. Resour*,. 31 (2006): 297-325.

11 Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *Ecological economics*, 63, no. 1 (2007): 93-103, at p.94.

12 United Nations, *Introduction to Environmental Governance*, 2017. Available at https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf [Accessed on 13/1/2020].

13 United Nations Environment Programme, "Environmental governance," available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 13/1/2020].

1.3 Place of Law in General Governance Matters

Some scholars have conceptualised the link between law and governance in general terms.[14] A good example of this link is to be found under the current Constitution of Kenya which provides for national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them— (*a*) applies or interprets this Constitution; (*b*) enacts, applies or interprets any law; or (*c*) makes or implements public policy decisions.[15] The Constitution also declares the Republic of Kenya to be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.[16] It is thus evident that the law plays an important role in governance matters by not only setting up the relevant governance institutions but also setting out the *modus operandi* for such institutions.

Notably, the Constitution of Kenya recognises both formal and informal systems of law.[17] Despite this qualification, it is clear that the definition of law in the context of Kenya includes customary law and applies in a pluralistic way.

The Constitution thus creates room for pluralistic operation of formal and informal laws in Kenya in governance matters, albeit with certain qualifications as stated.

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14 Bell, C., "Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions*," Briefing Paper 4*, (The Political Settlements Programme Consortium, 2015), pp.1-2. Available at http://www.politicalsettlements.org/wpcontent/uploads/2017/09/2015_BP_4_Bell_Governance-and-Law.pdf [Accessed on 26/5/2019].

15 Constitution of Kenya 2010, Art. 10(1).

16 Constitution of Kenya 2010, Article 4(2).

17 Art. 2(4), Constitution of Kenya 2010.

1.4 Environmental Governance in Kenya: Prospects and Challenges in the Legal and Institutional Frameworks

1.4.1 Environmental Governance in Kenya: Legal and Institutional Frameworks

The Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment as including but not limited to the duty to:[18] ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources[19]. Notably, the Constitution of Kenya also places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[20] The Constitution envisages a collaborative approach between communities and the State. Decision making processes still seem to be largely top-down in nature and communities are only afforded opportunities to apply for resource user rights, with little or no consultations regarding management and governance matters.

The Court, in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*[21], stated that in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the EMCA. In this regard, Articles 42, 69 and 70 of the Constitution and the broad environmental principles set out in Section 3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes. Invariably, the environmental governance legal framework and any other relevant legislative instrument [substantive or subsidiary], ought to be construed in a manner that promotes the letter and spirit of the above

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18 Constitution of Kenya, Art. 69(1).

19 The Constitution interprets "natural resources" to mean the physical non-human factors and components, whether renewable or non-renewable, including—sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy (Art. 260).

20 Constitution of Kenya, Art. 69(2).

21 *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR,* Petition 32 of 2017.

constitutional underpinnings and general principles in Section 3 of the EMCA.[22]

1.4.2 Need for Revisiting the Formal and State-Centered Governance Solutions?

This section seeks to re-evaluate the effectiveness of the enforcement power of the state as against solutions or approaches based on voluntary cooperation within the environmental governance framework in Kenya.

Some scholars have observed that institutions resolve environmental conflicts by striking a particular balance between conflicting interests by either establishing, reaffirming or redefining entitlements in environmental resources.[23] In other words, they seek to strike a balance between anthropocentric and ecocentric approaches to environmental governance. An anthropocentric approach to environmental governance would focus on poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information and conflicts management, amongst others.[24] Ecocentric approaches dwell on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.[25] Conflicts over natural resources and environmental crimes intensify the problems. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits.[26]

The Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017]*

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22 *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others*, para. 23.

23 Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *op cit.*, at p.95.

24 See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

25 Ibid.

26 United Nations, "Environmental Rule of Law," available at https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0 [Accessed on 13/1/2020].

eKLR[27], pointed out that a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests.[28] This is an affirmation of the fact that courts, in collaboration with other stakeholders in the environmental governance matters, also have a role to play.

The State should consult widely when coming up with the methods of benefit sharing especially with regard to the local community. It is only through mobilizing the efforts of all the relevant stakeholders that the constitutional provisions on the environment and natural resources can effectively be implemented and make it possible to achieve sustainable development. The various sectoral laws and policies must be designed in a way that protects the environment from degradation, and also involves communities through measures that encourage active participation in benefit sharing or decision-making processes, whether through incentives or otherwise. Customary approaches to environmental governance can be incorporated into the formal environmental governance frameworks as a tool for facilitating participation of communities. As already pointed out, the law should include both formal and customary approaches to governance.

1.5 Achieving Sustainable Development in Kenya through Effective Environmental Governance: Revisiting the Role of Law in Environmental Governance

Environmental rule of law is central to sustainable development. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance. It highlights environmental sustainability by connecting it with fundamental rights and

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27 *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR,* Petition 32 of 2017.

28 Ibid, para. 22.

obligations. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations.[29]

In addition, it is contended that natural resources that are managed sustainably, transparently, and on the basis of the rule of law can be the engine for sustainable development as well as a platform for peace and justice. The rule of law in environmental matters is essential for equity in terms of the advancement of the Sustainable Development Goals (SDGs), the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights.[30]

Arguably, environmental governance structures should be used as means to an end, to wit, realisation of social justice for the people of Kenya. Legitimate environmental decisions have to reflect both distributive and procedural justice concerns. This is especially so when people have broader concerns than their narrowly construed economic welfare. In the context of pluralism, distributive justice matters in a broad sense of whose interests and values will be realized by the establishment, change or affirmation of environmental governance institutions.[31]

Procedural justice plays a role in justifying decisions to those whose interests and values are sacrificed to realize some other interests and values. It can also facilitate learning and transformation of values and motivations of involved actors. Therefore, governance solutions do more than specify entitlements: they also provide for participation and avail conflict resolution to involved actors.[32]

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29 United Nations, "Environmental Rule of Law", available at https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0 [Accessed on 13/1/2020].

30 Ibid.

31 Paavola, J., "Institutions and environmental governance: A reconceptualization," *Ecological economics*, vol.63, no. 1 (2007): 93-103 at p.98.

32 Ibid., p. 97.

Increasing environmental pressures from climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, contribute to poverty and to growing social inequalities.[33]

There is need for greater cooperation between state and private-sector actors in environment-related decision making and enforcement processes. The Constitution of Kenya creates an opportunity where, through devolution, communities are supposed to be empowered by devolving power from the state to local institutions of decision-making as a way of empowering local communities to manage natural resources and environmental matters.

The main custodian of the Constitutional rights and the law in general are the national courts and tribunals, as envisaged under the Constitution.[34] Of utmost importance under the environmental law are the environmental rights. The next section discusses the role of national courts in safeguarding these rights.

1.6 The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal

The preamble to the Constitution of Kenya recognises the importance of the environment and therefore calls for its respect, being the heritage of the Kenyan people, and also requires its sustenance for the benefit of future generations.[35] In addition, it also spells out and guarantees the right of every person to a clean and healthy environment and the need to have the same respected and protected.[36]

Notably, scholars have pointed out that there is 'considerable evidence that national courts are increasingly willing to apply international environmental obligations'[37]. It is in light of this that this section discusses the place of national courts in the pursuit of environmental justice and protection of environmental rights in Kenya.

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33 United Nations, "Environmental Rule of Law", op. cit.
34 Articles 20, 22, 23, Constitution of Kenya 2010.
35 Preamble, Constitution of Kenya, (Government Printer, 2010).
36 Art. 42, Constitution of Kenya 2010.
37 Sands, P. and Peel, J., *Principles of international environmental law*, Cambridge University Press, 2012, p.47.

1.6.1 Legal Recognition and Protection of Environmental Rights in Kenya: Where are we?

The Preamble to the Constitution of Kenya places a duty on every person to conserve and sustainably manage the environment. Thus, every person has a constitutional duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[38] The citizenry should not only cooperate but also actively participate in sustainable environmental and natural resources matters through seeking court's intervention.

Article 22(1) of the Constitution of Kenya guarantees the right of every person 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. Citizenry have a right of ensuring that their rights in relation to the environment are not violated, by way of litigation.[39] This is also captured in the various statutes such as the *Environmental Management and Co-ordination Act*.[40] The Constitution also recognises the right of every person to a clean and healthy environment.[41]

The protection and promotion of environmental rights in Kenya is further reinforced by the constitutionally recognised Environment and Land Court established under the *Environment and Land Court Act, 2011*[42], enacted to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.[43] The overriding objective this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.[44]

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38 Art. 69(2), Constitution of Kenya.

39 See also Art. 70 (1), Constitution of Kenya, 2010.

40 No. 8 of 1999, Laws of Kenya, s. 3(3); See also *Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya, (s. 3).

41 Art. 42, Constitution of Kenya, 2010.

42 No. 19 of 2011, Laws of Kenya. See S. 4 thereof.

43 *Ibid*, Preamble.

44 *Ibid*, S. 3(1).

The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.[45] The Court is also empowered to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.[46]

It is therefore clear that environmental rights in Kenya are well entrenched under the Constitution and statutes on environmental law. All that remains is taking measures geared towards ensuring that all persons get to enjoy these rights as envisaged under the law.

1.6.2 The Role of Courts in Safeguarding Environmental Rights in Kenya: Prospects and Challenges

1.6.2.1 Pre-Constitution 2010 Era

EMCA was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and related matters.[47] The Act provides that in exercising the jurisdiction conferred upon it under the Act, the High Court is to be guided by the principles of sustainable development.[48]

Part XII,[49] section 125 of EMCA establishes the National Environment Tribunal (NET), which is charged with settling disputes that arises in matters provided for under the Act.[50] NET is charged with hearing appeals arising from administrative decisions of committees mandated to enforce environmental standards.[51]

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45 *Ibid*, S. 13(1).
46 *Ibid*, S. 13(3).
47 *Ibid*, Preamble.
48 EMCA,S. 3(5).
49 SS. 125-136, No. 8 of 1999.
50 S. 125, No. 8 of 1999.
51 S. 126, No, 8 of 1999.

Notably, dispute management procedures under EMCA require the active participation of NEMA, being the implementing agency, with any grievances being addressed by NET Tribunal as an appeal which can however be heard by the Environment and Land Court as the final port of call. The role of NEMA in the safeguarding environment as established under EMCA was well summarized in the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR*[52] in the following words:

> *72. …… NEMA is not just an investigator and a prosecutor. Its success cannot be measured in terms of successful investigations and prosecutions. It has a bigger mandate: to be the principal instrument of government and the people of Kenya in the implementation of all policies relating to the environment….*

1.6.2.2 Post-Constitution 2010 Era

The constitutionalisation of the role of courts in promotion and protection of environmental rights is a step that seeks to ensure that these rights are treated as any other human rights that are justiciable under the laws of Kenya.

The *Environment and Land Court Act*, 2011 provides that in exercise of its jurisdiction under the Act, the Court should be guided by the principles of sustainable development.[53] Access to courts is an important pillar in promoting environmental justice in Kenya. Courts have, however, been faced by a number of challenges that hinder people particularly local communities from vindicating their environmental rights. Although the Constitution of Kenya guarantees the right of every person to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened with no need to prove *locus standi* to institute the suit, there still lies other challenges hindering access to courts such as the geographical location, complexity of rules and procedure and the use of legalese.[54] There is also lack of information amongst the citizenry and

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52 Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR, Petition No. 53 of 2012.

53 S. 18.

54 *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the*

ignorance of their rights as far as environmental rights are concerned. Uninformed people cannot make use of courts in fighting for their rights and thus, despite their recognition under the Constitution and other laws of Kenya, a lot still need to be done to achieve this full enjoyment of these rights for all. There is however a number of ways through which this can be addressed. It must however be pointed out that this cannot only be achieved by courts but they need the support of all stakeholders.

1.6.3 Enhancing the Role of Courts in Safeguarding Environmental Rights in Kenya

1.6.3.1 Judicial Activism

There is no clear definition of some of the rights guaranteed in the Constitution regarding the environment and thus it is up to the courts to give guidance in certain matters. This would not be new as noted by some scholars. For instance, some scholars have argued that the role of courts in recognition of environmental rights around the world has been so fundamental that, whereas the right to a clean and healthy environment has rapidly gained constitutional protection around the world, in some countries, recognition of the right first occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life.[55]

There is, therefore, a need for judicial activism so that jurisprudence in this area can be improved. For instance, there is no explanation of what, for

Judiciary in the new Constitution, ICJ Kenya, Vol. III, May, 2002; See also Muigua, K., *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp. 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012. Available at http://www.chuitech.com/kmco/attachments/Art./101/Avoiding.pdf [Accessed on 13/1/2020].

55 Boyd, D.R., 'The Implicit Constitutional Right to Live in a Healthy Environment,' *Review of European Community & International Environmental Law*, Vol. 20, No. 2, 2011, pp. 171-179 at p. 171.

example, amounts to a 'clean and healthy environment', and in some instances, it has taken court's intervention[56] to delineate the right.[57]

Notably, the *Environment and Land Court Act* gives the court *suo moto* jurisdiction.[58] It is arguable that the section allows judges to engage in judicial activism to safeguard environmental rights by ensuring sustainable development using the devices envisaged in Article 159 of the Constitution to ease access to justice. Courts may therefore act without necessarily waiting for filing of any cases on public interest litigation so as to promote environmental justice.

1.6.3.2 Public Interest Litigation

Courts should continually support and encourage public interest litigation geared towards protection of environmental rights and enhancing environmental justice in Kenya. The Constitution provides for the enforcement of environmental rights and guarantees that any person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.[59] Further, constitutional provisions that are useful in the promotion of the right under Article 70 are to be found under Articles 22, 23 and 48 thereof. These are important provisions that are aimed at promoting environmental justice for every person through use of public interest litigation. This was also affirmed in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR*[60] where the Court reiterated that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.[61]

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56 See *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd,* Misc. Cause No. 181 of 2004 (High Court of Uganda).

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

58 S. 20, *Environment and Land Court Act,* 2011.

59 Art. 70 (1) Constitution of Kenya, 2010.

60 Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR, Environment and Land 273 of 2013.

61 Ibid, para. 26.

These provisions have been applied in other significant cases too.[62] Some of the ways through which courts can encourage aggrieved persons to make use of public litigation is being slow in awarding costs where such parties do not get favourable outcomes. This was in fact highlighted in the case of *Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR*[63] where the place of public litigation in constitutional matters was sumarised in the following words: "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."

This was also affirmed in the case of *Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR*[64].

1.6.3.3 National Courts and Sustainable Development

Access to justice is one of the pillars of the *Agenda 2030 on Sustainable Development Goals (SDGs)*.[65] SDG Goal 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'.

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.[66] For instance,

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

63 Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR, Petition 429 of 2017.

64 Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR, Miscellaneous Application 388 of 2017.

65 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

66 Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at *http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf* [Accessed on 13/1/202020].

the *Environmental Management and Co-ordination (Amendment) Act, 2015*[67] seeks to ensure that any area declared to be a protected area under section 54(1), may be managed in cooperation with any individual, community or government with interests in the land and forests and should *provide incentives to promote community conservation* (emphasis added).[68] Such an approach can boost the State's efforts in sustainable development.

In *Peter K. Waweru v Republic*,[69] the Court observed that '…environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman….'.[70]

The role of the State and the national courts, and indeed the general public, in promoting sustainable development through striking a balance between environmental conservation and development needs of the country was also reiterated in the case of *Patrick Musimba –vs- National Land Commission* & *4 Others (2016) eKLR*[71] where the Court reiterated the constitutional role of the State on ensuring sustainable development and every person's right to a clean and healthy environment.

Courts should thus closely work with the rest of the stakeholders in not only safeguarding the environment but also ensuring that the country meets its international and national obligations towards realisation of the sustainable development agenda. Courts play an important role in giving life and meaning to human rights, including environmental rights, by providing a forum of last resort for human rights violations, at the national level.[72]

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67 *Environmental Management and Co-ordination (Amendment) Act*, No. 5 of 2015, Laws of Kenya.

68 S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

69 [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.

70 *Peter K. Waweru v Republic*, p.14.

71 *Patrick Musimba –vs- National Land Commission* & 4 Others (2016) eKLR, Petition 613 of 2014.

72 Boyd, D.R., 'The Constitutional Right to a Healthy Environment,' *Environment: Science and Policy for Sustainable Development*, July-August 2012, available at *http://www.environmentmagazine.org/Archives/Back%20Issues/2012/JulyAugust%202012/constitutional-rights-full.html* [Accessed on 13/1/2020].

1.7 Conclusion

It is imperative for the policy makers and legislators to bear in mind the end game of any intended law or policy as far as environmental governance is concerned. Achieving social justice should be one of the direct results of implementing environmental laws and policies on governance.

The law should be a tool for achieving social justice for the people and environmental governance laws should not be any different. There is indeed a need to revisit the role of law in environmental governance in Kenya. Formal laws and also customary law practices and norms should be utilised in participatory governance for sustainable development.

Courts are important players in promoting and securing the environmental rights of persons as well as in environmental conservation and are therefore useful in achievement of peace, sustainable development and environmental justice for all.[73]

Kenyans have a role to play in achieving the ideal of a clean and healthy environment. There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same. Developing environmental ethics and consciousness through such means as dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

2. Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya

2.1 Introduction

The previous section has critically discussed the role of law in promoting sustainable environmental management as well as the role of courts in implementing the same. This section discusses the constitutional provisions covering the policy, legal and institutional framework on natural resources and environmental management in Kenya. It seeks to examine where the opportunities exist under the constitutional framework but the required

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

implementation tools are either non-existent or underdeveloped. The author offers suggestions on some of the most plausible ways of effectively implementing these provisions.

2.2 Constitution of Kenya 2010 and Natural Resource and Environmental Management

The Constitution of Kenya provides for obligations meant to ensure sustainable management of natural resources and the environment, which lie against both the State and individual persons.[74] This section briefly looks at these functions as encapsulated by the Constitution.

2.2.1 State Obligations in Environmental and Natural resources Governance

Constitutionalisation of environmental rights is now one of the universally accepted approaches to environmental conservation and management.[75] This approach can be argued to have been informed by the adoption of a human rights approach to environmental matters. The link between human rights and the environment may have first been established by the *Stockholm Declaration* in 1972.[76] It has also become the norm worldwide for the duties of the state in respect of the environmental management and conservation to be spelt out in the Constitution.

It is against this background that the Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment.[77] The courts have affirmed that although the national objectives and directive principles of State

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74 Art. 69, Constitution of Kenya 2010.

75 See generally, Boyd, D.R., 'The Effectiveness of Constitutional Environmental Rights,' *Yale UNITAR Workshop*, April 26/27, 2013, available at https://environment.yale.edu/content/documents/00003438/Boyd-Effectiveness-of-Constitutional-Environmental-Rights.docx?1389969747 [Accessed on 14/1/2020]; See also Daly, E. & May, J.R., 'Comparative environmental constitutionalism,' *Jindal Global Law Review*, April 2015, Volume 6, Issue 1, pp 9–30; See also, Mwenda, A. & Kibutu, T.N., 'Implications of the New Constitution on Environmental Management in Kenya,' *Law, Environment and Development Journal*, Vol. 8, No. 1, 2012, p. 78.

76 UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

77 Art. 69(1) Constitution of Kenya 2010.

policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it was fairly possible to do so without violating the meaning of the words used.[78] Considering that the Constitution is the supreme law of the land, all the other sectoral laws on environment and natural resources management ought to be aligned to the constitutional provisions. The reality however, is that some of the laws are yet to be aligned and thus making it difficult to achieve the constitutional objectives on environment and natural resources governance.

2.2.2 Obligations of Citizens in Environment and Natural Resources Management: Co -managers or Mere Spectators?

Article 69(2) of the Constitution of Kenya places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[79] The duty is only limited to cooperation with the state and personal initiative that falls outside of statutory requirements may only be construed. Thus, it is the State and its organs that are to take initiative in management and the rest are only expected to offer support and follow any direction given.

The Constitution has gone a step further to provide for active involvement of communities in sustainable environmental and natural resources matters through seeking court's intervention. Citizenry have a role of ensuring that their rights in relation to the environment are not violated, by way of litigation.[80]

As already observed, active participation of citizens makes them appreciate and support government efforts and also take part in conservation measures. However, there has not been meaningful participation of the public in environmental and natural resource management matters since majority of the sectoral laws only provide for public participation as a mere formality and not

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78 Para. 18, Republic v Kenya Forest Service Ex-parte Clement Kariuki & 2 others [2013] eKLR, Judicial Review Case 285 of 2012.

79 See also para. 53, Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR, Petition 61 of 2018.

80 Art. 22(1), Constitution of Kenya 2010.

as an empowerment tool as envisaged in international human rights instruments.[81] A good example is the *Environmental Management and Co-ordination Act* 1999 (EMCA), which, while it provides for consultations, the same are mainly meant to be between the state agencies charged with environmental governance. Thus, it is possible to have a scenario where the protectionist approaches adopted in most of these sectoral laws end up undermining efforts towards achieving sustainable development instead of boosting the same.

The *Agenda 21*[82] under section 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. The *Rio Declaration* also largely adopts an anthropocentric approach to environmental conservation and sustainable development in general.

While the Constitution of Kenya has not been very clear on the specific role of communities as far as environmental governance is concerned, it has however addressed the right of communities to seek legal redress. The right to seek legal redress is also guaranteed under s. 3(3) of the *Environmental Management and Co-ordination Act*.[83] The State should ensure that communities play a key role in these efforts and thus, there is need to align these laws with the current Constitution.

2.3 Policy, Legal and Institutional Framework on Natural Resource and Environmental Management in Kenya: The Disconnect

Policies and laws on natural resources and environment in Kenya should be aligned to reflect the requirements and spirit of the Constitution. This section examines the extent to which select existing legislation on natural resources such as land, water, forests, minerals and wildlife reflect the spirit of Article 69 and the Constitution in general as far as resource management is concerned.

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81 See Principle 10 of the *Rio Declaration; UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or Aarhus Convention,* Articles 4, 5, 6 & 9.

82 United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

83 No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Co-ordination (Amendment) Act, 2015* (s. 3).

2.3.1 Resource Management Approaches

It is arguable that some of the current laws on natural resources management in Kenya still suffer from adopting approaches that defeat any efforts aimed at achieving sustainable development. This section briefly interrogates some of these laws and the specific approaches that they adopt.

i. Wildlife, Biodiversity and Forest Management Approaches

The *Forest Act*, 2005[84] was enacted, as an attempt to provide for involvement of local communities living around any forest in the management of those forests.[85] The Forests Act (2005) introduced participatory forest management, through the engagement of local communities, and the promotion of the private sector investment in gazetted forest reserves, accompanied by associated institutional and organisation change, notably the establishment of the Kenya Forest Service (KFS)[86], and the formation of Community Forest Associations (CFAs)[87].

The important role of communities in resource management has recently been acknowledged and this is commendable. For instance, the National Land Commission Chairman was recently quoted as saying that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country's forest cover.[88] If the Commission adopts such an approach, they are likely to boost chances of succeeding in environmental conservation and enhancing meaningful and active participation of communities in natural resources and environmental conservation, especially with regard to forests. It is also notable that the Act did not specifically spell out how communities are to be involved in decision-making processes.

Secondly, CFAs are registered by few people who are interested in doing so and the same are not necessarily representatives of the majority of the people. This means, therefore, that even where they make decisions regarding formulation and implementation of forest programmes consistent with the

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84 No. 7 of 2005, Laws of Kenya (repealed).
85 Part IV, SS. 45-48.
86 S.4, No. 7 of 2005.
87 No. 7 of 2005, S. 45.
88 Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

traditional forest user rights of the community concerned, the same cannot be said to be a representative voice of the majority. Community, in this context and as defined in the Act, does not necessarily mean the whole community.

The *Forest Policy 2014* also identifies key issues and challenges in the forestry sector which needs to be addressed. It also acknowledges that the promulgation of the Constitution brought new requirements for natural resource management such as public participation, community and gender rights, equity in benefit sharing, devolution and the need to achieve 10% forest cover among others.[89] Therefore, the need to enact supporting legislation following the promulgation of the Constitution was required to minimize conflicts between industry, communities and governments at both national and county levels over resource management and benefit sharing. In addition, forest governance needed to take into account emerging issues and best practices at global, regional and national level.[90]

The Forest Act 2005 was repealed by the *Forest Conservation and Management Act, 2016*[91] which did not change much in terms of actualisation of the requirements on public consultation and participation. The provisions on public consultation in the *Forest Conservation and Management Act*, 2016 are contained in a schedule[92]. The statute provides that where the law requires public consultation, the relevant entity should publish a notice in relation to the proposed action in the Kenya gazette, newspapers and local radio stations.[93]

One way of implementing the constitutional obligations on the state to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities is to incorporate it with the scientific knowledge and involving these communities and helping them appreciate all the foregoing principles of natural resource management

89 Ibid, para. 2.1.1.
90 Ibid, para. 2.1.2.
91 *Forest Conservation and Management Act,* No. 34 of 2016, Laws of Kenya.
92 Second Schedule, s.34, Provisions for Public Consultation.
93 Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.7.

for realisation of sustainable development agenda. These principles are both international and cultural.

The *Environmental Management and Co-ordination (Amendment) Act, 2015*[94] amends section 48 of EMCA by inserting subsection (3) to the effect that where a forested area is declared to be a protected area under section 54(1), the Cabinet Secretary may cause to be ascertained, any individual, community or government interests in the land and forests and shall provide incentives to promote community conservation.[95] This is an important clause that can promote forests conservation through the use of incentives. The incentives can be in the form of benefits that accrue to the community from the forests resources. However, this calls for their active involvement in the management through continuous collaboration and consultations with state agencies.

With regard to wildlife biodiversity, it has been observed that many of the regions with abundant and diverse wildlife communities remaining in East Africa are occupied by pastoralists.[96] Further, it has also been documented that recent studies show that the majority of the local people around protected areas have negative feelings about state policies and conservation programmes. The alienation of grazing land for the exclusive use of wildlife and tourists has a very direct impact upon the pastoralist communities, and prompts them to raise questions about African wildlife policy – as if it leads to a 'people versus animals' conflict.[97] The local communities continue to incur wildlife-related losses and insecurity rather than benefits, while the government and foreign investors continue to draw large amounts of foreign income from parks through the lucrative tourism industry.[98]

The National Wildlife Conservation and Management Policy, 2012 (Wildlife Policy 2012) observes that since Kenya is rich in natural resources, including

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94 No. 5 of 2015, Laws of Kenya.

95 S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

96 Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' *African Journals Online*, p. 65. Available at *http://www.ajol.info/index.php/ajcr/article/download/63311/51194 [Accessed on 22/07/2016]*.

97 Ibid.

98 Ibid, p. 74.

a vast array of wildlife, and due to its species' richness, endemism and ecosystem diversity, under the Convention on Biological Diversity Kenya is categorized as a mega-diverse country.[99] Accordingly, the Policy affirms the need for different conservation priorities and measures, for each of the ecosystems. This is accredited to a combined set of attributes which include: variability in climate, topography, diversity in ecosystems and habitats ranging from mountain ranges to semi-arid and arid areas to marine and freshwater.[100]

Wildlife is required to contribute directly and indirectly to the local and national economy through revenue generation and wealth creation.[101] Notably, the Policy observes that Kenya's wildlife is increasingly under threat and consequently opportunities are being lost for it to positively contribute to economic growth, wealth creation and increased employment. Much of this wildlife occurs outside the protected areas on lands owned by communities and other different organizations or persons. Communities consider the presence of wildlife on their land as a burden rather than an opportunity for gaining benefits.[102]

The *Wildlife Conservation and Management Act*, 2013[103] was enacted, as a result of the Wildlife Policy 2012, to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.[104] The Act affirms that benefits of wildlife conservation should be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline; wildlife conservation and management should be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations; and benefits accruing from wildlife conservation and management should be enjoyed and equitably shared by the people of Kenya.[105] The Act provides for consumptive wildlife use activities, which include, game farming, ranching, live capture, research

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99 Republic of Kenya: Ministry of Forestry and Wildlife, National Wildlife Conservation and Management Policy, 2012, p. 1.

100 Ibid.

101 Ibid.

102 Ibid.

103 Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

104 Ibid, Preamble.

105 Ibid, s.4.

involving off-take, cropping and culling.[106] However, hunting is prohibited as a form of consumptive utilization.[107]

The Act also provides for non-consumptive utilization of wildlife. A general permit may be issued by the Cabinet Secretary for non-consumptive wildlife user rights, including - wildlife-based tourism; commercial photography and filming; educational purposes; research purposes; cultural purposes; and religious purposes.[108] The functions of the Kenya Wildlife Service, under the Act, include, collecting revenue and charges due to the national government from wildlife and, as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas, and developing mechanisms for benefit sharing with communities living in wildlife areas.[109]

Also significant is the provision that every person has the right to practice wildlife conservation and management as a form of gainful land use.[110] Further, every person has the right to reasonable access to wildlife resources and shall be entitled to enjoy the benefits accruing there-from without undue hindrance.[111] However, utilisation and exploitation of wildlife resources by any person whether individual land owner or in a conservation area, and wherever else should be practised in a manner that is sustainable and in accordance with regulations made under this Act.[112]

The *Wildlife Conservation and Management Act* requires the Cabinet Secretary, in consultation with the land owner, the National Land Commission, the Commission on Revenue Allocation and in liaison with the Service, to formulate regulations and guidelines on access and benefit sharing.[113]

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106 Ibid, s.80 (3).
107 Ibid, s. 97 & s. 98; See also Eighth Schedule to the Act.
108 Ibid, s. 80.
109 Ibid, s.7 (e) (f).
110 Ibid, s. 70(1).
111 Ibid, s. 71(1).
112 Ibid, s. 72(1).
113 Ibid, s. 73; See also s. 76(1)-The Cabinet Secretary shall, upon advice by the Service, in consultation with the Commission on Revenue Allocation, formulate guidelines regarding incentives and benefit sharing, and the nature and manner in which the same shall be distributed.

In a bid to curb human-wildlife conflict, the Act provides that in furtherance of the spirit mutual co-existence in the framework of human – wildlife conflict, every decision and determination on the matter of conservation and management of the wildlife resource should not be exercised in a manner prejudicial to the rights and privileges of communities living adjacent to conservation and protected areas: Provided that in the parties should have due regard for the provisions of the appropriate and enabling laws, including laws on devolution and land management.[114] Where animals enter community's areas of living, only authorised officers may kill them where there is potential risk of injury, and any unauthorized persons who may kill a rogue animal, unless for self defence, may be prosecuted.[115]

The 2013 Act provides for County Wildlife Conservation Committees, Community Wildlife Associations and Wildlife Managers and community conservancies as institutions of promoting community participation. As far as regulation is concerned, the Act does away with an autonomous regulatory agency and instead gives powers of wildlife regulation and licensing to the Cabinet Secretary in charge of wildlife. The various institutions are mostly to advise the Cabinet secretary who then makes the final decision. It is therefore clear that the Act does not create clear channels for the communities to participate in decision making. The approach adopted is also broadly protectionist and does little to bring a change of attitude by local communities regarding wildlife diversity. While the Policy framework seems to acknowledge the importance of community inclusion, there is little evidence in the Act that the same was considered during deliberations to formulate the law.

If the affirmations in the Wildlife Policy are anything to go by, then the protectionist approaches adopted in management and conservation of biological diversity are not justified and do little to achieve the desired objectives of sustainable development. It has been suggested that there is need to adopt a more active participatory approach which is mainly informed by two additional principles: putting resources under local control; and giving local communities a decisive voice and representation through their own local

[114] Ibid, s. 75(1).
[115] Ibid, ss. 77-78.

institutions, which means participation in making decisions that affect them.[116] These principles, it has been contended, intend to increase trust and confidence and strengthen leadership capabilities at the community level.[117] While it may not be necessarily important to devolve control and ownership, there is need for more active and quality community participation in decision-making processes.

2.4 Implementing the Constitutional Obligations of the State in Respect of the Environment

It has been observed that the management regimes of public forests (and perhaps even other natural resources in Kenya), whether they are protectionist oriented or incentive-based are important in determining outcomes of conservation and sustainable use.[118] Kenya has historically adopted a protectionist model, where conservation strategies have been dominated by attempts to fence off or reserve areas for nature and exclude people from the reserved areas, and also involved the creation of protected areas (national parks, game reserves and national forest reserves), the exclusion of people as residents, prevention of consumptive use, and minimisation of other forms of human impact.[119] Broadly, this approach viewed development objectives of local communities as being in direct conflict with the objectives of biodiversity conservation.[120]

It is for this reason that this section explores measures that may facilitate securing the dream of sustainable exploitation, utilisation, management and conservation of the environment and natural resources and equitable sharing

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116 See Songorwa, A.N., et al, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature,' op cit. p. 607; See also Colchester, M., 'Sustaining the Forests: The Community-Based Approach in South and South-East Asia,' (United Nations Research Institute For Social Development, 1992). Available at http://www.unrisd.org/80256B3C005BCCF9%2F(httpAuxPages)%2F53024E4A3BAA768480256B67005B6396%2F$file%2Fdp35.pdf [Accessed on 28/07/2016].

117 Ibid.

118 Guthiga, P.M., 'Understanding Local Communities' Perceptions Of Existing Forest Management Regimes of A Kenyan Rainforest,' *International Journal of Social Forestry (IJSF)*, 2008, Vol. 1, No.2, pp.145-166 at p. 146.

119 Ibid, p. 146.

120 Ibid.

of the accruing benefits. This is in recognition of the fact that the Constitution contemplates adoption of measures that not only promote sustainable management of resources but also actively and meaningfully engage communities in such efforts.

2.4.1 Sustainable and Inclusive Approaches to Environmental Management

As far as wildlife biodiversity is concerned, it has been contended that the involvement and support of local communities in wildlife conservation is a prerequisite to effective and long-term conservation of wildlife and wildlands as part of the terrestrial biodiversity.[121] To this extent, it is argued that as a resource, wildlife must be of value to humans and contribute to human development. In other words, it must directly benefit the people who have the option to use the wildlands for other purposes.[122] Consequently, in spite of any existing controversies between the purely protectionist approach to wildlife management and the conservation approach, it is argued that it is the local communities who are to determine whether wildlife conservation is a priority form of land use.[123]

It has been recommended that involving local communities in sustainable natural resource use and conservation must be encouraged. Arguably, no rural-based education about the use of such resources will succeed if local community needs and opinions are not met and incorporated in conservation practice and policies. If they do not benefit from biodiversity resources, and are not compensated for opportunity costs and wildlife-induced losses, they

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121 Sibanda, B.M.C. & Omwega, A.S., 'Some Reflections on Conservation, Sustainable Development And Equitable Sharing of Benefits From Wildlife in Africa: The Case of Kenya and Zimbabwe,' *South African Journal Of Wildlife Research*, Vol. 26, No. 4, 1996, pp. 175-181 at p 175.

122 Ibid.

123 Ibid; see generally Grossman, E. (ed), 'Integrating Land Use Planning & Biodiversity,' (Defenders of Wildlife, Washington, D.C., 2003). Available at http://www.defenders.org/publications/integrating_land_use_planning_and_biodiversity.pdf [Accessed on 14/1/2020]; See also Kiss, A., 'Making Biodiversity Conservation A Land Use Priority,' available at http://www2.gsu.edu/~wwwcec/special/AgiBookSection2002.pdf [Accessed on 14/1/2020]

will not support the conservation of biodiversity.[124] Lastly, it has been suggested that a national land use plan can also help and will put into perspective land use practices that are compatible with the socio-economic needs, natural resource endowment, and ecological and climatic constraints within different regions of the country.[125] There is however, hope in Kenya after the recently developed Draft National Land Use Policy 2016[126] whose overall goal is to provide legal, administrative, institutional and technological framework for optimal utilization and productivity of land and land related resources in a sustainable and desirable manner at National, County and local level.[127]

The various sectoral laws and policies must be designed in way that protects the environment from degradation, and also involves communities in such measures, first through decision-making, and then encouraging active participation, whether through incentives or otherwise.

2.4.2 Achieving Ten Percentage Forest Cover

It has rightly been argued that forest and landscape restoration is about more than just trees. It goes beyond afforestation, reforestation, and ecological restoration to improve both human livelihoods and ecological integrity. Key characteristics include the following: Local stakeholders are actively engaged in decision making, collaboration, and implementation; whole landscapes are restored, not just individual sites, so that trade-offs among conflicting interests can be made and minimized within a wider context; landscapes are restored and managed to provide for an agreed, balanced combination of ecosystem services and goods, not only for increased forest cover; a wide range of restoration strategies are considered, from managed natural regeneration to

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124 Okech, R.N., 'Wildlife-community conflicts in conservation areas in Kenya,' *African Journals Online*, op cit at p.78.

125 Ibid, p. 78; See also generally, Wehrmann, B. (ed), 'Land Use Planning: Concept, Tools and Applications,' (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Eschborn, 2012). Available at https://www.giz.de/fachexpertise/downloads/Fachexpertise/giz2012-en-land-use-planning-manual.pdf [Accessed on 14/1/2020]

126 Developed by the Ministry of Lands and Physical Planning, Kenya, May 2016.

127 Ibid, para. 1.4.

tree planting; and continuous monitoring, learning, and adaptation are central.[128]

Further, a restored landscape can accommodate a mosaic of land uses such as agriculture, protected reserves, ecological corridors, regenerating forests, well-managed plantations, agroforestry systems, and riparian plantings to protect waterways. Restoration must complement and enhance food production and not cause natural forests to be converted into plantations.[129]

Principle 8(a) of the *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (the Forest Principles of the United Nations Conference on Environment and Development (UNCED)[130] provide that efforts should be undertaken towards the greening of the world. Furthermore,

Draft National Forest Policy, 2015[131] provides for a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors to enable the sector contribute in meeting the country's growth and poverty alleviation goals within a sustainable environment.[132] The overall goal of the Policy is sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.[133]

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128 World Resources Institute, 'Atlas of Forest and Landscape Restoration Opportunities,' available at http://www.wri.org/resources/maps/atlas-forest-and-landscape-restoration-opportunities [Accessed on 14/1/2020].

129 Ibid.

130 Report Of The United Nations Conference On Environment And Development (Rio De Janeiro, 3-14 June 1992), Annex III: Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus on The Management, Conservation and Sustainable Development of All Types of Forests, A/CONF.151/26 (Vol. III).

131 Forest Policy, 2015 (Government Printer, Nairobi, 2015).

132 Ibid, para. 1.1.9.

133 Para. 3.1.

The *Draft National Forest Policy*, 2015 acknowledges that to achieve the national forest cover target of 10% of land area, the major afforestation effort will have to be in community and private lands.[134] Further, the Policy emphasizes that participatory forest management and sound conservation practice has potential to improve forest protection, management and growth by involving relevant non-state actors and local communities in planning and implementation.

The *Draft National Land Use Policy 2016* requires that to address the low vegetation cover with other competing land uses, the government should: carry out an inventory of all land cover classifications; establish mechanisms to ensure protection and improvement of vegetation cover over time; incorporate multi stake holder participation in a forestation programmes and initiatives; develop a framework for incentives to encourage maintenance of forest cover; promote the use of alternatives and efficient production methods to reduce demand on forest products; and ensure public participation in stakeholder forums in the determination of planning zones.[135]

It has been asserted that land users require long-term secure rights to use and harvest a piece of land before they will invest time and effort in sustaining its long-term productivity.[136] As a result of past land alienation policies, a significant portion of much of the developing world's forest lands now falls within the public domain, and has become a de facto open access resource.[137] If the people using these resources have no enforceable legal or customary rights (to cultivate, graze or collect forest products) they have no incentive to conserve the productive potential of the resources (soil, water, vegetation and animals). Tenurial systems are therefore important in any aspect of natural resource management.[138]

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134 Para. 4.5.

135 Draft National Land Use Policy 2016, para. 3.8.3.

136 Lamb, D. & Gilmour, D., *Rehabilitation and Restoration of Degraded Forests*. IUCN, Gland, Switzerland and Cambridge, UK and WWF, Gland, Switzerland, 2003. x +110 pp. at p. 66. Available at http://cmsdata.iucn.org/downloads/rehabilitation_and_restoration_of_degraded_forests.pdf [Accessed on 14/1/2020].

137 Ibid.

138 Ibid; see generally, *Rethinking Forest Partnerships and Benefit Sharing: Insights on Factors and Context that Make Collaborative Arrangements Work for*

The *Forest Conservation and Management Act, 2016* was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to make provision for the conservation and management of forests; and for connected purposes. The Act applies to apply to all forests on public, community and private lands.[139] Among the guiding principles of the Act are: public participation and community involvement in the management of forests; and consultation and co-operation between the national and county governments. The Act also requires the Cabinet Secretary, in consultation with the relevant stakeholders, develop a national forest management policy for the sustainable use of forests and forest resources, and which must be reviewed at least once in every five years.[140]

The *Forest Conservation and Management Act, 2016* notably retains provisions for formation and registration a community forest association in accordance with the provisions of the Societies Act.[141] The management agreement between the Kenya Forest Service and the community forest association is meant to give such communities some forest user rights.[142] Such forest user rights may, with the approval of the Director-General, be assigned either partly or all under a management agreement to a suitably qualified agent on mutually agreed terms.[143]

The Forest Conservation and Management Act, 2016 also provides that subject to Article 66[144] of the Constitution, investors in forests must share the benefits of their investment with local communities by applying various options including but not limited to infrastructure, education and social amenities.[145]

Communities and Landowners, Report No. 51575-GLB, (The International Bank for Reconstruction and Development / The World Bank, Washington, DC, 2009).

139 Forest Conservation and Management Act, 2016(Government Printer, Nairobi, 2016), sec. 3.

140 Ibid, Sec. 5.

141 Ibid, Sec. 47(1).

142 Ibid, Sec. 48.

143 Ibid, Sec. 49.

144 Art. 66(1)- The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

145 Ibid, sec. 52.

This provision is in recognition of the fact that "benefits" mean quantifiable and non-quantifiable goods and services provided by forest ecosystems.[146] Unilateral efforts to achieve at least ten percent tree cover may not bear much fruits since communities may feel used by the State organs without necessarily benefiting from the same.

Deforestation contributes to climate change and thus, it must be tackled as one of the means of achieving the sustainable development agenda. The *National Climate Change Response Strategy 2010* (NCCRS)[147], has identified the forestry sector as a strong vehicle for undertaking both mitigation and adaptation efforts and intends to exploit incentives provided within the framework of UNFCCC, especially the REDD mechanism, to implement sustainable forest management approaches.[148] These efforts and initiatives should be supported as they demonstrate Kenya's commitment to climate change mitigation, a positive step towards attaining sustainable development.

The Bali Principles of Climate Justice of 2002 (Bali Principles)[149] acknowledge that if consumption of fossil fuels, deforestation and other ecological devastation continues at current rates, it is certain that climate change will result in increased temperatures, sea level rise, changes in agricultural patterns, increased frequency and magnitude of "natural" disasters such as floods, droughts, loss of biodiversity, intense storms and epidemics. Further, deforestation contributes to climate change, while having a negative impact on a broad array of local communities.

2.4.3. Realising the State's Role in Facilitating Equitable Benefit Sharing for Social Sustainability

The proposed legislation *Natural Resources (Benefit Sharing Bill)*[150] seeks to establish a system of benefit sharing in resource exploitation between resource

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146 Ibid, sec. 2. *Legal Notice 160 of 2006 on the Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations*, 2006, Regulation 20 (1).

147 See para. 4.2.5.2, Government of Kenya, 2010.

148 The REDD Desk, *REDD in Kenya*, available at http://theredddesk.org/countries/kenya [Accessed on 14/1/2020].

149 Available at http://www.ejnet.org/ej/bali.pdf [Accessed on 14/1/2020].

150 2018 (Government Printer, Nairobi, 2018).

exploiters, the national government, county governments and local communities, to establish the natural resources benefit sharing authority and for connected purposes. The proposed law is to apply with respect to petroleum and natural gas, among other natural resources. The proposed law provides for guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.[151] The proposed legislation seeks to set up a Benefit Sharing Authority which will be mandated to coordinate the preparation of benefit sharing agreements between local communities and affected organizations, among other functions.[152]

There is need to actively involve communities in the implementation of this law, if enacted, to ensure that they are not left out as far as benefit sharing is concerned. The approach should be one that ensures that communities feel part of the resource management strategies and not mere spectators where they are not consulted even on the best approaches to benefit sharing.

There is also the *Community Land Act, 2016*[153] was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.[154] Section 36 provides that subject to any other law, natural resources found in community land should be used and managed—sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits.

The International Finance Corporation (IFC) suggests practical processes for sharing benefits with communities.[155] One of the ways that this can be

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151 Ibid, Clause 4.

152 Clause 6, *Natural Resources (Benefit Sharing Bill),* 2018.

153 *Community Land Act, No. 27 of 2016, Laws of Kenya.*

154 Preamble, *Community Land Act, No. 27 of 2016 (*Government Printer, Nairobi, 2015).

155 Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 61. Available at

achieved is through maintaining active relationships built on trust with communities through appropriate and effective communication. This implies that genuine consultations and participation in decision-making will happen whenever possible and that perceptions and expectations are closely aligned with reality.

There is need to ensure that any model that is put in place guarantees a fair and equitable benefit-sharing, with terms and provisions which clearly spell out the model to be used in determining the accruing benefits and the associated costs, in order to determine the investments (and compromises) from all parties and stakeholders involved.[156]

2.4.4 Empowerment and Public Participation for Effective Natural Resources Management

It has been observed that an emphasis on responsibilities rather than rights echoes language from the Stockholm Declaration and subsequent instruments that emphasize the duty of each person to protect and improve the environment for present and future generations.[157] This, it is arguable, calls for empowerment of the citizenry to enable them carry out their duties towards environmental management effectively. The fact that the Constitution of Kenya[158] and EMCA[159] have already dispensed with the need to prove locus standi in environmental matters litigation presents a good opportunity for the citizenry, through relevant support, to hold government and private entities accountable as far as management of environmental resources is concerned.

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http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 14/1/2020].

156 See generally, Jonge, B.D., 'What is Fair and Equitable Benefit-sharing?' *Journal of Agricultural and Environmental Ethics*, Vol. 24, 2011, pp.127–146.

157 Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' op cit. p. 3.

158 For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3).

159 S.3 (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action – (a) is not frivolous or vexations; or (b) is not an abuse of the court process.

In the case of *Joseph Leboo & 2 Others v Director Kenya Forest Services & Another*[160] the Learned Judge observed that affirmed that any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually.[161]

However, such suits require that the particular persons be first empowered through the relevant information, acquired either through formal, informal or non-formal education or general awareness on the relevant matters. The right to information must therefore be realized to facilitate enjoyment of environmental rights. This can be achieved through implementation of Article 35 of the Constitution, which guarantees the right to information.[162]

The United Nations Development Programme (UNDP) recommends adoption of decentralised governance of natural resources, which concerns the ownership and control of, access to and use of resources, and involves decision making and the exercise of the powers over others.[163] According to UNDP, decentralised governance of natural resources is considered one of the key strategies for promoting sustainable management, equitable decision-making, promoting efficiency, participatory governance and equitable sharing of benefits accrued from exploitation of natural resources at the local levels.[164]

The Constitution provides for the role of devolved governance system in the management of natural resources and the environment. The Fourth Schedule to the Constitution[165] provides for the distribution of functions between the National Government and the County Governments.

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160 [2013] eKLR, Environment and Land No. 273 of 2013.

161 Paras 25 & 28.

162 Art. 35(1), Constitution of Kenya 2010; *Access to Information Act, 2015*.

163 United Nations Development Programme, *Decentralized Governance of Natural Resources*, available at http://web.undp.org/drylands/decentralized-governance.html [Accessed on 14/1/2020].

164 Ibid.

165 (Article 185 (2), 186 (1) and 187 (2)), Constitution of Kenya.

Agenda 21 tasks the Government to do all that is necessary in giving communities a large measure of participation in the sustainable management and protection of the local natural resources in order to enhance their productive capacity.[166]

Thus, it is important to ensure that public participation is well captured in the policy and legal framework to facilitate sustainable management and conservation of environmental resources through approaches that are inclusive, participatory and deliberative in nature.

2.4.5 Establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment. EMCA tasks National Environmental Management Authority (NEMA) with the responsibility of carrying out Environmental Audit of all activities that are likely to have significant effect on the environment. While Environmental Impact Assessment is conducted before commencement of any new development to minimise negative environmental impacts, for ongoing activities, an Environmental Audit ascertains if the activities in question have significant environmental effects.[167]

In Kenya, an environmental impact assessment study preparation is generally required to take into account environmental, social, cultural, economic, and legal considerations, and should—identify the anticipated environmental impacts of the project and the scale of the impacts; identify and analyze alternatives to the proposed project; propose mitigation measures to be taken during and after the implementation of the project; and develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which should

166 Agenda 21, clause 3.7(d).

167 FAO, 'Environmental Impact Assessment (EIA) and Environmental Auditing (EA),' available at http://www.fao.org/docrep/005/v9933e/v9933e02.htm [Accessed on 14/1/2020].

include the cost of mitigation measures and the time frame of implementing the measures.[168]

Public participation is believed to be an integral part of the environmental impact assessment process as it creates an opportunity for concerned citizens to express their views on natural resource development.[169] Public participation is also encouraged under EIA because, after stakeholders have had the opportunity to express their opinions, they may be more inclined to accept the final outcome decided by the regulators, as they have had the opportunity to express their views.[170]

The mandatory requirements for Environmental Impact Assessment, Strategic Environmental Assessment[171] and Strategic Environmental and Social Assessment (SESA) also present viable channels through which communities can actively participate in sustainable development agenda in the country.[172]

These exercises should not be just a matter of formality and paper work.[173] The affected communities should be afforded an opportunity to meaningfully

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168 Regulation 16, *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003.

169 Ingelson, A., et al, 'Philippine Environmental Impact Assessment, Mining and Genuine Development', op cit, p. 6; See also Okello, N., et al, 'The doing and un-doing of public participation during environmental impact assessments in Kenya,' *Impact Assessment and Project Appraisal*, Vol. 27, No.3, 2009, pp.217-226.

170 Ibid, p. 6.

171 "strategic environmental assessment" means a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives (s.2, *Environmental Management and Co-ordination (Amendment) Act*, No. 5 of 2015); S. 57A, EMCA, No. 8 of 1999; See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42 & 43.

172 One of the Policy Statements in the *National Environment Policy 2013* is that the Government will ensure Strategic Environmental Assessment (SEA), Environmental Impact Assessment, Social Impact Assessment and Public participation in the planning and approval of infrastructural projects (para. 5.6).

173 See generally, United Nations, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, (UNEP, 2004). Available at

participate and give feedback on the likely effects on social, economic and environmental aspects of the community.

2.4.6 Judicial Activism

It has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.[174]

In the enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the right in question.

2.5 Conclusion

The existing policies, legal and institutional frameworks, as already highlighted in select statutes, appear to suggest that the sustainable management of resources agenda is one to be driven by the State, especially in terms of decision-making, and not the local community. The Constitution envisages a collaborative approach between communities and the State. Decision making processes still seem to be largely top-down in nature and communities are only afforded opportunities to apply for resource user rights, with little or no consultations regarding management.

The Constitution creates an opportunity where, through devolution, communities are supposed to be empowered by devolving power from the state to local institutions of decision- making as a way of empowering local

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http://www.unep.ch/etu/publications/textONUbr.pdf [Accessed on 14/1/2020]; See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment [Accessed on 14/1/2020].

174 Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf [Accessed on 14/1/2020].

communities to manage natural resources and environmental matters. There is also need to put in place a framework that clearly defines the role of various stakeholders.

3. Role of Corporations in Environmental Conservation and Sustainable Development in Kenya

3.1 Introduction

The vast majority of economic activities around the world are organized through corporations.[175] Corporations have often faced the dilemma of striking a balance between economic development and environmental conservation.[176] In Kenya, it has been observed that corporate bodies are involved in acts and omissions which violate the right to a clean and healthy environment such as pollution and non-compliance with statutory obligations including undertaking environmental impact assessments and audits.[177]

The main concern of corporates engaged in such acts is their economic growth and they engage in acts of pollution to save costs through acts and omissions such as failure to treat effluent before discharging into water bodies.[178] However, with the increased environmental challenges such as climate change, the acts and omissions of corporations can no longer go unregulated.

The concept of environmental liability has emerged at both the national and global level to curb against environmental damage by corporations. Further, corporate governance principles such as corporate social responsibility require corporations to consider the social consequences of their economic actions in

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175 Rauterberg. G, 'The Corporation's Place in Society' available at http://michiganlawreview.org/wp-content/uploads/2016/04/114MichLRev.913_Rauterberg.pdf [Accessed on 14/1/2020].

176 Sozinova. A et al, 'Economic Environmental Activities of Russian Corporations' International Journal of Economics and Financial Issues, Volume 6, Issue 1, 2016, p. 52-56.

177 Kamweti D et al, 'Nature and Extent of Environmental Crime in Kenya' available at https://www.files.ethz.ch/isn/111770/M166FULL.pdf [Accessed on 14/1/2020].

178 Ibid.

decision making.[179] It has been argued that the concept of environmental governance is an important aspect of corporate social and environmental responsibility.[180]

This section discusses the concept of corporate environmental compliance in Kenya and proposes solutions on how the same can be enhanced to promote sustainable development. In light of the provisions of the Constitution of Kenya, 2010 and EMCA the environmental regime in Kenya has been strengthened and corporations now face both civil and criminal liability for acts and omissions related to the environment. It delves into corporate environmental compliance challenges in Kenya and highlights how they affect the right to a clean and healthy environment in addition to other human rights before suggesting how corporations can tackle these challenges.

3.2 Legal and Institutional Framework for Corporate Environmental Compliance

3.2.1 International Legal Framework

The international framework on corporate environmental compliance is based on a number of treaties, standards and principles aimed at facilitating enforcement and compliance with environmental laws and regulations. While such treaties, principles and standards generally bind states, they are directly applicable to corporations since a state can control the activities of a corporation within its jurisdiction in compliance with its obligations under international law especially on environmental matters.

The *United Nations Framework Convention on Climate Change, Paris Agreement 2015*[181], is an Agreement aimed at strengthening the global response to the threat of climate change in the context of sustainable

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179 Buckley, P 'Can Corporations Contribute directly to society or only through regulated behaviour' Journal of the British Academy, 6 (sl), p. 323-374.

180 MSV. Prasad, 'Corporate Environmental Governance: A Perception of Indian Stakeholder', available at https://ecoinsee.org/conference/conf_papers/conf_paper_18.pdf, [Accessed on 14/1/2020].

181 Paris Agreement, United Nations, 2015, available at https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf [Accessed on 14/1/2020].

development. The Agreement contains provisions aimed at holding the rise in global temperature levels and controlling greenhouse gas emissions.[182] It is noteworthy that most corporations especially those in industrial goods production release greenhouse gases that may adversely affect the ozone layer and this makes them bound by this legal instrument.

The Montreal Protocol[183] is an international Treaty which aims to regulate the production and use of chemicals that contribute to the depletion of ozone layer. It sets limits on the production of chlorofluorocarbons (CFCs) and related substances that may lead to the depletion of the ozone layer. Again, some corporations may release chemicals that may adversely affect the ozone layer. *The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment*[184] contains provisions on compensation for damage to victims of environmental liability and requires member states to adopt laws that provide for liability and compensation to victims of environmental damage such as pollution. This has been captured in Kenya under the Environmental Management and Co-ordination Act, 1999[185] which imposes both civil and criminal liability for environmental damage.

The Rio Declaration on Environment and Development[186] captures several principles aimed at protecting the integrity of the global environment and developmental system. These include sustainable development, public participation, inter and intra generational equity, precautionary principle and the polluter pays principle.

ISO 14000 entails a number of standards developed by the International Organization for Standardization to help organizations take a proactive

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182 Ibid, Art. 2.

183 Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987).

184 Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, available at https://legal.un.org/avl/ha/dunche/dunche.html [Accessed on 14/1/2020].

185 Act No. 8 of 1999, Laws of Kenya.

186 The United Nations Conference on Environment and Development, Rio Declaration 1992, Available http://www.unesco.org/education/pdf/RIO_E.PDF [Accessed on 14/1/2020].

approach to managing environmental issues.[187] The standards challenge organizations to undertake a number of activities related to environmental governance which include taking stock of their impacts on the environment, establishing objectives and targets towards environmental management, committing to effective and reliable solutions such as prevention pollution and taking personal responsibility for conduct related to the environment.[188] The existence of such standards is important since it allows organisations to gauge their environmental efforts against the generally accepted international criteria.

3.2.2 National Legal Framework

a) Constitution of Kenya, 2010

The Constitution of Kenya accords every person the right to a clean and healthy environment[189], which includes the right to have the environment protected for the benefit of present and future generations through measures contemplated in article 69; and to have obligations relating to the environment fulfilled under Article 70. These Constitutional provisions bind both the state and every person. Corporations thus have environmental obligations under the Constitution since they are artificial persons. Breach of these obligations could result in enforcement of environmental rights against the corporation and sanctions such as compensation for any victim of a violation of the right to a clean and healthy environment under Article 70 (2) (c).

b) Environmental Management and Co-ordination Act (EMCA), 1999

The *Environmental (Management and Co-ordination) Act, 1999* (EMCA) is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment.[190] The Act entitles every person to a clean and healthy environment and requires

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187 Environmental Management: The ISO 14000 family of International Standards, available at https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/theiso14000family_2009.pdf [Accessed on 14/1/2020].

188 Ibid.

189 Art. 42, Constitution of Kenya 2010, (Government Printer, 2010, Nairobi).

190 Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, Government Printer, Nairobi.

every person to cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.[191] EMCA also stipulates several measures for protection and conservation of the environmental subsectors including rivers, lakes, seas, wetlands, mountain areas, forests, biological resource and the ozone layer.[192]

These provisions bind both the state and individuals and their violation could result in commission of environmental offences set out under the Act. When these offences are committed, *by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence* (emphasis added).[193]

To aid in environmental protection and conservation, the Act lists several environmental management tools such as *Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA), Strategic Environmental and Social Assessment (SESA), Environmental Audits and Monitoring (emphasis added).*

c) Companies Act, 2015

The *Companies Act, 2015* calls upon directors while discharging the duty to promote the success of a company to have regard to the impact of the operations of the company on the community and the environment.[194] The Act further mandates directors while preparing their reports to include information about environmental matters and take into account the impact of the business of the company on the environment.[195]

d) Climate Change Act, 2016

The *Climate Change Act, 2016* provides a regulatory framework for enhanced response to climate change and puts in place measures and mechanisms aimed

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191 Ibid, s. 3 (2A).
192 Ibid, Part V.
193 Ibid, s. 135.
194 Companies Act, No. 17 of 2015 (Government Printer, 2015, Nairobi), s. 143 (1) (d).
195 Ibid, s. 655 (4) (b).

at achieving low carbon climate development.[196] The Act applies in all sectors of the economy and requires measures to be taken towards mainstreaming climate change responses in development planning, providing incentives and obligations for private sector contribution in achieving low carbon climate development and promotion of low carbon technologies.[197] *It also imposes climate change duties upon private entities which may also be required to prepare reports on the status of performance of such obligations (emphasis added).*[198] The Act empowers the National Environmental Management Authority (NEMA) to monitor, investigate and report whether public and private entities are in compliance with their duties under the Act. [199]

e) Water Act, 2016

This is an Act of Parliament to provide for the regulation, management and development of water resources.[200] It enshrines the right to clean and healthy water and contains provisions that seek to curb contamination and pollution of water sources and establishes institutions to enforce the Act. Despite enactment of the Act, there are still many cases of pollution of water bodies some which are perpetrated by corporations through discharge of untreated wastes. Enforcement and compliance with the Act is necessary in attainment of the right to clean and healthy water.

f) Sectoral Regulations

In addition to these legal instruments, there are several sectoral regulations which govern environmental compliance in Kenya. *The Environmental (Impact Assessment and Audit) Regulations, 2003*[201] provide for a system governing the Environmental Impact Assessment process and environmental audits. *The Air Quality Regulations 2014*[202] provide for prevention, control

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196 *Climate Change Act, No. 11 of 2016*, Laws of Kenya (Government Printer, 2016, Nairobi).

197 Ibid, s. 3.

198 Ibid, s. 16.

199 Ibid, s. 17.

200 *Water Act, No. 43 of 2016*, (Government Printer, 2016, Nairobi).

201 The Environmental (Impact Assessment and Audit) Regulations, Legal Notice No. 101 (June 13, 2003),

202 Environment Management And Co-ordination (Air Quality) Regulations, available at

and abatement of air pollution to ensure clean and healthy ambient air. The regulations further provide for establishment of *emission standards* for various sources *including industries* as outlined in the Environmental Management and Coordination Act, 1999 (emphasis added). *The Water Quality Regulations 2006*[203] provides for the right to clean and healthy water and obligates every person to refrain *from acts and omission that may cause water pollution (emphasis added)*. The *Waste Management Regulations 2006*[204] provide a system to govern management of wastes including industrial and hazardous wastes.

g) Environmental Compliance Requirements under EMCA

Environmental compliance *entails adherence to environmental laws, standards, regulations and other requirements*. The need for *environmental compliance is important among corporations due to the potential of environmental liability as a result of non-compliance (emphasis added).*[205] Corporations thus have to adhere to the various environmental laws, regulations and standards set out under EMCA and other environmental sectoral laws. EMCA sets out various environmental management tools such as Environmental Impact Assessment (EIA), Environmental Audits, Strategic Environmental Assessment (SEA) and Strategic Environmental and Social Assessment (SESA).

i. Environmental Impact Assessment

Since most development activities and projects in Kenya are undertaken by companies, EIA becomes an important aspect of the corporate governance discourse. It has been argued that EIA *can be a powerful tool for keeping the*

http://www.nema.go.ke/index.php?option=com_content&view=article&id=31&Itemid=171 [Accessed on 14/1/2020].

203 Legal Notice No. 120 (September 4, 2006), Environment Management and Co-ordination Water Quality Regulations, 2006.

204 Legal Notice, No. 121 (September 4, 2006), Environmental Management and Co-Ordination (Waste Management) Regulations, 2006.

205 Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' available at https://www.google.com/search?client=firefox-b-d&q=environmental+compliance [Accessed on 14/1/2020].

corporates including Multinational Corporations (MNCs) operating in the country in check (emphasis added).[206]

The need for EIA is so important that the Environmental (Impact Assessment and Audit) Regulations, 2003 makes it mandatory to conduct an EIA study and have it approved before undertaking a project likely to have environmental effects.[207] The Regulations require a proponent to prepare a Project Report that covers *inter alia*; the nature of the project, activities to be undertaken during construction of the project and the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project.[208]

Failure to comply with EIA requirements under EMCA has seen instances where projects have been halted. In *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, the Applicant was issued with a mining license without complying with the EIA requirements under EMCA. In cancelling the license, the Environment and Land Court decided that:

> *'To the extent that the Commissioner for mines was not furnished with a NEMA Licence as required under the EMCA Act and the Regulations made thereunder my view is he could not issue a valid Mining Licence and the Licence he issued to the Applicant on 7th March 2013 was null and void and of no legal effect.'*[209]

It is important for corporations to comply with EIA requirements under EMCA in order to minimise the environmental impacts of their projects and promote sustainable development.

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206 Muigua K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

207 The Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No.101 (June 13, 2003), Government Printer, Nairobi.

208 Ibid, Regulation 7.

209 Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR, available at http://kenyalaw.org/caselaw/cases/view/109485 [Accessed on 14/1/2020]; See also Save Lamu & 5 Others v NEMA & another, Tribunal Appeal No. NET 196 of 2016, where the license was cancelled on account of lack of public participation.

ii. Strategic Environmental Assessment (SEA)

EMCA requires all entities, including corporations, to undertake preparations for SEAs at their own expense and submit them to NEMA for approval.[210] It has been observed that the object of SEA is to enhance environmental protection and promote sustainable development through contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.[211]

iii. Environmental Audits and Monitoring

The requirement for environmental audits and monitoring has been enshrined under the Constitution of Kenya as part of the obligations in respect of the environment.[212] Environmental audits and monitoring act as follow up tools to determine the extent to which activities being undertaken conform to the environmental impact assessment study report issues in respect of the particular project.

The aim of this process is to guard against deviation from the study report which could have detrimental effects on the environment. NEMA is mandated under EMCA to undertake environmental audits of all activities that are likely to have *significant effect on the environment and in consultation with lead agencies, monitor all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts (emphasis added)*.[213]

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210 EMCA, s. 57 A (3).

211 Environmental protection Agency, 'Strategic Environmental Assessment,' Available at http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA [Accessed on 14/1/2020]; See also Muigua. K, 'Legal Aspects of Strategic Environmental Assessment (SEA) and Environmental Management, available at http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf [Accessed on 14/1/2020].

212 Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.

213 EMCA, s. 68 & 69.

iv. Public Participation

The principle of Public participation has become essential under the current Constitutional dispensation in Kenya. It is enshrined under the Constitution as one of the national values and principles that binds all persons (including corporations) in the implementation of policy decisions.[214] The principle is fundamental in environmental governance and all policies, plans and processes related to the environment are to be subjected to public participation. In *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, the court recognized the importance of this principle and observed that, 'One of the environmental governance principles emphasized by the legal framework is the principle of public participation in the development of policies, plans and processes for the management of the environment and natural resources.'[215]

This principle has also been captured under EMCA. The Act requires the Environment and Land Court in exercising jurisdiction conferred upon it by the Act to be guided by principles of sustainable development including participation of the people in in the development of policies, plans and processes for the management of the environment.[216]

v. Sustainable Development

Sustainable development has been enshrined as one of the national values and principles under the Constitution.[217] The principle has also been captured under EMCA and incudes public participation, inter and intra generational equity, polluter pays principle, precautionary principle *inter alia*.[218] The Sustainable Development Goals (SDGs) by the United Nations member states in 2015 are a universal call of action towards targets such as ending poverty and protecting the planet.[219] The SDGs set various targets such as sustainable

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214 Constitution of Kenya, 2010, Art. 10.

215 Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR, available at http://kenyalaw.org/caselaw/cases/view/140427 [Accessed on 14/1/2020].

216 EMCA, s. 3 (5) (a).

217 Constitution of Kenya, 2010, Art. 10 (2) (d).

218 EMCA, s. 3 (5).

219 Sustainable Development Goals, available at

management of water and sanitation for all, attainment of affordable and clean energy, promotion of inclusive and sustainable industrialization and taking action to combat climate change.[220] Corporations can assist towards promoting sustainable development through compliance with the targets set out under the SDGs.

3.3 Challenges Related To Corporate Environmental Compliance in Kenya

3.3.1 Environmental Pollution

EMCA defines pollution as 'the direct or indirect alteration of any part of the environment through discharge, emission or deposition of wastes'.[221] Environmental pollution has also been defined as 'any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life'.[222] *Environmental pollution occurs in various forms including water pollution, air pollution, noise pollution and land pollution (emphasis added).*[223] Environmental pollution has become a major challenge across the world due to the rapid economic development to cater for the rising human population.[224]

The problem of pollution especially by manufacturing industries is well documented in Kenya. It has been pointed out that a number of

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https://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf [Accessed on 14/1/2020].

220 Ibid.

221 EMCA, s. 2, Government Printer, Nairobi.

222 Coker, A.O, "Environmental Pollution: Types, Causes, Impacts and Management for the Health and Socio-Economic Well-Being of Nigeria," p.1. Available at https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf [Accessed on 14/1/2020].

223 Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," International Journal of Education and Research, Vol. 1 No. 6 June 2013.

224 Muigua K, 'Safeguarding the Environment through Effective Pollution Control in Kenya' available at http://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf [Accessed on 14/1/2020].

manufacturing industries discharge untreated effluent into rivers resulting in high pollution levels in the Nairobi and Ngong Rivers.[225] According to the National Environment Management Authority (NEMA), many factories in the country have been contravening provisions of the *Water Quality Regulations, 2006* by either discharging untreated effluent into a public sewer or discharging into the environment without an effluent discharge license.[226] These incidences of pollution have recently been highlighted by the media resulting in crackdown by the National Environment Management Authority (NEMA) against the perpetrators.[227]

In addition to water pollution through discharge of effluent, other forms of environmental pollution by corporations have also been reported in Kenya.[228] Further, studies have also indicated that this has contributed to soil pollution in the area.[229]

Despite the existence of laws and regulations to curb against pollution such as the Water Quality Regulations, Waste Management Regulations and Air Quality Regulations, the problem of pollution has persisted in the country.

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225 National Environment Management Authority (NEMA), 'Environment, People and Development' available at http://www.nema.go.ke/images/Docs/Regulations/KenyaSoECh1.pdf [Accessed on 14/1/2020].

226 National Environment Management Authority, 'Factories Closed, Owners Arrested for Polluting the Environment' available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454 [Accessed on 14/1/2020].

227 Onyango. L, 'Kenya Regulator Shuts Down 4 Firms for Polluting Nairobi River' The East African, 27th August, 2010, available at https://www.theeastafrican.co.ke/scienceandhealth/firms-shut-down-for-polluting-Nairobi-River/3073694-5250300-xrqj6bz/index.html [Accessed on 14/1/2020].

228 Consumer Federation of Kenya, 'Lead Poisoning in Owino Ohuru Slums in Mombasa-Kenya' available at https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf [Accessed on 14/1/2020].

229 Caravanos, 'Conflicting Conclusions or Competing Methodologies? Documenting Soil Lead Pollution in Owino Uhuru, Kenya' Journal of Health & Pollution, Vol. 9, No. 21, March 2019.

This calls for concerted efforts involving both the regulatory agencies such NEMA and corporations to enhance effective environmental compliance.

3.3.2 Human Rights Violation

It has been noted that environmental rights are intertwined with other human rights especially the economic and social rights.[230] The Constitution enshrines these rights which include the right to health, accessible and adequate housing, right to food, clean water and the right to education.[231] Realization of the economic and social rights is largely dependent on the quality of the environment which is a basic condition of life, indispensable to the promotion of human dignity, welfare and the fulfilment of other human rights.[232] Thus, acts and omissions by corporations related to the environment are likely to have impact on the realization of socio-economic rights enshrined in the Constitution. Where water sources are polluted due to effluent discharge from industries, the rights to clean water and health are likely to be compromised. Further, soil pollution is likely to affect the right to food due to its effect on agricultural activities. The right to housing may be affected in instances where people are displaced to cater for economic activities by corporations such as mining. The link between environmental rights and other human rights was succinctly captured by the High Court of Kenya in *Peter K. Waweru –v- Republic*[233].

Corporations therefore have a role to play in the attainment of socio-economic rights in Kenya through environmental compliance.

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230 Muigua. K and Kariuki. F, 'Safeguarding Environmental Rights in Kenya' available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/90689/Muigua_Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf?sequence=1&isAllowed=y [Accessed on 14/1/2020].

231 Art. 43, Constitution of Kenya, 2010.

232 Patricia Birnie & Alan Boyle, International Law and the Environment, Op. Cit.; See also Philippe Sands, Principles of International Environmental Law, 2 ed. (Cambridge: Cambridge University Press, 2003) and Phillipe Cullet, "Definition of an Environmental Right in a Human Rights Context".

233 Peter K. Waweru –v- Republic, (2006) 1 KLR (E&L) 677 at 691.

3.4 Environmental Liability by Corporations in Kenya

3.4.1 Civil Liability

Civil liability against corporations for environmental breaches occurs in the form of compensation and damages aimed at bringing the property or person affected by such acts as far as possible to the condition they were before the breaches occurred.[234] Civil remedies for environmental protection can be classified according to their intended function which could be preventive, compensatory, reparatory or natural restitution.[235] In addition to enshrining the right to clean and healthy environment, the Constitution sets out obligations in respect of the environment.[236] Breach of these obligations may result in enforcement of environmental rights under article 70 of the Constitution which empowers the Environment and Land Court to grant civil remedies such as compensation to the victim or orders of injunction to prevent, stop or discontinue any act or omission that is harmful to the environment. In addition to these remedies, EMCA provides for environmental restoration orders, conservation orders, and easements as part of civil remedies for environmental breaches.[237]

Consequently, corporations in Kenya found liable for environmental breaches have been imposed with civil consequences.[238] Civil liability for environmental breaches by corporations follows common law principles such as the strict liability rule. The rule was laid down in the case of *Rylands vs Fletcher*[239] which imposes strict liability on the owner of land for damage caused by the escape of substances to his or her neighbour's land. Courts in Kenya have applied the strict liability rule and imposed civil liability on corporations for actions that have resulted in damage to the adjacent lands.[240]

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234 Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," Economics of Agriculture 64, no. 3 (2017): 1161-1176.

235 Muigua, K, 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

236 Constitution of Kenya, 2010, Art. 42 & 69, Op Cit.

237 EMCA, Part IX (Sec. 108-116).

238 John Mutungu Waititu –vs- China Wuyi (Kenya) Co. Ltd, Environment and Land Court at Nyahururu, ELC Appeal No. 25 of 2017, (2018) eKLR.

239 Rylands vs Fletcher [1861-73] ALL ER REP 1.

240 Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited, High Court of Kenya at Nakuru, Civil Suit No. 144 of 2009 (2016) eKLR.

Corporations therefore have to guard against instances of environmental damage since their actions can give rise to civil liability.

3.4.2 Criminal Liability

EMCA stipulates various environmental offences which including offences related to *inspection*, offences *related to Environmental Impact Assessment*, offences related to records and *standards and offences related to hazardous wastes (emphasis added)*.[241] The Act also prescribes penalties for these offences.[242] The Act also empowers environmental inspectors appointed under the Act, subject to the Constitution and section 29 of the Office of the Director of Prosecution Act, *to institute and undertake criminal proceedings* against any person before a court of competent jurisdiction (other than a court martial) in respect of any *offence alleged to have been committed by that person under EMCA (emphasis added)*.[243]

Corporates need to be aware of the legal provisions in regard to civil and criminal liability and comply accordingly to avoid incurring liability.

3.5 Environmental Compliance and Corporate Social Responsibility: The Role of Company Secretary as the Compliance Officer

In recent years, the world has experienced awareness in the area of environmentalism.[244] Companies want to reduce pollution, engage in cleaner production, conserve the environment and generally engage in environmentally responsible corporate behaviour.[245] Some companies even go to the extent of incorporating environmental goals into their vision and mission statements.[246] Ideas such as conservation, pollution control, recycling waste,

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241 EMCA, s. 137-146.

242 Ibid.

243 EMCA, s. 118 (b).

244 'Awareness and Action for Environment Protection - Service Européen Pour l'action Extérieure' <https://eeas.europa.eu/topics/climate-environment-energy/63659/awareness-and-action-environment-protection_fr> [Accessed on 11/1/2020].

245 Marcia Narine Weldon, 'Corporate Governance, Compliance, Social Responsibility, and Enterprise Risk Management in the Trump/Pence Era' (2018) 19 Transactions: The Tennessee Journal of Business Law 14.

246 Marie Pavláková Dočekalová and Alena Kocmanová, 'Comparison of Sustainable Environmental, Social, and Corporate Governance Value Added

public awareness and education, use of cleaner fuels and the use of Environmental Impact Assessment and Audits have found their way into the management principles of corporations.[247] The Company Secretary who is a member of the management finds herself engaged in environmental issues at both policy and operational levels.[248] The survival of the corporate body may well depend on how environmental issues are handled.[249] The Company Secretary may find herself engaged in issues of environmental compliance as a matter of law. There is thus a need for knowledge of what the law requires in this regard.

Indeed, it has been observed that many private firms across the world are have adopted different forms of private environmental governance to improve their environmental footprints, going beyond mere compliance with rules of traditional environmental law.[250] As already pointed out in another section, the current Constitution of Kenya 2010 outlines the national values and principles of governance which must guide all persons makes or implements public policy decisions. These values and principles include among others,

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Models for Investors Decision Making' (2018) 10 Sustainability 649; Philip Mirvis, Bradley Googins and Sylvia Kinnicutt, 'Vision, Mission, Values' (2010) 39 Organizational Dynamics 316.

247 Raimi, L., "Who is Responsible? Mainstreaming Corporate Social Responsibility into Ecological Sustainability in the Niger Delta Region of Nigeria." *Development* 9, no. 3 (2019); Borland, H., Ambrosini, V., Lindgreen, A., & Vanhamme, J., "Building theory at the intersection of ecological sustainability and strategic management." *Journal of Business Ethics* 135, no. 2 (2016): 293-307; Dahlmann, F., Stubbs, W., Griggs, D., & Morrell, K., 'Corporate Actors, the UN Sustainable Development Goals and Earth System Governance: A Research Agenda' (2019) 6 The Anthropocene Review 167; Christian Voegtlin and Andreas Georg Scherer, 'Responsible Innovation and the Innovation of Responsibility: Governing Sustainable Development in a Globalized World' (2017) 143 Journal of Business Ethics 227.

248 Trevor D. Wilmshurst, Geoffrey R. Frost, "Corporate environmental reporting: A test of legitimacy theory", Accounting, Auditing & Accountability Journal, Vol. 13 Issue: 1, 2000, pp.10-26; Y Sumiani, Y Haslinda and Glen Lehman, 'Environmental Reporting in a Developing Country: A Case Study on Status and Implementation in Malaysia' (2007) 15 Journal of cleaner production 895;

249 Beate Sjafjell, 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board' (2018) 23 Deakin Law Review 41.

250 Light, S.E., "The Law of the Corporation as Environmental Law." *Stanford Law Review* 71, no. 1 (2019), p.139.

sustainable development.[251] This is affirmed under the Companies Act, 2015[252] which provides that a director of a company should act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to, inter alia — the impact of the operations of the company on the community and the environment.[253]

In addition to the foregoing statutory requirements on environmental reporting, corporations are also notably bound by the provisions of EMCA depending on the various projects or activities that they are involved in.

Under the Environmental Management and Coordination Act, *when an offence under the Act is committed by a body corporate, the body Corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act shall be guilty of an offence* (emphasis added). A Company Secretary is increasingly being viewed as an officer of the company. The law thus imposes a duty on the Company Secretary to ensure compliance with environmental law, rules and regulations.[254]

The penalties under EMCA are harsh and can include imprisonment and fines that ran into hundreds of thousands of shillings.[255] Offences under EMCA relate among other things, failing to submit to inspection[256], offences relating

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251 Constitution of Kenya 2010, Article 10.

252 Companies Act, No. 17 of 2015, Laws of Kenya.

253 Sec. 143(1), Companies Act, 2015; See also Sec. 655 (1); Sec. 655 (4) (b); Sec. 655 (6) (b).

254 'Role of the Company Secretary' <http://aicd.companydirectors.com.au/resources/all-sectors/roles-duties-and-responsibilities/role-of-the-company-secretary?no_redirect=true> accessed 11 January 2020; Lee, J., "From 'Housekeeping' to 'Gatekeeping': The Enhanced Role of the Company Secretary in the Governance System." *Available at SSRN 2733180* (2015); Dr Bob Tricker, 'The Significance of the Company Secretary' 60; Lee, J., "The corporate governance officer as a transformed role of the company secretary: An international comparison," *SCJ Int'l L. & Bus.* 14 (2017): 107.

255 S 138.

256 Sec. 137, EMCA.

to Environmental Impact Assessment[257]; offences relating to records[258]; offences relating to standards[259]; offences relating to hazardous waste[260]; offences relating to pollution[261]; and offences relating to restoration orders[262].

The Act imputes personal liability even where the offence complained of was committed on account of another person (corporate body)[263]; it is thus possible for a Company Secretary to be personally liable for environmental offences committed by the Company. The role of the Company Secretary in Environmental Compliance is thus a statutory one.[264]

The imposition of liability on the directors and officers of a corporation is meant to act as a disincentive to ensure that they establish corporate mechanisms for environmental compliance, and thus avoid passing the cost of non-compliance to consumers and the general public.[265]

A Company Secretary as an officer of the company must then logically ensure that where an Environmental Impact Assessment is required to be prepared, the same has been prepared in accordance with the law[266]. Similarly, where an Environmental Audit is required to be carried out, the Company Secretary should ensure that it is prepared in accordance with the requirements of EMCA or the regulations made thereunder.[267] It also follows that the Company Secretary being an Officer of the Company has a duty to ensure compliance with standards set out under EMCA.

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257 Sec. 138, EMCA.
258 Sec. 139, EMCA.
259 Sec. 140, EMCA.
260 Sec. 141, EMCA.
261 Sec. 142, EMCA.
262 Sec. 143, EMCA.
263 Sec. 145, EMCA.
Republic v National Environment Management Authority & another Ex-Parte Philip Kisia
& City Council Of Nairobi [2013] eKLR, JR Case 251 of 2011.
265 Lord, R., Goldberg, S., Brunnée, J., & Rajamani, L. (Eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012), pp. 315-316.
266 Sec s 58 (7) EMCA; See also Sec. 43, Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.
267 Sec. 68 (3), EMCA.

If he/she does not do so, then liability in criminal law attaches.[268] Similarly, a Company Secretary should ensure that hazardous waste and other chemicals and radioactive materials are handled properly to avoid liability.[269]

3.6 Way Forward

3.6.1 Enhanced Corporate Environmental Compliance

Environmental compliance by corporate organizations is mandatory under EMCA. The foregoing discussion has demonstrated that breach of environmental compliance may result in civil and criminal sanctions upon an organization. This relates to the sanctions that may be imposed for breach of environmental compliance requirements such as damages or closure of the corporation.

As already pointed out, officers of corporations such as directors and company secretaries have to ensure that all environmental laws, regulations and policies are adhered to. Breach of this duty may result in both civil and criminal liability under EMCA.[270]

3.6.2 Adhering to Principles of Sustainable Development

Sustainable development is enshrined as one of the national principles under the Constitution and binds all persons including corporations.[271] Sustainable development is also captured under EMCA and incorporates the principles of public participation, international co-operation, inter and intra generational equity, polluter pays principle and the precautionary principle.[272]

Corporations should therefore adhere to the principles of sustainable development to ensure that their economic activities meet the needs of both the present and future generations.

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268 Sec. 140, EMCA.
269 Sec. 141, EMCA.
270 EMCA, s. 145 (1).
271 Art. 10 (2) (d), Constitution of Kenya, 2010.
272 EMCA, s. 3 (5).

3.6.3 Corporate Social and Environmental Responsibility

Related to sustainable development is the idea of Corporate Social Responsibility (CSR). However, while sustainable development is a legal requirement, CSR is a voluntary undertaking. CSR has been defined as a transparent business practice based on ethical values, legal requirements compliance and respect for the community, people and the environment within which the business operates.[273]

It has been argued that CSR contributes to the economic success of an organization since it meets the needs of stakeholders who are critical to its existence.[274] According to proponents of CSR, a firm's success is dependent on how it is able to safeguard relationship with stakeholders such as employees, communities and customers since socially responsible helps it gain support from such stakeholders.[275] In Kenya, studies have shown that *corporations that have undertaken CSR initiatives such as environmental conservation programs have witnessed success in areas such as sales and market share (emphasis added).*[276] Corporations should therefore pursue corporate environmental responsibilities such as environmental conservation programmes which may include clean up exercises, restoration activities, tree planting exercises and environmental awareness campaigns. These activities have the ability to contribute to the economic growth of an organization.

3.6.4 Environmental Insurance

Environmental Insurance can be used as a tool for environmental management. This however is yet to be popularized in Kenya and EMCA does not have provisions on environmental insurance. It has however been suggested that environmental insurance can be popularized in the country for both medium

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273 Arora, R., & Richa, G. D. (2013). 'Corporate Social Responsibility–Issues and Challenges in India.' International Journal of Research in Finance & Marketing, 3 (2).

274 Freeman. E, and Velamuri. R, 'A New Approach to CSR: Company Stakeholder Responsibility' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186223 [Accessed on 14/1/2020].

275 Ibid.

276 Mwancha. Y, and Ouma. C, 'Effects of Social Responsibility Initiatives on Performance of Safaricom Kenya Limited' International Journal of Innovative Research & Development, Volume 6, Issue 8, August 2017.

and large corporations to shield them against environmental liability which could turn out to be too costly.[277] Some insurance providers have packages on environmental liability covering environmental damage and clean-up costs for pollution.[278] It is therefore important to popularize environmental insurance in the country since *some cases of environmental liability may not be foreseen by a corporation and could arise due to natural acts (emphasis added)*. However, the strict liability rule imposes liability on the corporation even where such acts could not be foreseen. Through environmental insurance, it may be possible to shield a corporation from cases of environmental liability.

3.7 Regulating Grant of Concessions for Corporate Accountability and Transparency

3.7.1 Introduction

The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*[279] was enacted in 2016 to give effect to Article 71 of the Constitution of Kenya and for connected purposes.[280] Article 71 of the Constitution provides that a transaction is subject to ratification by Parliament if it—involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation[281] of any natural resource of Kenya; and is entered into on or after the effective date.[282] This Act was thus enacted in 2016 in line with the constitutional requirement that Parliament should enact legislation providing for the classes of transactions subject to ratification under clause (1).[283]

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277 Muigua. K. 'Strengthening the Environmental Liability Regime in Kenya for Sustainable Development' Op Cit.

278 https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability [Accessed on 11/1/2020].

279 *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act,* No. 41 of 2016, Laws of Kenya.

280 Ibid, Preamble.

281 Notably, section 2 of the Act interprets "exploitation" to mean an activity that confers or is aimed at conferring a benefit on the beneficiary of the grant of the concession or right but does not include an activity that is exploratory in nature.

282 Article 71(1), Constitution of Kenya 2010.

283 Article 71(2), Constitution of Kenya 2010.

This provision is similar to the one found in the Constitution of Ghana[284] which was hailed as a step forward in safeguarding the country's resources against arbitrary grant of concessions to foreign companies by the country's leadership including chiefs especially during the colonial period.[285] This may not be very far from the reality in Kenya especially in such cases as the Lake Magadi soda ash mining concessions and the infamous Maasai community land disinheritance by the colonial masters.[286] Kenya has also suffered other instances of skewed contracts whose resultant activities have been characterised by past reported and unreported cases of non-disclosure and non-declaration of income by the mining companies in the country.[287] Hence, the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016* was a welcome move by the Parliament of Kenya.

This section offers a critical appraisal of the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act* with a view to proposing some recommendations on how the Act can be used in ensuring that the natural resources are exploited and used in a way that benefits communities and the country at large.

3.7.2 Overview of the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016

This Act applies to any transaction entered into on or after the effective date which, under Article 71 of the Constitution, is subject to ratification by Parliament on account of the fact that the transaction- involves the grant of a right or concession by or on behalf of any person to another person for the

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284 Article 268.

285 Wouters, J., Ninio, A., Doherty, T., & Cisse', H. (Eds.), *The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*, The World Bank, 2015, p. 158.

286 Kamau, J., "Magadi saga exposes the ugly side of capitalism," *Daily Nation*, Sunday April 21 2019. Available at https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html [11/1/2020].

287 Sanga, B., "Auditor General reveals how mining companies under-declare tax dues," 25th Aug 2016. Available at https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues [Accessed on 11/1/2020].

exploitation of a natural resource of Kenya; and falls within the class of transactions designated as subject to ratification by section 4 of this Act.[288]

The Act also applies to any transaction involving the - national government, county government, state organ and all county government entities; and grant of a right or a concession by a private person in cases in which such transaction is required by this Act to be ratified by Parliament.[289] This clarification is important to reign in on county governments which, in an attempt to diversify their sources of income and possibly power struggles, may enter into exploitation agreements with foreigners or even worse, frustrate any investors with operations in their counties. The County governments must however be involved in the process. For instance, in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*[290], the Court affirmed that an issue involving prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the County Government – even if the primary activity is assigned to the National Government in our scheme of devolution.[291]

It can therefore be said that the Parliament is to come in later on in the process after the due process as per the Constitution and other statutory requirements has been complied with. Section 4 of the Act provides that the classes of transactions set out in the schedule are subject to ratification by Parliament pursuant to Article 71 of the Constitution.[292] The Act spells out the transactions relating to natural resources, which are subject to the Act.[293]

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288 Sec. 3(1), Natural *Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016.

289 Ibid, sec. 3(2).

290 Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

291 Ibid, para. 104.

292 Natural *Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016, sec. 4 (1).

293 Schedule [Section 4(1), 4(2)(e)].

The Act, however, exempts some transactions from ratification by Parliament.[294] While this exemption is well meaning, there is potential for abuse or confusion. For instance, where the Act exempts the grant of a concession or right to exploit a natural resource through a permit, licence or other authorization issued in accordance with the requirements of national or county government legislation from such ratification, what measures will be put in place to determine the seriousness of the transaction in question and the ramifications of such exemption? This, coupled with the exemption of the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract, are both likely to be used for personal gains especially in light of the rampant corruption in the country's governance structures. Would Parliament be compromised to classify a particular transaction as qualifying under these two exemptions for purposes of bypassing the Act's provisions? Again, how will grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract be qualified against the constitutional provisions that vest all minerals and mineral oils as defined by law in the government of Kenya?[295] How are the private persons to either benefit from the exploitation or the ones to grant the concession to be determined to prevent abuse? Is it possible for a private person to use the Parliament through insider lobbying to access or get a particular transaction for exploitation of a particular resource? These are some of the questions that may arise in light of the listed exemptions.

A transaction, which under this Act, is subject to ratification by Parliament, shall only be effective once it is ratified, and where Parliament has declined to ratify any transaction under this Act, the transaction shall be null and void.[296] The Act spells out certain relevant considerations in deciding whether or not to ratify an agreement: the applicable Government policy; recommendations of the relevant regulatory agency; comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located; adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement;

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294 Ibid, sec. 4 (2).
295 Constitution of Kenya 2010, Article 62 (1) (f) (3).
296 Ibid, sec. 7.

the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right the applicable law has been complied with.[297]

These considerations, if fully upheld may be useful in giving the ratification process some credence. However, this is based on the assumption that Parliament is above reproach as far as following due process and putting into consideration the general public's interests is concerned.

Notably, the Cabinet Secretary responsible for the transaction that is subject to ratification may, pursuant to Article 35 of the Constitution, grant a request that the agreement or portions of it ought not to be publicly disclosed on account of commercial confidentiality, national security or other public interest considerations.[298] While this may be a useful safeguard for purposes of commercial confidentiality, there is need for Parliament and other stakeholders to ensure that the same is not abused to hide or deny the public access to useful information.

Arguably, any such non-disclosure should also be done in line with the mining regulations as envisaged under the Mining Act 2016, as already discussed elsewhere in this paper. It is assumed that these regulations and other relevant statutory requirements are to be complied with before the agreements reach the ratification stage in order to avoid any foul play as far as due process is concerned. These Regulations, among others under different statutes dealing with natural resources exploitation[299], are meant to ensure that the benefits flowing from such exploitation get to benefit the communities and the economy in general. Notably, there are still complaints from communities about either lack of involvement or lack of direct benefits such as employment benefits.[300] They have been feeling marginalised and sometimes outright

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297 Natural *Resources (Classes of Transaction Subject to Ratification by Parliament) Act,* 2016, sec. 9.

298 Natural *Resources (Classes of Transaction Subject to Ratification by Parliament) Act,* 2016, sec. 13 (1).

299 For instance, see Mining Act, No. 12 of 2016, *Petroleum Act, No. 2 of 2019*, *Forests Management and Conservation Act, No. 34 of 2016*, *Water Act, No. 43 of 2016*.

300 Cordaid, "Oil Exploration In Kenya: Success Requires Consultation," *Assessment Of Community Perceptions Of Oil Exploration In Turkana County, Kenya*,

ignored as far as benefit sharing is concerned.[301] The *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act,* 2016 was thus meant to include the Parliament in ensuring that natural resources are exploited in a responsible manner that benefits concerned communities and the people of Kenya in general.

3.7.3 Making Natural Resources Work for the People: Challenges and Prospects

It is noteworthy that the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act* outlines some of the relevant considerations in deciding whether or not to ratify an agreement as including: comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located; adequacy of stakeholder consultation; the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement; the benefits which the local community is likely to enjoy from the transaction; and whether, in granting the concession or right the applicable law has been complied with.[302]

Apart from these considerations, it is worth pointing out that the Constitution has also laid out some national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[303]

Report, August, 2019; Etyang, H., "No oil will leave Turkana without security and jobs, protesters say," *The Star,* 27 June, 2018. Available at https://www.the-star.co.ke/news/2018-06-27-no-oil-will-leave-turkana-without-security-and-jobs-protesters-say/ [Accessed on 11/1/2020].

301 See generally, Schilling, J., Locham, R., & Scheffran, J., "A local to global perspective on oil and wind exploitation, resource governance and conflict in Northern Kenya." *Conflict, Security & Development* 18, no. 6 (2018): 571-600; see also Mwakio, P., "Mvurya: Public participation in mineral resource exploitation mandatory," *Standard Digital,* 22nd May, 2019. Available at https://www.standardmedia.co.ke/business/article/2001326660/mvurya-public-participation-in-mineral-resource-exploitation-mandatory [Accessed on 11/1/2020].

302 Natural *Resources (Classes of Transaction Subject to Ratification by Parliament) Act,* 2016, sec. 9.

303 Article 10(1), Constitution of Kenya 2010.

It is noteworthy that natural resources' exploitation and all the related activities are meant to benefit the country as well as communities that live in the areas where these resources are to be found. The Constitution of Kenya 2010 makes provisions on "natural resources" which means the physical non-human factors and components, whether renewable or non-renewable, including—*rocks, minerals, fossil fuels and other sources of energy*.[304] While the Act may not require ratification of all the transactions involving exploitation of different resources, it is important to note that there are other legal provisions that seek to safeguard the interests of the country and the general public as far as benefit sharing is concerned and should therefore be upheld in entering these agreements.

While the Act is well meaning in its mandate, there are notably some earlier exploitation agreements that were entered into before the enactment of the Act and were not revised in line with the Act.[305] The Act specifically provides that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.[306]

The implication of this provision is that there may have been some important transactions that greatly affect communities but do not get the chance to undergo the ratification process. As a result, the communities feel sidelined as far as decision-making is concerned and the environment also gets to suffer. While there are notably other statutory provisions in place to take care of some of these issues, there is the risk of complacency in some government organs and agencies which may mean that due process may not have been followed. There are still some complaints from some Kenyan communities about how natural resources exploitation activities within their localities are carried out and the lack of inclusion in decision-making and benefit sharing.[307] For

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304 See Article 260; and Section Five of the Constitution of Kenya.

305 For instance, the agreements on exploitation of the oil and gas in Turkana; Titanium mining in Kwale, among others.

306 Sec. 16, Natural *Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016.

307 Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation*, Tuesday February 12 2013. Available at

instance, the oil and gas mining activities in the Turkana region have been facing serious challenges from the locals who have been complaining about inadequate consultations, inadequate benefits and a general feeling of marginalization from the Government and the contractors.[308] There have also been complaints from other natural resources exploitation about environmental degradation which directly affects the livelihoods of the communities living with such areas.[309]

There is scarce information on the existing ratifications since 2016 because, although the Act provides that the Cabinet Secretary shall establish and maintain a central register of agreements relating to natural resources and other transactions which have been ratified as per the Act as well as ensuring that on an annual basis, they publish a report on the summary of the transactions submitted under this Act and the status of ratification of transactions, there are no publicly available reports or published summary of such reports. The effect

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https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html [Accessed on 11/1/2020].

308 Johannes, E. M., Zulu, L. C., & Kalipeni, E., "Oil discovery in Turkana County, Kenya: a source of conflict or development?" *African Geographical Review* 34, no. 2 (2015): 142-164; Mkutu Agade, K., "'Ungoverned Space'and the Oil Find in Turkana, Kenya," *The Round Table* 103, no. 5 (2014): 497-515; Enns, C., & Bersaglio, B., "Pastoralism in the time of oil: Youth perspectives on the oil industry and the future of pastoralism in Turkana, Kenya." *The Extractive Industries and Society* 3, no. 1 (2016): 160-170; Enns, C., "Experiments in governance and citizenship in Kenya's resource frontier," PhD diss., University of Waterloo, 2016. Available at https://core.ac.uk/download/pdf/144149828.pdf [Accessed on 11/1/2020]; See also Parliament of Kenya, the Senate, *The Hansard*, Wednesday, 27th March, 2019, *Petitions: Iron Ore Mining In Kishushe Area,Taita-Taveta County*, available at http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2C%2027th%20March%2C%202019.pdf [Accessed on 11/1/2020].

309 Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County: HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti*, September, 2017Available at http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf [Accessed on 11/1/2020]; See also Schilling, J., Locham, R., Weinzierl, T., Vivekananda, J., & Scheffran, J., "The nexus of oil, conflict, and climate change vulnerability of pastoral communities in northwest Kenya," *Earth System Dynamics* 6, no. 2 (2015): 703-717.

of such laxity on the part of the Ministry is violation of the right to information which is useful for public participation in decision-making processes and any potential pursuit of their other rights in case of perceived violation.

Environmental laws and regulations and other laws that govern natural resources exploitation are meant to ensure that due process and other legal requirements are met but there are still instances where exploitation agreements are still challenged in courts and other forums for alleged failure to abide by the law.[310] In order to bring the existing contracts or agreements especially in the extractives industry in line with the law on ratification of agreements, there may be a need to consider incorporating periodic contract review mechanisms. Such reviews would also be in line with international best practices, such as the principles of Extractive Industries Transparency Initiative (EITI)[311] which set the global standard to promote the open and accountable management of oil, gas and mineral resources.[312] Through reviews, there may be demonstrated accountability and transparency which is important for the contractors, the government and the communities at large.[313] Periodic contract review mechanisms, which are provisions in contracts that formally require parties to meet at particular intervals to review the terms

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310 See Parliament of Kenya, the Senate, *The Hansard*, Wednesday, 27th March, 2019, *Petitions: Iron Ore Mining In Kishushe Area,Taita-Taveta County*, available at http://www.parliament.go.ke/sites/default/files/2019-04/Wednesday%2C%2027th%20March%2C%202019.pdf [Accessed on 11/1/2020]; See also Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); Okiya Omtatah Okoiti v Kenya Power and Lighting Company & 10 others [2018] eKLR, Petition No. 14 of 2017.

311 See Muigua, K., "Promoting Open and Accountable Management of Extractives in Kenya: Implementing the Extractives Industries Transparency Initiative," August, 2019. Available at http://kmco.co.ke/wp-content/uploads/2019/08/Implementing-the-Extractives-Industries-Transparency-Initiative-in-Kenya-Kariuki-Muigua-15th-August-2019.pdf [Accessed on 11/1/2020].

312 Extractives Industries Transparency Initiative, "Who we are," available at https://eiti.org/who-we-are [Accessed on 11/1/2020].

313 Haufler, V., "Disclosure as governance: The extractive industries transparency initiative and resource management in the developing world." *Global Environmental Politics*, vol.10, no. 3 (2010): 53-73; See also African Union, "Africa mining vision," *AU, Addis Ababa* (2009).

of the contract, are mechanisms that may facilitate the process of negotiating contractual changes to accommodate changing circumstances over the term of extractive industries contracts.[314]

Some countries such as Tanzania have sought to renegotiate their extractives exploitation contracts where it was deemed necessary. The Tanzanian government enacted laws that introduced changes in the exploitation of natural resources in the country's mining sector to ensure that Tanzania's natural resources are exploited to benefit the citizens.[315] Some of the laws such as the Natural Wealth and Resources Contracts *(Review and Re-negotiation of Unconscionable Terms) Act, 2017*[316] are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.[317] The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 is meant to give powers to parliament to direct the Government to re-negotiate and rectify any term that seem to bear questionable circumstances in the contracts.

The provision for renegotiation in Tanzania is a notable departure from Kenya's position which is that a transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid

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314 Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *Journal of Sustainable Development Law and Policy (The)*, Vol.7, no. 1 (2016): 116-136, p. 116; Lax, D. A., & Sebenius, J. K., *Insecure contracts and resource development*, Division of Research, Graduate School of Business Administration, Harvard University, 1981.

315 "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html [Accessed on 11/1/2020].

316 Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No.6 of 2017, Laws of Tanzania. Available at https://tanzlii.org/tz/legislation/act/2017/6-0 [Accessed on 11/1/2020].

317 "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html [Accessed on 11/1/2020].

and lawful notwithstanding the absence of ratification by Parliament.[318] The question that arises is whether, where such a transaction is later rendered unconscionable due to the prevailing circumstances, is there any legal framework to facilitate renegotiation as is the case in Tanzania.

While statutory annual reporting requirements under different laws may seem like a cure for this, it is worth pointing out that there is hardly any mechanism in place to ensure that such reporting is done, and where the Cabinet Secretary in question fails to follow up or raise queries on such reporting, the lack or failure of contractors to report will most likely go unreported and unnoticed.[319] It may thus be necessary to consider going the Tanzanian way; putting in place a separate law to govern such matters. It has rightly been pointed out that provided that the parties take advantage of the opportunity to renegotiate terms, the contract terms and conditions can be readjusted before the parties are so desperate and frustrated that the investor decides to stop work or the Government decides to terminate permits and concessions.[320]

3.8 Conclusion

The Constitution of Kenya 2010 calls for concerted efforts of all persons in governance matters including in natural resources governance and management.[321] Sound environmental governance and natural resources management ought to consider these values and principles.[322] The Parliament of Kenya is afforded an opportunity to determine how natural resources exploitation is carried out through ratification of agreements. It is important that the Parliament not only considers the ability of the contractor in question to deliver but must also consider the country's development policies and must

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318 Sec. 16, Natural *Resources (Classes of Transaction Subject to Ratification by Parliament) Act*, 2016.

319 Sturesson, A., & Zobel, T., "The Extractive Industries Transparency Initiative (EITI) in Uganda: who will take the lead when the government falters?" *The Extractive Industries and Society*, Vol.2, no. 1 (2015): 33-45.

320 Mandelbaum, J., Swartz, S. A., & Hauert, J., "Periodic review in natural resource contracts," *op cit.*, p. 117; Smith, D. N., & Wells, L. T., "Conflict avoidance and concession agreements," *Harvard International Law Journal* 17 (1976): 51.

321 Article 10(1), Constitution of Kenya 2010.

322 Prno, J., & Slocombe, D. S., "Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories," *Resources policy*, Vol.37, no. 3 (2012): 346-357.

also remember the affected communities in certain areas with a view to ensuring that the resources in question get to benefit them especially in light of the fact that they may bear the brunt of most of the adverse environmental degradation. A good example would be the people living in Turkana region where oil and gas exploration and exploitation activities are ongoing.

The people living in Mui Basin region will also bear the brunt of the adverse effects of coal mining.[323] Laws are meant to protect the interests of the people and the Parliament must as such ensure that any ratification of agreements that they carry out are geared towards this. Existing agreements should also be reviewed accordingly to ensure that the considerations set out under existing laws and specifically the *Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016*.

It is important that the policy and legal framework and all the relevant actors work towards enhancing benefits from natural resources exploitation. Natural resources exploitation should contribute to the realisation of the sustainable development goals.[324] Corporate environmental compliance remains a central theme in the environmental governance debate in Kenya. In case of violation of these rules, both civil and criminal liability may be imposed upon the corporation. Corporations can therefore ensure environmental compliance by *adhering to environmental laws, rules and regulations, promoting sustainable development, engaging in Corporate Social Responsibility activities and taking up environmental liability insurance (*emphasis added*)*. Corporate Environmental Compliance is thus vital in the quest for attainment of sustainable development.

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323 Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

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

4. Realising Environmental Democracy in Kenya for Effective Environmental Management

4.1 Introduction

This section critically examines the concept of environmental democracy in light of the current Constitution of Kenya 2010 and the existing framework on facilitating enjoyment of environmental democracy by the Kenyan people. It traces the legal foundations of this right in the international environmental discourse as well as its place in the Kenyan law. The section proffers recommendations on the practical ways through which this right can be actualized based on the existing legal, institutional and policy frameworks.

Over the years, environmental democracy has been incorporated as one of the important aspects of environmental governance and management both in the international and national environmental law discourse. While most national legal instruments on environmental governance do not expressly refer to the concept of environmental democracy as such, the same is incorporated within the provisions, both constitutional and statutory. Indeed, it has been pointed out that the global trend toward adopting environmental rights within national constitutions has been largely regarded as a positive development for both human rights and the natural environment.[325]

The section traces environmental democracy within the constitutional and main statutory framework on environment law in Kenya. It also offers a post 2010 Constitution perspective on the extent to which the concept of environmental democracy has been embraced and incorporated into the environmental policies and laws in the country.[326] The author ultimately makes a case for environmental democracy as a means to an end in promoting and realisation of environmental rights for Kenyan communities, for peace and development, in the context of sustainable development.

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325 See Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *Global Environmental Politics* Early Access (2018): 99-121 at 99.

326 See a pre-Constitution 2010 discussion on the same topic, Muigua, K & Musyimi, P.N., "Enhancing Environmental Democracy in Kenya" (2008). Available at http://www.kmco.co.ke/attachments/article/81/072_Envtal_Dem_Kenya.pdf [Accessed on 15/1/2020].

4.2 Need for Environmental Democracy as an Environmental Right

4.2.1 The Concept of Environmental Democracy

The concept of environmental governance has been defined as encompassing the relationships and interactions among government and non-government structures, procedures and conventions, where power and responsibility are exercised in making environmental decisions.[327] Furthermore, it concerns how the decisions are made, with a particular emphasis on the need for citizens, interest groups, and communities generally, to participate and have their voices heard.[328] Principles such as inclusivity, representation, accountability, efficiency, and effectiveness, as well as social equity and justice, are believed to be the foundations of good governance.[329]

'Environmental democracy is rooted in the idea that meaningful public participation is critical to ensure that land and natural resource decisions adequately and equitably address citizens' interests.[330] In addition, at its core, environmental democracy involves three mutually reinforcing rights: the right to freely access information on environmental quality and problems; the right to participate meaningfully in decision-making; and the right to seek enforcement of environmental laws or compensation for harm.[331]

Democratic participation of citizenry in political processes is considered as one of the tenets of an open and just society around the world.[332] It has also

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327 Jeffery, Michael I, "Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice," *Journal of South Pacific Law* 9, no. 2 (2005).

328 Ibid.

329 "Part II: State of the environment," 54. Available at https://www.environment.gov.za/sites/default/files/docs/part2_environmental_governance.pdf [Accessed on 15/1/2020].

330 Environmental Democracy Index, 'Background and Methodology: Environmental Democracy Background,' available at http://environmentaldemocracyindex.org/about/background_and_methodology [Accessed on 15/1/2020].

331 Ibid.

332 See Jasanoff, Sheila, "The dilemma of environmental democracy," *Issues in Science and Technology* 13, no. 1 (1996): 63-70 at 64; See also Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural

been opined that 'participatory democracy seems at first glance to be wholly congenial with the spirit of science, which places its emphasis on free inquiry, open access to information, and informed critical debate'.[333] The main argument is that 'increasing knowledge and increasing participation - in the sense of larger numbers of voices at the table - do not by themselves automatically tell us how to act or how to make good decisions….because participation and science together often produce irreducible discord and confusion.'[334]

Environmental democracy is pegged on the right and ability of the public to freely access relevant and timely information, provide input and scrutiny into decision making, and to challenge decisions made by public or private actors which may harm the environment or violate their rights before an accessible, independent, and fair legal authority.[335] Environmental democracy is therefore an important element in effective environmental governance.

States make attempts to address environmental changes experienced at the national level by adopting environmental policy innovations whose origins lie at the global level, including environmental institutions, instruments, laws, and policies.[336] Principle 10 of the *1992 Rio Declaration on Environment and Development*[337] envisages the various elements of environmental governance

Environmental Rights and Environmental Justice," *Global Environmental Politics* Early Access (2018): 99-121 at 102.

333 Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 64.

334 Ibid, at 65.

335 Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.2. Available at http://environmentaldemocracyindex.org/sites/default/files/files/EDI_Technical%20Note%20Final%207_9_15.pdf [Accessed on 15/1/2020].

336 Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 99.

337 Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992) Annex I, *Rio Declaration on Environment and Development the United Nations Conference on Environment and Development*, A/CONF.151/26 (Vol. I). Adopted in Rio de Janeiro, Brazil on 14 June 1992.

where it provides that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.[338]

Although not directly applicable to Kenya, the *Aarhus Convention*[339] offers significant pointers on effective environmental governance. The Convention provides for: the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"); the right to participate in environmental decision-making ("public participation in environmental decision-making"); and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").[340]

It has been argued that 'participation is central to the notion of environmental democracy, and that participation in environmental governance enhances the likelihood that government agencies will be held accountable to the public; infuses local knowledge into decision-making processes; increases popular support for policies; and produces higher-quality planning outcomes, environmental decisions, and conservation efforts'.[341]

4.2.2 Environmental Democracy as an Empowerment Tool for Achieving Sustainable Development

The concept of sustainability provides the nexus of economic, social, and environmental spheres of life.[342] Sustainable Development Goal (SDGs) 16

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338 *Rio Declaration on Environment and Development the United Nations Conference on Environment and Development*.

339 United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.

340 European Commission, The Aarhus Convention: What is the Aarhus Convention? Available at http://ec.europa.eu/environment/aarhus/ [Accessed on 15/1/2020].

341 Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 102.

342 Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 104; See also Fisher, Joshua & Kristen Rucki, "Re-conceptualizing the Science of Sustainability: A Dynamical Systems Approach to Understanding the Nexus of Conflict, Development and the Environment," *Sustainable Development* 25, no. 4 (2017): 267-275.

aims 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'.[343] The SDGs also seek to promote participation of local communities in natural resource management.[344] The environmental democracy rights of access to information, public participation, and access to justice in environmental matters are promoted as key drivers of informed, accountable decision making and citizen empowerment.[345]

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to access and influence decision-making processes on various levels (household, community, national, global) in order to ensure the proper representation of one's interests (also described as getting a ―voice); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.[346]

It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.[347] Political empowerment requires inclusion in democratic

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343 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

344 Ibid, Goal 6b.

345 Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.1.

346 Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online, Vol. 2, No 1, 2009*, p.121.

347 The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), p. 4. Available at http://www.jimmenick.com/henhud/hhldph.pdf [Accessed on 15/1/2020].

decision-making processes which is equated to mainly gaining a voice within the local and/or central state.[348]

It is important to point out that while policy and legal framework is necessary, it cannot alone guarantee achievement of environmental justice for communities.

Indeed, the place of public participation has been justified as important in getting the public's views on scientific and technological issues.[349] Sustainable development needs to draw upon the best knowledge available from the relevant scientific and stakeholder communities.[350] Public participation, as observed above, is important as it provides a forum whereby the scientific information and values of the publics and the agency can be integrated so that the final decision is viewed as both desirable and feasible by the broadest portion of society.[351]

Environmental democracy presents an opportunity to entrench a culture of environmental justice for communities through formal and informal approaches.

4.3 Status of Environmental Democracy in Kenya

As already pointed out, environmental democracy includes the following: the rights of access to information, public participation and access to justice in environmental matters. These are mainly promoted through various concepts

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348 Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement, *Political Geography, (*Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, pp. 393–406.

349 Petts, J. and Brooks, C., "Expert Conceptualisations of the Role of Lay Knowledge i Environmental .Decision making: Challenges for Deliberative Democracy," *Environment and Planning A, 38,* 2006, pp.1045-1059 at pp.1045-46.

350 Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 4. Available at http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf [Accessed on 15/1/2020].

351 Ibid, p.4.

such as transparency, accountability and inclusiveness in environmental governance.

The Constitution of Kenya 2010 envisages the national values and principles of governance, including environmental governance matters. The relevant values and principles in this context include: democracy and participation of the people; equity; social justice; inclusiveness; equality; non-discrimination and protection of the marginalised; good governance; integrity; transparency and accountability; and sustainable development.[352]

The Constitution of Kenya 2010 guarantees the right of every citizen to: access information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom.[353] The State is however obligated to publish and publicise any important information affecting the nation.[354] These constitutional provisions are buttressed by the *Access to Information Act, 2016*[355] which was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.

The *Environment and Land Court Act, 2011* provides that 'in exercise of its jurisdiction under this Act, the Court shall be guided by the following principles-the principles of sustainable development, including—the principle of public participation in the development of policies, plans and processes for the management of the environment and land' and the national values and principles of governance under Article 10(2) of the Constitution.[356]

Under Article 69 (1) (d) of the Constitution, which deals with the environment and natural resources, the State is obligated to "encourage public participation in the management, protection and conservation of the environment."

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352 Article 10(2), Constitution of Kenya 2010.
353 Article 35(1), Constitution of Kenya 2010.
Article 35(3), Constitution of Kenya 2010.
355 Access to *Information Act*, No. 31 of 2016, Laws of Kenya.
356 Section 18, Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

There is an attempt by Parliament to statutorily entrench public participation through the proposed *Public Participation (No. 2) Act, 2019*[357] which seeks to provide a general framework for effective public participation; to give effect to the constitutional principles of democracy and participation of the people under Articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196,201(a) and 232(1)(d) of the Constitution; and for connected purposes.[358] The development of a law on public participation is a step in the right direction in enhancing environmental democracy in Kenya. One of the pillars underpinning the devolved system of governance in Kenya is public participation as envisaged under Article 174(c) of the Constitution of Kenya which outlines one of the objects of devolution as "to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them". Indeed, the Fourth Schedule to the Constitution, in Part 2(14), states that the functions and powers of the County government include: *"Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level."*[359]

In The Matter of the National Land Commission [2015] eKLR, the Supreme Court was of the opinion that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy.[360]

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357 *Public Participation (No. 2) Act, 2019,* Nairobi, 11th October, 2019), Kenya Gazette Supplement No. 170 (National Assembly Bills No. 71).

358 Preamble, *Public Participation (No. 2) Act, 2019.*

359 See also *County Public Participation Guidelines 2016.*

360 In The Matter of the National Land Commission [2015] eKLR, para. 21; See also Muigua, K., *et al,* (2015) *Natural Resources and Environmental Justice in Kenya,* (Glenwood Publishers Limited, 2015, Nairobi).

Environmental democracy is a means to an end; the aim is to achieve environmental justice.[361] Despite the foregoing constitutional and statutory provisions guaranteeing public participation, access to information and access to justice in environmental matters, Kenya still lags behind as far as environmental democracy is concerned. There arises a challenge regarding the implementation of the environmental rights as guaranteed under the Constitution and the other statutes. 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'.[362]

Communities are still suffering in the hands of foreign and local investors and complacent state agencies who fail to uphold the rule of law in environmental governance matters.[363] The next section looks at how communities and other stakeholders can employ more meaningful and practical approaches for realisation of environmental democracy for the Kenyan people.

4.4 Realising Environmental Democracy in Kenya

Enhanced environmental democracy for the Kenyan people is one of the ways through which the internationally and constitutionally guaranteed environmental rights can be achieved. The associated rights of access to information, access to public participation, and access to justice (the three "access rights") are considered practical means of ensuring that decisions by governments consider sustainable development concerns and the interests of

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361 The *2030 Agenda for Sustainable Development* Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. (Para. 16) (https://cic.nyu.edu/sites/default/files/publication_sdg16_roadmap_discussion_paper_07mar17.pdf [Accessed on 15/1/2020].).

362 Article 22(1), Constitution of Kenya 2010.

363 B. Jenje, 'MP to compensate families injured by lead poison 'if guilty',' *Daily Nation*, Wednesday, April 29, 2015, available at http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9ivl/-/index.html [Accessed on 15/1/2020]; See also M. W. Chege, *et al*, 'Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,' *International Journal of Physical Sciences*, Vol. 8, No.17, 9 May, 2013, pp. 835-839.

the poor.[364] There are diverse ways through which these rights can be promoted and realised, ranging from formal to informal mechanisms. It has been documented that 'that where environmental policy incorporates procedural rights, environmental protection efforts are more robust'.[365]

In addition, 'achieving environmental justice requires that vulnerable communities have opportunities to participate meaningfully in decision-making processes'.[366] Equipping underrepresented groups with environmental information and avenues for influencing policy decisions is also believed to strengthen the values and practices associated with democracy'.[367] Different forms of participatory processes have also been suggested as a way of improving environmental governance.[368]

This section proffers suggestions on how environmental democracy can meaningfully be realised for the benefit of all. While this section is not exhaustive on the possible ways of doing this, it offers some of the most viable means through which environmental democracy as a facilitative right can be achieved.

4.4.1 Mobilising Communities/Citizenry through Demonstrations, Picketing and Petitions

The Constitution of Kenya 2010 guarantees that 'every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities'.[369] Courts have also commented on this right and affirmed its importance in expressing personal views as part of a democratic society.[370]

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364 World Resources Institute, "The Access Initiative (TAI)," available at http://www.wri.org/our-work/project/access-initiative-tai/commissions [Accessed on 15/1/2020].

365 Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 100.

366 Ibid, at 100.

367 Ibid, at 100.

368 Ibid, at 102.

369 Article 37, Constitution of Kenya 2010.
Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others [2016] eKLR, Petition 169 of 2016.

When done within the confines of law, assemblies, demonstrations, picketing and petitions can be effective channels of realizing environmental democracy for the general public and affected communities in cases of environmental justice.[371] These channels are especially useful in instances where there are challenges in accessing courts for public litigation either due to limited resources or lack of courthouses. This channel has successfully been used in other jurisdictions with satisfactory results..[372]

Petitions to the Parliament, with proper guidance, can also provide a good channel for communities especially those suffering injustices to communicate their concerns and problems to the Parliament for discussion and possibly policy and legal responses.[373] It is, therefore, important to sensitise communities on the important role that demonstrations and picketing can play in enhancing environmental justice by giving a voice to the unheard communities.

4.4.2 Role of Media, Civil Society in Environmental Governance

Scholars have suggested that the civil society can play a major role in global environmental governance including: collecting, disseminating, and analysing information; providing input to agenda-setting and policy development processes; performing operational functions; assessing environmental conditions and monitoring compliance with environmental agreements; and advocating environmental justice.[374]

Regarding the place of media in environmental governance, it has been documented that countries with a larger newspaper circulation have better environmental responsiveness, on average, despite controlling for the extent of environmental regulation, the availability of information on environmental outcomes, and the level of economic development measured as GDP per

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371 Ibid.

372 Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 65.

373 Article 118 (1), Constitution of Kenya 2010.

374 See Gemmill, Barbara & Abimbola Bamidele-Izu,"The role of NGOs and civil society in global environmental gover nance," *Global environmental governance: Options and opportunities* (2002): 77-100 at 77; 83.

capita.[375] Furthermore, public opinion pressure generated by an active press is also essential to efforts by private sector organizations to use self-regulation to improve corporate governance.[376]

An improved working relationship between the government and non-state actors aimed at enhancing the contributions from civil society participation need to be enhanced through a strengthened, more formalized structure for engagement.[377]

4.4.3 Streamlining Access to Environmental Information

Ensuring access to information on environmental matters has been touted as one of the ways that enhance the capacity of citizens to check abuses that public or private actors commit.[378] Empowered communities also find it easier to hold to account those who flout environmental laws, be they government entities, private institutions or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors. It has rightly been asserted that informed with basic facts about the quality of their environment, citizens can become active participants in identifying and resolving issues at both local and national levels.[379]

Dissemination of information and knowledge in meaningful forms can enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

4.4.4 Enhanced Public Participation

Effective participation in decision-making processes by local communities is believed to be one of the ways through which they can articulate and

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375 Dyck, Alexander & Zingales, Luigi, "The Corporate Governance Role of the Media," August, 2002, p.5. Available at http://faculty.chicagobooth.edu/finance/papers/corporate%20governance.pdf [Accessed on 11/1/2020].

376 Ibid, at 11.

377 Gemmill, Barbara & Abimbola Bamidele-Izu, "The role of NGOs and civil society in global environmental governance," *Global environmental governance: Options and opportunities* (2002): 77-100 at 96.

378 Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 103.

379 Hazen, S., "Environmental democracy," *Our Planet 8.6-March 1997*, op cit.

effectively enforce their common interest.[380] The need for a broader conceptualisation of public participation was canvassed in the case of *Thuku Kirori & 4 Others v. County Government of Murang'a*[381] where the Court held that ***the participation of the public in affairs that concern them should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals who are out to rip maximum profits out of services for which they are neither registered nor qualified to offer; the ultimate goal for public engagement as envisaged in the constitution is for the larger public benefit***[382](emphasis added).

Notably, natural resource related conflicts in Kenya are still prevalent and a cause of much concern. Natural resources are a source of livelihood for many, and any development activities that affect the same in any way ought to seek the social licence through engaging the affected communities through public participation. Competition for scarce resources may lead to a 'survival of the fittest' situation.[383]

Lack of environmental democracy and environmental justice aggravates the situation since the affected groups are neither involved nor supplied with information regarding the resources. The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy.[384] Environmental justice ensures equitable treatment of people in ensuring access to and sharing of environmental resources and justice in environmental matters.[385]

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380 GH, Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* para. 20.

381 Petition No. 1 of 2014; [2014] eKLR.

382 See also *In the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference No. 2 of 2014, Para. 340.

383 See generally, "Section 5: Survival at Stake: Violent Land Conflict in Africa," *Small Arms Survey 2013*, available at *http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Section-5-EN.pdf* [Accessed on 15/1/2020].

384 Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), p. 332.

385 United States Environmental Protection Agency, 'Environmental Justice Analysis', available at *http://www.epa.gov/sustainability/analytics/environmental-justice.htm* [Accessed on 15/1/2020]. .

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the Constitution.[386] This is the true essence of environmental democracy; affording communities guaranteed and meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.[387]

4.4.5 Entrenching Environmental Ethics

Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. There is need to empower communities so as to actualise these constitutional provisions. It calls for active participation of all. Kenyans have a role to play in achieving sustainable development agenda. There is therefore a need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same. The citizenry should practise preventive measures. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources.

There is a need to encourage voluntary compliance with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. Such awareness can include organizing public forums, use of media to disseminate information and environmental campaigns and introducing comprehensive and up-to date environmental studies in learning institutions, at all levels.

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386 See Art. 60(1) (g); Art. 159.

387 Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf [Accessed on 15/1/2020].

Incentives and disincentives can also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.[388]

Apart from inclusion in decision-making and governance matters, these communities should be empowered economically and socially in a way that ensures that they have a diversified source of livelihood in order to insulate them against climate change and other adverse environmental factors. This is also a way of ensuring that pressure on available environmental resources is minimised and subsequently reduce or prevent emergence of inter-ethnic conflicts.

4.4.6 Proactive Role of Courts in Environmental Justice

The judiciary is considered a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance amongst environmental, social and developmental considerations through its judgments and declarations.[389] The *Rio Declaration* in principle 10 emphases the importance of courts by stating that: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.… *Effective access to judicial and administrative proceedings*, including redress and remedy, shall be provided (emphasis added).[390]

Section 3 (5) of *Environment (Management and Coordination) Act 1999*[391] (EMCA) provides that "in exercising the jurisdiction conferred upon the Court under subsection 3, the High Court shall be guided by the principles of

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388 International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' p.2, available at http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf [Accessed on 15/1/2020].

389 Gupta, K.S., The role of judiciary in promoting sustainable development: Need of specialized environment court in India. *Journal of Sustainable Development*, Vol. *4*, No.2, 2011, p.249-253 at p. 249.

390 United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

391 No. 8 of 1999, Laws of Kenya.

sustainable development. Courts have a role to play in promoting sustainable development agenda. This has also been affirmed through various cases. For instance, in *Mohamed Ali Baadi & 9 Others v Attorney General* [2018] eKLR, the Court observed that there is a narrow class of cases where the exhaustion doctrine in environmental-related controversies does not mandatorily oust the jurisdiction of the court as the first port of call, especially where the alternative fora do not provide an accessible, affordable, timely and effective remedy. The court was also of the opinion that the precautionary principle allows the court to intervene where it is necessary to do so in order to avert a violation of environmental governance principles. This approach envisages intervention by the Courts to step in and protect the environment without necessarily looking for immediate proof of likely violation of principles of environmental governance.

In the case of *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, the Court rightly stated that "Besides the above general guiding principles, a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests".[392]

The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws and principles of environmental law, including promotion of sustainable development, are interpreted and applied fairly, efficiently, and effectively.[393]

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[392] Para 22, *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*.

[393] International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' p.2, available at http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf [Accessed on 15/1/2020].

4.5 Conclusion

Environmental democracy, while not expressly acknowledged or recognised as one of the environmental rights, is a crucial component of the procedural rights associated with realisation of environmental rights, especially environmental justice. It is an important link in actualizing and providing a channel through which the general environmental rights may be realised by all, regardless of their social standing.

Getting a platform to voice their environmental related concerns is important for affected persons or communities. Enhanced environmental democracy can potentially afford them this platform. Thus, environmental democracy is an important component of procedural justice in environmental justice that must be cultivated for the sake of securing a brighter future for realization of environmental rights for all.

Democratic engagement in environmental governance is essential to achieving a healthy flourishing environment, which can support both nature and the health and wellbeing of society. Environmental democracy can be a driver of change towards achieving human rights in the environmental sphere.

5. The Sustainable Management of the Extractives Industry in Kenya: The (Dis) Connect

5.1 Introduction

This section critically discusses the regulatory framework governing the extractives industry in Kenya. It highlights the prospects of the existing laws in enhancing the sector's returns and contribution to the national development agenda. The extractives sector is an area that comes with a lot of hopes for the public worldwide, with the expectations that their governments will use these resources to make their lives as well as the national economy better. These expectations may however need to be managed through ensuring that the said groups of people have the relevant information on the available resources and how the same are to be utilised.

One of the most efficient ways of managing these expectations is through promoting open, accountable and transparent governance of the extractives sector as well as how the revenues accrued are utilised. Where such openness

and transparency in management of extractives lack, there has been negative effects on the socio-economic development in what is commonly referred to as the resource curse. Unmet expectations have often resulted in conflicts. It is for these reasons that the international community have often attempted to come up with best practices in form of guidelines to help nation states to put in place and implement measures that promote open, accountable and transparent governance of the extractives sector.

The section also discusses some of the loopholes that must be addressed by Kenya's policy makers and other stakeholders in order to realise the full benefits of the new laws, if any. One of the most common initiatives geared towards this is the Extractive Industries Transparency Initiative (EITI) which is meant to promote the open and accountable management of oil, gas and mineral resources. This section discusses how Kenya, with its nascent extractives sector can adopt and implement the EITI standard in ensuring open and accountable management of oil, gas and mineral resources.

The extractive industry mainly includes oil, gas and mining. The main argument is that implementation of the EITI standard alongside the domestic laws governing the sector can ensure that Kenya escapes the resource curse that has bedeviled other countries that have seen the sector becoming a source of agony instead of development as anticipated. Notably, these principles also form part of the national values and principles of governance enunciated under the current Constitution of Kenya 2010 and it is therefore argued that the EITI initiative and the principles therein ought to be implemented in a complementary manner.

Kenya's mining subsector and the extractives in general can be considered relatively small considering that its current contribution to the national Gross Domestic Product (GDP) is much smaller than the expected potential.[394] However, there have been improved hopes of higher incomes from this sector especially with the discovery of various mineral deposits in various parts of

[394] KPMG, "Analysis of Mining Act 2016," July 2016, p. 1. Available at https://assets.kpmg/content/dam/kpmg/ke/pdf/kpmg-mining-act-2016-analysis.pdf [Accessed on 16/1/2020].

the country.[395] These mineral resources come with great hopes of boosting the country's development agenda.[396]

5.2 Legal and Institutional Framework on Kenya's Extractives Industry: Gaps and Prospects

The main legal instrument that lays out the core governance principles for the natural resources exploitation in the country is the Constitution of Kenya 2010.[397]

Countries preparing to join the EITI are encouraged to identify potential barriers to systematic disclosures from the outset, for instance by conducting a systematic disclosure feasibility study or addressing opportunities for systematic disclosures as part of the preparations for becoming an EITI implementing country.[398]

Notably, Kenya made a commitment in 2015 to: (a) join EITI, making it a part of a global multi-stakeholder program designed to increase the transparency of the financial windfall many resource-rich governments receive from developing their oil, gas and minerals. Kenya pledged to establish a government focal point for EITI implementations within six months; and (b) adopt a "transparent policy and legislative framework" for the oil and gas sector, including the adoption of a transparent process for licensing (or

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395 Scola Kamau and Christine Mungai, "Kenya's $100 billion hidden mineral deposits," *The East African*, Saturday July 20 2013. Available at https://www.theeastafrican.co.ke/news/Kenya-hits-USD100-billion-rare-earth-jackpot-/2558-1920964-ma895tz/index.html [Accessed on 16/1/2020].
Mrima Hill, in the coastal county of Kwale, has one of the top five rare earth deposits in the world. The area also has niobium deposits estimated to be worth $35 billion.

396 Ndemo, B., "Kenya's mineral resources could pull millions out of poverty, *Daily Nation*, Monday June 24 2019. Available at https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html [Accessed on 16/1/2020]; Chimboza, R., "More should and can be done to start taking mining sector seriously," *Daily Nation*, Tuesday October 4 2016.

397 See Articles 10; 60, 69, Constitution of Kenya 2010.

398 EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.8.

awarding) oil and gas blocks as well as publication of contracts between oil companies and the government.[399]

Despite this commitment, Kenya is currently neither compliant nor a candidate country.[400] Becoming a member would require some self-introspection first to identify the existing gaps and challenges as far as the regulatory framework is concerned. The oil discovery in Turkana County led to stakeholders in the extractives sector calling for a comprehensive and consolidated legislative framework to help track revenue from the sector and enable Kenyans to understand its contribution to the economy.[401] It is noteworthy that Kenya is a resource-rich country and the recent discovery of new sources of crude oil and natural gas increases the urgency for developing a transparent extractives policy.[402]

The Mining Act 2016[403] is to apply to the minerals specified in the First Schedule[404]. Notably, the Act does not apply to petroleum and hydrocarbon gases[405]. The Mining Act thus covers only a section of the extractives industry since the extractive industry involves the development and exploitation of oil, gas, and mining resources.

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399 Gary, I., "Amidst the flurry of President Obama's visit, Kenya commits to a transparent oil boom," *Oxfam America*, August 21, 2015. Available at https://politicsofpoverty.oxfamamerica.org/2015/08/amidst-the-flurry-of-president-obamas-visit-kenya-commits-to-a-transparent-oil-boom/ [Accessed on 16/1/2020].

400 EITI, "Base Titanium," available at https://eiti.org/supporter/base-titanium [Accessed on 16/1/2020].

401 Open Government Partnership, "Kenya: Publish Oil and Gas Contracts (KE0013)," available at https://www.opengovpartnership.org/members/kenya/commitments/KE0013/ [Accessed on 16/1/2020].

402 Ibid.

403 Mining Act, No. 12 of 2016, Laws of Kenya.

404 The classification of minerals under first schedule includes: A. Construction and Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Minerals.

405 These fall under the domain of the Energy Act, No. 1 of 2019, Laws of Kenya; and Petroleum Act, No. 2 of 2019, Laws of Kenya.

The Mining Act has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits[406]; structures for negotiating mineral agreements[407]; terms and conditions for minimum activity and work programs, structure for payments[408]; and artisanal and small scale mining operations[409]. Previously, these have been the subject of several court matters hence the need to settle the same by way of substantive statutory provisions.[410]

As far as the matters falling within the purview of the EITI are concerned, the Mining Act empowers the Cabinet Secretary to make regulations, and he has since made the regulations discussed earlier in this section.

5.2.1 Kenya's Extractives Industry: The Policy, Legislative and Institutional Framework

The Government of Kenya has a ministry dedicated to the development of the extractives sector[411], as part of the efforts to improve resource exploitation in the country, and this is the Ministry of Mining and Petroleum[412]. The concerned Ministry undertakes various functions aimed at enhancing growth of the mining sector in the country as guided by the *Executive Order No. 2 of 2013*[413]. The mandate of the Ministry of Mining and Petroleum includes: Minerals Exploration and mining policy and Management; Inventory and

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406 Part ix—Surface Rights Compensation and Disputes (sections 151-157).

407 Part Vii—Mineral Agreements (sections 117-142).

408 Part Xii—Financial Provisions (sections 182-190).

409 Act, 2016, Sections 92-100.

410 See for instance, Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited [2001] eKLR, Civil Case 97 of 2001; Tom Mboya Odege v Cabinet Secretary, Ministry of Petroleum and Mining & 3 others [2019] eKLR, Environment and Land Petition 2 of 2018; Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR, Civil Appeal 105 of 2015.

411 Ministry of Mining, Available at http://www.mining.go.ke/index.php/about-us/about-ministry [Accessed on 16/1/2020].

412 https://www.petroleumandmining.go.ke/ [Accessed on 16/1/2020].

Republic of Kenya, *Executive Order No.2 of 2013 – Organization of the Government of Kenya*, May 2013.

mapping of mineral resources; Mining and minerals development; oil and gas development; Policies on the management of quarrying and mining of rocks and industrial minerals; Management of health and safety in mines; Policy around extractive industry; Resource Surveys and remote sensing; and Maintenance of geological data (research, collection, collation, analysis.[414]

The Mining sector in Kenya is mainly governed by the Constitution of Kenya 2010, the Mining Act 2016 and numerous Regulations made under the Act to promoted proper administration and implementation of the Act. The oil and gas sector is principally governed by the Petroleum Act, 2019[415] which was enacted to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes.[416]

The 2019 Petroleum Act came into effect on 28 March 2019, repealing the Petroleum (Exploration and Production) Act of 1984. The Act is to apply to all upstream, midstream and downstream petroleum operations being carried out in Kenya.[417]

a) Constitution of Kenya 2010

The Constitution of Kenya 2010 makes provisions on "natural resources" which means the physical non-human factors and components, whether renewable or non-renewable, including —*rocks, minerals, fossil fuels and other sources of energy*.[418]

Article 60 of the Constitution provides for the principles of land policy which include sustainable and productive management of land resources. Under Article 62 (1) (f) of the Constitution "all minerals and mineral oils as defined

414 http://www.mining.go.ke/index.php/about-us/about-ministry [Accessed on 16/1/2020].
415 Petroleum Act, Act No. 2 of 2019, Laws of Kenya.
416 Ibid, Preamble.
417 Sec. 3, Petroleum Act, 2019.
418 See Article 260; and Section Five of the Constitution of Kenya 2010.

by law" are classified as public land and by Article 62 (3) they are vested in and are held by the national government in trust for the people of Kenya.

The Constitution also outlines the obligations of the State in respect of the environment.[419] The Constitution further spells out the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[420] This includes any decision-making or implementation of any law affecting the mining sector.[421] The Constitution thus provides some overarching principles that should guide the implementation of any laws governing the mining sector.

b) Mining and Minerals Policy, Sessional Paper No. 7 of 2016

The *Mining and Minerals Policy, Sessional Paper No. 7 of 2016* was informed by the lack of predictability and certainty hence low investment in the mining sector, thus necessitating the need for policy framework to provide a clear guidance for sustainable mineral resources development.[422]

The Policy was therefore put in place to address gaps that have existed in the mining sector, form the basis for review of the outdated Mining Act of 1940 and align the industry's strategic direction with African Mining Vision, Vision 2030 and Constitutional Provisions. The overall goal of the Mining and Minerals Policy is to set out frameworks, principles, and strategies to provide for exploration and exploitation of mineral resources for socio-economic development.[423]

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419 Constitution of Kenya, Art. 69.

420 Article 10(1), Constitution of Kenya.

421 For instance, see Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR, Civil Appeal 105 of 2015.

422 Republic of Kenya, *Mining and Minerals Policy, Sessional Paper No. 7 of 2016*, p. 1.

423 Ibid, p.7.

c) Mining Act, 2016

To realise the vision of hope and growth in the mining sector, the *Mining Act 2016*[424] was enacted to give effect to Articles 60, 62b (1) (f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes.[425] The Act came about as a result and part of implementation of the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016.*

Notably, the Cabinet Secretary is empowered under the Act to make Regulations necessary or convenient for the proper administration and implementation of this Act.[426] As a result of this, the Cabinet Secretary responsible has since made some mining Regulations under the Act.

This section focuses generally on these Regulations and how the same can help in promotion and realisation of the country's dream of a vibrant mining sector that not only promotes national development but one that also benefits the local communities.

The Act is to apply to the minerals specified in the First Schedule[427]. Notably, the Act does not apply to petroleum and hydrocarbon gases[428]. The Act establishes a state mining corporation which shall be the investment arm of the national government in respect of minerals.[429] The Act also establishes the Mineral Rights Board whose functions include advising and giving recommendations, in writing, to the Cabinet Secretary on matters relating to mining activities and agreements.[430] In order to ease access to services, there

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424 Mining Act, No. 12 of 2016, Laws of Kenya.

425 Ibid, preamble.

426 Mining Act, 2016, sec. 223.

427 The classification of minerals under first schedule includes: A. Construction And Industrial Minerals; B. Precious stones; C. Precious Metal group; D. Semi-precious stones group; E. Base And Rare Metals Group; F. Fuel Mineral Group; and G. Gaseous Minerals.

428 These fall under the domain of the *Energy Act, No. 1 of 2019*, Laws of Kenya; and *Petroleum Act, No. 2 of 2019*, Laws of Kenya.

429 Mining Act, 2016, Sec. 22(1).

430 Ibid, secs. 30 & 31.

is also established under the Act the Directorate of Mines; and the Directorate of Geological Survey, each directorate headed by a director.[431]

The *Mining Act, 2016* has provisions covering various mining issues including but not limited to: mineral rights disputes relating to license and permits[432]; structures for negotiating mineral agreements[433]; terms and conditions for minimum activity and work programs, structure for payments[434]; and artisanal and small scale mining operations[435].

To operationalize some of these provisions, the Cabinet Secretary in charge of mining has since made Regulations covering the areas and matters in question. The next section casts a critical look at these Regulations.

d) Mining Regulations and Guidelines

i. *Mining (Dealings in Minerals) Regulations, 2017*

The *Mining (Dealings in Minerals) Regulations*, 2017[436] were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 100 and 223 (l) of the Mining Act, 2016. Section 100 of the Act deals with the sale of minerals won by an artisanal miner. These Regulations are to apply to- the export of a mineral by a holder of a mining right, among others.[437] However, these Regulations are not to apply to the export and import of rough diamonds.[438]

There have been numerous reported and unreported cases of illegal dealings in extraction and/or sale of minerals in the country. These Regulations were meant to curb this illegal business.[439]

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431 Mining Act, 2016, Sec. 17.
432 Part ix—Surface Rights Compensation and Disputes (sections 151-157).
433 Part Vii—Mineral Agreements (sections 117-142).
434 Part Xii—Financial Provisions (sections 182-190).
435 Mining Act, 2016, Sections 92-100.
436 Legal Notice No. 88, Kenya Subsidiary Legislation, 2017. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN88_2017.pdf [Accessed on 16/1/2020].
437 *Mining (Dealings in Minerals) Regulations*, 2017, Regulation 3(1).
438 Ibid, Regulation 3(2).
439 *Mining (Dealings in Minerals) Regulations*, 2017, Regulation 9(5).

The Regulations, alongside the *Mining Act 2016*, were expected to provide more transparency and credibility for investors in solving issues affecting the mining sector in the country.[440] The Regulations have however achieved little, if anything, in curbing illegal trading in minerals. This is exemplified by the continued reports of smuggling of gold and other precious stones in and of the country.[441] Traders still find a way of bypassing these rules to continue with the illegal trading in raw mineral resources. Transparency in declaration of revenues is still lacking as far as mineral extraction and other dealings in Kenya are concerned. It is estimated that Africa is losing over $60 billion annually due to the illicit mineral trade.[442] This is because, amongst other factors, most minerals and precious stones from the region are exported in raw form to processing centres in Asia, notably Hong Kong.[443]

It is therefore unlikely that these Regulations alone, without the support of other security institutions across the region, will curb the illegal dealings in trade. There is a need to ensure that the taxation and royalties regime is regularized and that the same is friendly not only to the multinationals but also the artisanal miners in the country as an incentive to discourage them from dealing with illegal traders in and outside the country.

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440 Ali, S., "Govt to make Nairobi a mineral trade hub," *Citizen Digital*, September 26, 2016. Available at https://citizentv.co.ke/business/govt-to-make-nairobi-a-mineral-trade-hub-142856/ [Accessed on 16/1/2020].

441 Otieno, R., "Government red tape killing mining sector, claims lobby," *Standard Digital*, 17th April, 2019. Available at https://www.standardmedia.co.ke/business/article/2001321316/government-red-tape-killing-mining-sector-lobby [Accessed on 8/7/2019]; Mnyamwezi, R., "Petroleum CS Munyes exposes minerals smuggling cartels," *Standard Digital*, 21st August, 2018. Available at https://www.standardmedia.co.ke/article/2001292787/kenya-losing-billions-to-minerals-smuggling-cartels [Accessed on 16/1/2020].

442 Senelwa, K., "Nairobi to process gold and gemstones at value addition centre," *The East African*, Monday February 20 2017. Available at https://www.theeastafrican.co.ke/business/Nairobi-to-process-gold-and-gemstones/2560-3820176-n8dw6hz/index.html [Accessed on 16/1/2020].

443 Ibid.

ii. *Mining (Licence and Permit) Regulations, 2017*

The *Mining (Licence and Permit) Regulations, 2017*[444] were enacted by the Cabinet Secretary for Mining in exercise of the powers conferred by sections 12 (3), 153 (3) and 223 (2), (c), (d), (g), (j), (k) and (1) of the Mining Act, 2016. These Regulations are to apply to all mineral rights.[445]

The *Mining (license and permit) Regulations 2017* (Clause 4) provides that all applications for mineral rights shall be made through the On Line Mining Cadastre (OMC) in order for them to be considered for grant.[446] Having an online application forum is a positive step towards establishing transparency as far as the application process is concerned so that regardless of whether one is a foreign or local investor, there is certainty on the process of seeking mining licenses and permits.

It is a commendable step that these Regulations seek to regulate, inter alia, small-scale mining or artisanal mining operations in line with the Mining Act 2016, by granting permits.[447] However, there is a need to ensure that the same are not used as a political tool in awarding permits for corrupt dealings in artisanal mining activities.

In addition, while the artisanal miners may smoothly get licences and permits (which will cost money to apply), there may be a funding challenge. It has been observed that acute cash shortage caused by poor linkages with the financial sectors of the economy is one of the biggest impediments to the growth of the artisanal and small-scale mining sector.[448] This is mainly attributed to the fact that being a nascent, capital intense and high-risk sector, it is difficult for local banks to finance it. However, government intervention can go a long way in addressing the funding challenge.

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444 *Mining (Licence and Permit) Regulations, 2017*, Legislative *Supplement No. 40, Legal Notice No. 87, Laws of Kenya.* Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN87_2017.pdf [Accessed on 16/1/2020].

445 *Mining (Licence and Permit) Regulations, 2017,* Regulation 3.

446 *Mining (Licence and Permit) Regulations, 2017,* Regulation 4.

447 Part ix — Artisanal Mining Permit.

448 Komu, J., "Fund artisanal and small-scale mining," March 26, 2019. Available at https://www.the-star.co.ke/opinion/columnists/2019-03-26-fund-artisanal-and-small-scale-mining/ [Accessed on 16/1/2020].

It is therefore not enough to regulate licensing and permits relating to mining activities in the country, there is a need to create a level playing ground for the artisanal miners by creating a funding kitty to help them competitively carry out these mining activities. Such a kitty would be similar to those in other African countries whose artisanal and small scale mining sectors are doing well such as 2017 Nigeria's Ministry of Solid Minerals and Steel Development and the Bank of Industry of Nigeria's N5 billion fund to provide loans and bring the sector under a structured system; and Zimbabwe's gold fund introduced in 2016 through the Reserve Bank of Zimbabwe.[449]

iii. *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*

The *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*[450] were enacted by the Cabinet Secretary in exercise of the powers conferred by section 221 (1)[451] of the Mining Act, 2016. These Guidelines -provide guidance to applicants for, and holders of, reconnaissance licences, prospecting licences, prospecting permits and retention licences on how to prepare work programmes and exploration reports; and are to assist the Director of Geological Surveys to review work programmes and exploration reports that shall be submitted by applicants for or holders of mineral rights.[452]

While these reports would go a long way in enhancing the right of access to information for the local people as far as the activities of the mining companies are concerned, there is no evidence of any such reports being made public since 2017 or even any being filed with the government agencies at all. There is therefore lacking in transparency and accountability from the mining companies in the country. As such, there is a need to ensure that these Regulations are not only enforced but also such reports should be made

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449 Ibid.

450 *Mining (Work Programmes and Exploration Reports) Guidelines*, 2017, Legal Notice No. 85 of 2017, Laws of Kenya. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/LN85_2017.pdf [Accessed on 16/1/2020].

451 221. (1) The Cabinet Secretary may publish and disseminate manuals, codes or guidelines relating to large scale and small scale operations, including in relation to environmental matters.

452 Clause 3, *Mining (Work Programmes and Exploration Reports) Guidelines*, 2017.

available to the public in light of the right of access to information as guaranteed under Article 35 of the Constitution of Kenya 2010 and Access to Information Act, 2016[453].

iv. *Mining (State Participation) Regulations, 20I7*

The *Mining (State Participation) Regulations, 20I7*[454] were enacted by the Cabinet Secretary in exercise of Section 48(4)[455] of the Mining Act, 2016. The purpose of these Regulations is to provide for State participation in prospecting or mining operations carried out by a holder of a mineral right.[456]

These Regulations are to apply to all applicants and holders of any mineral right-which entitles the State to a ten percent free carried interest; where the State acquires any additional interest that may be agreed with the holder of a mining licence; and where the State enters into an agreement to participate in prospecting operations or activities under a prospecting licence held by a holder other than the National Mining Corporation.[457]

In line with the Mining Act 2016, the Regulations reiterate that the National Mining Corporation shall on behalf of the State, be the investment arm of the National Government in respect of all prospecting or mining operations.[458] The direct interest and participation of the government, albeit through the National Mining Corporation is a positive step towards ensuring that the mining companies declare all the deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities. There has been past reported cases of non-disclosure and non-declaration by the mining companies in the country and this requires the government to have its own watchdog on the ground to curb the vice, hence

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453 Access to Information Act, No. 31 of 2016, Laws of Kenya.

454 *Mining (State Participation) Regulations, 20I7*, Legal Notice No. 84 of 2017, Laws of Kenya.

455 (4) The Cabinet Secretary shall make regulations to provide for state participation in mining or prospecting operations between the Government and the holder of a mineral right.

456 *Mining (State Participation) Regulations, 20I7*, Regulation 3.

457 *Ibid*, Regulation 4.

458 *Ibid*, Regulation 5 (1).

the need for this Corporation.[459] The Corporation is also useful in promoting capacity building in the sector as far as exploration of minerals in the country is concerned.

The direct interest and participation of the government, albeit through the National Mining Corporation is a positive step towards ensuring that the mining companies declare all the deposits and profits accrued as well as safeguarding the interests of local communities at all stages of mining activities. This will hopefully do away with such situations as the soda ash mining in Lake Magadi where the poverty and lack of investments in Magadi, after 100 years of exploitation of trona worth trillions of shillings, has been attributed to the lack of transparency in the governance of natural resources, corruption, and illegal outflows.[460]

v. *Mining (Use of Local Goods and Services) Regulations, 2017*

The *Mining (Use of Local Goods and Services) Regulations, 2017*[461] were enacted by the Cabinet Secretary in exercise of the powers conferred by section 223(l) of the Mining Act, 2016. The purpose of these Regulations is to- promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country; and achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain; among others.[462]

The Regulations require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be

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459 Sanga, B., "Auditor General reveals how mining companies under-declare tax dues," 25th Aug 2016. Available at https://www.standardmedia.co.ke/article/2000213275/auditor-general-reveals-how-mining-companies-under-declare-tax-dues [Accessed on 16/1/2020].

460 Kamau, J., "Magadi saga exposes the ugly side of capitalism," *Daily Nation*, Sunday April 21 2019. Available at https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html [Accessed on 16/1/2020].

461 *Mining (Use of Local Goods and Services) Regulations, 2017*, Legal Notice No. 83 of 2017, Laws of Kenya.

462 Ibid, Regulation 3.

conducted under a licence, give first priority to- materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.[463] Except as otherwise provided in the Act or under these Regulations, an application for a licence should not be granted unless, the applicant has submitted a procurement plan for the purchase of goods and services in Kenya to the Cabinet Secretary.[464] The plan, if approved, shall form part of the conditions or obligations under the licence.[465]

The mining sector in the country is expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. One way of alleviating poverty in any mining region would be empowering the local people through creating markets for the locally produced goods and services.[466] However, there is likely to arise a challenge in getting the mining sector players, both local and foreign, to abide by these rules. They are likely to bypass them on grounds of equality in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.

Considering that there are many factors (such as supply and demand, cost of raw materials, machinery, amongst others) that may influence the production cost of goods and services which may ultimately push up the price of these goods and services or worse compromise their quality, it is likely that the companies in question may use such loopholes to source for the same either from their home countries (for foreigners) or other cheaper and better quality goods from foreign countries for the locals. There are no public records or any

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463 Ibid, Regulation 5.

464 Ibid, Regulation 6(1).

465 Ibid, Regulation 6(4).

466 See generally, Musawenkosi, N., "Does mining alleviate or exacerbate poverty: Are local community grievances really'Much Ado about Nothing'?" PhD diss., University of Cape Town, 2017. Available at https://open.uct.ac.za/bitstream/handle/11427/24930/thesis_com_2017_nxele_musawenkosi.pdf?sequence=1&isAllowed=y [Accessed on 16/1/2020]; Pegg, S., "Mining and poverty reduction: Transforming rhetoric into reality," *Journal of cleaner production*, Vol.14, no. 3-4 (2006): 376-387.

other form of evidence thus far to indicate if the companies have complied with these Regulations or if indeed the Government, through the relevant ministry has sought to ensure compliance.

Implementing these Regulations may therefore call for the Government and other stakeholders to first address these challenges before local traders, service providers and communities can benefit from the legal framework.

vi. *Mining (Employment and Training) Regulations, 2017*

The *Mining (Employment and Training) Regulations, 2017*[467] were enacted by the Cabinet Secretary in exercise of powers conferred by sections 46(3)[468] and 223(l) of the Mining Act, 2016. The purpose of these Regulations is to- promote job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain.[469]

These Regulations shall apply to all applicants and holders, of any licence for- reconnaissance, prospecting and mining; cutting, polishing, processing, refining and smelting of a mineral; a large-scale mineral right which is valid after the coming into force of the Act and these Regulations; and mine support services.[470] An application for any licence shall not be granted by the Cabinet Secretary-unless the applicant has submitted a plan outlining the proposals for the employment and training of Kenyans.[471]

While these Regulations are well meaning and geared towards ensuring that the mining sector creates jobs, employment and results in specialized training

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467 *Mining (Employment and Training) Regulations, 2017*, Legal Notice No. 82, Laws of Kenya.

468 (3) The Cabinet Secretary shall make regulations to provide for the replacement of expatriates, the number of years such expatriates shall serve and provide for collaboration and linkage with universities and research institutions to train citizens.

469 *Mining (Employment and Training) Regulations, 2017,* Regulation 3.

470 Ibid, Regulation 4.

471 Ibid, Regulation 5 (1).

for the Kenyan people, it is based on the assumption that locals have some base knowledge that can be built on to achieve the level of expertise required in the execution of the corresponding duties within the industry. Exclusive reliance on the foreigners to create expertise through technology transfer may not yield the desired results.

There is need for the government to do much more through the local institutions of higher learning through sponsoring courses to build capacity and even having the students/professionals taking such courses leaving the country for specialized training and to gain experience. Such candidates would then be ripe to learn more through any exchange and technology transfer programmes set up under the Mining *(Employment and Training) Regulations, 2017*. There is a need to ensure that the jobs offered are not only menial in nature since, left unsupervised, the foreign companies may not be willing to place local experts in critical positions within the entire mining value chain as required by the law. The Government must offer technical and financial support to its people in order to uplift them to levels where they can competitively take up key positions in the mining sector and specifically represent the interests of the Government and the country at large within these companies.

The lack of proper guidelines or failure to implement any existing regulations and guidelines can lead to conflicts as has been witnessed in other African countries such as the Democratic Republic of Congo, where the locals feel sidelined as far as mining benefits sharing is concerned.[472] For instance, there

[472] Matthysen, K., Montejano, A. Z., & International Peace Information Service (Antwerp), *'Conflict Minerals' initiatives in DR Congo: Perceptions of local mining communities*. Antwerp: International Peace Information Service, 2013. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/20131112_HU.pdf [Accessed on 16/1/2020]; Zalan, K., "Tracing conflict gold in the Democratic Republic of the Congo," Public Radio International, June 23, 2017. Available at https://www.pri.org/stories/2017-06-23/tracing-conflict-gold-democratic-republic-congo [Accessed on 16/1/2020]; BSR, "Conflict Minerals and the Democratic Republic of Congo: Responsible Action in Supply Chains, Government Engagement and Capacity Building," May 2010. Available at https://www.bsr.org/reports/BSR_Conflict_Minerals_and_the_DRC.pdf [Accessed on 16/1/2020].

have been queries on how to manage expectations of the local people living within the mining areas in order to avert possible conflicts in future.[473] There is a need for ensuring that the constitutional principles of public participation, inclusive decision-making, environmental protection and conservation, respect for human rights and respect for occupational health and safety are taken into account when engaging investors in the mining sector in order to avoid any potential conflicts as well as ensuring that these natural resources benefit communities as well.[474]

In addition, there are no publicly accessible records to indicate the level of compliance for the existing mining companies in the country. Accountability and transparency are listed under Article 10(2) (c) of the Constitution, as "national values and principles of governance".

vii. *Mining (Use of Assets) Regulations, 2017*

The *Mining (Use of Assets) Regulations, 2017*[475] were enacted by the Cabinet Secretary in exercise of the powers conferred by Section 149(6)[476] of the Mining Act, 2016. These Regulations shall apply to holders of mining licences requiring them to maintain a complete, up to date and accurate register of all its immovable and movable assets.[477]

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473 Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation,*Tuesday February 12 2013. Available at https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html [Accessed on 16/1/12020]; Mulehi, A., "How it looks to live near mining sites – Kwale," (Natural Resources Alliance of Kenya, Oct 17, 2018). Available at https://kenra.or.ke/how-it-looks-like-to-live-near-mining-sites-kwale/ [Accessed on 16/1/2020].

474 Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited [2001] eKLR, Civil Case 97 of 2001; Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014.

475 *Mining (Use of Assets) Regulations, 2017,* Legal Notice No. 80 of 2017, Laws of Kenya.

476 The Cabinet Secretary shall prescribe Regulations on the use of the assets.

477 *Mining (Use of Assets) Regulations, 2017,* Regulations 3 & 4.

These regulations, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the mining companies as they seek to promote accountability and transparency on the income and expenses incurred by these companies. These Regulations, alongside other transparency and accountability measures and practices are useful for developing countries such as Kenya, where non-declaration or under declaration of profits by the multinationals has been happening. They can however work well where the authorities involved work with different stakeholders such as the revenue colleting agencies to get the actual figures.

5.3 Regulating the Extractives Industry in Kenya: Challenges and Prospects

5.3.1 The Mining Sector in Kenya

It is estimated that Africa hosts 30% of the earth's mineral reserves, including 40% of gold, 60% of cobalt, and 70% of platinum deposits, and produce about 30% of the world's gold, 70% of the world's platinum, 28% of the world's palladium, and 16% of the world's bauxite.[478] In addition, Africa also produces (yearly, in thousand metric tons) 205,056 of hard coal, 67,308 of nickel-bearing ores, and 29,174 of iron bearing ores, as well as 595,507 kg of gold-bearing ores.[479] The extractive or mining industries generally have long been touted as key to anchor 'development' or 'economic growth' to alleviate poverty in developing countries.[480]

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478 Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In *Social Responsibility*, IntechOpen, 2018, pp. 61-81, at p.63. Available at https://www.intechopen.com/books/social-responsibility/mining-conflicts-and-corporate-social-responsibility-in-kenya-s-nascent-mining-industry-a-call-for-l [Accessed on 16/1/2020].

479 Ibid, p.63.

480 Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.*, 9 (2013): 31, at p.33.

Despite this, African countries have largely exhibited low levels of development and poor standards of living.[481] This has been attributed to various factors including exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements, with the result that the Continent has received inadequate returns for its mineral wealth.[482]

At the continental level, the *Africa Mining Vision*[483] is expected to address most of these challenges if not all. Despite this Vision document, most of the African countries still struggle with making the mineral resources work for them, in uplifting the lives of their people.[484]

Kenya is no exception as it has a number of mineral deposits albeit in smaller amounts, which, as already pointed out, have not contributed much to the

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481 African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, p. 2. Available at https://repository.uneca.org/bitstream/handle/10855/23538/b11580379.pdf?sequence=1 [Accessed on 16/1/2020].

482 Ibid, p.2; Ezekwe sili, O.K., "Harnessing Africa's natural resources to fight poverty," *Daily Nation*, Wednesday April 15 2009. Available at https://www.nation.co.ke/oped/opinion/440808-560566-gnl8o6z/index.html [Accessed on 16/1/2020].

483 African Union, Africa Mining Vision: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development", (United Nations Economic Commission for Africa (ECA), February, 2009). Available at https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_english.pdf [Accessed on 16/1/2020].

484 See generally, Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In *Social Responsibility*, IntechOpen, 2018; African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, op cit.; Kimani, M., "Mining to profit Africa's people," *Africa Renewal* 23, no. 1 (2009): 4-5; Bush, R., "Conclusion: mining, dispossession, and transformation in Africa," In *Zambia, mining, and neoliberalism*, pp. 237-268. Palgrave Macmillan, New York, 2010. Available at https://www.sahistory.org.za/sites/default/files/file%20uploads%20/alastair_fraser_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed on 16/1/2020]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.* 9 (2013): 31.

country's GDP as would be expected. The communities are also yet to boast of any significant benefits from the mining activities going on within their regions.[485]

Notably, GDP from Mining in Kenya is estimated to have increased to 12527 KES Million in the fourth quarter of 2018 from 12313 KES Million in the third quarter of 2018. GDP from Mining in Kenya averaged 8963.05 KES Million from 2009 until 2018, reaching an all-time high of 12906 KES Million in the first quarter of 2018 and a record low of 4195 KES Million in the first quarter of 2009.[486] According to the *Mining and Minerals Policy, Sessional Paper No. 7 of 2016,* as at 2016, the sector was contributing 0.8 percent to gross domestic product (GDP) per annum. The contribution to GDP was expected to increase to three (3) percent by 2017 and ten (10) percent by 2030 according to the Medium Term Plan (MTP) II (2013-2017).[487]

While these statistics paint a hopeful picture with the figures increasing over the last ten years, there is still a lot of room for not only growth in these figures

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485 Ndemo, B., "Kenya's mineral resources could pull millions out of poverty, *Daily Nation,* Monday June 24 2019. Available at https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html [Accessed on 16/1/2020]; Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County:HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti*, September, 2017. Available at http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf [Accessed on 16/1/2020]; cf. Base Titanium, "Response to Hakijamii's Draft Report on Base Titanium's Impacts on the Community," 25th August, 2017. Available at https://www.business-humanrights.org/sites/default/files/documents/Hakijamii%20Base%20Response%20Final%20-%202017%2008%2028_0.pdf [Accessed on 16/1/2020]; see also Masinde, J., "Are Kwale residents expecting too much?" *Daily Nation,* Tuesday February 12 2013. Available at https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html [Accessed on 16/1/2020].

486 Trading Economics, "Kenya GDP from Mining," available at https://tradingeconomics.com/kenya/gdp-from-mining [Accessed on 16/1/2020].

487 Republic of Kenya, *Mining and Minerals Policy, Sessional Paper No. 7 of 2016,* p. 1. Available at http://www.mining.go.ke/images/PUBLISHED_MINING_POLICY_-_Parliament_final_.pdf [Accessed on 16/1/2020].

but also positive contribution of the mining sector to the lives of the ordinary citizens especially those to be found within the localities where such mining takes place. Indeed, the discovery of such minerals as the titanium deposits products in the Coastal region gives hope to the expectation of a brighter future for the sector and country at large.[488] Reserves for Titanium and Niobium, both found in the Coast region, are projected to be worth Sh9 trillion, and Sh3.8 trillion for the estimated 750 million barrels, according to Tullow Oil's 2017 projections.[489]

As already stated, there are Regulations that were made by the Cabinet Secretary seeking to ensure that the mining activities do not only go on smoothly but also that they benefit the local communities even as they contribute to the national development agenda. These Regulations are meant to streamline the mining sector in the country by ensuring that some of the main provisions in the Mining Act 2016 are fully and efficiently implemented. Notably, some of these Regulations such as the *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017* are meant to directly empower the local communities by promoting job creation and market for locally produced goods.

While these Regulations mean well for the local communities and local industries, a lot still needs to be done to ensure that the environment favours the implementation of such Regulations. For instance, the Regulations on use of local goods and services require that the holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any-activity to be conducted under a licence, give first priority to- materials and goods made in Kenya; and services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans: *provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya*.[490] This proviso stands to defeat the purpose of these Regulations because, as it may

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488 Michira, M., "The billions buried under Kenyan soil," 2nd May, 2017. Available at https://www.standardmedia.co.ke/business/article/2001238312/the-billions-buried-under-kenyan-soil [Accessed on 16/1/2020].

489 Ibid.

490 *Mining (Use of Local Goods and Services) Regulations, 2017,* Regulation 5.

be proved through statistics, there are many factors of production that may, and have indeed, been making locally produced goods more expensive when compared to imported ones. Thus, as long as investors can prove that they can source such goods and/or services at more competitive prices or those with better quality, they will easily bypass the requirements of these Regulations. The manufacturing sector and other factors affecting the local production of goods and services may thus need to be fixed before these Regulations can effectively be implemented.

Unless capacity is built across all stages of mineral extraction right from minerals agreements' negotiations all the way to the actual extraction of these resources, then Africa, including Kenya, will continue to lag behind in development despite its rich deposits in minerals.

5.3.2 Oil and Gas sector in Kenya

Kenya's oil and gas sector is a nascent one with the actual discovery of oil and gas reserves having been made only in the year 2012 after many years of exploration.[491] The UK-based Tullow Oil, in partnership with Africa Oil, a Canadian oil and gas company, made discoveries in two separate blocks of the Lokichar Basin in the sparsely populated northern interior.[492]

The oil and gas sector is mainly governed by the Petroleum Act, 2019[493] which was enacted to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes.[494] The 2019 Act came into effect on 28 March 2019, repealing the Petroleum (Exploration

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491 National Oil, "Wells Drilled," available at https://nationaloil.co.ke/wells-drilled/ [Accessed on 16/1/2020].

492 Oxford business Group, "Kenya sees increased oil and gas reserves, and a shift in energy consumption," available at https://oxfordbusinessgroup.com/overview/supply-and-demand-market-factors-seem-rise-tandem-increased-reserve-findings-and-growing-domestic [Accessed on 16/1/2020].

493 Petroleum Act, Act No. 2 of 2019, Laws of Kenya.

494 Ibid, Preamble.

and Production) Act of 1984. The Act is to apply to all upstream, midstream and downstream petroleum operations being carried out in Kenya.[495]

The Act empowers the Cabinet Secretary to negotiate, award and execute a petroleum agreement, on behalf of the national government, in the form prescribed in the Schedule to the Act.[496] The Act requires the contractor to submit to the Authority reports on— all geological, geochemical, geophysical surveys, drilling, completion and production data and any other information in accordance with the petroleum agreement and regulations made under this Act; the rates and volume of petroleum produced, its composition including test production and the recovery of petroleum in connection with formation testing; the volumes and other results of production monitoring as well as monitoring procedure; and the use, injection, venting and flaring of natural gas or petroleum which information shall be based on metering.[497] However, information obtained under section 45 relating to any matter shall not be published or otherwise disclosed to a third party without prior consent in writing from the person from whom the information was obtained.[498]

Under the Act, it is the duty of every contractor to furnish the Cabinet Secretary and the Authority as the case may be at such times and in such form and manner, such information as the Cabinet Secretary and the Authority may in writing require.[499] A person who refuses to furnish the information requested under section 47 or who makes a false statement or a statement which he has reason to believe is untrue, to the Cabinet Secretary, and to the Authority, as required under this Act, commits an offence and shall, on conviction, be liable to a fine of not less than twenty million shillings or to a term of imprisonment of not less than five years or both.[500]

The disclosure of information is a requirement for all stages namely upstream, midstream and downstream. The *Petroleum Act 2019* also has local content requirements on petroleum operations meant to create jobs and requiring the

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495 Sec. 3, Petroleum Act, 2019.
496 Sec. 18, Petroleum Act, 2019.
497 Sec. 45, Petroleum Act, 2019.
498 Ibid, Sec. 46.
499 Ibid, Sec. 47.
500 Ibid, Sec. 48.

procurement of locally available goods and services.[501] However, the cost of such local content should be at the prevailing market rate. This is aimed at encouraging the procurement of local content, while ensuring that projects remain fiscally viable.

The Act provides that the contractor shall comply with financial and fiscal obligations in the implementation of the petroleum agreement under this Act and any other written law.[502] They are to pay to the National Government all taxes, relevant fees and levies in such manner as may be prescribed by both the petroleum agreement and any other relevant laws.[503]

The Act also provides for revenue sharing among the National Government, county governments and the local communities.[504] The *Petroleum Act, 2019* also includes a Model Production Sharing Contract ("Model PSC")[505] to be used by the Cabinet Secretary when entering into a petroleum agreement.[506] The Act defines the specific minimum contents of the model PSC.[507] Notably, some of the provisions in this Act seek to address issues similar to those that fall under the concern of EITI.

5.4 Promoting Open and Accountable Management of Extractives in Kenya: Implementing the Extractives Industries Transparency Initiative

5.4.1 Introduction

Extractive Industries is a term that is often used to describe nonrenewable resources, such as oil, gas and minerals.[508] It is estimated that Africa alone is

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501 Ibid, Sec. 50.
502 Ibid, Sec. 53(1).
503 Sec. 53(2), Petroleum Act, 2019.
504 Sec. 57 & 58, Petroleum Act, 2019.
505 https://www.ketraco.co.ke/opencms/export/sites/ketraco/learn/maps/Legal_Documents/Model_PSC_2015.pdf [Accessed on 16/1/2020].
506 Schedule to the Act.
507 Ibid.
508 United Nations Interagency Framework Team for Preventive Action, "Extractive Industries and Conflict," *Toolkit And Guidance For Preventing And Managing Land And Natural Resources Conflict*, 2012, p.6. Available at

home to about 30% of the world's mineral reserves, 10% of the world's oil, and 8% of the world's natural gas.[509] Over the years, and with the recognition of the potentially positive and negative effects of the extractives, there has been an evolution at the international level to establish hard and soft rules to govern the impacts of the extractive industries.[510]

The extractives sector comes with not only high hopes for the average citizen in a country but also emergence of groups of people and cartels that seek to exclusively benefit from such resources at the expense of everyone else. This may lead to conflicts due to the secrecy surrounding their extraction and lack of accountability from the government and companies involved in the extraction activities.[511] Some of the identified main drivers of extractive industries- related conflicts causes are: poor engagement of communities and stakeholders; inadequate benefit-sharing; excessive impact on the economy, society and the environment; mismanagement of funds and financing war; inadequate institutional and legal framework; and Unwillingness to address the natural resources question in peace agreements.[512]

In the last few years, Kenya has joined the list of countries with oil and gas extractives after the discovery of oil and gas deposits in the Turkana region.[513]

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https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf [Accessed on 16/1/2020].

509 The World Bank, "Extractive Industries: Overview," available at https://www.worldbank.org/en/topic/extractiveindustries/overview [Accessed on 16/1/2020].

510 Van Alstine, J., "Transparency in resource governance: The pitfalls and potential of "new oil" in Sub-Saharan Africa," *Global Environmental Politics* 14, no. 1 (2014): 20-39, at p. 20.

511 United Nations Interagency Framework Team for Preventive Action, "Extractive Industries and Conflict," *Toolkit And Guidance For Preventing And Managing Land And Natural Resources Conflict*, 2012. Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf [Accessed on 16/1/2020].

512 Ibid, p.7.

513 Tullow Oil, "About Tullow in Kenya," available at https://www.tullowoil.com/operations/east-africa/kenya [Accessed on 16/1/2020]; United Nations, "Greasing the wheels of Kenya's nascent oil and gas sector," 18 July, 2018, available at https://www.unenvironment.org/news-and-stories/story/greasing-wheels-kenyas-nascent-oil-and-gas-sector [Accessed on 16/1/2020].

Apart from the oil and gas resources, the other notable mining activities in the country include: Soda ash; magnesite; fluorspar; titanium; diatomite; gold; and carbon dioxide, among others.[514]

This section seeks to appraise Kenya's extractives industry against the Extractives Industries Transparency Initiative with the aim of determining how far the country has gone in achieving the ideals promoted by the initiative.

5.4.2 Extractives Industries Transparency Initiative: Background and Overview

The Extractive Industries Transparency Initiative (EITI) is considered as an international hallmark of the efforts to promote better extractive-sector management and improved societal development in natural resource-rich countries.[515]

This is meant to strengthen public and corporate governance, promote understanding of natural resource management, and provide the data to inform reforms for greater transparency and accountability in the extractives sector.[516] Currently, there are about 52 implementing countries, and the EITI is supported by a coalition of government, companies, and civil society.[517]

Some authors have particularly recommended EITI for African countries involved in oil, gas and minerals extraction for the fact that the extractive industry sector and natural resources has been associated with a curse instead of a blessing for a lot of African countries and thus partly because of lack of transparency in the sector.[518] Experience in countries such as Norway, Canada, Botswana and Ghana points to the fact that extractives can be effectively

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514 Extractives Baraza, "Mining: History of Mining in Kenya," available at https://extractives-baraza.com/resources/overview-of-kenyas-extractive-industry/mining/ [Accessed on 16/1/2020].

515 Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

516 Ibid.

517 Ibid.

518 Open Government Partnership, "Extractive Industry Transparency Initiative (EITI)," 18th June 2018. Available at https://www.opengovpartnership.org/temp-commitments/05-extractive-industry-transparency-initiative-eiti/ [Accessed on 16/1/2020].

managed to contribute to sustainable economic growth. However, in other parts of the world including Nigeria, the Democratic Republic of Congo (DRC), South Sudan, and the Central African Republic (CAR), there is evidence to suggest that extractives if not well managed can be a curse leading to conflict.[519]

According to the proponents, to make sure that revenue from the industry contributes to sustainable development, there is need for a tool that tracks revenue collection and where such revenue goes. EITI is considered to be such a tool as it provides information to different stakeholders and citizens.[520] This is because, availability of information on revenue transparency will help citizens appreciate how much money the government receives from the sector and how that money contributes to national budget and translating to service delivery.[521]

The EITI is based on a number of principles which were a result of a diverse group of countries, companies and civil society organisations who attended the Lancaster House Conference in London (2003) hosted by the Government of the United Kingdom. They agreed on a Statement of Principles to increase transparency over payments and revenues in the extractive sector.[522]

Of relevance to this section is the requirement that the government should issue an unequivocal public statement of its intention to implement the EITI. The statement must be made by the head of state or government, or an appropriately delegated government representative.[523] It is not an easy to task

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519 Oiro Omolo, M.W. & Mwabu, G., (eds), A *Primer to the Emerging Extractive sector in Kenya: resource bliss, Dilemma or Curse*, (Institute of Economic Affairs, November 2014), p.2. Available at *www.ieakenya.or.ke/downloads.php?page=1487576975.pdf* [Accessed on 16/1/2020].

520 Open Government Partnership, "Extractive Industry Transparency Initiative (EITI)," 18th June 2018.

521 Ibid.

522 EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.6. Available at https://eiti.org/sites/default/files/documents/eiti_standard2019_a4_en.pdf [Accessed on 16/1/2020].

523 Ibid, p.9.

to achieve as noted in reference to the experience of other implementing jurisdictions. For instance, despite support and effort put into implementation of the EITI Standard, it has been noted that many participating countries are slow to fully implement it. Some countries, such as Guinea, the Democratic Republic of Congo (DRC), and Kazakhstan, took almost a decade after having officially committed to implementing the EITI Standard before becoming fully compliant members.[524] In fact, in some countries, attempts at EITI implementation have totally failed. Such was the case in Bolivia where the interest failed even before the commitment stage since EITI was seen as a neoliberal instrument and thus not in accord with the ideological position of the government.[525]

5.4.3 Accountability and Transparency in Benefit Sharing: Avoiding the Resource Curse

a. The Natural Resources (Benefit Sharing) Bill, 2018

The *Natural Resources (Benefit Sharing) Bill, 2018*[526] seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; and for connected purposes. The proposed legislation essentially seeks to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the national government, county governments and local communities and designates the Commission for Revenue Allocation to oversee the same.[527]

Notably, the legislation shall apply to the following natural resources—sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.[528] The legislation, if enacted, will also

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524 Lujala, P., "An analysis of the Extractive Industry Transparency Initiative implementation process," *World Development* 107 (2018): 358-381 at p. 358.

525 Ibid.

526 Kenya Gazette Supplement No.130 (Senate Bills No.31).

527 Memorandum of Objects and Reasons, Natural Resources (Benefit Sharing) Bill, 2018.

528 Clause 3, Natural Resources (Benefit Sharing) Bill, 2018.

amend the Mining Act 2016 by amending section 83 thereof in order to review the royalties payable.[529]

While the pending legislation will have a wide application and touching on the various types of natural resources, it is worth pointing out that the suggested amendment on the mining Act 2016 will have a huge bearing on the proceeds of mining activities in the country, if passed. The same seeks to ensure that all the interested stakeholders will have a share of the accruing benefits. The Bill has been pending for over five years due to the contentious issue of benefit sharing between national and county governments, amongst other issues.

The Benefit Sharing Bill addresses some important aspects and as pointed out in the *Africa Mining Vision 2009*, the state's ability to optimise the leasing (licensing) of its natural resource assets is concentrated at the outset (conclusion of the exploitation contract) as it is difficult to fundamentally renegotiate contracts at a later stage without sending negative signals to investors on the certainty of contracts, with resulting increased negative investment risk perceptions.[530] The Mining Vision thus recommends that it is therefore important to identify all the critical resource linkages at the outset (in the resource exploitation contract/lease/license), even if the local economy is not yet in a position to take advantage of such opportunities.[531]

These are some of the issues that the country's legislative and institutional framework on extractives is trying to capture through enactment of laws and regulations. However, despite such efforts, implementation of these laws and regulations is doubtful. For instance, while there are regulations seeking to empower the local people on the extractives by equipping them with skills and expertise for technology transfer, there have been damning reports that the government agencies responsible for overseeing this are not carrying out their mandate.

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529 Clause 19, Natural Resources (Benefit Sharing) Bill, 2018.

530 African Union, *Africa Mining Vision 2009*, p.17. Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf [Accessed on 16/1/2020].

531 Ibid.

Kenya's Petroleum Ministry is on the spot for failing to utilize millions of shillings set aside for training Kenyans on petroleum operations despite the country facing a severe skills shortage.[532]

Empirical studies by other scholars have concluded that good institutional governance - specifically, a strong public voice with accountability, strong political stability, good regulations, and powerful anticorruption policies tend to conduce a positive relationship between natural resource richness and economic development.[533]

This is even clearer in the case of Nigeria where it has been reported that, despite the enactment of various acts, the culture of impunity and corruption has continued to occupy the country's oil industry and poverty reduction remains elusive.[534] However, this does not mean that Nigeria is not an implementing country of EITI. In 2019, Nigeria was rated as having made satisfactory progress overall with implementing the EITI Standard.[535] Notably, the EITI Board points out that even if a country is found making satisfactory or meaningful progress, it does not indicate whether there is corruption in the country or not. It simply means that the country has put into practice significant aspects of all EITI Requirements and thus has sufficient mechanisms of public disclosure of natural resources.[536] EITI membership and implementation alone is not enough.

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532 Tubei, G., "Kenya's Petroleum Ministry is on the spot for failing to utilize millions meant for training Kenyans on Petroleum operations despite massive skills shortage," *Business Insider*, July 16, 2019. Available at https://www.pulselive.co.ke/bi/finance/millions-meant-for-training-kenyans-on-petroleum-operations-gather-dust-in-local/384gf52 [Accessed on 16/1/2020].

533 Zeynalov, A., "Do Sufficient Institutions Alter the Relationship between Natural Resources And Economic Growth?" *MPRA Paper* 46850 (2013), at p. 11. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413867 [Accessed on 16/1/2020].

534 Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

535 EITI, "The Board agreed that Nigeria has made satisfactory progress overall with implementing the EITI Standard," 27.02.2019; Reference: 2019-20/BP-42. Available at https://eiti.org/BD/2019-20 [Accessed on 16/1/2020].

536 EITI, "How We Work," https://eiti.org/about/how-we-work#upholding-the-standard-internationally-validation

As already pointed out above, the issues affecting the extractives sector in Kenya are therefore not only limited to those related to modes of benefit sharing. There has been a general lack of openness, transparency and accountability as far as the mining activities are concerned.[537]

Such situations may have informed the provisions in the *Petroleum Act 2019* which provides under section 49 (5) that any contract is a public document and the Government shall have the right to publish and keep it publicly available. Despite this forward looking and commendable provision on accountability and transparency, we are yet to see the publication of such contracts touching on oil and gas agreements in the country.[538] It is estimated that so far, out of the 44 Production Sharing Contracts signed by the government of Kenya, only 10 have been publicised.[539] In addition, as far as accessibility of information is concerned, it has been observed that the government of Kenya maintains an open data portal and has to some extent availed information on it on some of the on-going projects. However, key information regarding fiscal terms, negotiations and payments is missing on the sites.[540] While there are many legal and regulatory framework covering contracts, exploration and production, it has rightly been pointed out that the legal framework on revenue collection, revenue allocation and social and economic spending is skeletal at

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537 Wahome, M., "Kenya denies IMF access to secret mining agreements," *Business Daily*, Sunday, July 21, 2013. Available at https://www.businessdailyafrica.com/economy/Kenya-denies-IMF-access-to-secret-mining-agreements/3946234-1922406-qjn73nz/index.html [Accessed on 16/1/2020]; Jamah, A., "Stakeholders blame 'secrecy clause' to graft in Kenya mining sector," *Standard Digital*, 19th Oct 2013. Available at https://www.standardmedia.co.ke/article/2000095810/stakeholders-blame-secrecy-clause-to-graft-in-kenya-mining-sector[Accessed on 16/1/2020].

538 See generally, Odote, C., "Release information on all extractives," *Business Daily*, Sunday, June 30, 2019. Available at https://www.businessdailyafrica.com/analysis/columnists/Release-information-on-all-extractives/4259356-5177330-vwfkao/index.html [Accessed on 16/1/2020].

539 Kidunduhu, N., Transparency keeps resource curse at bay, *Business Daily*, Wednesday, August 7, 2019. Available at https://www.businessdailyafrica.com/analysis/ideas/Transparency-keeps-resource-curse-at-bay/4259414-5227226-13y169t/index.html [Accessed on 16/1/2020].

540 Ibid.

best or is completely non-existent.[541] In addition, the inclusion and involvement of civil societies, non-governmental organisations and other stakeholders in the transparency and accountability framework is also missing as part of independent oversight across the value chain.[542]

Transparency through public disclosure of the Production Sharing Agreements and other contracts that the government has signed with mining, oil and gas companies builds citizen confidence in the institutions overseeing the governance of the sector and assists in managing expectations.[543] In addition, mining, oil and gas resources are owned by the citizens and are merely managed in trust by the government. Citizens, therefore, have a right to information regarding how their resources are managed.[544] Transparency initiatives in the extractive industries have also made it possible for governments and citizens to engage in the governance of the sector where some governments such as Liberia, Sao Tome, Nigeria, Mongolia, and Ghana have used the EITI to either engage citizens in policy dialogue about resource utilization or governance issues of the extractive industries.[545]

5.5 Kenya's Extractives Industry: Achieving the Dream

The extractives industry in Kenya holds high hopes for the Kenyan people with not only increased revenues but also lowered cost of living as the prices of petroleum products have a significant effect on the cost of essential commodities in the country.[546] Some of the mechanisms that are meant to enhance the economies of the national, county governments and communities through benefit sharing include but not limited to: direct investment in projects

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541 Ibid.

542 Ibid.

543 Makore, G., "Kenya's New Government and Imperatives for Extractives Governance Reform," *Oxfam,* Wednesday, Feb 14, 2018. Available at https://kenya.oxfam.org/latest/blogs/kenya%E2%80%99s-new-government-and-imperatives-extractives-governance-reform [Accessed on 16/1/2020].

544 Ibid.

545 Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 109.

546 Munyua, J., & Ragui, M., "Drivers of instability in prices of petroleum products in Kenya," *Prime Journal of Business Administration and Management (BAM)* 3, no. 3 (2013): 919-926.

that benefit the people, jobs and employment creation and technology transfer amongst others. Notably, this is in line with one of the EITI principles that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction.

In recognition of the fact that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent, the current legislation seeks to peg revenue sharing on the profits accrued.[547] There is hardly any publicly available information on the important aspects that shed light on the status of the revenues from the extractives industry. Its only recently when the President mentioned that the first batch of oil had been exported, and there was mention of the amount exported or its value.[548] The details of such deals remain few.

In a bid to achieve greater transparency, Kenya needs to reconsider its stand on the EITI. Adopting and enforcing the EITI principles on financial transparency may bring greater levels of practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure as well as the companies or contractors involved. In order for the communities and the public at large to experience positive impact from the proceeds of oil, gas and minerals in the country, there is a need for high standards of transparency and accountability in government operations and in the contractors' business. Contracts in the extractives sector are shrouded in mystery with most African countries usually being conned by multinationals involved in the exploration, exploitation and extraction of the resources, the first steps towards failure in tracking revenues.[549]

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547 Petroleum Act 2019, sec. 36-39.

548 Presidential Strategic Communication Unit, "Kenya in Sh1.3bn oil export deal," Daily *Nation*, Thursday, August 1, 2019. Available at https://www.nation.co.ke/news/Kenya-joins-list-of-oil-exporters/1056-5219572-qkp633z/index.html [Accessed on 16/1/2020].

549 Welimo, R., "Legal professionals trained on negotiating contracts in extractives industry," Kenya Broadcasting Corporation, August 5, 2019. Available at https://www.kbc.co.ke/legal-professionals-trained-on-negotiating-contracts-in-extractives-industry/ [Accessed on 16/1/2020].

Thus, even as the country needs to embrace and implement the EITI standards, there is also a greater need to build capacity in its people who will be in charge of drafting and implementing the extractives industry contracts. The Government of Kenya has a responsibility to adopt frameworks that are consistent with the prevailing social, economic, political and cultural circumstances in the country so as to facilitate the development of the oil and gas industry.[550]

Extractives industry has promoted socio-economic development in other African countries without falling into the trap of resource curse. For instance, Botswana, which is neither a member state nor an implementing country of EITI, has extractive mineral industries that have played a crucial role in the development of the country. Through proper management of its resources and thus achieving a mineral-led economic growth, the country has been transformed from one of the poorest countries in the world at the time of independence in 1966 to an upper-middle income country.[551] Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.[552]

Kenya can learn a lot from the case of Botswana and other countries that have managed to use their mineral resources to promote development through open, accountable and transparent management of the extractives.

5.6 Conclusion

Since minerals and hydrocarbons are finite resources, developing countries rich in these resources seek for strategies to harness the opportunities created

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[550] Kenya Civil Society Platform on Oil & Gas, "Setting the Agenda For The Development Of Kenya's Oil And Gas Resources – The Perspectives Of Civil Society," Aug 11, 2014. Available at http://kcspog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/ [Accessed on 16/1/2020]; Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research* 5, no. 1 (2018): 106-121, p. 108.

[551] Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

[552] Ibid, p.61.

with the extractive industries to support sustainable economic development.[553] The EITI Requirements are minimum requirements and implementing countries are encouraged to go beyond them where stakeholders agree that this is appropriate.[554]

However, this should be implemented alongside the domestic laws governing the sector as they will come in handy in addressing the other issues such as promoting public participation and consultations[555], curbing corruption, promoting fair and equitable benefit sharing for conflict avoidance and security, sound environmental management and governance, empowering communities and enhancing the general welfare of all.

6. Making the Blue Economy Work-Tapping into the Blue Economy for Sustainable Development

6.1 Introduction

This section discusses these challenges and suggests ways through which Kenya's Blue Economy can be unlocked to boost national development agenda. Partly based on the recently concluded first ever Global Sustainable

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553 Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimizing Value Retention In Host Countries*, UNCTAD/SUC/2012/1 (New York and Geneva, 2012), p. 1. Available at https://unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf [Accessed on 16/1/2020].

554 EITI International Secretariat, "The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources," Edition 1, 17 June 2019, p.9.

555 *Hassan and 4 others v KWS,* (1996) 1KLR (E&L) 214; Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok, HC Judicial Review No. 122 of 2011, [2012] eKLR; *Meza Galana and 3 others v AG and 2 Others*, HCCC No. 341 of 1993, [2007] eKLR; Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR, Environment and Land Case 195 of 2014; Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); Tata Chemicals Magadi Limited v County Government of Kajiado & 2 others [2019] eKLR, Petition 2 of 2019; Lake Naivasha Friends of the Environment v AG and 2 others, HC Petition No. 36 of 2011, [2012] eKLR.

Blue Economy Conference held in Nairobi, Kenya in November 2018[556], this section explores ways in which Kenya can tap into its diverse blue resources, with the aim of drawing valuable lessons for Kenya and making recommendations on what the country can do to maximize on these outcomes and achieve sustainable livelihoods for its people and national economic development in general.[557]

The section critically analyses the challenges hampering harnessing of these resources, how they can be surmounted and recommends measures within the policy, legal and institutional framework to assist Kenya effectively harness these resources.

6.2 Blue Economy: The Definition and Scope

The World Bank defines 'blue economy' in the following terms: "sustainable use of ocean resources for economic growth, improved livelihoods, and jobs while preserving the health of ocean ecosystem."[558] Thus, according to the World Bank, the "blue economy" concept seeks to promote economic growth, social inclusion, and the preservation or improvement of livelihoods while at the same time ensuring environmental sustainability of the oceans and coastal areas.[559]

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556 Conference on the Global Sustainable Blue Economy, held at the Kenyatta International Convention Centre, Nairobi from 26th to 28th November 2018. Available at http://www.blueeconomyconference.go.ke/ [Accessed on 17/1/2020].

557 Guleid, M., "True value of the blue economy to Kenya," Standard *Digital*, 29th Nov 2018. Available at https://www.standardmedia.co.ke/article/2001304390/true-value-of-the-blue-economy-to-kenya [Accessed on 17/1/2020].

558 The World Bank, Infographic: What is the Blue Economy? June 6, 2017, available at http://www.worldbank.org/en/news/infographic/2017/06/06/blue-economy [Accessed on 17/1/2020].

559 World Bank and United Nations Department of Economic and Social Affairs, *The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries*, World Bank, Washington DC, 2017, p.2. Available at https://openknowledge.worldbank.org/bitstream/handle/10986/26843/115545.pdf?sequence=1&isAllowed=y [Accessed on 17/1/2020].

Scholars have argued that the linkage between the *blue econ*omy, economic growth, and ocean and coastal resource conservation should be clarified by highlighting the following: The *blue economy* encompasses all economic activities with a direct dependence on the ocean or coastal and marine resources; it also includes marine education and research as well as activities of the public sector agencies with direct coastal and ocean responsibilities (e.g., national defense, coast guard, marine environmental protection, etc.); the ocean generates economic values that are not usually quantified, such as habitat for fish and marine life, carbon sequestration, shoreline protection, waste recycling and storing, and ocean processes that influence climate and biodiversity; and new activities are also evolving over the recent years, such as desalination, marine biotechnologies, ocean energy, and seabed mining.[560] Despite the existence of these resources and their potential benefits to Kenya's economy, harnessing them has been beset with major challenges, as discussed in the next section of this paper.

6.3 Towards a Sustainable Blue Economy for Economic and Social Development: Challenges and Prospects for Kenya

6.3.1 Achieving Sustainable Blue Economy in Kenya: Challenges

The Eastern Africa region faces challenges of illegal and unregulated fishing, piracy and armed robbery, maritime terrorism, illicit trade in crude oil, arms, drug and human trafficking and smuggling of contraband goods; degradation of marine ecosystems through discharge of oil, the dumping of toxic waste, illegal sand harvesting and the destruction of coral reefs and coastal forests.[561] Kenya also suffers from fragmented management of the coastal zone, lack of capacity and technical know-how, lack of capital, minimal participation by

[560] UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.2; See also *Report On The Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, Prepared By SBEC Technical Documentation Review Committee At A Retreat Held At Lake Naivasha Simba Lodge, Kenya, December 5th – 9th 2018.

[561] UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.5.

citizens, incoherent benefit sharing regime and biodiversity loss, amongst others.[562]

Furthermore, Kenya is confronted with border disputes, the dispute with Somalia over the maritime boundary[563], over a potentially lucrative triangular stretch of 100,000 square kilometers offshore territory that is about 370 kilometers from the coastline, believed to be home to huge oil and gas deposits.[564] Through these challenges, Kenya loses resources to foreign exploitation due to lack of capacity and knowhow as well as degraded and dwindling resources within its internal waters, attributable to environmental degradation, as already highlighted. Notably, the country's marine fisheries are primarily exploited by foreign fishing vessels which rarely land or declare their catches in the country, thus depriving the country of much needed revenue and processing jobs.[565]

Statistics have shown that fisheries, which Kenya has only focused on both for domestic and export markets, accounting for only about 0.5 per cent of the Gross Domestic Product (GDP) and generate employment for over two million Kenyans through fishing, boat building, equipment repair, fish processing, and other ancillary activities.[566] Despite this, the Kenya Maritime Authority (KMA) estimates the annual economic value of goods and services in the marine and coastal ecosystem of the *blue economy* in the Western Indian Ocean is over US$22 billion with Kenya's share slightly over US$4.4 billion (20%) with the tourism sector taking the lion's share of over US$4.1 billion.[567]

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562 See United Nations, Kenya: Common Country Assessment, United Nations Development Assistance Framework for Kenya: 2018-2022, January 2018. Available athttp://ke.one.un.org/content/dam/kenya/docs/unct/Kenya-%20Common%20Country%20Assessment%20%202018.pdf [Accessed on 17/1/2020].

563 Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

564 UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.5.

565 USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," p.1. Available at https://www.agrilinks.org/sites/default/files/resource/files/kenya_file.pdf [Accessed on 17/1/2020].

566 UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.5.

567 Ibid, p.5.

Therefore, the full economic potential of marine resources has not been exploited, yet Kenya has a maritime territory of 230,000 square kilometers and a distance of 200 nautical miles offshore.[568] Kenya has not yet invested in this potentially lucrative area thus occasioning loss of income and opportunities for the Kenyan people. It is also a potential solution to the food insecurity problem in Kenya through maximizing on the seafood harvesting.[569]

For Kenya to benefit fully from these resources there must be conscious efforts aimed at tackling the highlighted challenges related to environmental sustainability, maritime security and inclusive development.

6.3.2 Tapping into the Blue Economy Resources: The Way Forward

There have been positive steps, albeit slow ones, in tapping into these vast resources. For instance, in the recent years, there have seen a shift in approach, where there has been an integrated approach as reflected in the renaming of the Department of Fisheries as the Department of Fisheries and Blue Economy in June 2016 and the establishment of a Blue Economy Implementation Committee in January 2017.[570] During the Blue Economy Conference, there was emphasis on the need to improve the health of the oceans, seas, lakes, and rivers and the ecosystems which are under increased threats and in decline in many countries and regions across the globe.[571]

One of the challenges facing exploitation of the blue resources in Kenya is the lack of capital. Kenya can enter into mutually beneficial partnerships and networks for joint investments in projects, financing, technology development and transfer and capacity building, among others that will help it build capacity for exploitation of its resources. Funding mechanisms would not only build

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568 Ibid, p.5.

569 USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," op. cit.

570 Benkenstein, A., "Prospects for the Kenyan Blue Economy," South African Institute of International Affairs, Policy Insights 62, July, 2018, p.1. Available at https://saiia.org.za/wp-content/uploads/2018/07/saia_spi_62_benkestein_20180718.pdf [Accessed on 17/1/2020].

571 *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.4.

capacity for the experts but also facilitate the community's efforts to venture into this area of economy.

In addition to the foregoing, there is a need for conscious efforts aimed at curbing pollution of the water bodies. Farmers especially those in highlands should continually be sensitized on the need for cautious and minimal use of farming chemicals that are likely to adversely affect the water bodies and the living resources therein.

There is also a need for the various communities to be supported and sensitised on the need to venture into seafood business both as a source of food as well as a source of income.

6.4 Conclusion

Kenya can reap big from the Blue Economy. It can harness the blue economy resources to achieve sustainable development and specifically address questions of eradication of poverty, provision of food security and generally raise the people's standards of living.

7. Enhancing Benefit Sharing from Natural Resources Exploitation

7.1 Introduction

The role of government in establishing a framework to manage and invest revenues derived from oil, gas, and mining projects and indeed all natural resources is crucial to ensure that the sector contributes positively to the economy and livelihoods.[572] Most private-sector investors realize that projects that are good for the host country and communities, and whose benefits are perceived to be shared reasonably, are less likely to face disruption, renegotiation, or even expropriation.[573]

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572 Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 11. Available at http://www.ifc.org/wps/wcm/connect/8e29cb00475956019385972fbd86d19b/IFC_Art+and+Science+of+Benefits+Sharing_Final.pdf?MOD=AJPERES&CACHEID=8e29cb00475956019385972fbd86d19b [Accessed on 21/01/2020].

573 Ibid.

Effective Natural Resources Management (NRM) contemplates the use, access of resources to preserve and conserve for the good of all generations.[574] The NRM role is bestowed upon the state but with duty on cooperation from everyone to ensure that there is sound use of the natural resource.[575] Thus, it is necessary to take care of natural resources to ensure that the benefits that accrue undoubtedly serve the present and the generations to come.[576] The issue of benefit sharing has been a great challenge.[577]

This section reflects on equitable benefit sharing in the context of the emerging extractive industry in Kenya. The discourse thus goes beyond reliance on extractive industries to encourage communities on how best they can overcome the perennial problems of economic underdevelopment and consequently, poverty.

7.2 Extractive Industries Resources: The New Canaan for Kenya?

In the year 2012, the then Kenya's President Hon. Mwai Kibaki announced the discovery of oil in Turkana County.[578] Expanding extractive industries, particularly in sub-Saharan Africa, is characterized by increasing levels of political, social, technical and environmental risk.[579] Changes brought about by extractive investment can have negative social impacts, such as rapid urban

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574 Child, B., et al, *Zimbabwe's CAMPFIRE Programme: Natural Resource Management by the People.* (1997) IUCN-ROSA Environmental Issues Series No. 2

575 See Article 69, Constitution of Kenya 2010.

576 See United Nations, *World Economic and Social Survey 2013: Sustainable Development Challenges*, E/2013/50/Rev. 1, ST/ESA/344. Available at https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf [Accessed on 21/01/2020].; See also Kibert, C.J., 'The Ethics of Sustainability,' available at http://rio20.net/wp-content/uploads/2012/01/Ethics-of-Sustainability-Textbook.pdf [Accessed on 21/01/2020]..

577 Ochola, O.W., et al (eds), *Managing Natural Resources for Development in Africa: A resource Book.* IDRC, 2010. Available at http://www.gbv.de/dms/zbw/646005146.pdf [Accessed on 21/01/2020].

578 Kagwe, W., 'Kenya strikes new oil well, doubles estimates*,' The Star,* 4 July 2013. Available at http://allafrica.com/stories/201307040991.html [Accessed on 21/01/2020].; Liloba, H., 'Kenya: Tullow Hits another Oil Field,' *East African Business Week* (Kampala), 9 July, 2013. Available at http://allafrica.com/stories/201307100096.html [Accessed on 21/01/2020].

579 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.

growth, physical and economic displacement of communities, weakening of traditional social structures, new conflicts, and even impoverishment.[580] Sudan, Democratic Republic of Congo and Nigeria are just but few examples of African states that have gone on internal armed conflict because of their rich natural resources.[581] In Democratic Republic of Congo, the war has largely impacted on the environment and native wildlife. Parties to armed conflicts have resorted to occupying natural habitats thereby scaring animals away. Further, the illegal trade of minerals bars communities from benefiting from its resources.[582]

There is conflicting literature on the potential of extractive industries capacity to promote national development. It has been observed that proponents of resource-led development, argue that the inflow of foreign direct investment (FDI) into the country and a model of export based growth will provide jobs, economic growth and ultimately, poverty reduction.[583] However, for many resource rich developing countries pursuing this model, the reality has been low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.[584]

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580 Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 55.

581 Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at http://pubs.iied.org/pdfs/13578IIED.pdf [Accessed on 21/01/2020].

582 See 'Diamonds in Sierra Leone, A Resource Curse?' available at http://erd.eui.eu/media/wilson.pdf [Accessed on 22/05/2016]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' *Dissent Magazine*, Spring 2014, available at https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on [Accessed on 21/01/2020].; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' *Investigative Field Report*, June 2013. Available at https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf [Accessed on 21/01/2020].

583 Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, op cit, p. 48.

584 Ibid, p. 48.

There have been renewed hopes of 'spurred economic growth and development' in Kenya as a result of the recently discovered oil resources in the country.[585] Turkana County has been documented as one of the Counties with the highest level of poverty in Kenya.[586] The distrust between local communities around the region against each other[587] has led to constant conflicts as well as cross border conflicts.[588] The conflict is largely sparked by livestock rustling, harsh climate and boundary dispute. Due to low literacy levels,[589] other communities have subsequently been employed as locals had no skills for drilling and seismic work.[590]

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585 See Institute for Human Rights and Business, 'Human Rights Risks and Responsibilities: Oil and Gas Exploration Companies in Kenya,' *Background Paper*, 2013. Available at http://www.americanbar.org/content/dam/aba/events/international_law/2015/06/Africa%20Forum/Security1.authcheckdam.pdf [Accessed on 21/01/2020].

586 *Turkana County –United Nations Joint Programme 2015-2018*, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf [Accessed on 21/01/2020].

587 Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. http://www.jstor.org/stable/25842144. [Accessed on 21/01/2020].

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

589 Chikwanha, A.B., 'The Anatomy of Conflicts in the East African Community (EAC):
Linking Security With Development,' *Keynote speech to Development Policy Review Network-African Studies Institute, Leiden University, the Netherlands, 2007*. Available at https://www.issafrica.org/uploads/EACANNIE.PDF [Accessed on 21/01/2020]; See also http://opendata.go.ke/Education/Percentage-disribution-of-population-15years-by-/jbxify92 [Accessed on 21/01/2020].

590 See Cordaid, 'Oil Exploration in Kenya: Success Requires Consultation,' *Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya,* August 2015, p. 36. Available at https://www.cordaid.org/media/publications/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf [Accessed on 21/01/2020]. See also Turkana *is the least educated, says report*, Daily Nation November 25, 2013. Available at http://www.nation.co.ke/news/Turkana-is-the-least-educated-says-report-/-/1056/2087018/-/vvpnq1z/-/index.html [Accessed on 21/01/2020].
; Kenya National Bureau of Statistics, *Exploring Kenya's Inequality: Pulling Apart or Pooling Together?*

While there are prospects of 'real' development in the region, the foregoing averments in the international arena affirm that the expected development may not be realized or may not achieve the desired outcome for the country and specifically the locals.[591] Pegging hopes of development on the extractive resources only may mean that the region remains under-developed or undeveloped for longer as the oil may not turn out as expected. If anything, it may add to the above mentioned problems that characterise the region in question.[592] Failed economies result in conflicts,[593] as a result of natural resources bad governance or mismanagement.[594]

Skewed distributions of benefits from natural resources can fuel social exclusion and conflict, threatening sustainability.[595] For instance, in the case of Kenya, there have been reports that the Irish oil Firm Tullow, which was allocated the Lokichar Basin oil reserves, has so far incurred $ 1.5 billion (Kenya Shillings 150 billion) in exploration costs and this amount is to be recovered once production begins.[596] This has led to the fears that in the absence of proper audits by Kenya, explorers such as Tullow Oil may inflate recoverable costs ultimately denying Kenyans the full benefits of their national

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591 Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 21/01/2020]

592 See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012.)

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

594 Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf [Accessed on 21/01/2020].

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

596 Herbling, D., 'Tullow's Sh 150bn Exploration bill Raises Queries on Costing methods,' *Business Daily,* Monday, AQpril 18, 2016 (Nation Media Group Publication No. 2331), pp. 1 & 4.

resource.[597] Kenya has in the past been advised that since it has a very short period within which it can maximize benefits from the oil sector before their depletion, it should continue to focus on key sectors such as agribusiness and service sectors.[598]

7.3 Benefit Sharing: Community Rights and Responsibilities

Equitable benefit sharing can be defined as the access to benefits that accrue from natural resources by stakeholders including indigenous communities.[599] The international recognition of the right to benefit from natural resources wealth may be predicated upon such recognised rights of communities as the right to self-determination, right to development and the right of peoples to freely dispose of their wealth and natural resources.[600]

The principle of equitable benefit sharing is acknowledged in several international environmental and natural resources law instruments[601] some of which are highlighted in this section. As a potentially major importer of oil in future,[602] the discovery of oil is deemed as a major boost to the Kenyan economy.[603] The economic value of oil is expected to be high and central to the development of the local community, though it has its benefits and challenges in equal measure.[604] Indeed, it has been reported that the discovery of oil has facilitated infrastructural developments such as schools, health amenities and making the area easily accessible. Within two years of discovery, buildings were erected, human population was recorded at 500%

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597 Ibid, p. 1.

598 Ibid, p. 4.

599 Jonge, B., W*hat is Fair and Equitable Benefit Sharing? Journal on agricultural and environmental ethics*, vol. 24, issue 2, 2011.

600 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1.

601 *Convention on Biological Diversity; OECD Energy Charter Treaty 1994; Annex to the Nagoya Protocol on Access and Benefit-sharing*; CISDL, 'The Principles of International Law Related to Sustainable Development,' available at http://cisdl.org/tribunals/overview/principles/1.html [Accessed on 21/01/2020].

602 The 2015 Economic Survey Report by Kenya National Bureau of Statistics.

603 http://www.tradingeconomic.com/kenya/imports [Accessed on 21/01/2020].

604 BBC (2012, March 26) Kenya oil discovery after Tullow Oil Drilling; The *paradox of plenty* is a fear that may hit the county In comparison to countries in Africa, those which are rich in minerals are the lowest in terms of development.

growth in several towns within Turkana County.[605] This is an indication of the high hopes that have been pegged on the potential benefits that may accrue from this venture. Benefits may take either monetary or non-monetary forms and stakeholders should exploit both forms.

Capacity building within the community ensures that communities become less dependent on the immediate benefits accruing from commercial exploitation of the resources and instead have enduring sources of livelihoods. Research may go a long way in helping communities realise the other forms of investments or economic activities that may be viable within their localities. Thus, communities should not only seek to receive the monetary benefits but should also take advantage by acquiring the relevant skills and investing in businesses or venture that will help them in the long term even after the oil reserves are depleted.

7.4 Legal Framework on Benefit Sharing and Natural Resource Exploitation in Kenya

The Constitution also outlines the principles of land policy and provides that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the laid down constitutional principles.[606] Land in Kenya is also classified as public, community or private.[607] Also noteworthy is the provision that regardless of their location, the Constitution classifies all minerals and mineral oils as defined by law and all rivers, lakes and other water bodies as defined by an Act of Parliament as forming part of public land.[608]

The *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016*[609] is meant to give effect to Article 71 of the Constitution of Kenya, 2010

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605 Kenya County Fact Sheet, 2014; Kornet, J., 'Oil in the cradle of mankind - A glimpse of Africa's future,' available at http://www.frontiermarketscompendium.com/index.php/news-commentary/entry/oil-in-the-cradle-of-mankind-a-glimpse-of-africa-s-future [Accessed on 21/01/2020].

606 Art. 60(1), Constitution of Kenya 2010.

607 Art. 61(2), Constitution of Kenya 2010.

608 Art. 62(1) (f) (i), Constitution of Kenya 2010.

609 Act No. 41 of 2016, Laws of Kenya.

and for connected purposes.[610] Notably and as already discussed in a previous section, the Act outlines the relevant considerations in deciding whether or not to ratify an agreement.[611]

The proposed legislation *Natural Resources (Benefit Sharing Bill), 2018*[612] seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities, to establish the natural resources benefit sharing authority and for connected purposes. The Act applies with respect to petroleum and natural gas, among other natural resources. The Act provides for guiding principles to include transparency and inclusivity, revenue maximization and adequacy, efficiency and equity and accountability.[613] The legislation proposes setting up a Benefit Sharing Authority which will be mandated to coordinate the preparation of benefit sharing agreements between local communities and affected organizations, and review and where appropriate determine the loyalties payable to an affected organization engaged in natural resource exploitation, among other related functions.[614]

The *Environmental Management and Co-ordination (Amendment) Act, 2015*[615] amends section 48 of EMCA by inserting subsection (3) to the effect that where a forested area is declared to be a protected area under section 54(1), the Cabinet Secretary may cause to be ascertained, any individual, community or government interests in the land and forests and shall provide incentives to promote community conservation.[616] This is an important clause that can promote forests conservation through the use of incentives. The incentives can be in the form of benefits that accrue to the community from the forests resources. The Mining Act, 2016[617] provides for accruing benefits in the form

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610 See also S. 124A, *Environment (Management and Coordination) Act*, No.8 of 1999, Laws of Kenya.

611 Sec. 9, *Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016.*

612 *Natural Resources (Benefit Sharing) Bill, 2018*, 23rd October, 2018 (Government Printer, Nairobi, 2018), Kenya Gazette Supplement No.130 (Senate Bills No.31).

613 Clause 4, *Natural Resources (Benefit Sharing Bill), 2018*.

614 Clause 6, *Natural Resources (Benefit Sharing Bill),* 2018.

615 No. 5 of 2015, Laws of Kenya.

616 S. 31, *Environmental Management and Co-ordination (Amendment) Act, 2015*.

617 Mining Act, No. 12 of 2016, Laws of Kenya

of financial and other benefaction to which communities in mining areas are entitled to receive from the proceeds of mining and related activities.

The *Petroleum Act, 2019*[618] provides that the relationship between the Government and an exploration and production company is governed by a Production Sharing Contract (PSC).[619] The PSC stipulates that the exploration and production company gets a share of the oil and gas produced and its share is in the form of oil barrels.[620]

Notably, the Act introduces the concept of "local content" which means the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.[621] The local content plan should address- employment and training; research and development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; and succession plans for positions not held by Kenyans.[622] The requirement on local content can go a long way in enhancing benefit sharing mechanism in the extractive industry in Kenya, an aspect that was missing or inadequate in the Kenyan framework.

The *National Sovereign Wealth Fund Bill*, 2019 is a proposed legislation that seeks to establish the Kenya Sovereign Wealth Fund, to provide institutional arrangements for effective administration and efficient management of minerals and petroleum revenues, and for connected purposes and incidentals thereto.[623] The purpose of the Fund shall be to — insulate expenditure under the budget estimates of the national government from fluctuations in resource revenues; provide finance for infrastructure development priorities to foster strong and inclusive growth and development; and build a savings base for

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618 Petroleum Act, No. 2 of 2019, Laws of Kenya.

619 Ibid, sec. 18.

620 See Muigua, K., et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, August, 2015), pp. 248-251; Petroleum Act, 2019, Schedule.

621 Sec. 50(1), *Petroleum Act, 2019*.

622 Sec 50(3) *Petroleum Act, 2019*.

623 Preamble, *National Sovereign Wealth Fund Bill*, 2019.

future generations when minerals and petroleum resources are exhausted.[624] This fund will be important in promoting intergenerational and intragenerational equity in natural resource benefits sharing.

The *Community Land Act, 2016* is meant to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.[625] The Act provides that every member of the community has the right to equal benefit from community land, where equality includes full and equal enjoyment of rights of use and access. This is a form of promoting benefit sharing as far as community land is concerned.[626]

The content of this provision, if fully implemented, is likely to impact positively on the community in ways that ensure that the community becomes self-sustaining as far as livelihood sustenance is concerned through both monetary and non-monetary forms of benefits.

7.5 Lessons from Ghana: Catapulting National Development through Extractive Industries

Ghana is often considered a model of best practice, based on the government's distribution of a proportion of mining rents to mining affected communities.[627] In Ghana's mining sector, the system devised to distribute mining wealth to local level is royalty, with royalty agreements being set at between 3% and 6%, provided directly to the government quarterly, which is the main source of revenue derived by gold mining.[628] The mine revenue is paid to the Large Tax Unit of the Ghana Revenue Authority, which then dispenses the money into the Consolidated Fund. Of this sum, 80% is retained by the government and used for general budget support. 10% is dispensed into the Mineral Development Fund (MDF), which is ostensibly used to help fund public

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624 *National Sovereign Wealth Fund Bill*, 2019, Clause 5.

625 Preamble, *Community Land Act*, No. 27 of *2016*, Laws of Kenya.

626 Sec. 35, Community Land Act, 2016.

627 Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *Resources Policy*, vol. 40, 2014, pp.74–82, p. 74.

628 Ibid, p. 75; See S. 25, *Minerals and Mining Act*, 2006 (Act 703), Laws of Ghana.

mining sector institutions and for funding ad-hoc flagship projects in mining communities.[629]

Decentralization of mining revenue in Ghana is legislated as compensation for mining-affected communities; it is not a dividend or admission that citizens in mining areas have economic rights to mineral deposits.[630] It is however noteworthy that even in Ghana, it has been observed that as is the case in many countries, the relationship between industrial mining and communities in Ghana is complex and highly contested, because, despite macroeconomic growth fueled by the mining boom, Ghana remains a country with high rural poverty.[631] There have even been instances of misappropriation of mineral benefits distributed through the grassroots leaders, namely, village chiefs who are supposed to ensure that the funds are invested well for the benefit of the communities.[632] The result has been unending poverty despite the presence of resources. Ghana can offer good lessons in terms of models of division, while ensuring that Kenya does not fall into the same problem of misappropriation of funds. Local communities should be also supported and encouraged to diversify their sources of livelihood in a way that ensures sustainability in income and growth for both the communities and the country.

7.6 Nigeria: Resource Curse or Blessing?

There has been documented evidence from the vast majority of resource-rich countries, especially those endowed with depletable natural which suggests that resource riches can be a ‘‘curse’’ rather than a ‘‘blessing’’.[633] One such country is Nigeria, one of the largest economies of the African continent and

629 Ibid, p. 75.

630 Standing, A., ‘Ghana's extractive industries and community benefit sharing: The case for cash transfers,’ op cit, p. 74; See also Ayee, J., et al, ‘Political Economy of the Mining Sector in Ghana,’ *The World Bank Policy Research Working Paper 5730*, July 2011. Available at http://www.cmi.no/publications/file/4091-political-economy-of-the-mining-sector-in-ghana.pdf [Accessed on 21/1/2020].

631 Ibid, p. 75.

632 Ibid.

633 Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,’ *Resources Policy*, 38(2013), pp.181–195, p. 181.

one of the leading oil producers in the world.[634] It is estimated that oil accounts for more than 90 percent of the country's exports, 25 percent of the Gross Domestic Product (GDP), and 80 percent of government total revenues.[635] Notable is the observation that the oil boom of the 1970s led to the neglect of agriculture and other non-oil tax revenue sectors, expansion of the public sector, and deterioration in financial discipline and accountability.[636] While oil exports have fuelled real GDP growth of over 5 per cent a year in Nigeria, the official unemployment rate climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates are estimated to be as high as 60 per cent.[637]

The source of Nigeria's vast oil wealth is also a site of an ecological disaster that has destroyed livelihoods of farmers and fisher folk in the delta's inlets on a huge scale.[638] This is because environmental damage not only affects health and wellbeing but also decimates livelihoods, such as fishing and agriculture that depend upon natural resources.[639]

Kenya should therefore avoid a scenario where oil exploration result in corruption, human rights abuse and environmental degradation which in turn affects the livelihoods of the people.

7.7 Opportunities: Making Natural Resources Wealth Count

Benefit-sharing mechanisms can be organized along two main axes: a *vertical axis* of benefit sharing across scales from national to local, and a *horizontal*

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634 See Agbaeze, E. K, 'Resolving Nigeria's dependency on oil – The derivation model,' Journal *of African Studies and Development*, Vol. 7(1), pp. 1-14, January 2015.

635 Ibid, p. 3.

636 Ibid, p. 2.

637 Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' *Africa Progress Report* 2013, p. 31. Available at http://appcdn.acwupload.co.uk/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf [Accessed on 21/1/2020].

638 Ibid, p. 32; *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company*, Centre for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al*., available at http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [Accessed on 21/1/2020].

639 Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' *Africa Progress Report* 2013, p. 33.

axis of sharing within scales, including within and across communities, households and other local stakeholders.[640] Free and prior informed consent of local communities and transparent and equitable benefit-sharing mechanisms can bring affected communities into the mainstream of a natural resource dominant development model.[641] Understanding who the key stakeholders are, what their aspirations, concerns and expectations of a project are, and what drives these is important for judging the reasonableness of a benefit sharing settlement and its legitimacy and durability over time.[642]

The social and economic development is essential to enable a favourable living and working environment.[643] Natural Resource Management plays a key role in the conservation of the environment. Human rights remain the obligation of the state to protect and may be done through inclusive decision making processes.[644]

Therefore, while it is important for the state to promote the people's right to benefit from their natural resources as envisaged in international and national legal and human rights instruments, this should be done within the framework of achieving sustainable development. However, it is also important for the Kenyan people to look beyond oil resources in the country and invest in innovation to boost production in other areas such as livestock and agriculture production as well as innovative business investment in creative technologies.

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640 Ibid.

641 Talbott, K. & Thoumi, G., 'Common ground: balancing rights and responsibilities for natural resource investments and community development,' 3rd April 2015, available at https://news.mongabay.com/2015/04/common-ground-balancing-rights-and-responsibilities-for-natural-resource-investments-and-community-development/ [Accessed on 21/1/2020]

642 Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), op cit. p. 12.

643 Principle 8, UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

644 Aarhus Convention in Access to Information, Public participation in decision making and Access to Justice in Environmental Matters1989 recognizes the nexus between human right and the environment as being essential in the well-being of human beings.

7.7.1 Foundations and Trusts

The approaches taken by Kenya towards resource management, for instance, have been through Foundations, Trusts and Funds initiatives in the energy sector. FTF represent a wider range of financial and institutional framework that channel revenues to local communities. This mode of benefit sharing enable for the operation of government payment, compensation and community investment. The author suggests that they establish a systematic, professional formal approach to development. This has been successful in jurisdictions such as Senegal, Ghana, Australia and Canada.[645]

7.7.2 Enhancing Local Accountability and Building Capacity

Communities with more control over access and better common property management regimes play stronger decision making roles.[646] They acknowledge that land-use decision making is inherently a multilevel process since numerous actors are involved both directly and indirectly representing multiple sectors with different roles, interests and incentives.[647]

Arguably, resource funds (RF) may provide, even to a limited degree, a track record of windfalls.[648] It has also been suggested that through CSR and social investment strategies, extractive firms can provide local socio-economic development where the government is unable or unwilling to do so, and thus may help mitigate against the potentially harmful impacts of resource-led growth.[649] Notably, the ideal goal is for private sector development interventions to supplement government service provision, to avoid a situation of dependency on the private sector, and not to impact the willingness or ability of the state to develop its capacity.[650] However, due to the uncertainties

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645 Muigua K., et al, Natural *Resources and Access to Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

646 Myrers, R., et al, 'Benefit sharing in context: a comparative analysis of 10 land-use change case study in Indonesia,' *Infobriefs, No. 118, May 2015.* Available at http://www.cifor.org/publications/pdf_files/infobrief/5585-infobrief.pdf [Accessed on 21/1/2020].

647 Ibid, p.1.

648 Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' op cit, p. 190; cf. Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, op cit, p. 50.

649 Alstine, J.V., et al, Resource Governance Dynamics: The Challenge of 'New Oil' In Uganda, op cit, p. 50.

650 Ibid.

that come with CSR, there may be a need for a framework that is anchored in law to shield it from the uncertainties that come with CSR arrangements. This also increases accountability not only to the local communities but also the government.

7.7.3 Achieving Right to environmental information

Environmental information comprises of information held by authorities, factors that affect the environment, research on the environment, health and safety measures[651], and reports on the implementation of environmental legislation and so forth.[652] Lack of environmental information regarding conservation and management becomes more technical in undertaking natural resource management.

As far as indigenous communities are concerned, their right to information should be upheld by ensuring that any information needed is received as soon as possible. Enabling access to environmental information forms basis to access environmental justice.[653] Communities are also likely to understand the implications of extractive industries on their day to day lives as far as the environment is concerned.

Access to Information Act 2016[654] was enacted to, inter alia, to give effect to Article 35 of the Constitution of Kenya on the right of access to information. The Act provides that subject to the Act and any other written law, every citizen has the right of access to information held by — (a) the State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.[655] The term 'information' is interpreted to include information which is of significant public interest due to

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651 Convention on Environment Impact Assessment in a Transboundary Context, 1991, calls for the establishment of EIA procedures that involves public participation.

652 http://www.citizensinformation.ie/en/environment/environmental_law/access_to_environmental_information.htm[Accessed on 21/1/2020].

653 Muigua, K., *Natural Resources and Environmental justice in Kenya,* op cit; See also Access to Information Act, No. 31 of 2016, Laws of Kenya; See also Art. 35 of the Constitution of Kenya 2010.

654 *Access to Information Act*, 2016, Laws of Kenya (Government Printer, Nairobi, 2016).

655 Ibid, S. 4(1).

its relation to the protection of human rights, the environment or public health and safety.[656]

7.7.4 Devolution and Benefit Sharing

The 2010 Constitution requires that services be devolved and both the national and county governments ensure reasonable access to its services so far as it is appropriate.[657] Ideally, local communities should be allowed to access natural resources for them to be able to uphold their responsibilities for future generations.[658] Natural resources are a source of livelihood as they from part of their economic activity. If natural resources are accessed and well managed, they provide for raw materials which are then processed to get products that are sold and thereby generating income. Allowing communities to access natural resources will undoubtedly promote sustainable development.

It is important to make use of the devolved system to empower communities and build capacity through investing accrued benefits in sustainable development projects which will go beyond the lifespan of oil exploration and at the same time uplift the livelihoods of the local people. The County governments are in a better position to identify the most viable and sustainable projects.

7.7.5 Public participation

Public participation allows individuals to express their views on key governmental policies and laws concerning conditions in their communities. Fostering public participation will mean that authorities dispense their constitutional and legislative obligation, positive deviation in terms of contribution and motivation. *In The Matter of the National Land Commission [2015] eKLR*,[659] one of the issues that the Supreme Court of Kenya had to deal with was the role and place of public participation in the administration and management of land in Kenya. Mutunga, CJ observed that *public participation*

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656 Ibid, s.2.

657 Article 6, Constitution of Kenya, 2010.

658 Article 40, United Nations Declaration on the Right of the Indigenous people, 2007; see *Joseph Letuya and 21 others v AG and 5 others ELC civil suit no 821 of 2012*.

659 Advisory Opinion Reference No. 2 of 2014, December 2, 2015.

was a major pillar, and bedrock of democracy and good governance (emphasis added).[660]

The Supreme Court's advisory opinion is an affirmation of the important role that the principle of public participation can play in enhancing people's appreciation of the management of natural resources in the country. Apart from enhancing people's role in management, public participation may promote co-existence among indigenous communities and allow investors to carry out their activities peacefully.[661]

7.7.6 Addressing Resource capture Phenomenon/Corruption

It has been argued that rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption.[662] Corruption has been termed as a threat to protected human security.[663] It calls for global effort to combat corruption.[664] Resources have fostered corruption, undermined inclusive economic growth, incited armed conflict and damaged the environment.[665] For the governments managing significant resource rents, rent appropriation may be preferable when compared to the promotion of wealth creation policies.[666] The argument is based on the preposition that rent appropriation may dominate over wealth generation as it offers immediate

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660 Ibid, para. 45.

661 See Yagoub, A.M., 'Public Participation in Natural Resource Management in Sudan'; Mohair, P., *Public Participation and Natural resource Decision Making: the Case of RARE II Decisions,* Utah Agricultural Experiment Station, Journal Paper No. 3282.

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

663 Alao, A., *Natural Resource Management and Human Security in Africa,* in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010).

664 Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact,* August 2012. Available at http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780 [Accessed on 21/1/2020].

665 Aled, W., et al, *Corruption in Natural Resource Management: An introduction* (Bergen: Michelsen Institute, 2008). Available at http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf [Accessed on 21/1/2020].

666 Ibid.

economic and political gains. These gains appear quite appealing as they can, arguably, be highly personal, favouring the specific members of the ruling elite.[667]

7.8 Conclusion

Effective management of these resources and equitable benefit sharing are essential.[668] There is need for debate and consensus on how best to manage natural resources and the extractive industry so as to avoid the resource curse and alleviate poverty and promote development.

8. An Integrated Approach to Environmental Management and Conservation for Sustainable Development in Kenya

8.1 Introduction

Natural Resources and the environment in general are central to both the anthropocentric and ecocentric approaches to sustainable development agenda.[669] Natural resources law represents a major and perhaps one of the most important regulatory regimes in most countries.[670] One of the crucial issues addressed by natural resources law is how to avoid harm and serious damage to resources.[671] Therefore, policymakers have a variety of approaches

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667 Ibid.

668 United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

669 Helen Kopnina, 'Revisiting Education for Sustainable Development (ESD): Examining Anthropocentric Bias Through the Transition of Environmental Education to ESD' (2014) 22 Sustainable Development 73; Guido Montani, 'The Ecocentric Approach to Sustainable Development. Ecology, Economics and Politics' 36; Satish C Shastri, 'Environmental Ethics Anthropocentric To Eco-Centric Approach: A Paradigm Shift' (2013) 55 Journal of the Indian Law Institute 522; Louis Kotze and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 Global Journal of Comparative Law 5.

670 Hutter, B.M, 'Socio-Legal Perspectives on Environmental Law: An Overview' in Hutter B.M. (ed), *A Reader in Environmental Law,* (Oxford University Press, 1999) 3, p.4.

671 Gunningham, N. & Sinclair, D., 'Designing Smart Regulation,' in Bridget M. Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999), p.305.

available when legislating to enable holistic protection and management of the environment and natural resources.[672] These approaches include command and control, market-based approaches, incentives (taxation and subsidies) amongst others. Community Based Natural Resource Management (CBNRM) and traditional resource management institutions have also been used with some success in Kenya.[673] Ecosystem-based approaches such as Integrated Water Resources Management (IWRM) or River basin management, integrated coastal zone management (ICZM) and integrated management of land and other resources are other approaches to NRM.[674]

Notably, the relationship between development and environment is central to the sustainable development concept.[675] At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted *the 2030 Agenda for Sustainable Development*, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.[676]

While various groups define sustainability differently, where some restrict it to environmental sustainability and others include broader issues affecting human life, the most common one sees sustainability as the requirement to maintain the capacity to provide non-declining well-being over time.[677]

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672 *Ibid*, p.305.

673 See generally, Measham, T.G. & Lumbasi, J., "Success factors for Community Based Natural Resource Management (CBNRM): lessons from Kenya and Australia." *Environmental Management*, Vol. 52 (3), 2013, pp. 649-659.

674 See Feeney, C. & Gustafson, P., "Integrating Catchment and Coastal Management-A Survey of Local and International Best Practice," *Prepared by Organisation for Auckland Regional Council, Auckland Regional Council Technical Report 2009/092*, 2010.

675 'Theories of Economic Development,' p. 14. Available at *www.springer.com/cda/content/document/cda_downloaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406* [Accessed on 21/01/2020].

676 United Nations Development Programme, 'Sustainable Development Goals (SDGs),' available at *http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development agenda.html* [Accessed on 21/01/2020].

677 Neumayer, E., 'Sustainability and Well-being Indicators,' Research Paper No. 2004/XX, (UNU World Institute for Development Economics Research (UNU-WIDER), March 2004, p.1. Available at

It is therefore, in recognition of the central role of the environment in human wellbeing that this section explores the various approaches aimed at facilitating effective environmental governance that balances the foregoing aspects.

These approaches are to be applied as complementary tools in natural resource management. They are not mutually exclusive as they overlap with one another in their application.[678] Command and control and market-based mechanisms can be used in a synergetic manner such that while broader environmental objectives are set by public authorities, the methods of achieving those objectives are determined by the business fraternity.[679] Some argue that [680] while market-based mechanisms are seen to extend the freedom to the market players, in command and control mechanisms, the benefits are said to flow to the consumers due to government intervention. Further, the government will always play its role of granting rights, imposing responsibilities, and extend, restrict, or eliminate privileges, while the market conservatives argue that once there is efficient market then the free play of the market forces will allocate resources to their highest valued uses and governments should therefore stay away.[681]

http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/SustainabilitywellbeingArt..pdf [Accessed on 21/01/2020].

678 Blanco, E. & Razzaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives,* (Edward Elgar Publishing Limited, 2011), p. 106; See also Miller, B. W. & Morisette, J. T., "Integrating research tools to support the management of social-ecological systems under climate change," *Ecology and Society,* Vol. 19, No. 3, 2014, Art. 41.

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

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

681 *Ibid.*

8.2 Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya

8.2.1 Introduction

Much of the debates revolving around sustainable development agenda have evolved around how environmental and natural resources can be harnessed in a way that puts man in the middle of such activities, that is, an anthropocentric approach. An anthropocentric approach focuses mainly on meeting the need of human beings at the expense of a system that values the environment and ecological health, that is, an ecocentric approach.

The human rights-based approaches provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.[682] Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.[683] There is an overemphasis on anthropocentric approach at the expense of an ecocentric approach that puts a greater emphasis on environment and ecological health. This section discusses Kenya's approach to environmental conservation and protection and makes a case for a more ecocentric approach.

8.2.2 Ecocentric Approaches to Environmental Management

The *World Charter for Nature*[684] points out that mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients. Furthermore, civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity, and for rest and recreation.[685]

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682 Fisher, A.D., 'A Human Rights Based Approach to the Environment and Climate Change' *A GI-ESCR Practitioner's Guide*, March 2014.

683 Ibid.

684 UN General Assembly, *World Charter for Nature,* 28 October 1982, A/RES/37/7.

685 Ibid, Preamble.

Ecocentric approaches to environmental management explore such themes as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.[686] The ecocentric approach to environmental management and governance advocates for the conservation of the environment as a matter of right and not merely because of the benefits that accrue to the human beings.[687] Under the ecocentric approach, there is a moral concern for nature.[688] Some scholars have rightly argued that we should give legal rights to forests, oceans, rivers[689] and other so-called "natural objects" in the environment-indeed, to the natural environment as a whole.[690]

8.2.3 Environmental Management Approaches in Kenya: Prospects and Challenges

Environmental management and governance in Kenya mainly focuses on achieving sustainable development, where development is interpreted as having several dimensions which include: Economic development; Human development; and Sustainable development.[691] It is thus evident that while

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686 See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers Limited, 2016).

687 See generally, 'Species Extinction Is a Great Moral Wrong' (Elsevier Connect). Available at <*https://www.elsevier.com/connect/species-extinction-is-a-great-moral-wrong*> [Accessed on 21/01/2020].

688 See Carter, A., "Towards a multidimensional, environmentalist ethic," *Environmental Values* 20, no. 3 (2011): 347-374.

689 The Guardian, "New Zealand River Granted Same Legal Rights As Human Being," March 2017. Available at https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being [Accessed on 21/1/2020]; The Guardian, "Ganges and Yamuna rivers granted same legal rights as human beings," available at https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings [Accessed on 21/1/2020].

690 See generally, Stone, C.D., "Should Trees Have Standing--Toward Legal Rights for Natural Objects." *S. CAl. l. rev.* 45 (1972): 450; cf. Varner, G.E., "Do Species Have Standing?" *Environmental Ethics*, Volume 9, Issue 1, Spring 1987, pp. 57-72.

691 Bellù, L.G., 'Development and Development Paradigms: A (Reasoned) Review of Prevailing Visions,' (Food and Agriculture Organization of the United Nations, May 2011), p.3. Available at *http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf* [Accessed on 21/1/2020].

there are attempts aimed at conserving the environment, much of the efforts seem to be directed at anthropocentric approach that seeks to meet the needs of human beings and the general developmental needs of the country.

8.2.4 Entrenching the Ecocentric Approach in Environmental Management in Kenya

The anthropocentric approach mostly adopted by most of the existing legal instruments in Kenya and indeed much of the sustainable development agenda debates create the false impression that the environment should only be protected for the convenience of human beings.[692] However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

There is a need for more emphasis while coming up with laws to ensure that there are measures that are geared towards protecting the aspects of nature whose benefits are not obvious to the human beings, if at all. Some of the challenges that the country is experiencing such as degradation of natural forests and dwindling water catchment areas would become a thing of the past if people understand that the earth has intrinsic value and right to be protected from climate change and degradation.

If human beings view themselves as part of the nature, and not merely as conquerors of the nature with a right to use or even plunder the earth resources, then respect for the environment is likely to increase as well as entrenchment of environmental ethics where people take care of the environment without necessarily doing it as a reaction to laws on environment in the country.[693]

It is important that the country integrates both anthropocentric and ecocentric approaches to environmental conservation and protection. All beings are interdependent and every form of life has value regardless of its worth to human beings.[694] For instance, without the bees, pollination of plants would be almost impossible, and without plants animal lives would be jeopardized.

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692 They focus on eliminating poverty and other social ills afflicting the human society in Kenya.

693 Ojomo, P.A., "Environmental Ethics: An African Understanding," *African Journal of Environmental Science and Technology* 5, no. 8 (2011): 572-578.

694 *World Charter for Nature,* Principle 1.

A sustained and secure environment is also useful for the regeneration of resources.[695]

These organisms may not speak for themselves and it is important that human beings take them into consideration when exploiting environmental and natural resources. They should be a voice for the voiceless. There is an increased need for the policy makers and legislators to ensure that any laws, plans, policies and other legal instruments are geared more towards ensuring that environmental conservation and management efforts reflect ecocentric approaches.

8.3 The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya

8.3.1 Introduction

The prevailing debate on sustainable development the world over mainly revolves around minimizing adverse human impact on the environment as part of maximizing accruing Ecosystem Services. However, one area of biological diversity conservation that has received little or no attention, especially under the current Kenyan environment and natural resources laws, is the plant-pollinators' community that plays an indispensable role in natural resources and environmental regeneration for ecosystem Services.

Globally, biodiversity loss has been attributed to various factors, including, habitat loss, pest invasion, pollution, over-harvesting and disease.[696] Pollination services are provided both by wild, free-living organisms and by commercially managed bee species. Bees are considered the predominant and

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695 Ibid, Principle 2.

696 Wilcove D.S, Rothstein J, Dubow A, Phillips and Losos E., "Quantifying threats to imperiled species in the United States", *BioScience*, 48, 1998, pp. 607-615 (As quoted in Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., *Global honey bee colony disorders and other threats to insect pollinators*, (United Nations Environmental Programme, 2010), p.1. Available at https://www.researchgate.net/profile/Peter_Neumann5/publication/305160493_Disorders_of_bee_colonies_around_the_world_and_other_threats_to_insect_pollinators/links/5783b17208ae37d3af6c005c/Disorders-of-bee-colonies-around-the-world-and-other-threats-to-insect-pollinators.pdf [Accessed on 21/1/2020].

most economically important group of pollinators in most geographical regions.[697] Past reports carried in the Kenyan local dailies have highlighted the problem, asserting that Kenyan farmers are driving bees, wasps, butterflies and other pollinators to extinction, consequently threatening food supply.[698] Despite this, there is arguably inadequate evidence demonstrating Kenya's commitment to protect these important organisms as part of biodiversity conservation, and ultimately, achieving the right to food security for all, as guaranteed under the Constitution of Kenya 2010[699].

The inadequacy or lack of legal responses to pollinators' protection in the Kenyan environmental and natural resources laws has had adverse effect on the pollinators, and arguably, their protection is currently based on a general approach to environmental conservation for provision of ecosystem services. Pollinators are part of the biodiversity and, if any measures geared towards biodiversity conservation are to succeed, they must include pollinators.

8.3.2 Pollinators as Key Players in Environmental Conservation Discourse: The Neglected Link

Pollinators are important for the provision of ecosystem services.[700] Pollination is vital to the ecosystems and to human societies and the health and wellbeing of pollinating insects is considered as crucial to life, be it in sustaining natural habitats or contributing to local and global economies.[701]

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697 Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., *Global honey bee colony disorders and other threats to insect pollinators*, op cit., p. 1.

698 "Bees, butterflies face extinction, threatening Kenya food production," *Business Daily Africa*, Monday, April 18, 2016 16:36. Available at http://www.businessdailyafrica.com/economy/Bees-butterflies-face-extinction-threatening-Kenya-food/3946234-3164704-xvcgld/index.html [Accessed on 21/1/2020].

699 Constitution of Kenya, 2010, Art. 43.

700 Dolf de Groot, 'Protecting natural capital for human wellbeing and sustainable development,' *Science for Environment Policy – A Weekly News Alert*, Special Issue: Ecosystem Services, Issue 20, May 2010, p.1. Available at http://ec.europa.eu/environment/integration/research/newsalert/pdf/20si_en.pdf [Accessed on 21/1/2020].

701 Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., *Global honey bee colony disorders and other threats to insect pollinators*, op cit., p. 2; See also generally, Ollerton, J., Winfree,

Biotic pollination is meant to be a symbiotic process in which both the animal pollinators and the plants benefit in terms of food for the former and pollination process for the latter.[702] This discourse is thus meant to address the factors and practices that adversely affect this mutual relationship between the two groups.

Considering that 'plants serve as air and water filters, are an indispensible part of the water cycle, prevent erosion of valuable soil re-sources, and give us numerous foods, fibers, and medicines, pollinators are considered as critical to biodiversity, ecosystem services, agricultural productivity, world economies, and human quality of life'.[703] Any threats to these animal-pollinators therefore threaten the whole chain of natural provision of ecosystem services.

8.3.3 Protection of Pollinators: the Legal, Institutional and Policy Framework

Internationally, the 1992 *Convention on Biological Diversity*[704] was adopted during the Earth Summit in Rio de Janeiro, with the objective of conservation of biological diversity.[705] While the Convention does not specifically mention pollinators, it accords "Biological diversity" a broad definition to mean 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems'.[706]

Pollinators are thus covered under these broad definitions as part of the biodiversity to be protected and conserved under the Convention. The Convention outlines under Article 6 thereof state obligations on the general

R. and Tarrant, S., "How many flowering plants are pollinated by animals?" *Oikos*, Vol.120, No., 2011, pp.321-326.

702 Ibid.

703 San Luis Obispo County, 'Pollinator Information & Resources ', op cit., p.1.

704 United Nations Environment Programme, *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), United Nations, Treaty Series, vol. 1760, p. 79.

705 *Convention on Biological Diversity*, Art. 1.

706 *Convention on Biological Diversity*, Art. 2.

measures for conservation and sustainable use of the biological diversity within their territories.[707]

The *Agenda 21*[708] also contains provisions under section 15 thereof on the conservation of biological diversity. Agenda 21 specifically acknowledges that our planet's essential goods and services depend on the variety and variability of genes, species, populations and ecosystems. The *Aichi Biodiversity Target 7* seeks to ensure that, by 2020, areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.[709]

The *Environmental Management and Co-ordination Act 1999*[710] (EMCA) calls for conservation of 'biological diversity'.[711] Notably, EMCA provides for conservation of biological resources in situ and ex-situ.[712] Other provisions in EMCA that are germane to protection of pollinators relate to standards of pesticides and toxic substances.[713] EMCA further provides for the registration of the pesticide or toxic substance, before importing, manufacturing, processing or reprocessing of pesticides or toxic substance.[714]

Kenya's *National Environment Policy 2012* rightly points out that 'the main human activities contributing to environmental degradation in Kenya include unsustainable agricultural land use, poor soil and water management practices,

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707 Ibid, Art. 6. General Measures for Conservation and Sustainable Use Each Contracting Party.

708 *Agenda 21* (A/CONF.151/26, vol.II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.

709 Aichi Biodiversity Targets - Convention on Biological Diversity (CBD), https://www.cbd.int/sp/targets/ *[Accessed on* 21/1/2020].

710 *Environmental Management and Co-ordination Act,* Act No. 8 of 1999, Laws of Kenya [Revised Edition 2012 [1999]; See also the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act, No. 5 of 2015, which was enacted to amend the Environmental Management and Co-ordination Act,1999.

711 Ibid., sec. 2.

712 Ibid., sec. 51; sec. 53(1).

713 *Environmental Management and Co-ordination Act, 1999,* sec. 94.

714 Ibid., sec. 94(1).

deforestation, overgrazing, and pollution'.[715] 'These activities contribute a great deal to degradation of the country's natural resources such as land, fresh and marine waters, forests and biodiversity threatens the livelihoods of many people. They undermine the sink function of the environment which operates through such processes as nutrient recycling, decomposition and the natural purification and filtering of air and water.'[716]

All the foregoing national laws and policy instruments have some issues that may affect pollinators in their implementation, but notably, most of them hardly mention pollinators.[717] There is no dedicated law that is meant to protect the pollinators and currently, their protection can only be done within the framework of all the above laws.

8.3.4 Safeguarding the Future: Addressing the Challenges Affecting Pollinators

It has rightly been pointed out that insect pollinators of crops and wild plants are under threat globally and their decline or loss could have profound economic and environmental consequences.[718] Specifically, insect pollinators are believed to face growing pressure from the effects of intensified land use, climate change, alien species, and the spread of pests and pathogens; and this has serious implications for human food security and health, and ecosystem function.[719]

There is need to avert the danger facing pollinators, and this can be achieved through various ways. While some require radical change in management approaches, others require all stakeholders to work closely and also include other relevant but often ignored groups in implementing decisions.

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715 Republic of Kenya, *National Environment Policy 2012*, (Government printer, 2012, Nairobi), para. 2.1.

716 Ibid, para. 2.2.

717 See also the *Wildlife Conservation and Management Act, No.47 of 2013*, Laws of Kenya; See also the *Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017*, Legal Notice No. 242 of 2017.

718 Vanbergen, A.J., "Threats to an ecosystem service: pressures on pollinators," *Frontiers in Ecology and the Environment*, Vol.11, No. 5, 2013, pp.251-259.

719 Ibid, p. 251.

i. Ecosystem Services Approach to Pollinators Conservation

Studies have indicated that ecological restoration is likely to lead to large increases in both biodiversity and ecosystem services, offering a potential win-win solution if the two goals are combined in restoration projects.[720]

To effectively protect animal pollinators, there is a need to entrench biodiversity management and conservation approaches that eliminate or reduce human activities which pose risks to these organisms. There is also need to empower communities in ways that give them alternative means of making a living for social sustainability as opposed to relying on environment only as well as enabling them make informed decisions that would contribute positively to environmental sustainability.[721]

The *Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006*[722], coupled with other laws, if effectively implemented, would go a long way in ensuring that environment-degrading activities that adversely affect pollinators are reduced or eliminated.

ii. Reduction or Effective Control of Pesticide Use

Pest control practices such as Integrated Pest Management that enhance natural pest controls are believed to be effective to reduce or eliminate the use of Pesticides (herbicides, insecticides, fungicides), while at the same time, they greatly benefit pollinators which may be heavily impacted by

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720 Rey Benayas, J.M., Newton, A.C., Diaz, A. & Bullock, J.M., 'Enhancement of Biodiversity and Ecosystem Services by Ecological Restoration: A Meta-Analysis,' Science, Vol.28, No.325, 2009, pp. 1121-1124. (As quoted in Dolf de Groot, 'Improved biodiversity and ecosystem services go hand-in-hand,' *Science for Environment Policy – A Weekly News Alert*, Special Issue: Ecosystem Services, Issue 20, May 2010, p.5.)

721 Muigua, K., "Realising the Right to Education for Environmental and Social Sustainability in Kenya," available at http://www.kmco.co.ke/attachments/article/139/REALISING%20RIGHT%20TO%20EDUCATION%20FORENVIRONMENTAL%20AND%20SOCIAL%20%20JUSTICE%20IN%20KENYA-%20%2022nd%20%20October%20edited.pdf [Accessed on 21/1/2020].

722 Environmental Management and Co-ordination Act, No. 8 of 1999, Legal Notice No. 160 of 2006.

pesticides.[723] It has been suggested that adoption of integrated pest management (IPM) programs can limit pesticide usage to times of economic damage and spraying at certain times in the pest and crop life cycles, through which pest control can be maximized and amount of pesticide used minimized.[724] This calls for closer working relationship between farmers and the agricultural extension services officers for sensitisation and education on the same.

Incentives should be offered to farmers to restore pollinator-friendly habitats, including flower provisioning within or around crop fields and elimination of use of insecticides by adopting agroecological production methods.[725] Additionally, conventional farmers are advised to be extremely cautious in the choice, timing, and application of insecticides and other chemicals.[726] Agriculture is believed to pose many threats to insect pollinators such as changes in land use, loss and fragmentation of habitat, introduction of exotic organisms, modern agricultural practices, and pesticide use.[727]

The Pest Control Products Board established under the Pest Control Act is empowered to: assess and evaluate pest control products in accordance with the provisions of the regulations made under the Act; consider applications for registration of pest control products and to make recommendations thereon to the Minister; and advise the Minister on all matters relating to the enforcement of the provisions of this Act and regulations made thereunder.[728] Such a Board ought to closely work with the scientific and technology community and the general public especially the agricultural and pastoral communities in order to

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723 Food and Agricultural Organisation of the United Nations, "Pollination Services for Crop Production: Managing Ecosystem Services for Productive and Healthy Agroecosystems," available at http://www.fao.org/3/a-at109e.pdf [Accessed on 21/1/2020].

724 Kings River Conservation District (KRCD), "Agricultural Management Practices," available at http://www.krcd.org/water/water_quality/ag_mgt_practices.html [Accessed on 21/1/2020].

725 Nicholls, C.I. & Altieri, M.A., "Plant Biodiversity Enhances Bees and Other Insect Pollinators in Agroecosystems: A Review," *Agronomy for Sustainable development*, Vol.33, No. 2, 2013, pp.257-274 at p. 257.

726 Ibid., p.257.

727 Ibid., p.258.

728 Ibid., Sec. 5 & 6.

reduce or eliminate the use of harmful pesticide products, as a way of minimizing destruction of pollinators and their habitats. The Board should also have representatives in agricultural trainings and seminars in order to sensitize farmers on any outlawed or potentially dangerous pesticides that have broad spectrum effect on pollinators.

iii. Environmental Education, Awareness and Ethics

If empowered through education, people are able to make their own decisions especially in matters relating to exploitation of natural resources, Environmental Impact Assessment (EIA) and other matters that touch on development but have a bearing on the environment and the livelihoods of the people.[729] The local communities would be able to actively engage potential investors in ensuring environmental sustainability. Principles of public participation in governance and environmental democracy[730] as envisaged in the current Constitution of Kenya becomes easier to implement.

iv. Use of Scientific Research and Traditional Knowledge

Continuous scientific research on the effects of various agricultural practices on biodiversity conservation is key in any efforts geared towards protecting animal pollinators. There is need for concerted efforts from the Government agencies concerned with agriculture and scientific research to work closely with the International Centre of Insect Physiology and Ecology (ICIPE) to address some of the problems facing these important players for the realisation of sustainable development agenda.

Arguably, such communication between the scientific and technological community and the policy and lawmakers would go a long way in coming up with policies and laws that are more responsive to the need to protect pollinators. The Convention on Biological Diversity Secretariat recommends that one of the ways of implementing the Aichi Biodiversity Target 7 would

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729 Heila Lotz-Sisitka, H.L., et. al., *Africa Environmental Education and Training Action Plan 2015-2024: Strengthening Sustainable Development in Africa*, (United Nations Environment Programme, January, 2017), p.1.

730 See Article 69 of the Constitution of Kenya; For a more detailed discussion, see also Muigua, K. & Musyimi, P.N., 'Enhancing Environmental Democracy in Kenya,' available at http://www.kmco.co.ke/attachments/article/81/072_Envtal_Dem_Kenya.pdf.

be incorporating customary use of biodiversity by indigenous and local communities, which can often offer lessons of wider applicability and could be enhanced by increasingly delegating governance and management responsibility to the local level.[731] Traditional knowledge can play a critical role in eliminating some of the problems affecting animal pollinators such us excessive use of pesticides. Traditional farming and conservation practices can go a long way in reducing the use of pesticides in crop production. The general public and specifically the agricultural communities would also benefit from closer working relationships between them and the government agencies to appreciate how some of the traditional practices in farming can be incorporated into their modern farming practices as a way of reducing the use of harmful chemicals in crop production as well as discarding some of the destructive farming practices.

The knowledge can also be used together with scientific knowledge to come up with agricultural crops that are fairly resistant to some pests thus reducing the indiscriminate use of pesticides. Some of the traditional farming practices coupled with relevant scientific knowledge can also go a long way in achieving elimination or lower pollution levels on the farm or used in wider areas including, indigenous knowledge of soil management, agricultural practices, animal husbandry, irrigation system, crop breeding, harvesting and storage which have been traditionally used successfully and in a sustainable manner.[732]

v. Addressing Climate Change

Scholars have rightly suggested that climate change may be one of the biggest anthropogenic disturbance factors imposed on ecosystems today.[733] These studies have concluded that climate change affects plants, pollinators and their interactions through increased temperatures, disturbances on rainfall pattern and other many environmental changes, including alteration in the native biodiversity and trophic relationship which result in lower the production

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731 Convention on Biological Diversity Secretariat, "TARGET 7 - Technical Rationale extended (provided in document COP/10/INF/12/Rev.1)," op. cit.

732 Thakuria, G., 'Traditional Knowledge for Sustainable Development: A Geographical Analysis,' *International Journal of Research in Applied, Natural and Social Sciences*, Vol. 2, Issue 9, Sep 2014, 39-44, p.42.

733 Pudasaini, R., et al., "Effect of climate change on insect pollinator: a review," *New York Science Journal,* Vol. 8, No.3, 2015, pp.39-42 at p.40.

of crops.[734] The *Agenda 2030 on Sustainable Development* urges countries to take urgent action to combat climate change and its impacts.[735]

8.4 Conclusion

The quest for sustainability and sustainable development requires integrating economic, social, cultural, political, and ecological factors.[736] As indicated above, the various management mechanisms have relevance in the management of natural resources in the Kenyan context. If effectively applied, the result would be the realisation of environmental justice and sustainable use of resources. In addition, a hybrid approach which harnesses the positive attributes of each perspective, while minimizing the negative aspects of each, is also suggested as the most appropriate approach going forward. All the approaches discussed this section have a place in sustainability debate. An integrated approach to natural resources and environmental management is the way to go in order to attain sustainable development.

9. Strengthening the Environmental Liability Regime in Kenya for Sustainable Development

9.1 Introduction

Environmental liability has been defined as an obligation which may result in future payments for the enterprise, due to past events or to compensate a third party harmed by environmental damage by the company.[737] Liabilities incurred accrue from either legal obligations, such as rehabilitation of land, a fine or compensation as a result of court decision, or from contractual obligations arising out of company's internal commitment to environmental safeguards.[738] Environmental liability stems from the states' desire and

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734 Ibid.

735 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Goal 13.

736 Gallopín, G., 'A systems approach to sustainability and sustainable development,' op cit., p.7; See also Goodland, R., 'The Concept of Environmental Sustainability,' *Annual review of ecology and systematics*, Vol. 26, 1995, pp.1-24, at p. 4.

737 Nuta, F. M., & Nuta, A. C., "Environmental Liabilities Accounting: A Review of Some Standards and Guidelines," *Journal of Public Administration, Finance and Law* 2, no. 2 (2012): 47-51, at p.47.

738 Ibid, at p.47.

responsibility to not only ensure the protection of the right to clean and healthy environment but also the fact that the environment is considered to be the main reservoir for most of the resources necessary for realisation of economic and social rights.[739]

On a general scale, it is believed that environmental hazards are responsible for an estimated 25% of the total burden of disease worldwide, and nearly 35% in regions such as sub-Saharan Africa.[740] In this regard, addressing the effects of the environment on human health is considered to be essential if we are to achieve the goal of health for all.[741]

Despite the progressive Kenyan Constitution making great strides in promoting environmental conservation and protection[742], there is still no evidence of strict environmental culpability in cases of environmental damage, with many of the environmental restoration and protection initiatives being left to the state.[743]

It is against this background that this section examines the status of the environmental liability regime in Kenya and makes some recommendations on how enforcement and compliance with environmental standards can be enhanced as a step towards realising sustainable development in the country.

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739 See generally, Muigua, K., *Reconceptualising the Right to Clean and Healthy Environment in Kenya*, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017.

740 Health and Environment Linkages Initiative – HELI, *Health and Environment Linkages Initiative*, available at *http://www.who.int/heli/en/ [*Accessed on 21/01/2020].

741 Higenbottam, N., 'Nurse's Role as an Environmental Activist,' p.2. Available at *http://www.theluminaryproject.org/downloads/Essay%20Contest%20Higenbottam.pdf* [Accessed on 21/1/2020].

742 See Section Five of the Constitution, Part 2 (Articles 69-72).

743 Article 69 of the Constitution of Kenya 2010.

9.2 Environmental Liability under the International and Regional Environmental Legal Framework

Article 2 (1) of the *Vienna Convention for the Protection of the Ozone Layer* [744] outlines some of the States' general obligations towards the ozone layer. This Convention mainly advocates for preventive and control measures by States implemented through cooperation.

The *1972 Stockholm Declaration of the United Nations Conference on the Human Environment* under Principle 13 deals with the issue of compensation for damage to victims of environmental damage. The *Rio Conference on Environment and Development from 1992* not only established the basic principles of civil protection of basic ecological values, but also the precautionary principle, all based on the recommendations of the Brundland Commission.[745]

The *Montreal Protocol,*[746] an international Treaty, aims to regulate the production and use of chemicals that contribute to the depletion of Earth's ozone layer. The Protocol sets limits on the production of chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.[747]

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[748] affirms that States are responsible for the fulfillment of their international obligations concerning the protection of

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744 United Nations, *Vienna Convention for the Protection of the Ozone Layer*, Vienna, 22 March 1985, United Nations, Treaty Series, vol. 1513, p. 293. Kenya is a signatory to the Convention.

745 Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," op. cit., at p. 1167.

746 Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987). Kenya is a signatory to the Protocol.

747 Arts. 2A-I.

748 Basel, 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.

human health and protection and preservation of the environment, and are liable in accordance with international law.[749]

Also relevant is the *Minamata Convention on Mercury*[750] is a global treaty to protect human health and the environment from the adverse effects of mercury.[751]

The International Court of Justice, in the 1997 case concerning the *Gabcíkovo-Nagymaros Project* (Hungary and Slovakia)[752], held that the corpus of international law which relates to the environment now consists of the general obligation of states to ensure that activities within their jurisdiction and control respects the environment of other states or areas beyond national control.

The *Aarhus Convention*[753] provides that each Party should make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public..[754] This Convention affirms the central role of the principle of public participation in environmental assessment.

9.3 Environmental Liability under Kenya's Legal Framework: The (In) Adequacy

Under the Fourth Schedule to the Constitution, the National and County Governments have shared responsibilities when it comes to environment and natural resources. The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment.[755] The two government

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749 Preamble.

750 16 August 2017, No. 54669. Adopted in 2013 in Japan, entered into force in 2017.

751 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-17&section=27&clang=_en [Accessed on 21/1/2020].

752 GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.

753 UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (the Aarhus Convention), 1998

754 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Art. 7.

755 Article 42, Constitution of Kenya 2010 (Government printer, Nairobi, 2010).

levels should work together to facilitate a coordinated, multisectoral approach for effectiveness discharge of their environmental responsibilities.

9.3.1 Environmental Management Tools in Kenya

While some approaches seek to rely on a human rights approach to environmental conservation and protection, there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes which have all formed part of the framework of international and national environmental law and health law.[756] This section discusses some of these approaches in reference to Kenya's environmental laws. It is however worth pointing out that while most of these tools are provided for and enforced through the *Environmental Management and Coordination Act* (EMCA)[757], there are corresponding provisions and requirements under the various sectoral laws on water[758], land[759], forests[760], mining[761], public health[762], agricultural production[763] and energy[764] sectors, among others. Their wordings may be different but they are mainly concerned with health and environmental protection while carrying out various activities or laying out relevant infrastructure. They also define penalties and other remedies in case of violation of set rules and regulations.

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756 Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at *http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf* [Accessed on 21/1/2020].

757 *Environmental Management and Coordination Act* (EMCA), Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015).

758 *Water Act, No. 43 of 2016*, Laws of Kenya.

759 Land Act, No. 6 of 2012, Laws of Kenya.

760 Forests Management and Conservation Act, No. 34 of 2016, Laws of Kenya.

761 Mining Act, No. 12 of 2016, Laws of Kenya.

762 Public Health Act, Cap 242, Laws of Kenya; Health Act, No. 21 of 2017, Laws of Kenya.

763 Agriculture, Fisheries and Food Authority Act, No. 13 of 2013, Laws of Kenya; Fisheries Management and Development Act, No. 35 of 2016, Laws of Kenya; Crops Act, No. 16 of 2013, Laws of Kenya.

764 Energy Act, No. 1 of 2019, Laws of Kenya.

a. Civil Liability Against State and Private persons

Civil law protection is enforced through sanctions as a mechanism of coercion against a person or entity that causes damage, with the aim of achieving and bringing the property or other personal non-material goods to the state in which they were before threat or disturbance.[765] Notably, civil law sanctions relating to protection of the environment are grouped on the basis of their function: *preventive sanctions, natural restitution and compensatory and reparatory sanctions* (emphasis added).[766]

The Constitution of Kenya guarantees the right 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. It defines duties and obligations for both the state and every person.

b. Criminal Liability in Environmental Matters

Criminal law enforces the protection of society from crime, so that the most favorable protection of the environment is achieved in this way.[767]

The *Environmental Management and Coordination Act (EMCA), 1999*, provides for criminal liability in environmental matters under various sections.[768] Part XIII of EMCA on environmental offences carries more elaborate provisions on criminal liability in environmental matters.[769]

c. Environmental Impact Assessment

Environmental Impact Assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any

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765 Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176, 1163.

766 Ibid, at p. 1163.

767 Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.

768 S. 118, EMCA.

769 Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146.

adverse impacts on the environment.[770] Effective Environmental Impact Assessment (EIA) may provide an opportunity for public scrutiny and participation in decision-making; introduce elements of independence and impartiality; and facilitate better informed judgments when balancing environmental and developmental needs.[771]

Environmental Impact Assessment (EIA) is one of the tools for environmental management, a procedure for evaluating the likely impact of a proposed activity on the environment. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed.[772] The *Environment (Management and Conservation) Act (EMCA) 1999*[773] provides for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts.

EIA can be a powerful tool for keeping the corporates including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered through more involvement in the same to ensure that the EIAs achieve their objectives. This is the only way that the affected sections of population appreciate the use of EIAs and also ensure that such exercises are not mere formalities on paper but are utilised fully for the protection of the right to clean and healthy environment.[774]

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770 *Environmental Management and Co-Ordination Act*, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2; Al Ouran, N.M., 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

771 Birnie, P. & Boyle, A., "*International Law and the Environment*", (2nd ed. Oxford University Press, 2002), p.131-132; See also Muigua, K., 'Environmental Impact Assessment (EIA) in Kenya,' available at *http://www.kmco.co.ke/attachments/Art./109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf* [Accessed on 21/1/2020].

772 Birnie, P. & Boyle, A., *International Law and the Environment*, (2nd ed., Oxford University Press, 2002), p.131-132.

773 Act No. 8 of 1999, Laws of Kenya.

774 Jenje, B., 'MP to compensate families injured by lead poison 'if guilty',' *Daily Nation*, Wednesday, April 29, 2015, available at *http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9ivl/-/index.html* [Accessed on 15/1/2020]; See also Chege, M. W., *et al*, 'Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,' *International Journal of Physical Sciences*, Vol. 8, No.17, 9 May, 2013, pp. 835-839.

d. Strategic Environmental and Social Assessment (SESA) and Strategic Environmental Assessment (SEA)

One of the conceptual definitions of SEA is a process directed at providing the proponent (during policy formulation) and the decision-maker (at the point of policy approval) with a holistic understanding of the environmental and social implications of the policy proposal, expanding the focus well beyond the issues that were the original driving force for new policy.[775]

The objectives of the Strategic Environmental Assessment (SEA) process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.[776]

Thus, it may be said that Strategic environment assessment is all about ensuring that public policy, programmes and plans are compliant with sound environmental management. Strategic Environmental and Social Assessment (SESA) is an effective environmental management tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.[777]

Strategic Environmental Assessment (SEA) has been hailed as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform, and the World has even demonstrated its commitment to promoting the use of SEA as a tool for sustainable development.[778]

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775 Brown, A.L. & Thérivel, R., 'Effective methodologies: Principles to guide the development of strategic environmental assessment methodology,' op cit, at p. 184.

776 Ibid; See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42 & 43.

777 Notably, the *Energy Act, No. 1 of 2019*, Laws of Kenya, section 107 (1) (2)(d); s. 57A(1), *Environmental Management Co-ordination (Amendment) Act 2015*.

778 The World Bank, 'Strategic Environmental Assessment,' September 10, 2013, available at http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment [Accessed on 21/1/2020].

While Kenya's parent Environmental Act (EMCA) was initially silent on SEA, the same was introduced via the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act 2015).[779] It has been posited that the establishment of Strategic Environmental Assessment (SEA) in Kenya was ostensibly in recognition of the fact that the existing Environmental Impact Assessment (EIA) tool was unable to respond to environmental integration needs at strategic levels of decision-making.[780]

The Amendment Act 2015 amended EMCA by introducing section 57A (1) which provides that all Policies, Plans and Programmes for implementation should be subjected to Strategic Environmental Assessment.[781]

The *Environmental (Impact Assessment and Audit) Regulations, 2003*[782] also provide for SEA and interprets it to mean the process of subjecting public policy, programmes and plans to tests for compliance with sound environmental management.[783] The Regulations also require the Government and all the lead agencies to incorporate principles of strategic environmental assessment in the development of sector or national policy.[784]

The Constitution captures all the elements of SEA such as public participation and sustainable development and calls for an integrated approach to environmental and development agenda.

Applied as a systematic process, SEA leads to more pro-active decision making in support of sustainable development, ensuring that ethical principles

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779 *Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya.

780 Mutui, F.N., 'The Development and Practice of Strategic Environmental Assessment (Sea) in Kenya,' *European Scientific Journal*, October 2013, vol.9, No.29, pp. 165-185, p. 166.

781 S. 42, *Environmental Management and Co-ordination (Amendment) Act, 2015.*

782 Legal Notice No. 101 of 2003.

783 *Environmental (Impact Assessment and Audit) Regulations*, 2003, Legal Notice No. 101, Regulation 2.

784 Ibid, Regulation 42(3); 43 (1).

are considered in policy, plan and programme making and different paths on how to achieve overall goals and objectives can be mapped out.[785]

e. Environmental Audits and Monitoring

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.[786] An initial environmental audit and a control audit are conducted by a qualified and authorized environmental auditor or environmental inspector who is an expert or a firm of experts registered by NEMA. In the case of an ongoing project NEMA requires the proponent to undertake an initial environmental audit study to provide baseline information upon which subsequent environmental audits shall be based. The proponent shall be issued with an acknowledgement letter and an improvement order where necessary.[787] The *Environment (Assessment and Audit) Regulations, 2003*[788] provide the necessary guidelines on the procedure. Arguably, NEMA, as it is currently, is still facing challenges in discharging its mandate and there is a need to work closely with the county governments in order to be in touch with what is happening across the country.[789]

f. Implementation of Principles of Sustainable Development

The principles of sustainable development as captured in EMCA[790] include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the principle of international co-operation in the management of environmental resources shared by two or more states; the polluter-pays principle; and the pre-cautionary principle.

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785 Fischer, T.B., 'Strategic environmental assessment in post-modern times,' op cit, at p. 163.

786 Constitution of Kenya, 2010, Art. 69(1) (f).

787 The Environmental (Impact Assessment and Audit) Regulations, 2003. Available at https://www.nema.go.ke/index.php?option=com_content&view=article&id=27&Itemid=167 [Accessed on 21/1/2020].

788 Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Laws of Kenya (Government Printer, Nairobi, 2003).

789 See *Johnson Kamau Njuguna & another v Director of Public Prosecutions* [2018] eKLR, Judicial Review No 9 of 2018.

790 EMCA, S. 3(5).

There is a need to actively engage the communities in environmental management and conservation in order to help in the implementation of these principles. With the communities empowered, then it is possible to hold to account those who flout environmental laws, be they entities or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

9.4 Enhanced Environmental Enforcement and Compliance for Sustainable Development in Kenya

Environmental protection is inherent in the concept of sustainable development, as is a focus on the sources of environmental problems rather than the symptoms.[791] While the existing laws seem to put great emphasis on enforcement of environmental responsibilities, there is little evidence of actual promotion of deterrence under the current environmental liability regime in Kenya.

Proper apportionment of environmental liability in the country will go a long way in ensuring that all stakeholders, both public and private play their role in achieving sustainable development agenda. Investing in compliance and enforcement of environmental laws benefits the public by securing a healthier and safer environment for themselves and their children.[792]

Strengthening environmental compliance and enforcement requires renewed efforts by individuals and institutions everywhere. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in trust for all of their citizens according to the standards of good governance and with a view to protecting and improving public well-being and conserving the environment.[793] The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws are interpreted and applied fairly, efficiently, and effectively.[794]

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791 Ibid, para. 50.

792 International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' *op cit*, p.2.

793 Ibid.

794 Ibid.

Concerted efforts from all the stakeholders, including the general public can ensure that the compliance and enforcement framework in place is used to promote and safeguard the right to clean and healthy environment as envisaged in the Constitution and environmental laws.

9.4.1 Encouraging Proactive Corporate Environmental Compliance

It has rightly been pointed out that virtually all companies face the possibility of environmental liability costs and as such, it is imperative for the management to make at a least a general estimate of their company's potential future environmental liability be it from legally mandated cleanup of hazardous waste sites or from lawsuits involving consumers, employees, or communities.[795] The gathered information, it is argued could be useful in the following ways: encourage defensive and prudent operations and waste reduction; improve manufacturing, waste disposal and shipping practices; negotiate and settle disputes with insurance carriers; influence regulators and public policy makers; determine suitable levels of financial resources; reassess corporate strategy and management practices (think green); articulate a comprehensive risk management program; improve public relations and public citizenship; and assess hidden risks in takeovers and acquisitions.[796]

It is advisable for companies and organisations to engage in proactive environmental risk management as part of their strategic plans in order to avoid costly environmental liability mistakes.

9.4.2 Due Diligence/Cultivating Environmental Ethics

Kenyans have a role to play in achieving the ideal of a clean and healthy environment.[797] There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same.[798] The citizenry should be able to practise preventive measures while allowing the courts to come in only in cases of violation of environmental standards. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of

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795 Schoemaker, P. J., & Schoemaker, J. A., "Estimating environmental liability: Quantifying the unknown," *California Management Review*, Vol.37, no. 3 (1995): 29-61, at p.29.

796 Ibid, at pp. 29-30.

797 Article 69(2), Constitution of Kenya.

798 Preamble, Constitution of Kenya.

environment and its resources.[799] Dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.[800]

There is, therefore, a need to encourage voluntary compliance with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. Incentives and disincentives can also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.[801]

The same should include change of attitude by the general public. The current generation has a responsibility and an environmental liability to ensure that future (unborn) generations have their future guaranteed (*Oposa et al. v. Fulgencio S. Factoran, Jr. et al (G.R. No. 101083)* (199).[802]

9.4.3 Environmental Insurance

Environmental insurance is one of the tools that is used in environmental management. However, EMCA does not have provisions touching on the same. In addition, Kenyan insurance firms are yet to popularise environmental insurance services. It is suggested that this is a service that they should take up especially in light of the sustainable development agenda. However, all is not lost as a few of the insurance providers have packages on environmental

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799 Article 69(2), Constitution of Kenya.

800 See generally, Muigua, K., *Realising Environmental Democracy in Kenya*, available at http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf [Accessed on 21/1/2020].

801 International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' p.2, available at *http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf* [Accessed on 21/1/2020].

802 Ibid.

impairment liability, such as the AIG Kenya Insurance Company whose package covers: third-party bodily injury; third-party property and environmental damage; and clean-up costs for pollution conditions, both on site or while migrating from site.[803] Environmental law practitioners may also advise their clients on the possibility of taking up environmental liability insurance.

There is a need to popularize environmental insurance in the country for both medium and huge companies to shield them against environmental liability which could turn out to be too costly.[804]

9.5 Conclusion

The environment should be accorded some right, independent of the human beings. The constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment. Strengthening the environmental liability regime in Kenya is necessary in order to enable the country to have a clean and healthy environment and to achieve sustainable development.

10. Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development

10.1 Introduction

'Environmental mainstreaming' has been defined as the informed inclusion of relevant environmental concerns into the decisions of institutions that drive national, local and sectoral development policy, rules, plans, investment and action.[805] The section thus looks at how traditional environmental knowledge can be mainstreamed not just in the agricultural sector but all areas that have an environmental aspect within them.

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803 https://www.aig.co.ke/commercial/products/liabilities/environmental-impairment-liability [Accessed on 21/1/2020].

804 Smith Jr, T.T., "Environmental Damage Liability Insurance—A Primer," *The Business Lawyer* (1983): 333-354, at p.336.

805 Dalal-Clayton, D. B., & Bass, S., *The challenges of environmental mainstreaming: Experience of integrating environment into development institutions and decisions*, No. 1. IIeD, 2009.

Africa has a rich and highly diverse array of natural resources. It also has traditional communities' knowledge and environmental governance practices that have been practised over centuries before the advent of colonialization.[806] This was a reflection of the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship of the local people with their environment.[807] Traditional knowledge incorporates belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment.[808]

From international law to domestic laws, has been a realisation of the critical role that traditional knowledge has played over the centuries especially among indigenous and local communities. This is especially pronounced within the sustainable development discourse. As early as 1970s and 80s, there were attempts at mainstreaming traditional environmental knowledge in policy, law and action plans as a way of promoting sustainable development.[809]

Despite the international recognition of the rights of these communities to be consulted and involved in decision-making processes that directly affect their livelihoods, countries around the world continue to disregard such rights with adverse effects on the ability of the affected communities to fight poverty and realise the right to self-determination. The global call for application of Free, Prior, And Informed Consent (FPIC) in resource extraction and management is generally meant to address the abuse of the rights of indigenous peoples worldwide including: indigenous land rights, recognition of and respect for culture, the right to economic participation, to a livelihood and to a clean environment, among others.[810]

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806 African Regional Intellectual Property Organization, available at *http://www.aripo.org/index.php/services/traditional-knowledge* [Accessed on 22/1/2020].

807 Ibid.

808 Ibid.

809 WCED, *Our common future: Report of the World Commission on Environment and Development*, G. H. Brundtland, (Ed.). Oxford: Oxford University Press, 1987.

810 Owen, J.R. and Kemp, D., "'Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing A Knowledge Base," *Resources Policy*, Vol.41 (2014): 91-100., at p. 92.

Food security depends, *inter alia*, on sustainable management of natural resources and the environment since in many indigenous communities, natural resources are the principal sources of their staple food.[811] Environmental sustainability comes with sound environmental decision-making. This is supposed to be an all-inclusive process that involves not only the formal decision-makers but also communities. These communities are a rich source of traditional knowledge that includes environmental knowledge.

10.2 Traditional Environmental Knowledge: Relevance to the Environment and Natural Resources Management

Traditional knowledge has been broadly defined as a cumulative, collective body of knowledge, experience, and values held by societies with a history of subsistence.[812] The term is not to be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.[813]

Traditional knowledge or traditional ecological knowledge is believed to represent experience acquired over thousands of years of direct human contact with the environment.[814] A growing recognition of the capabilities of ancient agriculturalists, water engineers and architects led to increased appreciation of ethnoscience, ancient and contemporary, which paved way for the acceptability of the validity of traditional knowledge in a variety of fields.[815] One of the fields that embraced the use of traditional knowledge is the environment.

Traditional ecological knowledge is also seen as bound up with "indigenous stewardship method," which is defined as the "ecologically sustainable use of natural resources within their capacity to sustain natural processes."[816]

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811 The *Rome World Food Summit*, Commitment No. 3.

812 Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 66.

813 Ibid.

814 Inglis, J., ed., *Traditional ecological knowledge: concepts and cases*, IDRC, 1993, at p. 1.

815 Ibid, p.2.

816 Whyte, K.P., "On the role of traditional ecological knowledge as a collaborative concept: a philosophical study," *Ecological processes*, Vol.2, no. 1 (2013): 7, at p.3.

Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.[817]

The resilience of indigenous peoples and local communities, as sustained by their cultural systems which have adapted to local ecological niches over long timeframes, and the detailed and broad knowledge they have of adaptation, is affected negatively by the loss of land, ecosystem capacity, and alienation of culturally significant places, migration and losses in livelihoods.[818] They are thus interested parties when it comes to efforts towards achieving sustainable development and should thus be included.[819]

There are two recognised practical methods for encouraging the use of traditional knowledge in environmental decision-making. The first one includes those methods that are based on official recognition of traditional knowledge, followed the development of rules of procedure for the use of knowledge by institutions of authority. In this "top-down" approach, the structures of governance are constructed accommodate traditional knowledge, but the knowledge itself is not fostered or sought out.[820] The second category increases the capacity of indigenous people to bring traditional knowledge to bear on policies and procedures governance and regulation. This "bottom-up" approach is characterized by initiatives designed to encourage learning and transmission of traditional knowledge at community level, as well as developing the means communicate this knowledge within the structures processes of environmental governance.[821]

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817 Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 67.

818 Crawhall, N., 'Indigenous knowledge in adaptation: conflict prevention and resilience-building,*' Conflict-sensitive Adaptation: Use Human Rights to Build Social and Environmental Resilience, Brief 10*. (Indigenous Peoples of Africa Co-ordinating Committee and IUCN Commission on Environmental, Economic and Social Policy, 2014), p. 2. Available at *http://cmsdata.iucn.org/downloads/tecs_csa_10_indigenous_knowledge_in_adaptation_crawhall.pdf* [Accessed on 22/1/2020].

819 Ibid, p.8.

820 Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p.67.

821 Ibid, p.67.

10.3 International and National Legal Framework on Traditional Environmental Knowledge

10.3.1 International Framework on Traditional Environmental Knowledge

The *Convention on Biological Diversity* recognizes the importance of indigenous and local communities to the conservation and sustainable use of biological diversity.

The *United Nations Declaration on the Rights of Indigenous Peoples*,[822] provides that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.[823]

The Food and Agriculture Organization of the United Nations (FAO) opines that the promotion and protection of traditional and local food and agricultural knowledge will require international, intercultural and interdisciplinary approaches, communication and cooperation.[824]

10.3.2 National Legal and Institutional Framework on Traditional Environmental Knowledge

The Constitution of Kenya provides that culture is the foundation of the nation and the cumulative civilization of the Kenyan people and nation.[825] Specifically, it obligates the State to, *inter alia*, recognise the *role of science and indigenous technologies in the development of the nation*, and, recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya

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822 61/295. *United Nations Declaration on the Rights of Indigenous Peoples*.

823 *United Nations Declaration on the Rights of Indigenous Peoples,* Art. 31(1).

824 Food and Agriculture Organization of the United Nations (FAO), *FAO and traditional knowledge: the linkages with sustainability, food security and climate change Impacts*, 2009, p.9.

825 Art. 11(1), Constitution of Kenya 2010.

(emphasis added).[826] Further, with respect to the environment, the State is obligated to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.[827] The State should not just protect the indigenous knowledge but should also actively promote the use of this knowledge for environmental protection and conservation for sustainable environment.

It is also noteworthy that most of the principles of sustainable development are similar to the traditional practices of indigenous communities in Kenya as far as application of indigenous ecological knowledge is concerned. Such principles as precautionary principle are a reflection of the unwritten principles on environmental management that have existed for generations across indigenous cultures. These communities considered themselves and their cultural ecological practices as part of the ecosystem hence adopted both anthropocentric and ecocentric approaches when dealing with environmental and natural resource management.[828] It has been acknowledged by some government officials that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country's forest cover.[829] This is because such people have the traditional skills needed to help the Government conserve the forests.[830] These communities ensured conservation of the wildlife resource through cultural and social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.[831]

One way of implementing the constitutional obligations on the state to protect and enhance intellectual property in, and indigenous knowledge of,

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826 Ibid, Art. 11(2) (b) & (3) (b).

827 Ibid,Art. 69(1) (c),.

828 See generally, Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at http://www.kmco.co.ke/attachments/article/175/Traditional%20knowledge%20and%20conflict%20management-25%20April%202016.pdf [Accessed on 22/01/2020].

829 Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

830 Ibid.

831 Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy, 2012*, p.2.

biodiversity and the genetic resources of the communities is to incorporate it with the scientific knowledge and involving these communities and helping them appreciate all the foregoing principles of natural resource management for realisation of sustainable development agenda. These principles are both international and cultural.[832]

10.4 Kenya's Environmental and Natural Resources Laws: Challenges and Prospects

As already highlighted in the previous section, formal recognition of traditional knowledge has existed in Kenya's laws for some time.[833] However, this has not marked an increase or even efforts to promote any meaningful or active utilisation of the knowledge held by communities for management of environmental problems in the country. There has been what mostly seems like promoting use of formal and western knowledge at the expense of the traditional one. As a result, communities feel sidelined as they are neither involved in decision-making and management practices and are also expected to respond to the government's directives without any inclusion. This has especially been exemplified by the Government's efforts at conservation and management of forests and the associated resources.[834] During evictions, people have been accused of illegal logging and clearing of forests for settlement and farming.[835]

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832 See *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016*, No. 33 of 2016, (Government Printer, Nairobi, 2016).

833 Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016; Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at http://www.kmco.co.ke/attachments/article/175/Traditional%20knowledge%20and%20conflict%20management-25%20April%202016.pdf [Accessed on 22/01/2020].

834 Soi, C., "Kenya to evict thousands to protect Mau forest," *Al Jazeera News*, 14 March 2019. Available at https://www.aljazeera.com/news/2019/03/kenya-evict-thousands-protect-mau-forest-190314165702863.html [Accessed on 22/01/2020].

835 Murage, G., "CS Tobiko to order second phase of Mau evictions," *The Star*, 16 July 2019. Available at https://www.the-star.co.ke/news/2019-07-16-cs-tobiko-to-order-second-phase-of-mau-evictions/ [Accessed on 22/01/2020]; Vidija, P., "Rift Valley MPs turn wrath on Tobiko over Mau evictions," *The Star*, 29 July 2018. Available at https://www.the-star.co.ke/news/2018-07-29-rift-valley-mps-turn-wrath-on-tobiko-over-mau-evictions/ [Accessed on 22/01/2020]. Per Hon. Isaac Ruto, former Governor of Bomet County.

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*[836], the Court observed that: "quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests.

The Maasai peaceful co-existence with wildlife is however not without challenges especially when environmental co-management is practised. It has been observed that although Maasai knowledge is evoked in conservation planning proposals, Maasai participation as knowledgeable actors in conservation activities on their lands remains extremely limited.[837] This is compared to situations throughout the world where environmental co-management is said to be taking place between scientists and local communities.[838] Thus, while some instances seem to support and recognise the use of traditional knowledge, there has not been consistency. There is a need to mainstream traditional environmental knowledge for environmental management and governance in Kenya.

10.5 Mainstreaming Traditional Ecological Knowledge in Kenya's Environmental Governance Framework

Traditional knowledge may contribute to improved development strategies in several ways such as by helping identify cost-effective and sustainable mechanisms for poverty alleviation that are locally manageable and locally meaningful; by a better understanding of the complexities of sustainable development in its ecological and social diversity, and helping to identify innovative pathways to sustainable human developmental that enhance local communities and their environment.[839]

836 ELC Civil Suit No. 821 of 2012 (OS).

837 Goldman, M., "Tracking wildebeest, locating knowledge: Maasai and conservation biology understandings of wildebeest behavior in Northern Tanzania," *Environment and Planning D: Society and space* 25, no. 2 (2007): 307-331, at p.308.

838 Ibid.

839 African Regional Intellectual Property Organization, *op cit.*

Recognition and active utilisation of communities' traditional environmental knowledge can create a viable channel for communities to appreciate government's efforts in effective environmental governance through promoting sustainable use of the environment and its resources.[840] It has been argued that 'while trust and community are equally necessary in addressing complex environmental problems, building institutions that foster knowledge and trust, participation and community, is one of the greatest challenges confronting today's human societies'.[841]

It is important to point out that while policy and legal framework is necessary, it cannot alone guarantee achievement of environmental justice for communities. The law alone cannot enforce the common interest and thus it needs community knowledge and support, which entails greater public participation in the decisions that affect the environment. This is best secured by decentralizing the management of resources upon which local communities depend, and giving these communities an effective say over the use of these resources. It will also require promoting citizens' initiatives, empowering people's organizations, and strengthening local democracy'.[842]

Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.[843] In Africa, environmental

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840 Mohammad, N., 'Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,' *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192.

841 Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 65.

842 Brundtland, GH, *Our Common Future: eport of the World Commission on Environment and Development*, Oxford University, 1987, A/RES/42/187, para. 77.

843 Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006), p.8. Available at *http://www.gov.scot/resource/doc/123822/0029776.pdf* [Accessed on 22/1/2020].

justice mostly entails the right to have access to, use and control over natural resources by communities.[844]

Traditional knowledge, coupled with other forms of knowledge can enhance predicting and preventing the potential environmental impacts of development, as well as informing wise land-use and resource management especially within the local community setups.[845] Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.[846]

Traditional knowledge can be used at the local level by communities as the basis for making decisions pertaining to food security, human and animal health, education, natural resource management and other vital activities.[847] Exploring the community's knowledge and knowledge of people dealing with agriculture, is crucial to determine their norms, values, and belief in regards to their activities, particularly in the area of water and land management.[848]

Incorporating provisions recognising traditional environmental knowledge in national environmental laws is commendable but just marks the first step towards mainstreaming such knowledge into effective environmental governance. There is need for actively and meaningfully involving

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844 Obiora, L., "Symbolic Episodes in the Quest for Environmental Justice," *Human Rights Quarterly*, Vol.21, No. 2, 1991, p. 477.

845 Ellis, S.C., Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making,' *Arctic*, Vol. 58, No. 1 (March 2005), p. 66–77 at p. 67.

846 Ibid at p. 67.

847 Gorjestani, N., 'Indigenous Knowledge for Development: Opportunities and Challenges,' in Twarog, S. & Kapoor, P. (eds), 'Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions,' (United Nations Conference on Trade and Development, 2004), UNCTAD/DITC/TED/10, pp. 265-272 at p. 265. Available at *http://unctad.org/en/docs/ditcted10_en.pdf* [Accessed on 22/1/2020].

848 Retnowati, A., et al, 'Environmental Ethics in Local Knowledge Responding to Climate Change: An Understanding of Seasonal Traditional Calendar *Pranoto Mongso* and Its Phenology in Karst Area of Gunung Kidul, Yogyakarta, Indonesia,' *Procedia Environmental Sciences*, Vol. 20, 2014, pp. 785 – 794 at p. 787.

communities in utilising traditional environmental knowledge to practice sustainable production methods. Where they do not perceive a danger to their livelihoods, these communities are likely to embrace development projects and are also not likely to turn to unconventional ways of protecting their livelihoods.[849]

10.5 Conclusion

One way of protecting and enhancing the use of traditional environmental knowledge in environmental management, while ensuring meaningful inclusion and participation of local communities, is integrating it into the environmental governance framework as this will help achieve sustainable development as contemplated in the sustainable development agenda. Combining western scientific knowledge which forms the bulk of *formal laws, policies and programmes with traditional environmental knowledge for the purpose of improving natural resources and environmental management is important for inclusive and participatory approaches to environmental management* (emphasis added). The implication would be that environmental scientists and policy professionals, indigenous and non-indigenous, should focus more on creating long term processes that allow for the implications of different approaches to knowledge in relation to stewardship and management priorities to be responsibly thought through.[850] This will improve cooperative environmental and natural resources stewardship and management between indigenous and non-indigenous institutions.[851]

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849 Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

850 Whyte, K.P., "On the role of traditional ecological knowledge as a collaborative concept: a philosophical study." *Ecological processes*, Vol.2, no. 1 (2013): 7, p. 2.

851 Ibid,p. 3.

11. Effective Environmental Management and Governance for Peace Building in Kenya

11.1 Introduction

SDG Goal 16 of the *2030 Agenda for Sustainable Development*[852] 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.[853] The *Agenda* also rightly points out that there can be no sustainable development without peace and no peace without sustainable development. The *Agenda* recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.[854]

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

11.2 Environmental Governance: Theories and Conceptualisation

11.2.1 Theories and Conceptualisation of Environmental Governance

There exist different definitions of the term 'governance' by various scholars. Governance has been defined as a system for shaping behaviour to socially useful ends, involving many participants serving various roles. Those involved in this system include government officials, legal authorities, self-governing organisations and non-government actors such as citizens, industry

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

853 Goal 16,

854 Target 35, *Transforming our world: the 2030 Agenda for Sustainable Development*.

stakeholders, those being governed and those who are affected by governance.[855]

Environmental Governance has been defined as the means by which society determines and acts on goals and priorities related to the management of natural resources. This includes the rules, both formal and informal, that govern human behavior in decision-making processes as well as the decisions themselves. Appropriate legal frameworks on the global, regional, national and local level are also considered to be a prerequisite for good environmental governance.[856]

'Governance of natural resources' has been used to mean the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say in the management of natural resources – including biodiversity conservation…[857] The concept of 'good governance' includes accountability and is built on "fundamental human values and rights, including fairness, equity and meaningful engagement in and contribution to decision making."[858]

It is arguable that environmental governance in any country is only as effective as the general governance framework in place. Environmental governance does not operate in a vacuum but also relies on the effectiveness of the general governance in a given country.

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855 Martin, P., Boer, B. and Slobodian, L., (Eds.), *Framework for Assessing and Improving Law for Sustainability*IUCN, Gland, Switzerland, 2016, xii + 126 pp at p. 1. Available at https://www.iucn.org/sites/dev/files/framework_for_assessing_and_improving_law_for_sustainability.pdf [Accessed on 22/01/2020].

856 IUCN, Environmental Law: Governance and MEAs, available at https://www.iucn.org/theme/environmental-law/our-work/governance-and-meas [Accessed on 21/01/2020].

857 IUCN Resolution 3.012 on Governance of natural resources for conservation and sustainable development adopted in Bangkok, Thailand in 2004. Available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2004_RES_12_EN.pdf [Accessed on 22/1/2020].

858 Ibid.

11.2.2 Role of Law in Environmental Governance and Management

The law contains anticipatory mechanisms to ensure that natural resources are properly distributed, conserved and protected well into the future. Since law is the key instrument for transforming societal goals and aspirations into practice, its role is vital in interweaving environmental interests into the scheme of economic development. Law sets substantive norms, establishes decision-making institutions and processes, and provides mechanisms for accountability and conflict-resolution.[859]

It has rightly been argued that law reflects the combined result of the many viewpoints, values, knowledge systems, information types, and power struggles that come into play in its making and is thus inherently integrative. Law reflects the values of society.[860] Law creates rights, duties, powers, establishes institutions and procedures, and the basic principles on how people are to interact with each other and with natural resources. Further, the economic and financial interests that drive most of the decisions concerning natural resources are also reflected in the law.[861]

The system depends upon norms that may be translated into formal or informal rules, and upon organisations and institutional arrangements to implement these norms. Governance systems vary between communities, and change over time, and they intersect. Nation-state governance intersects with private sector approaches, such as voluntary commitments or supply chain standards, and with traditional and indigenous norms and practices for conserving and using the natural world.[862]

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

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

861 Moore, P., *et al*, *Natural Resource Governance Trainers' Manual*, (IUCN, RECOFTC, SNV, Bangkok, Thailand, 2011), p. 119.

862 Ibid, at p. 1.

In Kenya, there are intricate and detailed frameworks and sectoral laws in place to ensure proper conservation and protection of natural resources.[863] The key weaknesses that have made the law seem not to be playing its intended role in natural resources management are the complex institutional set ups, differing and overlapping mandates and organizational cultures of state agencies created to manage natural resources. Laws also provide for differing management and enforcement methods over similar resources thus creating conflict between agencies, as well as, between agencies and communities living with the resources.[864]

What is required is a strengthened and clear framework law that gives proper attention to all sectors of natural resources as well as inclusive of all stakeholders for effective management.

11.3 Peace Building: Meaning and Scope

11.3.1 Meaning and Scope of Peace Building

The term 'peace' is related to the well-being of any person. It is a generally accepted value. In most cultures it is a type of desideratum linked to harmony, tranquillity, cooperation, alliance, well-being, and agreement.'[865] Notably, 'peace is not just the absence of violence, it is much more.[866] Peace may be classified into positive peace or negative peace. Negative peace is the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.[867]

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863 See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

864 See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

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

866 Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

867 Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y [Accessed on 22/1/2020].

Positive peace is considered as a true, lasting, and sustainable peace built on justice for all peoples. The concept of positive peace involves the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects these commitments. Positive peace assumes an interconnectedness of all life.[868] In a negative peace situation, it may not see conflict out in the open, but the tension is boiling just beneath the surface because the conflict was never reconciled. The concept of negative peace addresses immediate symptoms, the conditions of war, and the use and effects of force and weapons.'[869]

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

Peacebuilding is about dealing with the reasons why people fight in the first place and supporting societies to manage their differences and conflicts without resorting to violence. It involves a broad range of measures, which can take place before, during and after conflict. They aim to prevent the outbreak, escalation, continuation and recurrence of conflict.[870] Peacebuilding approaches can also be geared towards either 'positive' or 'negative' peace.[871]

11.3.2 Role of Law in Peace Building

Conflict is grounded in social, structural, cultural, political and economic factors as seen from the foregoing pillars, since depreciation in one increases chances of conflict in a particular society.[872] Some scholars have also argued

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868 Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

869 Ibid, pp.106-107.

870 International Alert, "What is Peace Building?" Available at https://www.international-alert.org/what-we-do/what-is-peacebuilding [Accessed on 22/01/2020].

871 Ibid.

872 Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at http://www.beyondintractability.org/essay/social-structural-changes [Accessed on 22/1/2020]; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G.

that peaceful nations are better equipped through their attitudes, institutions and structures to respond to external shocks. This can be seen with internal peace correlating strongly to measures of inter-group cohesion and civic activism, which are key proxies that indicate the ability of societies to resolve internal political, economic, and cultural conflicts as well as being able to respond to external shocks.[873]

Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.[874] Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.[875] Peacebuilding approaches and methods are geared towards ensuring people are safe from harm, have access to law and justice, are included in the political decisions that affect them, have access to better economic opportunities, and enjoy better livelihoods.[876] It is thus arguable that while the law may have in place structures directly meant to bring about negative peace by stopping violence through various mechanisms, all the legal structures meant to address the socio-economic factors listed above have a bearing on achievement of positive peace. It has rightly been argued that many root causes and drivers of conflict such as discrimination and marginalization, unequal distribution of public goods and services, corruption, impunity and lack of accountability stem from or are exacerbated by the absence of the rule of law.[877]

Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at http://www.beyondintractability.org/essay/underlying-causes [Accessed on 22/01/2020].

873 Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' IEP Report 22, p. 5. Available at https://www.files.ethz.ch/isn/169569/Pillars%20of%20Peace%20Report%20IEP.pdf [Accessed on 22/01/2020].

874 Ibid, p. 2.

875 Ibid, p. 6.

876 Ibid.

877 IDLO, "Sustaining Peace, Building Justice: Discussion Note," available at https://www.idlo.int/system/files/event-documents/IDLO%20IN%20-%20Sustaining%20Peace-Building%20Justice%20NO%20CONTACTS.PDF [Accessed on 22/1/2020].

Also notable is the assertion that peacebuilding is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments, regional bodies and the private sector all play a role in building peace. Peacebuilding is also a long-term process, as it involves changes in attitudes and behaviour, and institutional norms.[878] The law can be useful in contributing to the change in institutional norms as well as shaping the changes in attitudes and behaviour.

The rule of law is seen as a framework for the peaceful management of conflict because of its defining features: laws establishing the operating rules of society and therefore providing reliability, justice and stability in the society; norms defining appropriate societal behaviour; institutions able to resolve conflicts, enforce laws, and regulate the political and judicial system; laws and mechanisms protecting citizens' rights.[879] It is thus worth noting that this makes the law an important ingredient in the process of peace building, whether positive peace or negative peace.

11.4 Nexus between Environmental Governance and Peace Building

Debates about the relationship between the environment and peace building focus on how environmental problems, like resource scarcity and climate change, are likely to create or exacerbate conflict. Some scholars have opined that the environmental governance of a system based on participation, accountability, and equity ensures the broad political social and economic issues of the marginalized sections of the society are addressed.[880]

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878 International Alert, "What is Peace Building?" Available at https://www.international-alert.org/what-we-do/what-is-peacebuilding [Accessed on 22/01/2020].

879 Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" available at http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844 [Accessed on 22/01/2020].

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

Environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.[881] 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.[882] The role of natural resources in conflict has also been a focus of many authors. The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.[883] Under the scarcity theory, it is argued that rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to exacerbate poverty and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict."[884]

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the "resource curse"—corruption, economic stagnation, and violent conflict over access to revenues.[885] For instance, it has been pointed out that for many resource rich developing countries, there have been cases of low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.[886]

Communities expect that availability of environmental goods and services in their region will improve their livelihoods by 'real' development, which may

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

882 Ibid., p.6.

883 United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

884 Ibid., p.8.

885 United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

886 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.

not always be the case.[887] Poor and low economic development[888] and consequently, failed economies result in conflicts,[889] as a result of environmental and natural resources' bad governance or mismanagement.[890] It is thus evident that any peacebuilding efforts that do not factor in streamlining environmental and natural resources governance are bound to fail as they would not capture the very basic needs of the communities in question: satisfaction of their socio-economic needs with minimal or no struggle.

11.5 Building Lasting Peace through Effective Environmental Governance

The 2030 SDGs Agenda maintains that while the causes of conflict vary widely, the effects of climate change only exacerbate them. Climate-related events such as drought threaten food and water supplies, increase competition for these and other natural resources and create civil unrest, potentially adding fuel to the already-disastrous consequences of conflict. Thus, investing in good governance, improving the living conditions of people, reducing inequality and strengthening the capacities of communities can help build resilience to the threat of conflict and maintain peace in the event of a violent shock or long-term stressor.[891]

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887 Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 22/01/2020].

888 See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012).

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

890 Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf [Accessed on 22/01/2020].

891 United Nations, *The Sustainable Development Goals Report, 2018*, p.15. Available at https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf [Accessed on 22/01/2020].

The Constitution of Kenya, 2010 provides for both the state and personal obligations in respect of the environment.[892] This provision emphasizes the need for incorporation of good governance practices in the management of natural resources. These good governance practices should demonstrate democracy in terms of accountability and transparency.[893] The law is a necessary part of the solution to sustainability challenges.[894] This section offers some recommendations that go beyond the law in enhancing environmental governance as one of the prerequisites for successful peace building in the country.

11.5.1 Use of Alternative Dispute Resolution Mechanisms to Enhance Public Participation in Environmental Conflict management

The Constitution of Kenya, 2010 encourages the application of traditional dispute resolution mechanisms in land conflicts.[895] The *Environment and Land Court Act*, 2011 empowers the Court to adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

Alternative Dispute Resolution (ADR) mechanisms have the potential to create forums for engaging the various stakeholders in environmental matters and subsequently address any underlying tension or feelings of marginalization. This can go a long way in creating more peaceful societies.

11.5.2 Inclusive and Participatory Approaches to Environmental Governance and Management

The *UN Conference on Environment and Development, Agenda 21*[896] under section 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making

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892 Art. 69 Constitution of Kenya 2010.

893 Art. 69(1) (d).

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

895 Art.67 (2) (f); Article 159(2), Constitution of Kenya.

896 United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

and decision-making. It is in recognition of the fact that unless all these groups are equitably and meaningfully involved in the decision making policies, especially those on sustainable development, then the Government efforts would either fail or prove inadequate.

Kenya's approach to environmental governance and natural resources management has largely been sectoral and informed by the command and control approach. The Constitution of Kenya captures the need for concerted efforts of all, in the duty to conserve and sustainably manage the environment, since the same does not only lie against the State but also every individual person. In relation to the foregoing obligations, the Constitution places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[897]

Governance structures for all sectors, including environmental sector, should be built around the national values and principles of governance as enunciated in the Constitution of Kenya.[898] As already pointed, people who feel meaningfully engaged in governance matters are more likely to appreciate the process and also keep peace even when resources are scarce. Local people should be actively engaged in governance matters especially those that directly affect their livelihoods.[899]

11.5.3 Inclusive Education for Sustainable Livelihoods and Societies

There exists several regional legal instruments which promote the right to education for all.[900] At the international level, education is treated as a fundamental human right and essential for the exercise of all other human

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897 Art. 22(1), Art. 42, Art. 69(2), Constitution of Kenya.

898 Art. 10(2), Constitution of Kenya.

899 United Nations Development Programme, *Local Governance In Fragile And Conflict-Affected Settings: Building a Resilient Foundation for Peace and Development*, A UNDP how-to guide, 2016.

900 The *American Declaration of the Rights and Duties of Man* (1948), Article XII, Article XXXI; See also the *Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms* 1952; The *African Charter on Human and Peoples' Rights* (1981), Article 17; See also the *Charter on the Rights and Welfare of the African Child* (1990).

rights. It is said to be a right that promotes individual freedom and empowerment and yields important development benefits.[901]

The international and regional framework calls on governments to fulfill their obligations both legal and political in regard to providing education of good quality for all, and to implement and monitor more effectively education strategies since education is conceived as a powerful tool by which economically and socially marginalized adults and children can lift themselves out of poverty and participate fully as citizens.[902] In the Kenyan case of *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*[903], the Court affirmed the governments' international obligation to ensure the realisation of right to education within the available resources.

Education has a great role to play in peace building efforts and effective environmental both of which are important components of sustainable development. This realisation forms the basis of SDG Goal 4 which provides that State Parties should ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.[904]

This section contemplates two forms of education namely: "environmental education" and "environment-based education". Environmental education has been defined as a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment, thus enabling individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.[905]

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901 UNESCO, 'The Right to Education', visit http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education/ [Accessed on 22/1/2020].

902 Ibid.

903 [2013] eKLR, Petition No. 133 of 2013.

904 Goal 4.7, *Transforming our world: the 2030 Agenda for Sustainable Development*.

905 United States Environmental Protection Agency, 'What is Environmental Education?' available at http://www2.epa.gov/education/what-environmental-education [Accessed on 22/1/2020].

On the other hand, environment-based education focuses on educational results: using the environment to engage students in their education through "real-world" learning experiences, with the goals of helping them achieve higher levels of academic success as well as an understanding of and appreciation for the environment.[906] By applying environmental education to real-life problems, children are also given authentic opportunities to provide service for their communities and solve local problems.[907]

Education empowers individuals for full development of human personality, and participation in society though acquisition of knowledge, human values and skills. The right to education has close linkage with the right to development, and is a powerful tool in poverty reduction strategies.[908] The need for promoting the right to education arises from the fact that the younger generation will need to acquire this basic education while having environmental education inculcated therein. The older generation will also need to have access to education, which education takes various forms especially when it comes to environmental education, including traditional knowledge.

If empowered through education, people are able to make their own decisions especially in matters relating to exploitation of natural resources and environmental management tools. Environmental education gives people the voice and enables them appreciate the available information on environment.[909] There is a great need to ensure that appreciation and concern for the environment are instilled during the early years of development. Indeed, article 29(1) (e) of the *Convention on the Rights of the Child* (1989) states that States Parties agree that the education of the child shall be directed to, *inter alia*, the development of respect for the natural environment.

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906 California Department of Education, 'The Case For Environmental Education: Education and the Environment/ Strategic Initiatives for Enhancing Education in California', 2002, p. 5.

907 Ibid, p. 6.

908 UNESCO (2008), 'The Right to Education', p.2.

909 See generally UNESCO, 'Educating for a Sustainable Future: A Transdisciplinary Vision for Concerted Action', EPD-97/CONF.401/CLD.1.November 1997. Available at http://www.unesco.org/education/tlsf/mods/theme_a/popups/mod01t05s01.html [Accessed on 22/1/2020].

There is a close link between environmental degradation, lack of environmental justice and democracy, poverty and low levels of education among the citizenry, and provision of education is the crucial first step towards their elimination.[910]

11.6 Conclusion

Peace building in any country is desirable, and so is effective environmental and natural resources governance and management. The two concepts are arguably joined at the hip and both are at the core of the 2030 Agenda on sustainable development. This section has discussed the various ways that the two are related and demonstrated how they cannot be treated as mutually exclusive if any efforts towards achieving either are to bear any fruits.

While putting in place, any peace building policies, policy makers and other stakeholders ought to have the bigger picture in mind-effective environmental and natural resources governance must first be achieved as these resources are central in realisation of socio-economic rights of citizens. When these rights are largely achieved for all in any country, then it becomes easier to talk about and also achieve peace. Enhancing Environmental governance for peacebuilding in Kenya is a necessity that cannot be ignored in the quest for sustainable development.

12. Conclusion

This paper has offered a detailed discussion on some topical issues on adopting an integrated approach to environmental management in Kenya. Section one has critically discussed the general role of law in environmental governance and management. This is in recognition of the fact that law is a necessary tool, in not only spelling out the environmental rights of the citizens, but also laying out the State's and citizenry's duties towards sustainable environmental management and conservation. The role of law also means that courts, which are the primary custodians of the law, have a huge role to play in not only ensuring that environmental rights of every individual are protected and

[910] UNESCO, 'Educating for a Sustainable Future: A Transdisciplinary Vision for Concerted Action', EPD-97/CONF.401/CLD.1.November 1997.Available at http://www.unesco.org/education/tlsf/mods/theme_a/popups/mod01t05s01.html [Accessed on 22/01/2020].

upheld but also meting out punishment to those who violate environmental laws as part of guaranteeing access to environmental justice.

The Constitution of Kenya calls for a collaborative approach in environmental and natural resources governance and management, within the framework of the national values and principles of governance. In recognition of the important role played by corporations in the society and their contribution to the economic development, the paper has also discussed the contribution of corporations in promoting sustainable environmental and natural resources management as far as their environmental liability is concerned. The corporations are also expected to contribute positively towards improving the livelihoods of the people. The paper has analysed both positive and negative duties of these corporations in relation to environmental sustainability.

The paper also dedicates a whole section on the general environmental liability regime in the country as an important aspect of environmental management and measures geared towards achieving the sustainable development agenda. The discourse recognises the important role that the citizenry can play, in line with the constitutional principles in achieving sustainable environmental management in Kenya, and as a result, has explored such themes as environmental democracy which is meant to empower the general public and enable them to meaningfully participate in environmental management.

Considering that Kenya is still at a nascent stage in exploring its extractives industry, the paper has substantively discussed the implications of these activities not only on the environment but also on the lives of communities. The theme of benefit sharing in natural resources and environmental goods also features across the paper as an acknowledgement of the fact that these resources form the backbone of many communities' livelihoods and measures must thus be put in place to ensure that there are some benefits that accrue to them. The State is supposed to manage these resources in trust for the people and must therefore ensure that they get to benefit from them in a bid to improve their living standards.

It is in the spirit of promoting meaningful inclusion and public participation that the theme of indigenous knowledge as a tool for promoting communities' participation features prominently in the paper. There is a need for the

stakeholders to ensure that there is a complimentary application of the indigenous ecological knowledge alongside the scientific knowledge. The use of indigenous ecological knowledge not only make the communities own and appreciate the government's efforts in environmental management and conservation, it also enables the government to tap into the positive aspects of such community knowledge. Furthermore, local people are the custodians of traditional systems and are therefore well informed about their own situations, their resources, what works and what does not work.[911] Traditional knowledge on environment should therefore be treated as equally important as the mainstream forms of environmental education in their role of achieving environmental sustainability.

It is also important to note that there are diverse resources within the country, ranging from the dryland resources to those that are to be found within the ocean and other large water bodies. The blue economy holds the potential for diversification of the sources of the much needed income not only for the government but also for improving the lives of communities living around these areas. There is thus a need to invest in the sector.

This paper calls for an integrated approach to environmental and natural resources management in Kenya in order to ensure that the various approaches to resource management are not only applied efficiently but also that the various aspects of the environment such as the flora and fauna are well taken care of. An integrated approach will also be important in addressing such challenges as pollution which poses one of the greatest threats to environmental sustainability. An integrated approach will also ensure that anthropocentric approaches coupled with ecocentric approaches strike a balance in safeguarding environmental, social and economic interests of the country.

When the needs of all interested parties and stakeholders are taken care, peacebuilding efforts become easy to fulfill. Conflicts and disputes are mainly caused by either inadequacy of environmental and natural resources required

[911] United Nations Convention to Combat Desertification (UNCCD) (2005), 'Revitalizing Traditional Knowledge: A Compilation of Documents and Reports from 1997 – 2003', UNCCD, Bonn, Germany. 150 pp. at p. 11.

to meet the basic needs of people as well as marginalization of some groups which may be in the form of 'resource capture' by the elites in the society.

It is the high time that the state agencies recognised that sectoral approaches to environmental and natural resources management that is devoid of meaningful public participation may not only lead to the perennial conflicts associated with natural resources but may also mean that the realisation of sustainable development agenda as envisaged under the different international environmental legal instruments and domestic laws may remain a pipe dream. With the ever increasing competing needs for the natural and environmental resources, an integrated approach to the management of these resources that involves the state agencies, civil society, corporations and communities will not only actualize environmental ideals as conceived in the *2030 Agenda for Sustainable Development*[912] which is a plan of action for people, planet and prosperity, but will also be useful addressing social challenges such as poverty, food security and peace, among others for a sustainable society.

It is vital that we effectively manage the environment to ensure survival of the current and future generations. We all deserve a clean and healthy environment. Securing our destiny is our noble responsibility.

[912] *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

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Institutionalization of Alternative Dispute Resolution in Kenya: A Democratization Imperative

By: ***Henry K Murigi****

Abstract

Constitutionalism is one of the pillars of democratization that entails ensuring that Constitutions work as intended. In any democracy, the proper functioning ADR as institutions of governance, is indeed a clear indicator of constitutionalism. Conflicts existed before institutions, modernity, development and progress and even democracy has not been able to eliminate them. It is therefore critical for democratization processes to adopt ADR as an imperative erstwhile the States become fragile notwithstanding efforts to democratize. Institutionalizing ADR is critical to the concept of democratization. In this paper we argue that there are converging points between democracy and ADR. In particular, this paper is premised on the notion that ADR should not be viewed merely as alternative to judicial process instead it should be regarded as an alternate to violence and useful within any democratic culture. To this end, this paper contends that a one sided view of access to justice is a narrow conceptualization of democratization. The paper instead suggest a more progressive approach to justice as an imperative for democracy..

1.0 Introduction

To fully understand institutions of governance one has to consider the ontological as well as the epistemological foundation for the ideas giving rise to their existence. This requires an understanding of the institutional theory which explains transitions through rational myths, isomorphism and the legitimacy of democratization structures[1]. Institutionalization of democracy in Africa is an ongoing debate and can be explained through the institutional

PhD International Relations Student at USIU-A, MA Peace and Conflict Management, Post-Graduate Dip in Law from Kenya School of Law, LLB, Advocate of the High Court of Kenya.

[1] Scott, W. R. 1994. Institutions and Organisations; Toward a Theoretical Synthesis. California: Sage Publishers.

theory. The institutions of democracy are both formal and informal the former attracting debate from scholars. These institutions include the three arms of government as well as the mechanisms around them. The judicial arm of governance is critical for any democracy and if flows from the broader idea of justice which is central to democratization. ADR is one of the mechanism that support access to justice. In this paper we suggest that justice should be viewed from multiple perspectives. In so doing this paper seeks to postulate four major themes. First, the paper traces the conceptual origins of ADR and democracy suggesting that it is a shared history. Second, this paper situates democracy and ADR in Africa by locating some of the similarities. Third, the paper suggests that a deeper consideration of Dahl doctrine will reveal that ADR is an imperative of democratization. Finally, this paper reacts to some of the arguments put forward by opponents of institutionalization of ADR as a democratization imperative.

2.0 Democratization Defined

Defining democracy, though necessary, is convoluted by a number of issues including the many philosophical components that have informed its growth over time[2]. Although there is no unanimity in defining democratization, there are many methods of describing consensus as deliberated below. Lipset opines that democratization is a process which is an unceasing course[3]. Such a process seeks to establish certain social pre-requisites like supporting institutions and values as democratic imperatives. Democratization is certainly not a static concept. It is an unsolidified, extremely questioned, a milieu-specific involvement which suggests that it is observed as both a contextual variable and deontological concept[4]. To this end, democratization cannot be defined by a fixed timeless objective criterion. Thus, it is a transitional ideology with innumerable stages characterized by disintegration, reintegration, and cataclysmic social change[5]. Theoretically democracy is premised on the prism

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2 Schmitter, Phillipe, C. 1994. "What Democracy is and is Not." Journal of Democracy 75-88.

3 Lipset, Seymour, Martin. 1959. "Some Social Requisites of Democracy: Economic Development and Political Legitimacy." The American Political Science Review 53 (1): 69-105.

4 Whitehead, Lawrence. 2002. Democratization; Theory and Experience. Oxford: Oxford University Press.

5 Conteh-Morgan, Earl. 1997. Democratization in Africa: The Theory and Dynamics of Political Transitions. London: Praeger Publishers.

of consensus to govern based on a social contract as suggested by classical thinkers such as Plato 1943[6], Thomas Hobbes 1588-1679[7] and John Locke 1690[8] among others. This thread of idea springs forth to the modern day constitutionalism. Democratization is often gauged by adherence to the principles of rule of law and constitutionalism[9].

3.0 Comparative Origins of ADR and Democracy

The arrival of political authority in the form of the state is not largely contested by African scholars in terms of its origin[10]. However, some trace the origin of democracy in the class struggle in Europe, America and China[11]. Others trace it to the arguments by Socrates, Plato and Aristotle. Plato envisioned how a state would operate within the existing structural arrangement. Since then States create and operationalize formal institutions to resolve disputes. These have taken diverse formats such as litigation, arbitration, mediation, and adjudication. There are several examples that can explain this point. First, in China an important ideology of legal formalism and strong state power existed before the third century BC[12]. This thinking (legalism) was as a response to the Confucian ideology that insisted on harmony, moral leadership, education and self-sacrifice. The emergence of legalism and Confucian ideologies have continued to harmoniously cohabit and arguably become institutionalized with modern day modifications. The entrenched ideology has consistently been utilized by ordinary people adopting self-administered justice (ADR) as opposed to formalist institutions (litigation).

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6 Plato. 1943. Plato's The Republic. New York: Books Inc.

7 Hobbes, Thomas. 1588-1679. Leviathan. Baltimore: Penguin Books.

8 Locke, John. 1690. Two Treaties of Government. Indianapolis: Hackett Publishing Company.

9 Fredrich, C. J. 1968. "Constitutions and Constitutionalism." International Encyclopedia of the Social Science 16-18. And Lijpart, Arendt. 1991. "Constitutional Choice for New Democracies." Journal of Democracy 72-84.

10 Randall, V., and L. Svåsand. 2002. "Political Parties and Democratic Consolidation in Africa." Democratization 9 (2): 30-52. Doi:10.1080/714000266.

11 Moore, Barrington. 1958. Social Origins of Dictatorship and Democracy: Lord Peasant and the Making of the Modern World. New York: Beacon Press.

12 Robert, S., & Palmer, M. 2005. "Cultures of Decision-Making: Precursors to the Emergence of ADRs." In Dispute Process: ADR in the Primary Forms of Decision Making, by S. Robert, 9=44. Cambridge: Cambridge University Press.

Second, in Rome although there seems to be no clear documentation of formal justice institution, there is abundant evidence that settling disputes was by way of both formal and informal mechanisms[13]. It is argued that initially Rome dealt with justice through judicial council which adjudicated both private and public claims[14]. Rome transitioned from a Monarchy to a Republic and later an Empire which influenced how disputes were resolved globally[15]. The Roman Community was ideally orderly and resolving disputes was part of the function of ensuring social order which include democracy[16].

The agrarian society in Africa was more adept to resolving dispute resolutions. In most African States, patterns of pluralist social legal ordering emerged after colonialism. This pluralist legal order was utilized greatly in Europe and exported effectively to Asia and Africa[17]. This introduced a preference for western style democratic values in the African States. Traditional dispute resolution mechanisms were declared repugnant. According to Kariuki Muigua there are several approaches to the institutionalization of traditional dispute resolution mechanisms[18]. He contends that the repugnancy test is crucial in determining the type of traditional dispute resolution mechanisms. The test is envisioned in Article 159(3) of the Constitution. The traditional-based dispute resolution processes emphasized approaches akin to negotiation and mediation. In the period after colonialism, efforts to reinstate pre-colonial law and institutions have variously been put in place not only to support in the removal of foreign laws and aspects presented by the colonial leaders, but more lately also attempt to deal with aspects arising out of the downfall of political authority.

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13 Oakley, S. P. 1997. "The Beginning of Rome; Italy and Rome from the Bronze Age to Punic Wars." The Classical Review 358 - 361.

14 Cornell, T. J. 1995. The Beginning of Rome: Italy nd Rome from the Bronze Age to the Punic Wars. London: Cambridge University Press.

15 Gibbon, Edward. 1946. The History of the Decline and Fall of the Roman Empire Vol 1 . New York: Fred de Fau and Company Publishers.

16 Lipset, S. Martin. 1960. Political Man: The Social Basis of Politics. New York: Anchor Books.

17 Gazal-Ayal, O., & Perry, R. 2014. "Imbalance of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcome." Law & Society 791=823.

18 Muigua, Kariuki. 2017. "Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems." Alternative Dispute Resolution 1-80.

In addition, the theory and practice of democracy and ADR cohabit a similar conceptual origin. The main idea is located in what Socrates envisioned of society being able to dialogue. Indeed Aristotle is credited for having praised arbitration over the court dispute resolutions system. He argued that an arbitrator is guided mainly by the fairness of a dispute and a judge is guided primarily by the law. Therefore, Aristotle suggests that arbitration and indeed other dispute resolution mechanisms were invented with the direct purpose of fortifying power for fairness and equity[19]. John Rawls explains that in the original position (before democracy), the individual (state) is allowed to aspire to the highest standard of life based on their areas of strength. In the same way, States before and during democratization should come up with ideals of justice that are suitable for their contexts[20].

4.0 Conceptualising Institutional Theory

The institutional theory is concerned with the behavior of individuals, organizations and states engaged in a quest for legitimacy. The theory is used to understand the processes by which institutions are formed and how they attain legitimacy. One can consider how they are formed by spreading the new practices and ideas as new norms.

The ideas underpinning this theory can be classified into several isomorphic categories. (Isomorphism seeks to explain why states follow the same strategies or adopt the same practices). The first isomorphic category is the coercive process which involves norms and regulation including non-governmental self- regulation. When a new law is adopted organizations are expected to dutifully to follow it. This should be fascinating for legal scholars. Second, the concept of mimetic refers to the tendency to deal with uncertainty by imitating the behavior of other organizations that have responded to the same situation. Here, states adopt a similar policy by simply copying as is. The third isomorphic category is normative which stems from a process of professionalization of the institutions. This process goes hand in hand with the dictates of democratization.

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[19] Lintott, Andrew. 1992. "Aristotle and Democracy." The Classical Quarterly, 114-128.

[20] Rawls, B. John. 1971. Theory of Justice. Cambridge: University of Harvard Press.

In this paper we argue that ADR in Kenya has been constitutionalized but not adequately institutionalized since it has not attained adequate attention past coercive process. To attain normative status there is a clear need to include a deeper view of justice in society as being more that what the Judiciary promises.

Jowett made several compelling arguments on Aristotle's thoughts on ADR and Democracy[21]. Firstly, as Aristotle's argued, equality beyond everything else is the aim of human interactions. This is because mankind quickly becomes captivated by socialistic theories especially when they are intermingled with assaults on standing institutions. These institutions include religion, philosophies and political institutions which although different share a common concern in human nature. Secondly, since Aristotle wrote in the context of Sparta and Carthaginians disputes, he was able to locate that judicial institutions were part of a democracy. Thirdly, Jowett argued that judicial institutions of a country reflect the political institutions even though there is a difference in their functions. Aristotle insisted that there is also an analogy that can be drawn between the political and judicial institutions. In a free state the law must be supreme, and the courts of law must exercise an independent authority; they must be open and public, and they must include popular element[22]. From the forgoing it is clear that institutions exist as a product of social relations.

5.0 Philosophy of ADR and Democracy under the Institutional Theory.

The main idea of the institutional theory can be traced in what Socrates envisioned of society being able to dialogue Plato. There is plenty of evidence that ADR existed as early as 1800 BCE to 300 BCE starting with Akhenaton all through to Woodrow Wilson[23]. Both ADR and democracy can also be located in Aristotle's main idea on politics. To this end, the ontology of democracy and ADR is that they both exist to facilitate human interactions that are fair and just. The constructivist theories are the epistemological

21 Jowett, B. M.A. 1885. The Politics of Aristotle. London: The Clarendon University Press.

22 Ibid

23 Barret, T. Joseph & Barret P. Jerome. 2004. A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement. The Association for Conflict Resolution. Doi: ISBN: 978-0-787-96796-3.

foundation of both ADR and democracy as institutions. This means they are social constructions. These institutions are ideally premised on the thinking located in the social contract theory as advanced by Hobbes and Locke who argued that people come together and decide to donate their authority to a sovereign.

The epistemological basis for the institution theory can also be located in the idea of justice that comes about from the sovereign allowing distribution of resources as the basis for equality as suggested by John Rawls. Constructivism requires both quantitative and qualitative research methodology. We argue that in conducting such a study one must consider that social institutions are implanted in a social structure and institutionalization is the process by which ideas such as ADR becomes embedded in a social structure[24]. Institutionalization therefore is the process by which social institutions develop from a founding idea or ideas and set of unorganized acts into an organized set of behaviors with a social stricter, role and function. To this end, a study under this theme would require both qualitative and quantitative research.

ADR and democracy cohabit the same ontological foundation which is that human interactions bring people together in pursuit for equality which is exercised in the arena of an institution. This occurs when someone has an idea and other people see the idea and begin to take action in accordance with that idea. These actions can appear in an amorphous blob which in time both the actor and observant create boundaries with parts of the actions eliminated because of inaccuracy or inappropriateness. These actions are based on values, norms and rules of the actions. With time, a division of labor develops for specific actions developing social roles. When new rules are put in place, they are primarily seeking to encourage formation of institutions[25].

6.0 Situating Institutionalisation in Africa

Most political activities and actions of tangible consequence happen in institutions. As such, it is critical to understand how institutions act and how

[24] Goodin, Robert E. 1996. The Theory of Institutional Design. New York: Cambridge University Press.

[25] Scott, W. R. 1995. Institutions and Organizations. California: Sage Publishers.

they influence the behavior of individuals working within them[26]. According to Rustow, democracy is instituted in phases [27]. These phases in the African context were predetermined by the systems that were put in place during the colonial era. Almond and Verba suggest that there are several ways of considering the political posture of a state in terms of political culture[28]. This can explain how institutionalisation and democracy are located in Africa. When presented in Africa, democracy produced several attitudes which revealed the political culture in Africa as democracy was being assimilated[29]. There are three attitudes that can be used to explain the political culture[30]. These include: the parochial attitude, subjective attitude and participants' attitude. The first attitude was hinged on citizens being remotely aware of the presence and function of the central government. The second projects an individual who is aware of what is going on but not a willing participant. The third is pegged on citizens orientation as a whole, to both the political and administrative structures. All these attitudes should be considered in the process of democratization because they determine its longevity all the while taking into consideration that democracy in Africa was instituted as a foreign ideology. We now turn to some of the perspectives to institutionalization of democracy and ADR in Africa

a) Perspectives for Democracy and ADR in Africa

There are several perspectives for situating democracy and ADR in Africa. It is important to note that for ADR and Democracy in Africa, history, politics and internal affairs of a state are in sharp focus. Here we suggest that there are three approaches that converge to show how the type of politics within a state

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26 Peters, B Guy. 2001. Institutional Theory in Political Science; The New Institutionalism. London: Continuum.

27 Rustow, Dankwart, A. 1970. "Transitions to Democracy: Toward a Dynamic Model." Comparative Politics 2 (3): 337-363.

28 Almond, Gabriel, A., and Verba Sidney. 1963. The Civic Culture: Political Attitudes and Democracy in Five Nations. Princeton, N. J.: Princeton University Press.

29 Robert, S., & Palmer, M. 2005. "Cultures of Decision-Making: Precursors to the Emergence of ADRs." In Dispute Process: ADR in the Primary Forms of Decision Making, by S. Robert, 9=44. Cambridge: Cambridge University Press.

30 Dalton, Russell, J., and Christian, Welzel. 2014. Political Culture and Value Change' in the Civic Culture Transformed From Allegiant to Assertive Citizens. New York: Cambridge University Press.

will affect democratization. Firstly, the triadic approach to dispute settlement affects democratization within a state[31]**.** Here the argument is that the rules used to resolve disputes take into account three aspects (1) autonomy of the umpire, (2) availability of the dispute resolution mechanism to all disputants and (3) how well democracy is entrenched within the society. Secondly, when institutions of governance are consolidated, the distinction between law and politics vanishes. Here practices such as triadic dispute resolution become embedded as normative values that shape future relations[32]. Thirdly, to understand democratic decision makers, it is necessary to consider the trust levels within states. The contention here is that the input of the universal populace in non-democratic States is insignificant[33]. Therefore stronger democratic dyads emerge to influence the approach of ADR within a state[34]. To this end, the institutionalization of democracy and ADR has both inner and exterior posture on democratization.

One of the realities in Africa is that States have been in transition for a long period. In any event, democratization operates ideally within states that are in transition. It is important to contextualize transitions in Africa which can be understood by considering four explanations to democratization suggested by Bratton et al[35]. First, they suggest the structural and contingent explanations which are based on Marxism. They adopt the thinking as advanced by Weber, a social scientist evolutionary who argued that capitalism introduced democracy[36]. Here the argument is that capitalism influences the type of

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31 Keohane, O. Robert et al. 2006. "Legalized Dispute Resolution: Interstate and Transnational." In International Law and International Relations, by A. Beth and Steinberg, H. Richard Simmons, 331-374. London: Cambridge University Press.

32 Sandholtz, Wayne and Sweet A. Alee. 2004. "Law, Politics and International Governance." In The Politics of International Law, by Christian Reus, 238-271. New York: Cambridge University Press.

33 Amatrya, Sen,. 1999. "Democracy as a Universal Value." Journal of Democracy 3-17.

34 Florian, Justwan. 2017. "Trusting Publics: Generalized Social Trust and the Decision to Pursue Conflict Binding Conflict Managements." Journal of Conflict Resoluton 61 (3): 590-614. Doi: 10.1177/0022002715590879.

35 Bratton, Michael, and Nicholas Van de Walle. 1997. Democratic Experience in Africa: Regime Transition in Comparative Perspective. England: Cambridge University Press.

36 Weber, Max. 1958. The Protestant Ethics and the Spirit of Capitalism. New York: Dover Publications, Inc.

institutions that emerge[37]. Second, the view is that African states are susceptible to international domination and manipulation and therefore ripe for the exportation of Westernized ideologies, which are predetermined by international forces[38]. Because of the push and pull for independence in Africa and the continued exploitation of its natural resources, institutions in Africa are sometimes not effective. Third is the participatory approach which is supported by Plato's model of philosopher-king where we have experts making crucial decisions on matters within their expertise. There is an abundance of African thinkers who can marshal expertise in different directions for the growth of Africa. The fourth approach is that the national states have elites who are the custodians of power and use their roles to form, shape and determine the course of democracy. All of these approaches help to expand and explain the systems that are used to govern and maintain powerful institutions in modern day Africa.

b) Deliberative and Actual Democracy

Deliberative democracy is another approach that can be used to show the link between ADR and democracy in Africa. In deliberative democracy, it is clear that human agency is critical. Human skills therefore come into question. The tactful management of conflict is one of the highest human skill which relates to both democracy and ADR[39]. Dominance and compromise (human skills) are useful tactics necessary to produce both justice and democracy. This is because the ideals of justice transcend just institutions[40]. In this regard, it is important to understand the process of formulating institutions that are perceived to produce justice. A one sided view of institutions does not reflect the reality of both deliberative democracy and justice. Similarly, justice is not a one sided affair. It comes from viewing all sides of the argument and as such is part of deliberative democracy. As Eleanor Roosevelt once said, justice and

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37 Durkheim, E. 1986. Durkheim on Politics and the State. Ed by Giddens. Cambridge: Polity Publishers.

38 Whitehead, Lawrence. 2002. Democratization; Theory and Experience. Oxford: Oxford University Press.

39 Barret, T. Joseph & Barret P. Jerome. 2004. A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement. The Association for Conflict Resolution. Doi: ISBN: 978-0-787-96796-3.

40 Rawls, B. John. 1971. Theory of Justice. Cambridge: University of Harvard Press.

peace considers all sides of the arguments. It is not about winning but arriving at decisions that solve problems with the rights process.

Actual democracy on the other hand is concerned with two questions[41]. The first is what political institutions are required to do for large scale democracy and the second responds to the requirements for government to govern democratically. Here the argument is that institutions emerge from practices that are part of deliberate measures. These are based on habitual practices and well settled values. To this end, we argue that all institutions both formal and informal are the arena for the practice of democracy. We argue that ADR should be institutionalized as a democratic imperative due to its contribution to access to justice as well as democratic governance.

7.0 Democratization Imperatives – Dahl Doctrine

One of the main proponents for the concept of democracy is Dahl Roberts. In his seminal works on democracy, he places a high premium on political systems that encourage opposition, political rivalry and competition between government and its opposition, without which, democratization cannot be complete[42]. For democratization to exist, citizens must have unimpaired opportunities to three key things (1) formulate preferences (2) signify preferences to their fellow citizens and governments (3) to have their preferences given equal weight by government without discrimination. Under these three, several other requirements occur and re-occur for the process of democratization to be valid, some of which are (1) freedom to form and join organizations (2) freedom of expression (3) right to vote (4) alternative source of information (5) right of political leaders to compete for support. The contention here is that the standards of predilection should to be domiciled in the Citizens.

The other framework under this doctrine is that no one group dominates politics and organized groups compete with each other to influence policy by using sources of influence such as legal authority, money, prestige, skill, knowledge, charisma, legitimacy, free time, and experience[43]. Pluralists

41 Dahl, A Roberts. 1998. On Democracy. Connecticut: Yale University Press.
42 Ibid
43 Ibid

believe that (1) resources and potential power are widely scattered throughout society; (2) as a bare minimum certain assets are accessible to almost everybody; and (3) at any period the amount of potential power exceeds the amount of actual power. (4) No one is all-powerful unless proven so through empirical observation.

The question then is who governs? The Dahl doctrine insists that it is erroneous to assume that any group in fact does. Dahl attempts to answer this question in his study of New Haven and posits that a few people usually those who are rich and well-read, sway political result or decision making. The Elite and pluralists agree with classical pluralists that there is plurality of power but this plurality is not pure as some people and groups have more power than others. Basically, this doctrine claims that in democracies people participate by electing the elite who then play a major role in decision making, representation and creation of laws.

8.0 Democracy and ADR

Certainly, democratization is a broad subject covering several phenomena. It goes beyond the idea of voting, electoral justice and proportional representation, to showing how individuals interact in a democratic society. The premise of this paper is that democratic states are ideally peaceful[44]. Also, democracies are known to produce favorable cultures for peaceful resolution of disputes and general restraints towards war and thirst for blood money[45]. This view promotes a perception by people in a democracy that reveals that they are autonomous and self-governing since they share norms and values that are not aggressive towards each other[46]. Here we argue that in post conflict transitions it is a democratic imperative that dispute resolutions systems must be institutionalized.

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44 Boulding, Kenneth. 1979. Stable Peace . Austin : University of Texas Press.

45 Schumpeter, Joseph, A. 1942. Capitalism, Socialism, and Democracy. New York: Harper & Row. And Munene, Macharia. 2009. "Generic Peace and The Peace: A discource ." Journal of Language Technology and Entrepreneurship in Africa 218-229.

46 Russett, Bruce. 1993. Grasping the Democratic Peace: Principles for a Post-Cold War World. Princeton, New Jersey: Princeton University Press.

New approaches to deal with internal conflicts have developed over time and ought to be considered as part of democratization. The model of a Truth and Reconciliation Commission have been used in several countries, in connection with their respective transitions to democracy. In addition, private property and individual rights are essential elements of the liberal democratic state which must be protected by adequate dispute resolution mechanisms[47].

There is an elaborate and symbiotic relationship between judicial and political processes. Their converging point is the pursuit for democratic ideals contained in the constitution. This may occur in the tension between Court decisions and political maneuvers which tension could be healthy as it produces growth for both institutions. In a constitutional democracy, independent institutions ought to operate without interference. Such independent institutions allow citizens to find several avenues for resolving their disagreements. ADR processes are attached to the concept of access to justice.

Little debate can be entertained on the question whether the rule of law is one of the vital elements of governance in a democratic regime. Central to rule of law are ideals such as access to justice which hinge on the need for procedural fairness as well as independence, neutrality and equal treatment in proceedings. Civic culture and social capital are far more effective than positive law, political institutions, and economic factors in generating effective democracy[48]. Successful regional governments, are marked by a civic culture that broadly encourages cooperation and reciprocation among its citizenry at all levels of national life, from social to political to economic and beyond[49]. Failure to regard the idea of dispute resolution as an integral part of a functioning democracy is fatal to democratization. The net effect of this failure is that the very law that citizens have agreed will govern their lives

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47 Sullivan. Daniel S. 1993. "Effective International Dispute Settlement Mechanism and Necessary Condition for Liberal Democracy." Georgetown Law Journal 2369- 2412.

48 Putnam, Robert D. 1993. Making Democracy Work: Civic Traditions in Modern Italy. Princeton, New Jersey: Princeton University Press.

49 Reuben, Richard C. 2000. "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Service Justice." UCLA LAW REVIEW 949- 1104. Elazar, Daniel. 1966. American Federalism: A View from the States. New York: Crowell.

under the social contract, ultimately has little bearing on how their disputes are resolved. To avoid a diminution of democracy itself, ADR should continue to expand and become more institutionalized, which effectively makes individualized injustices more practical and critical.

Conflict is inevitable in a democratic society[50]. The orderly adjudication of disputes is a crucial function of public court as contained in Article 165 and 159 of the Constitution of Kenya. It must be remembered that under Article 1 of the Constitution of Kenya, institutions of governance including the Judiciary and independent tribunals exercise delegated (indirect) democratic power. To this end, ADR forms part of the democratic practices in Kenya as part of the judicial function as is envisioned in Article 159 of the Constitution. This essential function - the orderly and enforceable resolution of disputes - is important to democratic governance in the same way the legislative and executive functions are. Indeed, it helps define civilized society, preventing routine disputes from escalating into violence and social chaos. Equally, like the executive and legislative branches, the judiciary best serves democratic governance when it acts in a manner that is consistent with and reinforces the basic values of democracy.

9.0 Converging Principles of Democracy and ADR

Once it is acknowledged that dispute resolution has an essential role in democratic governance, the question then is how to appreciate, assess, and beneficially cultivate the democratic character of a dispute resolution system, procedure, or structure. The core standards of democracy are generally agreed upon which can be clustered into political, legal, social capital values and cultural[51]. These are premised on participation, accountability and transparency and rationality. Similarly, these same values are espoused in most dispute resolution mechanisms. Let us consider these four aspects and how they converge.

First, participation as a democratic value is promoted in ADR albeit with difficulty. The idea here is that parties are allowed to participate in the

[50] Mwagiru, Makumi. 2006. Conflict in Africa: Theory Processes and Institutions of Management. Nairobi: CCR Publication.

[51] Dahl, Robert A. 1964. Who Governs? Democracy and Power in an American City. New Haven: Yale University Press.

decisional process, even when it is unilaterally imposed. This occurs in all dispute resolution mechanisms and in any event it is one of the democratic imperatives for democratization. In ADR, some rules of evidence and procedure may be relaxed to allow parties tell their version of events without technical legal obstacles. However, one may challenge this view by arguing the public does not participate in all arbitral matters more so in International Arbitration[52]. This goes to the question of legitimacy of participants and willingness to involve others who are affected when it is a matter of public policy.

The second and third aspects are transparency and accountability. Accountability is gleaned from the constitution making moments. In the Constitution of Kenya 2010, aware of the reality of alternative dispute resolution mechanism, Article 159 was crafted to provide for the avenue for practice of ADR and entrench principles of transparency and accountability.
Fourth, rationality is mainly found in arbitration and other dispute resolution mechanism. Most arbitration decisions are usually accepted as being very sensible. Rationality in ADR goes beyond what is strictly prescribed in law. While it is expected that the law will be strictly observed at all times, parties may clothe the arbiters with discretion to determine cases on grounds beyond those that may be required by a rule of law, grounds that may appear arbitrary or capricious to observers who are unfamiliar with the customs or practices within a particular relationship, entity, or industry[53]. Rationality is a strength of the arbitration process because it permits disputes to be resolved according to the unique facts and circumstances that may be most relevant to the parties, rather than according to a more remote general rule of law.

The idea of ADR as a movement in the context of democracy presents two main areas of tension[54]. This includes the discourse between formal law and justice. Here the argument is that while formal justice mechanisms are part of

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52 Reuben, Richard C. 2000. "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Service Justice." UCLA LAW REVIEW 949- 1104. Elazar, Daniel. 1966. American Federalism: A View from the States. New York: Crowell.

53 Ibid

54 Gazal-Ayal, O., & Perry, R. 2014. "Imbalance of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcome." Law & Society 791=823.

a democratic society, it remains clear that the mere existence of formal institutions does not amount to justice. The second area is the need for the institution to respond to societies ideals. The Hobbesian argument here is the sovereign should promote order, harmony, equality, all of which are expected for justice and communal identity.

10.0 Debates on ADR Institutionalization Efforts in Kenya

There have been several attempts to institutionalise ADR in Kenya[55]. These is seen in the emphasis no ADR under Article 159 of the Constitution of Kenya. Promoting use of ADR is a guiding principle to all Courts and tribunals who exercise judicial authority. The Article is couched in mandatory terms therefore obligating courts and tribunals to encourage and promote ADR. However the rider to this is all ADR mechanism must pass the repugnancy test as elaborated by Kariuki Muigua[56]. Also and most importantly, all the ADR forms must be conducted in accordance with the Constitution and written laws. This makes it an imperative for enactment, implementation and enforcement of laws guiding application of this principle. The laws and institutions currently governing ADR are the Arbitration Act, Nairobi Centre for International Arbitration and the rules thereunder. What is missing is a legal framework, in terms of Acts of parliament, to deal specifically with reconciliation, mediation and traditional dispute resolution mechanisms.

Institutionalisation takes the form of legal frameworks, policy formulations, and implementation of the measures to ensure that for instance ADR is the normative practice. Applause must be given to Kenyan Parliament which seeks to house all ADR initiatives in the Alternative Dispute Resolution Act, 2019. The Attorney General also gazetted a taskforce to validate the ADR policy framework. The idea of a taskforce can be explained by deliberative democracy. One may effectively argue that the composition of the taskforce clearly demonstrates the decision makers for ADR as argued under the Dahl

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55 Adar, Korwa. G. and Vivekananda, Franklin. 2000. "The Interface between Political Conditionality and Democratization: The Case of Kenya." Scandinavian Journal of Development Alternatives and Areas of Studies 71 -97.

56 Muigua, Kariuki. 2017. "Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems." Alternative Dispute Resolution 1-80.

doctrine[57]. The taskforce must allow participation of the people so that there is adherence to democratization principles. However, there is a little mention of reconciliation as an ADR mechanism which is at the heart of Justice. This is a gap that should be explored either by Parliament or in the taskforce.

The multiple-door principle should make ADR mandatory for specific cases in specific areas where it might thrive. Some scholars argue that making ADR mandatory or obligatory goes against the principle of democracy and ADR. Making ADR mandatory means insistence of power belonging to the people to determine as argued by Plato. The view would be that parties should be compelled to attempt ADR as an effort to resolve disputes and as a democratization imperative. When ADR is made mandatory it does not mean that there has to be a resolution by force. Each ADR mechanism has inbuilt principles that allow parties to control what matters most in an attempt to resolve the dispute. Such principles include consent, confidentiality, and autonomy of parties among others. These principles make an attempt at ADR a worthwhile democratic value.

11.0 Responding to Critics of Institutionalization of ADR

Although there are many advantages and converging points between democracy and ADR, this paper admits that there are voices that criticize both Democracy and ADR[58]. Some do not agree that settlement of disputes should become be institutionalized to form generic practice. Others argue that ADR creates an imbalance especially the indigent who are not capable of accessing it. There are several weaknesses for institutionalizing ADR which include absence of data on certainty of outcomes of attempts to resolve disputes through courts or war[59]. There are also certain vulnerable parties who may agree to settle disputes as a result of pressure from the superior parties. The parties without economic might are likely to be persuaded to agree to a settlement not because it is their ideal sense of justice but that it is a less expensive alternative.

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57 Dahl, Robert A. 1964. Who Governs? Democracy and Power in an American City. New Haven: Yale University Press.

58 Fiss, Owen M. 1984. "Against Settlement." Yale Law Journal 1073-1090.

59 Ibid

Some argue that privatizing public civil dispute resolution systems amounts to interfering with a large part of how democracy is realized[60]. Farrow makes three central criticisms to challenge the effect of the growth of ADR as privatized justice. Firstly, he suggests that ADR undercuts the expansion of common law by taking away the idea of judicial precedent. Secondly, ADR denies disputants the procedural shield of the court process and thirdly, and most interestingly, ADR reveals a real threat to the Western democratic institutions. The argument here is that ideally ADR reduces the chances for the existence of a fair, predictable, accessible, just and relatively common regulatory system for all.

Those who find ADR as a weaker substitute to justice seem to suffer from litigation romanticism based on unverified notion that Courts tend to offer better justice[61]. What the critics miss is that their focus on the structure of the institution and not the democratic values that are espoused in ADR. To this end ADR can be vindicated on its own ethical grounds now that there are significant values, consistent with the important values of any legal and political system backing the legitimacy of settlements disputes[62].

12.0 Conclusion

Democracy and ADR appear to cohabit a conceptual origin. There is clamor for democratization to the extent that it can be viewed from the minimalist framework. ADR on the other hand is seen as an appendage of democratic institutions in particular the judiciary as the third arm of governance. Access to justice perception dominate most scholarly debates and arguments in the ADR field. This mostly takes a one sided view of both democracy and justice. This paper has argued that ADR and democracy appear to be inseparable and the institutional school confirms this. It has been demonstrated that from their origin, democracy and ADR must be institutionalized as democratization imperatives. Institutionalization of traditional justice mechanisms seems to respond affirmatively to those who argue that democracy is not relevant in

60 Farrow, T. 2008. "Public Justice, Private Dispute Resolution and Democracy." CLPE Research Papers 4 (4): pp 59-70.

61 Menkel-Meadow, Carrie. 1990. "Durkheiman Epiphanies: The Importance of Engaged Social Science in Legal Studies." The Georgetown Law Journal (The Georgetown Law Journal) 91.

62 Ibid

Africa. It has been argued that ADR generally and traditional justice mechanisms specifically promote both culture and social interactions thus once institutionalized they become part and parcel of the idea of justice. There may be hurdles along the way such as normative practices on access to justice which stand in the way of ADR. To overcome these challenges, it is critical to ensure that ADR is considered as a democratization value. While it is acknowledged that norms are difficult to establish, we however argue that in Africa in general and in Kenya specifically, there are sufficient safeguards to respond to these concerns. This therefore calls for a new perspective to the idea of democracy in Africa which invites relearning, retooling and recasting ADR as a social and legal institution.

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The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States

By: ***Kariuki Muigua***

Abstract

With the anticipated the Singapore Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) coming into force in August 2019, this paper reflects on what the Convention holds for the African States. It offers some thoughts on how best these states can take advantage of the Convention to not only be at par with the rest of the world but also benefit from the same as far as trade and investments are concerned. The Paper makes some practical recommendations that countries can draw from as they embrace the Singapore Convention.

1. Introduction

This paper is inspired by the international trade and investment community's desire to come up with a formal legal framework meant to enhance recognition and enforcement of international mediation outcomes through the enforcement of the Singapore Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention[1]). While the Convention is set to come into force from August 2019[2], it raises some weighty issues especially in relation to the practice of mediation in Kenya and Africa in

**PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [April, 2019]*.

[1] Ministry of Law, Singapore, "Singapore clinches bid for UN Convention on Mediation to be named after Singapore," 21 Dec 2018. Available at https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html [Accessed on 3/4/2019].

[2] This Convention is open for signature by all States in Singapore, on 1 August 2019, and thereafter at United Nations Headquarters in New York (Article 10(1).

general. Notably, mediation is one of the Alternative Dispute Resolution (ADR) mechanisms that have global recognition due to its ability to resolve conflicts. Article 33 of the Charter of the United Nations outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (Emphasis added).[3] However, while these mechanisms are universally accepted, their practice generally varies from one society or jurisdiction to the other.[4]

International mediation involves different states or parties from different states, hence the international aspect. The trend has been that the outcome of a mediation is treated as a contractual agreement enforced as such and not as an award as in the case of arbitration. This has always been a problem in many states in that one party may pull out of such an agreement and seek court intervention as if the mediation never took place. This thus necessitated the drafting of the Singapore Convention in a bid to address this challenge. The mechanism has also not been very popular in many countries, especially in Africa, as a reliable platform for management of international commercial disputes due to the uncertain nature of its outcomes. It is on this basis that this paper analyses the Singapore Convention and the prospects and challenges that it holds for Kenya and the African continent.

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3 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

4 Lindgren, M., Wallensteen, P., & Grusell, H., *Meeting the New Challenges to International Mediation: Report from an International Symposium at the Department of Peace and Conflict Research, Uppsala University, Uppsala, Sweden, June 14-16, 2010*, Department of Peace and Conflict Research, Uppsala University, 2010. Available at https://www.pcr.uu.se/digitalAssets/667/c_667482-l_1-k_ucdp_paper_6.pdf [Accessed on 3/4/2019].

2. Recognition and Enforcement of International Mediation Outcomes: Singapore Convention on International Settlement Agreements Resulting from Mediation

The need for the Singapore Convention was informed by the Parties' acknowledgement of a number of issues within the international sphere. To begin with, there was the recognition of the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably.[5] They also noted that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation, and that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.[6] These factors that created the need for the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations.[7]

The Convention is to apply to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: at least two parties to the settlement agreement have their places of business in different States; or the State in which the parties to the settlement agreement have their places of business is different from either: the State in which a substantial part of the obligations under the settlement agreement is performed; or the State with which the subject matter of the settlement agreement is most closely connected.[8]

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5 Preamble, United Nations Convention on International Settlement Agreements Resulting from Mediation.

6 Ibid, Preamble.

7 Preamble, Convention on International Settlement Agreements Resulting from Mediation.

8 Ibid, Article 1(1).

The applicability of the Convention however excludes settlement agreements: concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; relating to family, inheritance or employment law.[9] It is also not apply to: settlement agreements: that have been approved by a court or concluded in the course of proceedings before a court; and that are enforceable as a judgment in the State of that court; and settlement agreements that have been recorded and are enforceable as an arbitral award.[10]

The Singapore Convention defines "mediation" to mean a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.[11]

The Convention sets out some general principles meant to govern mediation settlements as follows: each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention; and if a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.[12] The Convention also sets out the requirements for reliance on settlement agreements. The Convention requires that a party relying on a settlement agreement under this Convention should supply to the competent authority of the Party to the Convention where relief is sought: the settlement agreement signed by the parties; evidence that the settlement agreement resulted from mediation, such as: the mediator's signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried

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9 Ibid, Article 1(2).
10 Ibid, Article 1(3).
11 Ibid, Article 2(3).
12 Article 3, Convention on International Settlement Agreements Resulting from Mediation.

out; an attestation by the institution that administered the mediation; or in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.[13]

However, the competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: a party to the settlement agreement was under some incapacity; the settlement agreement sought to be relied upon: is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4; is not binding, or is not final, according to its terms; or has been subsequently modified; the obligations in the settlement agreement: have been performed; or are not clear or comprehensible; granting relief would be contrary to the terms of the settlement agreement; 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; or 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.[14]

In addition to the foregoing, the competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that: granting relief would be contrary to the public policy of that Party; or the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.[15] Notably, under the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

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13 Ibid, Article 4(1).

14 Ibid, Article 5(1).

15 Article 5(2), Convention on International Settlement Agreements Resulting from Mediation.

(New York, 10 June 1958)[16] public policy and arbitrability of certain matters are some of the grounds that recognition and enforcement of arbitral awards may be refused. Just like in arbitration, the Singapore convention will thus give state parties a huge leeway in determining the two grounds according to the domestic laws and policies.

The applicability of the Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.[17] The Convention however allows a Party to the Convention to declare that: it shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.[18]

Also noteworthy is the provision that a regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention.[19]

If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.[20]

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16 United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

17 Article 7, Convention on International Settlement Agreements Resulting from Mediation.

18 Ibid, Article 8.

19 Ibid, Article 12(1).

20 Article 13(1), Convention on International Settlement Agreements Resulting from Mediation.

The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Model Law). This is intended to provide parties with the flexibility to adopt either the Singapore Convention or the Model Law as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.[21] The Model Law, 2018, amends the Model Law on International Commercial Conciliation, 2002 and applies to international commercial mediation and international settlement agreements.[22] It covers procedural aspects of international commercial mediation including *inter alia* appointment of mediators, conduct of mediation, disclosure of information, termination of proceedings and resort to arbitral or judicial proceedings.[23] Further, it provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure.[24] It has been argued that creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution.[25] Adoption of this framework creates an assurance on the

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21 United Nations Commission on International on International Trade Law , "United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (Accessed on 06/12/2019)

22 United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation 200) Available athttps://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (Accessed on 06/12/2019)

23 Ibid, S 2

24 Ibid,, S 3

25 Hioureas. C, "The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?" Available at https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1567&context=bjil (Accessed on 06/12/2019)

enforcement of settlement agreements and will boost the practice of international commercial mediation.

In light of the ever growing international recognition of the place of ADR mechanisms, the Singapore Convention will potentially change the way international mediation will be carried out and enforced across the world especially in the areas of trade, commerce and investment. The Singapore Convention is meant to allow the party seeking to enforce a mediated settlement agreement to skip the step of litigation and go right to the enforcement. The convention provides a method for settling parties to directly enforce their mediated settlement agreements.[26] It is meant to be the equivalent of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)* as far as mediation is concerned. The next section looks at some of the concerns that may arise in the course of implementation of this Convention especially in the context of the African countries.

3. Singapore Convention on International Settlement Agreements Resulting from Mediation: Prospects and Challenges for African States

Most of the jurisdictions in Africa have been doing a lot to promote ADR mechanisms. However, much of the efforts however, have been focusing on arbitration with the other ADR mechanisms getting less than important attention. Mediation law and practice in most jurisdictions in such jurisdictions such as Kenya is still at its infant stage and still more or less informal, with parties getting a wide scope of autonomy in either accepting or rejecting the outcome of mediation processes. Domestic mediation still suffers from the litigious nature of the commercial community in African countries and mediation is yet to be considered mainstream. In fact, Kenya is among the countries that have made attempts at mainstreaming mediation in the commercial world by setting up such frameworks as the court annexed

[26] Patrick R. Kingsley, "The Singapore Convention on Mediation: Good News for Businesses," January 09, 2019. Available at https://www.law.com/thelegalintelligencer/2019/01/09/the-singapore-convention-on-mediation-good-news-for-businesses/ [Accessed on 10/4/2019].

mediation, which is mandatory for certain cases.[27] The debate has not only been on the approach to be adopted in referring cases to mediation but also on whether there should be formal legislation on mediation. Despite this, there is a policy on mediation that is being prepared in Kenya as a way of mainstreaming the use of mediation in the country. However, there is still no institution that is exclusively dedicated to mediation as may be found in other jurisdictions such as Singapore. Institutions such as Strathmore Dispute Resolution Centre[28] and Nairobi Centre for International Arbitration Centre[29] offer mediation services alongside arbitration. There is therefore inadequacy of an efficient and harmonised framework for cross-border enforcement of settlement agreements resulting from mediation which is a major challenge to the use of mediation within the commercial community within the African continent. However, while these developments are good for the domestic mediation, there is still need for setting up infrastructure that promotes international mediation as mediation resulting from or capable of enforcement as court decisions are excluded from the Singapore Convention's scope.

Various jurisdictions such as Singapore have done a lot to set up various institutions to promote arbitration and other ADR mechanisms, including the Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), and Singapore International Commercial Court (SICC) and Maxwell Chambers to provide a full suite of dispute resolution services for international commercial parties to resolve their disputes in Singapore.[30] Singapore has also enacted the Mediation Act 2017, which provides, among other things, for the recording of mediated settlement

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27 The Pilot Project on Court Annexed Mediation in Kenya commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Project has since been extended to cover other stations around the country.

28 https://strathmore.edu/sdrc/

29 Established under Nairobi Centre for International Arbitration Centre Act, No. 26 of 2013, Laws of Kenya.

30 Ministry of Law, Singapore, "Singapore clinches bid for UN Convention on Mediation to be named after Singapore," 21 Dec 2018. Available at https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html [Accessed on 3/4/2019].

agreements as orders of court, and facilitates the enforcement of mediated settlement agreements.[31]

Thus, while many jurisdictions outside Africa have shown great strides in promoting mediation as a means to resolve cross-border commercial disputes, there is not much evidence of the same happening in the African continent. This may be attributed to many factors. However, one of the major factors may be the fact that mediation in Africa has always been considered to be an informal mechanism. This has not only affected efforts to absorb it as a formal mechanism but has also made it difficult to document how and where it is practised. For instance, mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actor*s, *their communication*, *expectations*, *experience*, *resources*, *interests*, and *the situation in which they all find themselves* (emphasis added).[32] It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process.[33]

There is not enough data to rely on in marketing African countries as a preferred venue for international mediation. As already pointed out, much of the efforts have been directed at promoting arbitration. The question therefore is whether the Singapore Convention on mediation holds any benefits for the African continent in general. While the Convention is meant to address the lack of an effective means to enforce cross-border commercial mediated settlement agreements across the globe, the uncertainty on the state of international mediation practice across the African continent makes it difficult for the businesses community in Africa to incorporate international mediation in their agreements to settle their cross-border commercial disputes. Mediated

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31 Ibid.

32 United Nations Development Programme, et al, 'Informal Justice Systems: Charting A Course For Human Rights-Based Engagement,' 2012; see also Albrecht, P., et al (eds), 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform,' (International Development Law Organization, 2011).

33 See Eilerman, D., 'Give and Take - The Accommodating Style in Managing Conflict,' August 2006, available at http://www.mediate.com/articles/eilermanD5.cfm [Accessed on 10/04/2019].

settlement agreements thus face a hurdle when it comes to enforcement. The Singapore Conventional on Mediation is expected to be widely endorsed, and in turn will create significant momentum in favour of the use and recognition of the mediation of international disputes just as the New York Convention led to a rise in the use and recognition of arbitration.[34]

However, if African countries are to benefit from this Convention and avoid a situation where they have to run after the rest of the world to catch up as has been the case with international mediation, there is need to put in place structures that not only support informal mediation, but also promote international mediation. Just like in arbitration where national laws are required in recognition and enforcement of international arbitration awards, the courts of a contracting party under the Singapore Convention will be expected to handle applications either to enforce an international settlement agreement which falls within the scope of the Convention or to allow a party to invoke the settlement agreement in order to prove that the matter has already been resolved, in accordance with its rules of procedure, and under the conditions laid down in the Convention. It is thus important that African states consider putting in place some framework to support the application and implementation of the Singapore Convention.

This is the only way that they will take advantage of the Singapore Convention on Mediation to not only enforce international mediation outcomes within their territories but also offer venues for carrying out mediations that may stand the test of time and be enforced in other jurisdictions around the world on the basis of the Singapore convention. It is the high time that African States not only acceded to the Singapore Convention but also promote the growth of international mediation practice alongside international arbitration as part of opening up Africa as a suitable option to the global business community when seeking venues for management of international commercial disputes through mediation as well as qualified international mediators in Africa.

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[34] Patrick R. Kingsley, "The Singapore Convention on Mediation: Good News for Businesses," January 09, 2019.

Embracing Singapore Convention may therefore facilitate the growth of international commerce and promote the use of international mediation around the world without excluding Africa as evidenced in international arbitration[35]. A lot more needs to be done because the use of international commercial mediation within the business community in the African continent is currently still relatively rare compared with international commercial arbitration.

4. Getting the Best out of the Singapore Convention on International Settlement Agreements Resulting from Mediation

As already pointed out, if African countries are to avoid a situation where they struggle to set up a framework too late in the day as has been the case with international arbitration, they should take some conscious steps to enable them to effectively utilise the Convention.

There is a need to set up legal and institutional frameworks at the state level in order to facilitate the uptake and practice of mediation. The legal framework should among other things, provide for who should act as the competent authority for the purposes of the Convention. It is worth mentioning that while the Convention provides for a 'competent authority's' mandate under the Convention, there is no definition of who entails such authority. As such, it seems like state parties are given the discretion to define such authority. Under the New York Convention on arbitration, it is the national courts that perform similar functions as those of the competent authority (in Singapore Convention) as far as arbitration is concerned. There may therefore be a need to clearly define under the national laws who will play the role of the competent authority. Even where it is the national courts that will take up this mandate, this should be clearly defined in a legal instrument for clarity and certainty especially to the international community. One thing that must however be very clear in the national framework is that the competent authority should be independent and self-sustaining.

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[35] Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27.

In the Kenyan context, this role may either be given to the Nairobi Centre for International Arbitration which envisages the practice of international mediation in its framework or, at the risk of multiplicity of institutions in the country, have it working closely with another independent institution solely dedicated to mediation practice as is the case in Singapore. There is also a need to recognise and mainstream informal mediation. At the moment, it is arguable that a lot of mediators (who mostly deal with informal mediation) are left out.

The Preamble to the Convention states that one of its objectives is "the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, *social and economic systems* would contribute to the development of harmonious economic relations (emphasis added)." It is therefore possible that African states can still retain the practice of traditional mediation especially for domestic mediation while still making itself appealing to the global business community with respect to international mediation. This is especially important considering that the Singapore Convention will not apply to settlement agreements concluded for personal, family or household purposes by one of the parties (a consumer), as well as settlement agreements relating to family, inheritance or employment law.

The national structure should therefore take into account the role of culture in conflict management. Mediation is culture specific. Mediation may not be globalized at the local level.[36]

[36] Agulanna, C., "Community and Human Well-Being in an African Culture," *Trames: A Journal of the Humanities & Social Sciences*, Vol.14, No. 3, 2010; Nussbaum, B., "African culture and Ubuntu," *Perspectives*, Vol.17, No. 1, 2003, pp.1-12; Tarayia, G. N., "The Legal Perspectives of the Maasai Culture, Customs, and Traditions," *Arizona Journal of International & Comparative Law,* Vol. 21, No. 1, 2004, pp.183-913; Idang, G.E., 'African culture and values,' *Phronimon*, Vol.16, No.2, 2015, pp.97-111; Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana." Master's thesis, 2006. Available at http://urn.nb.no/URN:NBN:no-17988 [Accessed on 13/04/2019].

In order to fully capture the spirit of mediation at the local level, there may be a need for public awareness and participation in the making of a national framework for mediation. The National framework can borrow from the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 with or without amendments. The procedural aspects of the Model Law covering the appointment of mediators, conduct of mediation and resort to judicial proceedings can be adopted. There is need to ensure that the language used in mediation is acceptable to the parties. In Kenya, this could be English, Kiswahili and other local languages with translations provided.

As a way of ensuring a higher rate of success, there is a need to rally support from the business community and collaborate with such institutions as the International Chamber of Commerce, Kenya Private Sector Alliance (KEPSA), Central Organization of Trade Unions (COTU-K) and Kenya Association of Manufacturers (KAM), among others. Its success depends on not only the legal fraternity but also ensuring that everyone buys the idea and runs with it.

5. Conclusion

The drafting of the Singapore Convention is a step in the right direction: actualising Article 33 of the United Nations Charter. Africa should fully embrace and participate as a way of boosting trade and investments. Signing up for the Convention may be a good way of bypassing and ultimately setting standards of recognition and enforcement of mediation outcomes in the face of potential multiplicity of mediation laws in different states, just as is the case with international arbitration. African Countries can use the mediation Model Law as a basis for implementation of the Singapore Convention.

There are prospects-these should be harnessed. Challenges should be identified and dealt with to ensure a smooth uptake and operation of the Convention. The Singapore Convention represents an idea whose time has come. It can work to advance mediation as a facilitator of trade and business relations.

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Looking into the future: Judicial Review of the Law Reporting Function

By: ***Teddy J. O. Musiga****

Abstract

Increasingly, the practice of law reporting is emerging as an area that is attracting a considerable amount of scholarly attention.[1] And perhaps in the near future it may also begin attracting some litigation too. One of the possible areas that is likely to form the subject of litigation in court is the judicial review of the law reporting function. This may come as a result of the fact that the law reporting function is a public function across many jurisdictions using the common law legal systems. However, in some jurisdictions the law reporting function is also done by private entities. Whichever the case, judicial review is increasingly becoming applicable to both public and private bodies.[2]

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* *He is an Advocate of the High Court of Kenya. He is a Law Reporter/Legal Researcher at the National Council for Law Reporting (Kenya Law). He is also a doctoral (PhD) candidate at the University of Nairobi, School of Law. He holds a Master of Public Policy & Administration (Kenyatta University), LL.B (Moi University) and a Diploma in Law (Kenya School of Law).*

1 See Teddy Musiga, "Reflections on Emerging Practices and Developments in the Field of Law Reporting: Lessons from Kenya (2019) 4 *Southern African Journal of Policy and Development,* p 26; Michael Bryan, "Early English Law Reporting" (2009) *University of Melbourne Collections*, issue 4 <Accessed at https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1529632/Early-English-Law-Reporting.pdf>; Michael Bryan, 'The Modern History of Law Reporting' (2012) *University of Melbourne Collections*, issue 11 <Accessed at https://library.unimelb.edu.au/__data/assets/pdf_file/0010/1379026/07_Bryan-LawReport11.pdf>; Nathaniel Lindley, 'The History of the Law Reports', (1885) 1 *Law Quarterly Review,* pp. 137, 143; Frank Pegues, "Medieval Origins of Modern Law Reporting", (1953) 38 *Cornell Law Review Journal* 491; Susan Barker "Law Reporting in England and the United States: History, Controversy and Access to justice" (2007) 32 Canadian Law Library Rev 178-183; Frans Viljoen "Canonizing cases: The Politics of Law Reporting" (1997) 114 SALJ 318-333; Howard Slavitt, "Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur" (1995) 30 *Harvard Civil Rights-Civil Liberties* LR 109-142; Peter Spiller "The Development of Law Reporting in New Zealand" 1994 New Zealand LJ 75-79

2 Section 3 (1) of the Fair Administrative Action Act; Also see Ochiel Dudley, 'Grounds for Judicial Review in Kenya – An Introductory Comment to the Right

Particularly in Kenya, the law reporting function is a public function provided for by statute under the National Council for Law Reporting Act.[3] And one of the possible reasons for the probable litigation is that litigants are likely to begin asking the courts several key questions regarding how the publicly mandated law reporting function is being carried out with the view of making that function amenable for judicial review by the courts. Some of those questions may squarely revolve around the central question in law reporting which is why some judicial decisions are reported in the law reports while others are not.[4] This article therefore seeks to explore the possible scenarios in which the law reporting function is likely to be amenable to judicial review processes in the near future and how that is likely to happen. It does so drawing examples from the Kenyan experience.

1.0 Introduction

By way of definition, the traditional conceptualization of judicial review refers to a branch of administrative law that is concerned with control by the courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions.[5] Essentially, administrative excesses must be checked through judicial intervention.[6] However, judicial review has been evolving steadily from the days when it only concerned itself with the question of ensuring that public bodies did not exercise their powers unlawfully. The prevailing view at the moment is that by way of a statutory provision under section 3(1) of the Fair Administrative Action Act, judicial review can now be extended to private entities as well.[7] Other bases for judicial

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to Fair Administrative Action Act, 2015' (2015) 31 Kenya Law Bench Bulletin 26

3 Act No. 11 of 1994

4 Teddy Musiga, "Reflections on Emerging Practices and Developments in the Field of Law Reporting: Lessons from Kenya (2019) 4 *Southern African Journal of Policy and Development,* p 26*;* Also see Frans Viljoen "Canonizing cases: The Politics of Law Reporting" (1997); Howard Slavitt, "Selling the integrity of the system of precedent: Selective Publication, Depublication, and Vacatur" (1995) 30 *Harvard Civil Rights-Civil Liberties* LR 109-142;

5 Peter Kaluma, *Judicial Review Law Procedure and Practice* (Law Africa, 2009).

6 PLO Lumumba, *Judicial Review in Kenya* (Law Africa, 2nd ed., 2006)

7 Section 3(1) of the Fair Administrative Action Act provides that, "This Act applies to all state and non-state agencies, including any person – (a) exercising administrative authority; (b) performing a judicial or quasi-judicial function under

review action include, article 165(3) (d) which sets out the express constitutional underpinning for judicial review of legislation,[8] executive conduct[9] and conduct of state organs in respect of counties.[10] The other bases are to be found at Article 22,[11] 47[12] and 258[13] of the Constitution of Kenya, 2010. To illustrate how judicial review can be invoked with regards to the law reporting function this paper proposes four hypothetical cases that describe possible judicial review cases.

Scenario 1: Republic vs Law Reporting Agency ex Parte Justice XYZ. In this first scenario, let us assume that Justice XYZ files a judicial review application to the courts to compel the law reporting agency to report his/ her decision that in his/her view is very jurisprudential yet the law reporting agency has failed to report that case. Further, the said applicant/ judge argues that his/her alleged decision has been widely quoted by other judges both locally and internationally. He/ She has also won awards based on the same decision. And therefore he/she does not understand why the law reporting agency has failed and/ or refused to publish the said judgment. He/she therefore seeks for the judicial review remedy of mandamus to compel the law reporting agency to have the alleged judgment published. In the alternative the judge may also seek orders to certiorari to quash the decision not the report/ publish the said judgment.

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the constitution; or (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action or decision relates.

8 Article 165 (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution;

9 Article 165(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

10 Article 165(d) (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;…

11 Article 22 provides for 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.

12 Article 47 provides for the right to fair administrative action and to be given reasons for that action.

13 Article 258 provides for the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

Scenario 2: Republic vs Law Reporting Agency ex Parte a Public Citizen. In this second scenario, let us assume that a public spirited citizen is apprehensive that the law reporting agency is likely to publish a certain decision which in his/ her view ought not to be published. He/ she therefore files a judicial review application seeking the judicial review remedy of prohibition to prohibit the publication of such a decision.

Scenario 3: Republic vs Law Reporting Agency ex Parte a Public Citizen. In this third scenario, let us assume that a public spirited citizen files a judicial review application against the law reporting agency for reporting a decision which in his/her view is not jurisprudential at all. The said decision does not add any practical or legal value at all. And perhaps that decision has probably been reported (i) out of biasness i.e the law reporter has a personal relationship with the law firm that litigated the case; (ii) the law reporter has a relationship with the judge who decided the matter or even (iii) the law reporter has a personal interest in that matter.

Scenario 4: Republic vs Law Reporting Agency ex Parte a Public Citizen. In this fourth scenario, let us assume that one of the parties to a case files an application to the court seeking mandamus orders against the Law Reporting Agency to *un-publish (un-report)* a judicial decision which has already been reported. Such an order would have the effect of withdrawing or pulling down the reported decision. In his/ her view, the continued publication of that decision affects his/her interests adversely. Perhaps he/she had been charged in a criminal matter and then later acquitted by an appellate court or even the same court. He/she therefore argues that the continued publishing/ reporting of that case in the law reports imputes a criminal conduct on him yet he/she has since been acquitted of those charges (which formed the subject of the reported decision).

Is the law reporting function amenable to judicial review?

In some jurisdictions the law reporting function is a public function while in others it is a private function. Within the jurisdictions following the common law legal systems, countries such as the United Kingdom have very many law reporting agencies, some of them are public organizations while others are

private organizations.[14] Some of them are public organizations while some are also private organizations. In Sub Saharan Africa, countries like Kenya, Uganda, Tanzania, Ghana, Nigeria etc have the law reporting function as a public function while countries like South Africa have the law reporting function as a private function done by agencies in the private sector.[15] Taking the Kenyan experience as an example, this paper seeks to interrogate whether or not decisions of the law reporting agency in Kenya to publish or not to publish can be amenable to judicial review.

In Kenya, judicial review is provided for as one of the foremost remedies available under Article 23(3) (f) of the Constitution to redress any threats to or actual violation of any right or freedom including by private persons.[16] Likewise, Article 47 (1) of the Constitution of Kenya, 2010 also guarantees a right fair administrative action that does not violate or threaten to violate any fundamental right or freedom. That provision also provides an assurance that in the event an administrative action violates or threatens to violate any fundamental right or freedom, then the concerned person is therefore entitled written reasons justifying the rationale for that administrative action.[17]

The emerging scope of judicial review power in Kenya under the Constitution of Kenya, 2010 is that (i) judicial review is applicable to both public and private bodies.[18] (ii) Judicial review is for vindicating purely constitutional

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14 Some of the leading law reporting institutions in the United Kingdom include Incorporated Council for Law Reporting (ICLR) that publishes the official *Law Reports*: *Appeal Cases* (AC), *Queen's Bench* (QB), *Family* (Fam), *Chancery* (Ch); *Weekly Law Reports* (WLR); Butterworths/ Lexis Nexis publishes the *All England Law Reports* (All ER); Westlaw UK; Scottish Council of Law Reporting publishes the *Session Cases Law Reports*; the Council of Law Reporting for New South Wales publishes the NSW Law Reports etc

15 The Southern African Legal Information Institute (SAFLII) is one of the leading law reporting agencies in South Africa. Others include, Butterworths Law Reports publishes the *All South African Law Reports and Pensions Law Reports* etc

16 C/f: Article 47 of the Constitution of Kenya, 2010 guarantees all persons a right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

17 Article 47 (2) of the Constitution of Kenya, 2010

18 Section 3 (1) of the Fair Administrative Action Act; Also see Ochiel Dudley, 'Grounds for Judicial Review in Kenya – An Introductory Comment to the Right

rights and not any other ordinary civil disputes. (iii) Judicial review can examine both the merits and the process of the decision in question.[19] (iv) Applications for judicial review need not be brought to court in the name of the Republic because Article 22 and 23 of the Constitution guarantees every person with the right to seek judicial review orders.[20]

Having looked at the nature and scope of the judicial review power in Kenya, we now turn to the law reporting power/ function. The legal mandate of publishing the official law reports for the Republic of Kenya lies with the National Council for Law Reporting (Kenya Law). It is the organization mandated to perform the law reporting functions under section 3 of the National Council for Law Reporting Act.[21] In a nutshell, section 3 (a) and (b) of the National Council for Law Reporting Act provides that, the organization shall be "responsible for the preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgments, rulings and opinions of the superior courts of records; and to undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports". Section 19 of the National Council for Law Reporting Act requires judges of the superior courts of record to supply the decisions which they have rendered to the Editor of the National Council for Law Reporting:

> *"Every judge of the superior court of record shall as soon as practicable after delivering a judgment, ruling or an opinion cause to*

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to Fair Administrative Action Act, 2015' (2015) 31 Kenya Law Bench Bulletin 26

19 *Republic v Public Procurement Administrative Review Board ex Parte – Sanitam Services (E.A) Limited* [2013] eKLR; *Peter Muchai Muhura v Teachers Service Commission* [2016]eKLR; *Kenya Human Rights Commission v Non-Governmental Organizations Coordination Board* [2016]eklr; *Khadhka Tarpa Urmila v Cabinet Secretary Ministry of Interior and Coordination of National Government* [2016]eKLR. Previous decisions from the Kenyan courts that postulated a contrary view included; *Kenya National Examinations Council v Republic ex parte Geoffery Gathenji Njoroge* [1997] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002]ekLR; *Commissioner of Lands v Kunste Hotels Ltd* (1995-1998)1 EA 1; *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited* [2008]eKLR

20 *Margaret Nyaruai Theuri v National Police Service Commission* [2016]eKLR

21 National Council for Law Reporting Act, Act No. 11 of 1994

> *be furnished to the Editor a certified copy of the judgment, ruling or opinion delivered by him."*

Likewise, section 20 of the said Act provides that the Registrar of the superior courts of record should at the end of each month furnish the Editor of the Council for Law Reporting with the list of all judgments, rulings or opinions delivered by the said superior courts of record as the case may be. Section 21 of the said Act also provides that the Kenya Law Reports shall be the official law reports of Kenya and which may be cited in proceedings in all the courts of Kenya.

A close reading of sections 3, 19, 20 and 21 of the National Council for Law Reporting Act therefore makes law reporting a public function, done by public officials[22] and with public resources.[23] At this point, it is therefore imperative to determine whether the function of law reporting amounts to an administrative action or decision thereby amenable to judicial review. From the outset, the straight answer is in the affirmative. The reason for that is that first, there is a general consensus in the field of judicial review that (by their very nature) acts, decisions or omissions of public authorities and quasi-judicial bodies are expressly reviewable by courts.[24] In Kenya, the law reporting function is a public function provided for by statute (the National Council for Law Reporting Act) and is also performed by a public agency specifically established to perform that very function of law reporting.

The second way of looking at judicial review is by looking at actions or omissions of private persons or bodies also being reviewable only where they affect the legal rights or interests of an affected party.[25] In that way, judicial review employs the concepts of *intra* and *ultra vires* as well as the rules of

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22 See sections 4, 7, 8,9, 10, 13, 19 and 20 of the National Council for Law Reporting Act No. 11 of 1994

23 See sections 14, 15, 16, 17 and 18 of the National Council for Law Reporting Act No. 11 of 1994

24 See Migai Akech, 'The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations' (2008) 6 *Entertainment and Sports Law Journal* 1, 4; Ochiel Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would be Decided Differently Today' (2013) Issue 28 *Kenya Law Bench Bulleti*n 11, 11.

25 *Ibid*

natural justice to ensure that all persons/ bodies act within the law.[26] The end result is therefore that every exercise of power can be subjected to judicial review where the exercise of that power bears the potential to impact the rights and interests of individuals over whom that power is exercised. Therefore, to bring it into its proper context, in the event that a litigant feels that the law reporters have arrived at a decision to report a particular case which in their view they feel ought not to have bene reported for whatever reason, then such litigants may consider instituting judicial review proceedings against the law reporting entity in question.

2.0 The Right to Fair Administrative Action Regarding the Law Reporting Function

Article 47 (1) of the Constitution of Kenya provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[27] The central question being interrogated in this paper revolves around the issue of the possible litigation by way of judicial review of the law reporting function. This section will therefore use the four hypothetical scenarios described above to interrogate the right to fair administrative action under Article 47 (1) and (2) of the Constitution. According to section 2 of the Commission on Administrative Justice Act administrative decisions/ actions refers to any actions relating to matters of administration and includes – a decision made or an act carried out in the public service; a failure to act in discharge of a public duty required of an officer in public service; the making of a recommendation to a cabinet secretary; or an action taken pursuant to a recommendation made to a Cabinet secretary.[28] Therefore, the law reporting function qualifies to be an administrative action within the meaning of section 2 of the Commission on Administrative Justice Act.

(i) Expeditious

The Constitution requires that all administrative decisions ought to be done expeditiously. The requirement for expedition in decision making therefore

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26 Hilaire Barnett *Constitutional & Administrative Law* (5th edn), Australia, Cavendish Publishing Limited 2004) 88

27 Also see section 4 (1) of the Fair Administrative Action Act, No. 4 of 2015

28 Section 2 (1) of the Commission on Administrative Justice Act, No. 23 of 2011

provides that where there are prescribed timelines for performing certain tasks then any decisions made outside those stipulated timelines are considered to having been made with disregard of the law and therefore are deemed to be invalid.[29] The Commission for Administrative Justice has the power under section 8 (d) of the Commission on Administrative Justice Act to inquire into the allegations of delay when carrying out public functions. Inordinate delay when carrying out functions is therefore frowned upon.[30]

However, section 7 (3) of the Fair Administrative Action Act bars the jurisdiction of courts from entertaining applications for the review of administrative actions or decisions premised on the ground of unreasonable delay unless the court is satisfied that (a) the administrator is under a duty to act in relation to the matter in issue; (b) the action is required to be undertaken within a period specified under such law; or (c) the administrator has refused, failed or neglected to take action within the prescribed period of time.

Notwithstanding the provision of section 7 (3) of the Fair Administrative Action Act, courts in Kenya have been invoking the constitutional provision at Article 259 (8) to the effect that, "if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion requires."[31]

The National Council for Law Reporting Act does not have any specific timelines for conducting law reporting function. As a matter of fact, section 19 of the said Act is directed towards judges and it provides that every judge of the superior courts of record shall as soon as practicable after delivering a judgment, ruling or an opinion cause to be furnished to Editor a certified copy of the judgment, ruling or opinion delivered by him or her. The only other

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29 *Kate Kokumu & Another v University of Nairobi* [2016] eKLR; *Choitram and Others v Mystery Model Hair Salon Nairobi* (HCK) [1972] EA 525; *Wasike v Swala* [1985 KLR 425

30 *Lady Justice Joyce Khaminwa v Judicial Service Commission* [2014]eKLR

31 *Hersi Hasan Gutale & Another v Attorney General* [2013]eKLR; *Egal Mohamed Osman v Cabinet Secretary, Ministry of Interior and Coordination of National Government* [2015] eKLR; *Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government ex parte Patricia Olga Howson* [2013]eKLR; *Bhangra, Kana and Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons* [2014] eKLR

reference to timelines in that statute is found at section 20 which provides that the Registrars of the superior courts of record shall at the end of each month furnish the Editor with a list of all judgments, rulings or opinions delivered by the superior courts of record.

Fortunately however, the National Council for Law Reporting's internal policies provides for timely monitoring and reporting on the development of Kenyan jurisprudence through the publication of the Kenya Law Reports.[32] It also provides for the timely revision, consolidation and publication of the laws of Kenya.[33] This internal commitment to undertake their work in a timely fashion mirrors the prescriptions of the expeditious requirement under article 47 (1) of the Constitution of Kenya, 2010.

(ii) Efficiency

In a general sense, a decision is deemed to be efficient if such a decision if such a decision is done accurately. It is a decision that is made by looking at the relationship between determined objectives and results that are reached with minimum resources and efforts.[34] Efficiency means doing an action with a minimum cost, effort and fuss.[35] To achieve efficiency with regards to the law reporting function in Kenya, the National Council for Law Reporting has been able to align its mandate to the Constitution of Kenya, aligned its mandate to Kenya's development agenda, aligned its mandate to with the various other stakeholders such as the Judiciary, the State Law Office etc.[36]

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32 See generally, the Strategic Plan 2018 – 2022 for the National Council for Law Reporting. Accessed at < http://kenyalaw.org/kl/index.php?id=9270>

33 *Ibid*

34 Mirlinda Batalli, "Increasing Efficiency in Public Administration Through a Better System of Administrative Justice" (2007) 2 *Pecs Journal of International and European Law,* p54

35 Robert Cornall AO, "The Effectiveness and Efficiency of Administrative Law: The Governmental Perspective". Paper was presented at the AIAL National Administrative Law Forum, June 2007, Canberra. Accessed at <http://www5.austlii.edu.au/au/journals/AIAdminLawF/2008/28.pdf>

36 See generally, the Strategic Plan 2018 – 2022 for the National Council for Law Reporting. Accessed at < http://kenyalaw.org/kl/index.php?id=9270>

(iii) Lawfulness

Lawfulness of an administrative action can best be appreciated within the context of the doctrine of *ultra vires*. *Ultra vires* means beyond the scope of power, jurisdiction or authority granted or permitted by law.[37] In Administrative law, an authority is said to be acting *ultra vires* in two instances. Firstly, it refers to a situation where an authority has done or decided to do an act it lacks legal capacity or lawful jurisdiction to do.[38] Secondly, *ultra vires* refers to situations where an authority, while doing something it has legitimate power to do, fails to meet some requirement attached to the lawful exercise of the power.[39] Certainly, the law reporting function in Kenya is lawful under the National Council for Law Reporting Act. However, carrying out any acts outside the express provision of section 3 of the National Council for Law Reporting Act therefore becomes *ultra vires*.[40]

(iv) Reasonableness

The classical conceptualization of judicial review power was based on the 3I's namely illegality, irrationality and impropriety of procedure.[41] It is the ground on 'irrationality' that was also popularly referred to as the 'reasonable' test/ ground under common law. One of the earliest moments where the English courts determined the standards of reasonableness/ unreasonableness expected of public body decisions that would make them liable to be quashed on judicial review was rendered in the decision of *Associated Picture Houses Limited v Wednesbury Corporation.*[42] That case affirmed that reasonableness was expected of public officers in the execution of their duties. The test in *Wednesbury* was that a decision was considered to be "*wednesbury*

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37 Peter Kaluma, *Judicial Review Law Procedure and Practice* (Law Africa, 2009).

38 *Ibid*

39 *Ibid*

40 Section 3 of the National Council for Law Reporting Act provides for the mandate of the organization is to monitor and report on the development of Kenyan jurisprudence through the publication of the Kenya Law Reports; to revise, consolidate and publish the laws of Kenya; and to undertake any such other related publications and perform such other functions as may be conferred by law.

41 *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* [1948] 1 K. B. 223, H.L; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375; *R V The Chief Constable of North Wales ex parte Evans* [1982]1 WCR 1155

42 [1948] 1 KB 223

unreasonable or irrational" if it was so unreasonable that no reasonable person acting reasonably could have made it.[43]

However, under the Constitution of Kenya, 2010 there is a fundamental shift from the judicial review test captured in the *Wednesbury* unreasonableness to a new test of proportionality.[44] The new standard of proportionality therefore requires that any administrative action with potential impact on rights and freedoms should be proportionate to the public purpose sought to be protected.[45]

The idea of reasonableness therefore envisages justifiability.[46] It is a revolutionary ground because it compels courts to enter into the merits of decisions rather than simply consider the procedural aspects of decision-making.

With regards to the law reporting function, a decision to report or not to report a particular case can be deemed to be reasonable if it can be justified. For instance, the law on jurisdiction of courts in Kenya is a fairly settled issue already reported in the celebrated Court of Appeal case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.*[47] In that case, the Court of Appeal

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43 The facts of the case were that sometime in 1947, Associated Provincial Picture Houses was granted a license by the Wednesbury Corporation to operate a cinema on condition that no children under the age of 15 years, whether accompanied by an adult or not, were admitted on Sundays. Under the Cinematograph Act, 1909, cinemas could be open from Mondays to Sunday but not on Sundays, and under a Regulation, the commanding officer of military forces in a neighbourhood could apply to the licensing authority to open a cinema on Sunday. The Sunday Entertainments Act of 1932 legalised opening of cinemas on Sundays by the local licensing authorities "subject to such conditions as the authority may think fit to impose". Associated Provincial Picture Houses thus sought a declaration that Wednesbury's condition was unacceptable and outside the power of the corporation to impose.

44 Jefrey Jowel and Anthony Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1987) PL 368, 372

45 A W Bradley and K D Ewing *Constitutional and Administrative Law* (12th ed., Longman, 1997) 781

46 E Fox-Decent 'The Internal Morality of Administration: The Form and Structure of Reasonableness' in D Dyzenhaus (ed.) *The Unity of Public Law* (Hart Publishing 2004) 143.

47 *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1

held that jurisdiction is everything and where a court of law finds that it has no jurisdiction, then it should down its tools. Ordinarily, there would be no need to report another subsequent case touching on the question of jurisdiction because owing to the doctrine of precedent '*Lillian S'* case ought to be followed by courts at it level and courts below it.[48] Therefore, a decision not to report any other case touching on jurisdiction of courts can be found reasonable based on that reason.

However, upon the promulgation of the Supreme Court of Kenya, 2010 and the establishment of the Supreme Court of Kenya as the apex court there has been need to publish other decisions touching on the question of jurisdiction of courts from the Supreme Court of Kenya.[49] And the reasons for the same can also be deemed to be perfectly reasonable because under the prevailing circumstances that, the Supreme Court has become the highest court in the land.

(v) Procedurally fairness

The requirement for procedural fairness when making administrative decisions is at the core of the rules of natural justice.[50] Natural justice has two main building blocks; the first limb touching on the rule against biasness couched in the words that, 'no man shall be a judge in his own cause.'[51] The second limb entitles individuals to notice of the charge against them and to an adequate and fair hearing.[52] It is couched in the words, 'no man shall be condemned unheard.' Both rules are couched in Latin as follows, '*nemo judex in causa sua*' and '*audi alteram partem*' respectively.

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48 As at the time *Lilian S case* was decided, the Court of Appeal was the highest court in the land. Subsequently, under the Constitution of Kenya, 2010; the Supreme Court of Kenya was established as the apex court. Likewise, there are also very many other reported decisions of the Supreme Court of Kenya which have supported the views by the Court of Appeal which was by then the highest court in the land.

49 *Samuel Kamau Macharia & another v KCB & 2 others* [2011] eKLR; *Aramat v Lempaka & 2 others* (2013) 6 KLR (EP) 1177; *Lisamula v IEBC & 2 others* [2013] eKLR

50 PLO Lumumba, *Judicial Review in Kenya* (Law Africa, 2nd ed., 2006)

51 *Ibid*

52 *Ibid*

The recognition of procedural fairness therefore cuts across all cases in which the right of an individual may be adversely affected by administrative decisions.[53] Therefore with regards to the reporting function then a procedurally fair decision is one that is made devoid of any biasness on the part of the law reporter or the law reporting agency.

(vi) Reasons

Article 47(2) of the Constitution provides the right to be given reasons where a fundamental right or freedom has been or is likely to be adversely affected by an administrative action or decision. Similarly, section 6(1) of the Fair Administrative Action Act also provides the right to be supplied with information necessary to facilitate his or her application for an appeal or review. The information sought may include the reasons for which the administrative action was taken or even any relevant documents relating to that matter in question. In *Priscilla Wanjiku Kihara v Kenya National Examination Council (KNEC),* the court have affirmed this principle and held that where an administrator fails to give reasons, then the court can infer that there were no good; also that if the reasons given were not the ones the administrator was lawfully and justifiably entitled to rely upon then the court was entitled to intervene.[54]

For every decision to report or not to report a case there ought to be reasons provided for that action. Perhaps the said reasons could be fashioned along Lindley principles for law reporting or even whichever law reporting criteria the law reporting agency elects to use.[55] In Kenya, the guiding criteria for reporting cases include the following;

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53 Peter Kaluma, *Judicial Review Law Procedure and Practice* (Law Africa, 2009).

54 *Priscilla Wanjiku Kihara v Kenya National Examination Council (KNEC)* [2016] eKLR

55 Nathaniel Lindley, 'The History of the Law Reports', (1885) 1 *Law Quarterly Review*, pp. 137. The Lindley principles of cases deserving to be reported in law reports can be summarised into four (i) All cases which introduce, or appear to introduce a new principle of new rule, (ii) all cases which materially modify an existing principle or rule, (iii) all cases which settle, or materially tend to settle a question upon which the law is doubtful and (iv) all cases for any reason are peculiarly instructive.

i. Decisions making new law by dealing with a novel situation or extending the application of an existing principle of law;
ii. Decisions tending to materially settle a point over which the law has been doubtful.
iii. Decisions interpreting the language of legislation;
iv. Decisions in which a judge restates or abrogates an existing principle of law or restates the principle in terms of a particular applicability to local jurisdiction;
v. Decisions in which the court sets out deliberately to clarify the law for the benefit of lower courts and the teaching of law;
vi. Others include; first, decisions in which a judge applies a principle which although well established, has not been applied for many years and may be regarded as obsolete. Second; decisions where a court states its review on a point of practice or procedure. Third; decisions where a court states its review on a point of practice or procedure. Fourth; Occasional judgments interpreting clauses found in contracts, wills, articles, and other documents; Fifth; occasional judgments indicating the measure of awards being with regard to quantum of damages for personal injury, death, defamation, etc. Sixth; Appeals from decisions of lower courts which had been previously reported. Seventh; Judgments delivered in cases raising a matter of public interest or those which are for some other reason, are particularly instructive.[56]

3.0 Conclusion

This paper set out to explore the possibility of future litigation by way of judicial review action of the law reporting function. And it established that that indeed under the Constitution of Kenya, 2010 judicial review is one of the foremost remedies available to redress any threats to or actual violation of any right or freedom including by private persons.[57] It also demonstrated how the law reporting function fits in as an administrative action/ decision within the meaning of the Commission on Administrative Justice Act[58] and the Fair Administrative Action Act.[59]

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[56] See the Editorial Policy of the National Council for Law Reporting (Kenya Law) at www.kenyalaw.org
[57] Article 23(3) (f) of the Constitution of Kenya, 2010
[58] See Section 2.
[59] See Sections 2, 3 and 4.

As a result therefore, the paper demonstrated that there is a likelihood of challenging decisions of law reporting entities when conducting the law reporting function by way of judicial review. The basis for this is that courts are increasingly recognizing that where rights of individuals are likely to be affected then then there must be an 'anxious scrutiny' to determine if the decision maker went beyond the scope of his authority.[60] In that sense therefore, the law reporting function as an administrative action/ decision may not be an exception.

The paper used four (4) hypothetical scenarios to demonstrate how the task of challenging decisions of law reporting entities by way of judicial review is likely to be possible. However and admittedly, if and when this happens then it may be up to the courts to determine whether or not the rights of the individuals were affected by the decision of the law reporter.[61]

Ultimately, the paper argues that moving into the future, law reporters should exercise utmost due diligence, professionalism, caution, reasonable care and skill when performing their law reporting duties. That is because the failure to do so may open up their decisions for litigation by way of judicial review. As Neil du Toit argues that "law reporters are the hidden gate keepers of the law because they are the ones who make the interpretative decisions. In his view, determining whether or not a judgment has made a point of law is an interpretative decision. And the persons who make those interpretive decisions are the publishers: the hidden gatekeepers of the law. He further argues that judges sometimes say what is reportable. But it is the legal publishers who

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60 *R v Secretary for the Home Department ex parte Bugdaycay* [1987] 1 AC 514, 531; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. Also see, HWR Wade and CR Forsyth *Constitutional and Administrative Law* (Oxford University Press, 2014) 304

61 Articles 10 and 20 of the Constitution of Kenya imposes an interpretative obligation on courts requiring them to interpret all legislation, primary and subordinate, whenever enacted in a way which is compatible with the Bill of Rights. Particularly, Article 20 (3) (a) & (b) requires courts to always develop the law to the extent that it does not give effect to a right and fundamental freedom; and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

decide what is actually reportable."[62] This therefore underscores the reasons why law reporters ought to perform their task with utmost professionalism and competence.

Another reason for law reporters to exercise due diligence so as to avert any future possible litigation may be drawn from English law's neighbour principle.[63] That principle says that a person should take reasonable care to avoid acts or omissions that s/he can reasonably foresee as likely to cause injury to the neighbour.[64] Neighbour includes all persons who are closely and directly affected by the act that the actor should reasonably think of them when engaging in the act or omission in question.[65] One of the possible ways to avert such eventualities may be to strictly adhere to the editorial policies for law reporting thereby only reporting jurisprudential cases.[66] And in this case,

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62 Neil du Toit, "*On Reportability, and the Hidden Gatekeepers of the Law"(unpublished paper).*

63 The neighbour principle is based on the Christian principle of "loving your neighbour".

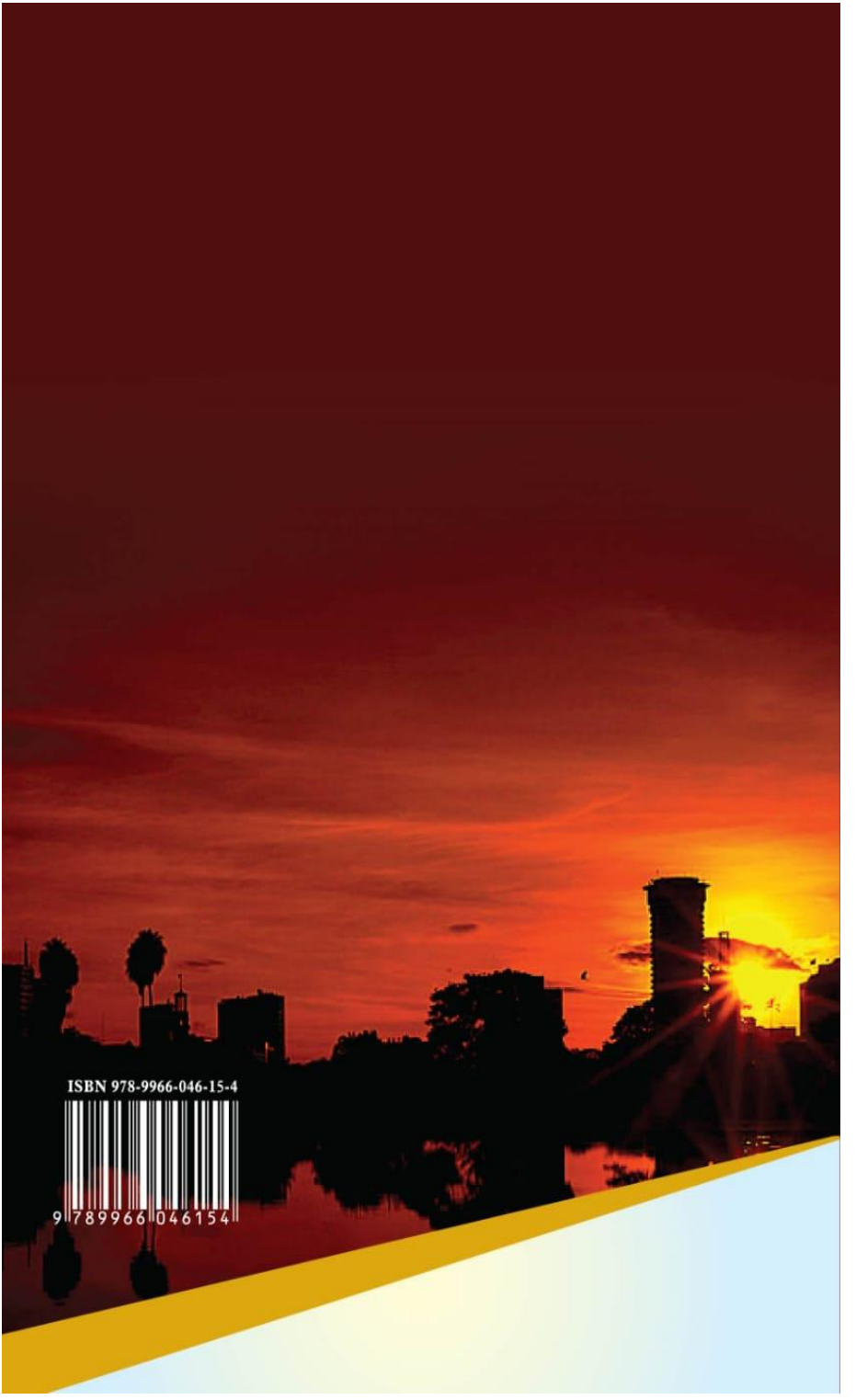
64 *Donoghue v Stevenson* [1932] UKHL 100; Also cited as *Donoghue v Stevenson* [1932] AC 562 at 580. H L

65 Lord Atkins in *Donoghue v Stevenson* [1932] UKHL 100 formulated the neighbour principle in the following words: "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour: and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

66 Nathaniel Lindley, 'The History of the Law Reports', (1885) 1 *Law Quarterly Review*, pp. 137. The Lindley principles of cases deserving to be reported in law reports can be summarised into four (i) All cases which introduce, or appear to introduce a new principle of new rule, (ii) all cases which materially modify an existing principle or rule, (iii) all cases which settle, or materially tend to settle a

jurisprudential cases refer to those cases that are of high legal and practical importance (the gold) and not reporting everything that happens at the court rooms. The latter category of cases could be categorised as *dross*.

question upon which the law is doubtful and (iv) all cases for any reason are peculiarly instructive.



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